PUBLIC RECORDS ACT MODEL RULES PUBLIC HEARING

6:00 p.m.
Wednesday, October 4, 2017
416 Sid Snyder Avenue Southwest
Olympia, Washington

LINDA WARMUTH, CCR

NORTHWEST COURT REPORTERS

1415 Second Avenue, Suite 1107

Seattle, Washington 98101

(206) 623-6136

E-mail: nwcourtreporters@qwest.net

1 PROCEEDINGS

2 NANCY KRIER: Good evening, everyone. My name
3 is Nancy Krier. I am the Assistant Attorney General for
4 Open Government in the Washington State Attorney General's
5 Office.
6 Today is October 4th, 2017. It's about 6:03,
7 according to the clock up there. We're here to conduct the
8 public hearing in order to receive comments on proposed
9 amendments to several public records model rules and
10 comments in Chapter 44-14 WAC. We filed what's called a CR
11 102, proposed rule making, in the Washington State
12 Register. Copies of the CR-102 are available on the table
13 or when you come up and speak, and then we have spare ones
14 in the back. They're also available on our website.
15 I'm the delegated hearing officer to take your
16 testimony here today. We will accept both oral comments,
17 and we'll have you come up and speak at the mike, as well
18 as written comments. So if you brought copies of written
19 comments, go ahead and drop them off with us. We'll take
20 those as well. You can also do both written and oral.
21 That's fine too.
22 We have a court reporter here today, so we are
23 making a record of this. And the comments that you make
24 here today, oral or in writing will be part of the rule
25 making record. So we will close the record after this

1 hearing.
2 If you're going to do oral comments, we have
3 sign-up sheets at the back. As people come in, they'll
4 also probably be signing up. Make sure you speak your name
5 clearly and spell it for the record so we have a correct
6 spelling. And if you use any unusual phrases in your
7 testimony also, it would be a good idea to spell those as
8 well. And speak clearly and slowly enough so we can make a
9 clear record and so we can all hear you. I would also ask
10 if you are speaking of a specific WAC, and if you have the
11 WAC number handy, that would be a helpful part of the
12 record as well.
13 We're going to start off with a 12-minute time
14 limit per person. I want to make sure everybody has a
15 chance to talk. And then apparently some people are also
16 still on their way. We will be here until 8:00, so if you
17 wanted to add additional comments after your initial time,
18 that's fine too. Again, we will end by eight o'clock. If
19 needed, we will take a short stretch break. I don't know
20 if we'll need it, but that may happen. And we will be
21 putting the written comments on our office's website.
22 So I hope that's pretty clear and pretty
23 straightforward. So I have the first list here, and then
24 I'm going to sit down so I can listen to all of you more
25 comfortably. So Mr. Howard Gale?

1 HOWARD GALE: Howard Gale, G-a-l-e, from
2 Seattle. I did send in written comments by the deadline of
3 the 29th. And what I would like to do is just expand on
4 that a little bit. Unfortunately, I'm not going to be able
5 -- I can refer to the pages. I'm not going to be able to
6 refer to the actual WAC numbers.
7 What I would like to do is just step back for a
8 second. Three of the items that I pulled out are actually
9 related in my written comments, and that has to do with
10 what are called customized services that an agency might
11 provide, original digital format for records, and also the
12 way searches are done, what the methods are, the
13 methodology of a search.
14 The way these are related is, for example, right
15 now in Seattle in July there were new orders put in place,
16 which very much mirror these current proposed rules. They
17 have a provision for customized services, which can become
18 very expensive. The problem with customized services is
19 oftentimes what is called a customized service is actually
20 the proper way one should do a search.
21 So as a concrete example, I had a problem back in
22 2014 with the City in which I was looking for a set of
23 emails on the topic of home -- They actually went to
24 individuals within the Department of Seattle Center and
25 asked them to look for these different terms and asked them

1 to search their e-mails. The result was a very incomplete
2 production of records, because people failed to search
3 attachments. They didn't look at documents. A lot of
4 things were missed.
5 Now what ended up happening is I went to court.
6 The City in court claimed that the reason that they
7 couldn't produce documents is because they had to use very
8 expensive and very specialized forensic tools. So what
9 this is trying to claim is to search an e-mail, we need
10 very specialized forensic tools.
11 I have been working with computers since the '70s.
12 Very commonly available free software can be gotten to do
13 these kind of searches. So I'm concerned about the issue
14 of customized services because of that, because very often
15 it's abused as a way of avoiding what would be a simple
16 search method. So this gets me to the antiquated search
17 methods which are actually elaborated on, on page 20, 26,
18 and 27. Actually, page 20. I'm sorry. A lot of these
19 search methods would be appropriate if we were living in
20 the '70s or '80s, but certainly by the time the '90s, 2000s
21 came, almost everything is done in Word documents,
22 PowerPoint, databases, e-mail. Those are searchable on a
23 server, and they can be searchable independent of the
24 operating system, how the server is run, or what the nature
25 of the records are. And I can get into more details, if

1 it's required, but that's a way to simplify searches
2 instead of actually trying to somehow mesh what would be a
3 '70s file cabinet approach with the reality of the digital
4 world that we live in now. And so a lot of these rules, I
5 think, are somewhat antiquated because they really are
6 trying to bridge a gap which shouldn't exist.
7 Which gets to my other point. On page 36, 37 it
8 talks about nothing in the PRA obligates an agency to
9 disclose records electronically. That is completely wrong.
10 It has to be wrong. Metadata is not something mystical.
11 So, for example, Seattle right now has a provision where,
12 if you want metadata, that's something subject to a
13 customized charge. That is wrong. The reason when I get
14 an e-mail I want the e-mail in a digital format is I can
15 tell who actually sent the e-mail, who it was sent from,
16 the actual time. There is a lot of information in the
17 digital format which is not obtainable if e-mails are
18 simply printed out.
19 So I would argue that actually there is numerous
20 supreme court decisions that say the opposite. There is
21 something that obligates the record be disclosed
22 electronically, and that actually is a Spokane case, the
23 Neighborhood Alliance. There is something that requires
24 electronic disclosure. If that's the way the record was
25 made, that's the way it should be produced for public

1 records. So just to sum up what I was trying to say here,
2 issues of digital format and electronic production,
3 customized services and the method and the way in which a
4 search is done are all intricately tied together. A lot of
5 the problems that stem from those issues could be obviated
6 if searches were done correctly. And that is what I would
7 suggest is initial searches should always be done on a
8 server. There is going to be very, very rare cases now
9 where an agency doesn't have a central server that provides
10 everything. So that's one point.
11 The other thing I wanted to talk about is there is
12 also the notion of treating multiple requests from a
13 requester as a single request. That is highly problematic.
14 In 2014 I presented in one e-mail four very separate
15 independent requests that were itemized and bulleted. The
16 City decided to sum all that up in one word, and the Court
17 actually found that the City had the right to do that.
18 This is now codifying a very bad tendency that agencies
19 have, which is to say I can ignore what the four
20 things are. I think it's this. So treating multiple
21 requests from requesters as a single request is bad.
22 Seattle has already put that provision in place in July.
23 The issue of bot requests is also poorly defined. In the
24 proposed rules on page 16, it says potentially two requests
25 in 24 hours could be considered a bot request. You do have

1 wording in there that suggests that one has to think a
2 little more about more than just the number of requests.
3 Seattle has taken that format rule and actually codified it
4 in July. Multiple requests from the same requester within
5 24 hours can be considered a bot request. That's a
6 problem. I often have four or five requests, because I
7 want to make them limited and clear and separate. So the
8 bot issue, I think, is a problem.
9 And one other very important thing: There's a
10 statement in there for agencies to use subjective
11 discretion in deciding what records relate to a specific
12 request. So, again, I'm sorry. I don't have the exact WAC
13 or page. But your rules state: When a request uses an
14 inexact phrase such as, quote, all records relating to a
15 topic such as property tax increase, the agency may
16 interpret the request to be for records which directly and
17 fairly address the topic.
18 That can't possibly be good. I think if someone
19 asks for all records related to a property tax increase, I
20 think that stands by itself. So do we really want to give
21 the agency the opportunity to actually say, oh, the e-mail
22 for the meeting with Mr. Smith to talk about tax increase
23 for property taxes isn't related to the tax increase. So
24 this is very problematic if we're giving an agency the
25 ability to decide what is related. And, again, there is

1 actually supreme court decisions on that.
2 And the final thing, I just want to get back to the
3 search issue. Very often -- in the proposed rules is a
4 suggestion. And we have the same thing. We have modelled
5 a lot of this in the City of Seattle. There is a
6 suggestion for protocol in a big agency to go to executive
7 aides, secretaries, and assistants and say these are the
8 things we need to look for. The problem that raises is am
9 I going to be willing, if I know someone is trying to
10 embarrass my boss, am I going to be willing to actually
11 freely search and disclose those records. It puts
12 employees in a very -- in an impossible position. So,
13 again, I go back to what I suggested at the beginning.
14 When you do have blind, simple algorithmic searches based
15 on the terms that are supplied on a server, you obviate a
16 lot of the problems. You're not relying on ten different
17 assistants in ten different offices trying to figure out
18 what they are looking for. Because again, in 2014 when
19 that procedure was done in Seattle, it failed miserably.
20 About 80 percent of the records that were ultimately
21 disclosed in the first three tries with the City failed to
22 disclose for those reasons. I'll stop there.
23 NANCY KRIER: Thank you. Mr. Crittenden?
24 Yes. My name is William John Crittenden. I'm
25 an attorney in Seattle, and I am also a board member of the

1 Washington Coalition for Open Government, which is called
2 WAYCOG (phonetic) or WCOG. The Washington Coalition
3 submitted written comments earlier today, and I delivered a
4 paper copy to the Attorney General as well at the beginning
5 of this hearing.
6 The big point I would like to make is that the
7 existing rules are actually considerably narrower in scope
8 than the rules that are required by the plain language of
9 RCW 42.56.100. I think every hearing officer and city
10 attorney in the state needs to go back and actually read
11 that statute carefully and see what it says. If you delete
12 out the language that was added in the '90s related to the
13 legislature, it says: "Agencies shall adopt and enforce
14 reasonable rules and regulations" consonant with the intent
15 of this chapter to provide full public access to public
16 records, to protect public records from damage and
17 disorganization, and to prevent excessive interference with
18 the essential functions of an agency. Such rules and
19 regulations shall provide for the fullest assistance to
20 inquirers, and the most timely action upon request for
21 information.
22 This provision of the PRA is from the original 1972
23 initiative. It's never been changed. The PRA was enacted
24 at a time, as Howard pointed out, that we had paper records
25 in file cabinets, and we got very comfortable with the idea

1 that, if we go down to the DCLU on Second Avenue and pull a
2 file out of a file cabinet and find out everything that
3 anyone who works for the City of Seattle had said about my
4 client's project. To do the same inquiry in 2017 is a
5 nightmare, because the records are scattered all over the
6 place. They're in e-mail, which no one bothers to
7 organize. There are e-mails that don't even have proper
8 subject lines. The drafters expected public records to be
9 kept organized. They could not have envisioned that you
10 would deploy e-mail systems and let people pile up 30- 40-
11 50,000 items in their inboxes without clearing them out.
12 But that is not what the PRA contemplated, and it is not
13 lawful.
14 To comply with Section 100 of the act, agencies
15 must adopt and enforce rules that keep their records
16 organized. And these rules need to take into account the
17 possible need to redact and reduce those records in
18 response to a PRA request. That is what the statute means
19 by the most timely possible action on a public records
20 request. It means if your process, the way you are
21 creating and organizing records, is a nightmare to produce
22 under the PRA, you're doing it wrong.
23 Now, the statute clearly says -- I believe this is
24 section 120 -- that agencies are not permitted to charge
25 requesters for locating records or preparing for

1 inspection. The agency bears that cost, and that should
2 give the agencies the incentive to keep their records
3 organized. Unfortunately, in many cases where there's a
4 public official who is not actually going to pick up the
5 tab, they don't organize them, because that just makes it
6 harder to find out what they're doing. And they don't care
7 if ten years from now they get a $150,000 PRA judgment
8 against them because their e-mail didn't get disclosed at a
9 time it mattered.
10 We have not actually found any agency that has
11 actually adopted the rules contemplated by Section 100 in
12 the PRA. I have made explicit requests for your rules
13 adopted under RCW 42.56.100 to any number of agencies and
14 never received anything. What I get is retention schedules
15 and things like that.
16 Now, we have proposed a new section 3004 that will
17 actually put some teeth into the requirement that agencies
18 organize their records. We also propose a section 060 that
19 addresses the problem subject to common exemptions. Now,
20 this is just a first cut. It's important to note that it's
21 not my job and it's not Washington Coalition's job to tell
22 agencies how to organize their records. I'm here to point
23 out that agencies are not complying with Section 100 of the
24 act, because they don't have these rules, and their records
25 are a mess.

1 Existing 44-14-3001 has a problematic discussion of
2 searching in it, and that needs to be eliminated. "Search"
3 is a legal term of art that means very different things
4 under the PRA, and it doesn't put forth the method. And I
5 don't like to see people arguing with lawyers and throwing
6 these terms around loosely.
7 And this brings me to one of the most significant
8 problems that we see with the way agencies interpret the
9 PRA. Over the past few years, I have seen several
10 erroneous constitutional attacks on the PRA, all of them on
11 a similar theory that somehow the PRA is unconstitutional
12 or unenforceable because the records are in the possession
13 of some public official who has them on their iPhone, even
14 though they know they're not supposed to do that. There's
15 even a Law Review article that takes the position that the
16 PRA is unenforceable with respect to such records.
17 In our comments we explain, hopefully for the last
18 time, that the right and duty of agencies to maintain
19 control of their own records is a function of other areas
20 of the law. The right of an agency to own, control, and
21 retrieve its own records did not pop into existence in
22 1972. Agencies have overlooked their obligation to assert
23 control over their own records, because the main agency
24 lawyers who are involved in this area of practice have
25 spent the last four or five years trying to kill the PRA.

1 So it's no accident that they have totally forgotten that,
2 oh, yeah, there's proper law. There's employment law.
3 There's a criminal statute that makes it illegal to destroy
4 or abscond with public records.
5 One little comment in there. It says an agency
6 might be required to get the records back. We don't know
7 how that happens. Take that out. The purpose of the model
8 rules is to tell agencies how to comply with the PRA. And
9 those rules should address not having records on someone's
10 smart phone in the first place. If a public records
11 officer finds that someone has been using their smart phone
12 and won't let them search it, talk to your legal advisor,
13 and they can deal with the problem.
14 I would make this point one more time, just in case
15 anybody is listening. The Public Records Act creates a
16 legal obligation to go and get the records and produce a
17 copy. Don't go looking for how you get the records back
18 from a crooked public official who is using their i-Phone
19 under the PRA, because it's not there. Charge them with a
20 crime. Threaten to fire them. Take them to the auditor.
21 Do whatever you have to, to get your records back. Stop
22 attacking the PRA.
23 I would like to touch on a few other details.
24 There's actually several provisions of the existing rules
25 and they are listed on page 5 of our letter that actually

1 misstate what Section 100 says. In several cases they
2 paraphrase the requirement of adopting rules out of
3 existence. They turn them into a principle of false
4 assistance and blah, blah, blah. No. The statute says
5 what it says, and we propose revising the rules so they
6 actually do what they're supposed to do.
7 We have proposed a clarification to section
8 44-14-020(3) to state that the PRA officer will ensure that
9 the rules adopted by the agency are actually enforced.
10 Gasp. We propose a Section 3004 which says, for the most
11 part, agencies should prohibit the use of personal
12 electronic devices and accounts. If a public official
13 needs a device or account to do their job, they should have
14 one provided by the agency, and it should be maintained by
15 the agency, and they have no expectation of privacy in it.
16 Moving forward to 4006(3). Agencies should always
17 make an electronic copy of whatever they produce, period
18 stop, no exceptions. If you do it any other way, they're
19 doing it wrong. Paper is a dying, antiquated technology
20 that belongs in boxes. When you get a PRA request for
21 paper, you scan it once and put the paper back in the file
22 never to be disturbed ever again.
23 Unfortunately, the existing records still have a
24 discussion of this concept of "reasonably translatable,"
25 which is not really a correct conceptual framework when

1 you're talking about paper. And we have proposed revising
2 the rules when they talk about paper records. What the
3 rules say is you scan them. Now you've got a PDF. You
4 don't have to ever talk about what paper is under the PRA
5 ever again, because paper is back in the box. So the rule
6 is in 2017, I don't care if you are a fleet control
7 district in the tiniest part of Washington state, go get a
8 scanner and a copy of Acrobat.
9 And, finally, I propose revisions to Section 0504
10 to clarify something that I had to sue Snohomish County
11 over ten years ago, which is a database is a public record.
12 It can be copied onto a large hard drive. It can be
13 redacted by someone who knows what they're doing. And in
14 several places there are rules that are written in such a
15 way that it implies that that's not possible or that what a
16 requester has to do is ask for customized access. And that
17 is not correct. A database can be copied, and a database
18 can be redacted. In fact, a database is by definition the
19 easiest type of record to redact, because it is a giant
20 electronic matrix of already normalized data.
21 Unfortunately, somebody convinced the court of
22 appeals in 2012 that you can redact the database by
23 printing it out on paper. To that I would make the point
24 that incorrect statements of fact about technology in a
25 judicial opinion are not precedent. They're just wrong.

1 If a Luddite judge says I think we redact it by firing up
2 the old steam engine, you ignore them, because they don't
3 know what they're talking about. As soon as they say
4 something about the law, we have to listen to them. But
5 all the incorrect statements about technology in all of our
6 existing judicial opinions are just junk that we can ignore
7 because -- you look it up -- legal points have precedent,
8 not erroneous factual statements like you redact a database
9 by printing it on paper.
10 I think I have covered all the points I wanted to
11 cover, and it looks like I have used up my 12 minutes. So
12 I thank the Attorney General for considering all these
13 comments. They were quite a lot of work by a number of
14 people. Thank you.
15 NANCY KRIER: Next we have Toby Nixon.
16 TOBY NIXON: Good evening. I'm Toby Nixon.
17 I'm the president of the Washington Coalition for Open
18 Government and also a member of the Kirkland City Council.
19 I'm here tonight in my capacity as president of the
20 coalition. I greatly appreciate the effort that has gone
21 into preparing this draft update of the model rules to
22 align them with recent statutory and case law changes. And
23 I especially want to acknowledge all the efforts that Nancy
24 Krier has put into this effort. Thank you for seeking to
25 make it easier for both agencies and requesters to

1 understand how this important part of our government
2 accountability system is supposed to work.
3 Some of my colleagues, including Mr. Crittenden,
4 who has already spoken, will discuss the coalition's
5 comments on other areas of the rules, but I would like to
6 focus my remarks on the management of work queues for
7 public records requests.
8 I was deeply involved personally in creating
9 Kirkland's system for processing records requests, and it
10 was one of my top priorities when I ran for city council.
11 I appreciate that the Attorney General recognizes the work
12 we have done in Kirkland is a best practice to the extent
13 that you would admit some of it in the model rules and
14 promote it to other agencies to make it easier to adopt as
15 their own.
16 I am concerned that the description of what we do
17 in Kirkland is incomplete as the proposed rules are now
18 drafted. Only really one part of the Kirkland way of doing
19 things is described, and I have some concerns about that
20 one. That part has to do with the categorization of
21 requests, which is in Section 40. It is referred to in
22 several places as prioritization or priority categories.
23 The fact is that a categorization, as we practice it in
24 Kirkland, is not prioritization. The only category that
25 has an implication of priority is category 1, which is only

1 used to designate requests that are kind of a drop
2 everything life or death emergency. These are extremely
3 rare. In fact, they are so rare that in the four years
4 Kirkland has been using our system, we have never had a
5 category 1 request. And I verified that at 3:00 p.m. today
6 by calling our city clerk.
7 All the other categories are not about priority at
8 all but about assessing the volume of records, the
9 complexity of retrieval, the amount of review and redaction
10 required, if attorneys are likely to be involved, those
11 sorts of things. And in fact the proposed rules include a
12 very complete list of those considerations. But I think
13 it's important to emphasize -- and there may be some just
14 minor wording changes that could be made. The
15 categorization of a request is not an excuse to delay
16 unpleasant requests. You don't get to ignore category 5
17 requests. Category 5 means big and complicated, not lowest
18 priority. It's not a way to delay requests. Categories
19 are a way to ensure that small routine requests don't get
20 blocked behind large complex requests in the work queue.
21 So I would really like to see the implications in
22 the current text that categorization is equivalent to
23 prioritization be omitted. But I also want to add that --
24 and this is my main point. In addition to categorization,
25 there are a number of other things that agencies need to do

1 if they want to handle public records requests the way
2 Kirkland does. First and foremost, they must culturally
3 commit to the principle that providing public records is an
4 essential service to the public that shows the agency's
5 commitment to accountability and builds trust that enables
6 doing all the other important things the agency does.
7 Agencies must understand there is demand for public records
8 and being committed to keeping up with that demand over
9 time, even though in some instances some delays may occur
10 when there are spikes in demand. Agencies must thoroughly
11 understand the resources used for records requests and be
12 committed to providing the resources to meet the ongoing
13 average level of demand. They can't be allowed to delay
14 production of records by chronically and intentionally
15 under-resourcing their public records function.
16 Agencies must carefully measure their performance
17 in producing public records and track it over time. In
18 Kirkland, our public records staff presents a performance
19 report to the city council every six months, including the
20 number of requests outstanding at the beginning and at the
21 end of the period so we can see whether the queue is
22 growing or shrinking, the number of requests that were
23 processed, the average time needed to respond to requests
24 by category. The council uses this data to ensure that
25 resources are allocated to meet the demands as they trend

1 over time. Agencies must have clearly defined processes
2 for how the queue of pending work is managed, including
3 some principles like first-in, first-out.
4 Nondiscrimination is a key principle of the Public Records
5 Act. They do, of course, need to be able to process
6 requests out of sequence when work gets blocked on earlier
7 requests, but they do have to ensure that they aren't
8 accused of favoring or disfavoring particular requests when
9 they do that.
10 Agencies must be fully transparent with requesters
11 and the general public about their public records request
12 function, such as posting logs of pending requests so the
13 public can see for themselves where their requests are in
14 the work queue so it's not a mystery. The agencies must be
15 as accurate as possible in estimating the time required to
16 produce records and keep requesters informed of changes in
17 those estimates. I think that last part is addressed in
18 the draft rules now.
19 So to pull all that together, the real key is
20 tracking of performance and having a commitment to level of
21 service. And that's really kind of missing from the rules
22 right now. But without that, if an agency were to be sued
23 under RCW 42.56.550(2) for making an unreasonable time
24 estimate, they would not be able to show to the Court that
25 they have applied a reasonable level of resources to meet

1 their typical level of demand for disclosure of records.
2 They also would not be able to show that they had met the
3 mandate in 42.56.100 to adopt and enforce reasonable rules
4 and regulations that provide full public access to public
5 records or that provide the fullest assistance to inquirers
6 and the most timely possible action on request. If people
7 aren't tracking their performance, they won't be able to
8 demonstrate any of those things.
9 So whether or not you decide to retain the
10 categorization element in the model rules, I would
11 recommend that you include more about the measurement of
12 demand and performance and the importance of regular review
13 by the governing body or authority of the agency to ensure
14 that sufficient resources are available to the agency's
15 public records function to meet the typical and expected
16 demand for records. And this should include agencies that
17 are spending less than $100,000 a year processing public
18 records, which is the vast majority in the state.
19 The new bills that were passed earlier this year
20 did create some new reporting requirements for those
21 agencies that process a large volume, but that doesn't mean
22 only those agencies should be tracking that data,
23 particularly when it comes to their level of performance.
24 You have received a ton of comments, some of which
25 will surely conflict. And I don't envy your task of trying

1 to get through them all. There are probably people who
2 would have commented but just didn't get the word in time.
3 In some sense, I think that we ought to think about
4 upgrading the State's mechanism for informing people about
5 rule-making actions. But to the extent the process permits
6 it, I will commit that the coalition would gladly
7 collaborate with the Attorney General's Office on resolving
8 the comments that you have received and producing the next
9 draft. We are at your disposal. Thank you very much.
10 NANCY KRIER: Thank you. I may be
11 mispronouncing your name. I'm sorry. Shadrach?
12 SHADRACH WHITE: Shadrach. I'm just here to
13 observe.
14 NANCY KRIER: Oh, you're just here to observe.
15 No problem. Kathy George.
16 KATHY GEORGE: K-a-t-h-y, G-e-o-r-g-e. And
17 I'm speaking tonight on behalf of Allied Daily Newspapers
18 of Washington. And I do have a written submission, which I
19 will hand to you after I'm done reading from it. The
20 general theme of the comments revolves around using these
21 model rules to convey to agencies that their primary
22 purpose is to provide the fullest assistance to requesters
23 and the most timely possible action on request.
24 So you will see in our rather lengthy attachment a
25 number of suggested revisions that reiterate and expand

1 upon what that responsibility should look like. I won't go
2 into every comment in detail, but I'll touch on some of the
3 larger points. One of the suggestions in the letter is,
4 first of all, to more clearly distinguish between the model
5 rules and the comments that are intended to provide
6 explanation of the rules. Another recurring suggestion in
7 these comments is to clearly distinguish, more clearly
8 distinguish among the separate duties imposed by 42.56.100
9 and that is to distinguish between providing full access to
10 public records, preventing disorganization of records,
11 preventing damage to records, and providing the most timely
12 possible action, which are all distinct responsibilities
13 that are sometimes conflated in the existing and proposed
14 model rules.
15 The comments also suggest giving more heft to these
16 model rules as they pertain to those duties. So, for
17 example -- and I think you heard Bill talk about this --
18 the model rules dealing with preventing disorganization of
19 records should prescribe that agencies will use filing and
20 labeling and searchable technology to make it easier to
21 find records that are requested. The existing rules on
22 preventing damage to records are aimed, it seems, mostly at
23 requesters and not letting requesters damage records. I
24 think the intent of that statute is that the agency is
25 going to prevent damage to records by following retention

1 schedules and by preserving records while requests are
2 pending. So there are some suggestions to make that more
3 clear.
4 Another thing that the comments highlight is the
5 need to distinguish between the responsibilities in
6 42.56.040 and the responsibilities under Section 100. 040
7 is a statute that is designed to prevent the need to even
8 make a records request. It obligates agencies to
9 proactively make available, either as part of their own WAC
10 regulations or in a prominent place at their central
11 office, those rules and policies and plans and adoptive
12 goals that affect the public. And the model rules seem to
13 misconstrue the statute as something that merely requires
14 identifying a records officer and saying how public records
15 can be requested. So the comments suggest that 040 should
16 be implemented through model rules that make clear what the
17 responsibility is.
18 And the comments also proposed to eliminate the new
19 sections on categorization due to a number of concerns
20 about them, one of which is that the proposed rules seem to
21 assume that every request is going to go into the queue and
22 is going to be categorized before any even initial search
23 takes place. The model rules should actually encourage
24 agencies to answer every request immediately, if possible,
25 or within five days, if possible, because that's consistent

1 with providing the most timely possible action and the
2 fullest assistance.
3 So the categorization scheme, if you will, that's
4 laid out in the model rules basically needs to be
5 overhauled or just eliminated. And as Toby said, I think
6 that you will find a willingness to work with you on that
7 overhaul.
8 Another recurring concern throughout these model
9 rules is that they don't recognize that requesters do have
10 the option of being anonymous. And another set of comments
11 addresses retrieving records from personal devices. As it
12 is, the proposed model rules discuss records on personal
13 devices as part of the definition of public records. It
14 really should be a separate model rule, and it should be a
15 rule that is expressed in imperative terms, not what
16 agencies should do but what their employees and officials
17 shall do to ensure that public records on personal devices
18 are made available upon request.
19 Another concern explained in the comments has to do
20 with the discussion of a third-party notice. The proposed
21 rules are concerning for a number of reasons. In general,
22 they seem to encourage notification of third parties for
23 the purpose of shifting the burden of proving exemptions
24 from the agency to a private party. In particular, there
25 is a statement that a third party notice shouldn't be given

1 unless the agency reasonably believes the records are
2 exempt. But if the agency reasonably believes the records
3 are exempt, it should be asserting that exemption itself,
4 and that gives the requester the choice of either
5 challenging that exemption claim or not. But if the
6 agencies simply shifts the burden to a third party to
7 assert that exemption, then everybody ends up in court,
8 which is inefficient and a way of slowing down access to
9 records, should they prove to be not exempt.
10 There are also some comments about emphasizing the
11 need for specific explanation of exemptions when records
12 are withheld. And I would just reiterate what Toby and
13 Bill said about the process. That is, Allied Daily
14 Newspapers of Washington is concerned that at this public
15 hearing there is a rather small number of people who are
16 able to make it here at 6 o'clock on a weeknight, and these
17 are rules that will affect the entire state, the entire
18 public. And so we would encourage you to continue the
19 process, at a minimum to circulate a revised proposal,
20 before making a final decision. Thank you for listening.
21 NANCY KRIER: That's our last speaker who
22 signed up, but I understand one is -- oh, no.
23 MR. THOMPSON: I'm Rowland Thompson,
24 R-o-w-l-a-n-d, T-h-o-m-p-s-o-n. I'm executive director of
25 Allied Daily Newspapers and the Washington Newspaper

1 Publishers Association. I don't want to go over the points
2 that were raised by the previous speakers, including our
3 attorney, who was speaking for us, but I would like to
4 expand a little bit on the last point that she made, and I
5 asked her to do that.
6 I'm a denizen of this process, and I'm here in
7 Olympia all the time. And I go to rule-making hearings
8 often, a couple of times a month, and those hearings are
9 discrete to that agency. They might be about a process
10 involving a discharge permit, or they might be about how
11 interest is calculated on a Department of Revenue issue, or
12 they might be about how construction is going to be done on
13 a particular project or a standard of some kind of a
14 singular agency. This is a unique process, and it's unique
15 in its breadth and its recommendation to be used throughout
16 state government and throughout local government. When I
17 talk to my members and to the members of the Washington
18 Newspaper Publishers Association, not one of them was aware
19 that this was happening, and it will have major impact on
20 them and on their readers. And it behooves the Attorney
21 General as the people's lawyer, I think, to take this
22 farther afield and to publicize it further. The
23 implications of this are wide reaching, and they're wide
24 reaching and they're long reaching in time. This last set
25 of rules was in place for almost a decade, and these will

1 probably be in place for about that similar period of time.
2 And the larger amount of input that you can get and buy-in
3 from the public ahead of them being finalized and published
4 I think is very important here, because local governments
5 from the largest to the smallest will be relying upon
6 these. Agencies of a single person up to King County will
7 use these as the model for them to rely upon when they
8 adopt their rules, their governing boards will.
9 I actually talked to a couple of people involved in
10 local government, and they were not aware that this was
11 going on. This is a process that's sufficient for people
12 who are practitioners in an area with an agency. It's
13 really not sufficient for something that's of this breadth.
14 It may fulfill the requirements of your agency, but I
15 really don't think it fulfills the requirement of the
16 Attorney General as the arbiter of these issues and you as
17 a public counsel for that office. And I hope that you
18 would consider as you move forward with this that you would
19 actually hold further hearings around the state for people
20 locally to be able to get them, rather than to having a
21 travel a great distance and not having them publicized as
22 fully as they probably should be.
23 We have submitted written comments. You'll get
24 them electronically, and that will make it easier to work
25 with. We're critical, but we want to be helpful, and

1 hopefully we can come to something that we can all agree
2 on, hopefully in this process we will look at like the desk
3 books that were done by the bar association back in
4 previous iterations. We have some strong opinions, and we
5 would like to be heard, needless to say. Thank you.
6 There is someone who is coming and is stuck on the
7 other side --
8 NANCY KRIER: That's what I heard. I don't
9 know if anyone else wants to speak. We can take a stretch
10 break.
11 SHADRACH WHITE: My name is Shadrach White,
12 S-h-a-d-r-a-c-h, last name White like Snow White. I know
13 there is a lot of strong opinions about the Public Records
14 Act. In full disclosure, I own a software company, and I
15 have been following this quite closely. There's other
16 software companies that have a lot bigger head start in
17 trying to help solve this problem. But I just wanted to
18 state for the record, I spent two and a half weeks
19 traveling around our state. I went to every county. I
20 went to as many incorporated cities as I could, and I met a
21 lot of really, really great city clerks, public records
22 officers, and records managers who work extremely hard.
23 They are overwhelmed, and they are in a lot of cases
24 overworked. And so I just -- I don't hear that voice here
25 at this hearing. I think it's important that it's put on

1 the record that there are a lot of public servants that are
2 trying to do a very diligent job. And I think that they
3 deserve recognition. And that's all.
4 NANCY KRIER: Okay. I think we'll take a
5 break.
6 (Break in proceedings from 6:54 p.m. to 7:03 p.m.)
7 NANCY KRIER: We're back on the record. If
8 you can state your name and spell anything you think might
9 be need to be spelled.
10 JOAN MELL: Thank you. My name is Joan Mell.
11 I'm an attorney in Fircrest, Washington. I am here before
12 you to really encourage careful consideration of any rule
13 making around the Public Records Act based on my advocacy
14 for individuals who believe in transparency. It has been
15 my experience that transparency makes a tremendous
16 difference in holding government officials accountable.
17 I am the attorney who represents Mike Ames and
18 Glenda Nissen in Pierce County. I wanted you to be aware
19 of the background of what's currently happening in Nissen
20 II so you can make sure to be attentive to the arguments
21 that Pierce County is bringing forward and how those might
22 influence how you finally implement any of your rule
23 changes. I think Pierce County has taken the unique
24 position of arguing that post Nissen I the supreme court
25 has created a new definition of the rule of public record.

1 And they so argue. It's a very interesting briefing that's
2 before Judge Lanese here in Thurston County on whether or
3 not Mark Lindquist has sufficiently met the affidavit
4 requirements in Nissen II that were set forth in Nissen I.
5 And their contention is that Nissen I, the supreme court
6 upheld the privacy of public officials and that they had
7 determined that the only basis for disclosure of any text
8 messages that were on a personal device would be measured
9 by whether or not that public official used the device,
10 slash, technology, slash, individual text for purposes of
11 carrying out the duties of the prosecutor as defined by the
12 prosecutor. So we are engaged in quite a discussion before
13 Judge Lanese on whether or not that's what the supreme
14 court did and then how he's going to then enforce his
15 determination that Mark's declaration was insufficient.
16 So we're waiting to see. But that's why I'm here.
17 I want to make sure that, one, the AG is nowhere near
18 adopting that principle, because it's wrong. It's wrong in
19 so many ways. The supreme court did not redefine the
20 meaning of a public record. The "prepared," "used,"
21 "retained," "owned" still are in the statute, and the
22 supreme court never applied the definition to any texts.
23 So that's important to me.
24 It's also important to me to share my personal
25 belief that Nissen I didn't open up the universe to

1 obtaining text messages. In a practical matter, it said
2 personal devices aren't a way that you can hide public
3 records. But at the same time, the practical reality of
4 being able to obtain text messages, it's virtually
5 impossible to get them. And that's why -- the reason that
6 texts are even employed in Nissen I and II is that I have
7 been trained to notify the carrier when you were interested
8 in phone records and text messages as soon as you knew you
9 were interested in them so that the carrier would have put
10 a hold on them.
11 Now, I didn't know when I did it that somehow the
12 universe where that goes to at Verizon was established for
13 criminal law enforcement purposes, but the prosecutor's
14 office threw in my face at the Nissen litigation that
15 somehow I had done a heinous offense by sending a
16 preservation request to Verizon because I wasn't a law
17 enforcement agency and I had no right to do so.
18 The supreme court never touched that issue, and I
19 don't think it's going to be an ongoing issue. But as a
20 practical matter, unless you send a preservation hold
21 request to a phone company and you know who the phone
22 company carrier is for the text messages, those text
23 messages are gone. It's very rare for a public official,
24 even in a personal capacity, to have a continuous storage
25 capacity with their phone company where they're saying hold

1 my text messages. And my experience in interaction with
2 Verizon, in fact, in that case has been that they don't
3 want to be in this universe either. They don't want to be
4 sitting on a bunch of personal information for individuals.
5 So in the context of private technology, we're
6 still dealing with a very volatile record that's easily
7 dispensed with. And that's why I am supportive of the
8 agencies taking a very firm stance and elected officials
9 taking a very firm stance that they just simply are not
10 going to text when they're conducting the public's
11 business. It's hard for them to manage. It's hard for the
12 agency to manage, and it's better to just not create that
13 kind of record.
14 And that's also the bottom line. It's the choice
15 to actually communicate in writing that gives us the right
16 to look at their activities. So it's the fact that we're
17 dealing with a record as opposed to some sort of nebulous
18 communications or oral communications. So if they're going
19 to decide that they need to convey information in words on
20 paper in a digital format, it should be done in a digital
21 format that can be recovered and stored and preserved for
22 as long as the retention requirements allow or require.
23 I think there should be some precautions in these
24 rules adopted. And training should necessarily include and
25 recommend that public officials recognize that the mere

1 fact that it's transitory, as they like to tell me all the
2 time, isn't a reason to delete it and get rid of it after a
3 request has been made in particular. And it's not a reason
4 to just completely dispense with your text right after it's
5 created.
6 I don't know if people have talked about the
7 Sacramento case that came out today, but I read a review
8 this morning that there is a judicial determination about
9 spoilage of evidence at issue down in Sacramento where an
10 official for the second time deleted text messages in
11 relationship to his communications about a developer who
12 was trying to get the permitting requirements. The first
13 time he did it, the judge said shame on you. This time
14 they are saying sanction and spoliation. But again, the
15 government lawyers are involved saying that's the most
16 speculative accusation to make against this public
17 official, that he deleted these transitory text messages
18 intentionally knowing that he was destroying a public
19 record, even though he had been told not to do it
20 previously.
21 So I'm seeing in this universe a lot of histrionics
22 around whether you need to keep things and don't need to
23 keep things. And you do. You just do, and it shouldn't be
24 about, oh, it's just quickly deleted or it was just a quick
25 little message. I am embroiled in whether or not a

1 communication relates to or was used by a public official.
2 And I think the state archivist has done a really
3 good job in adapting the retention schedule definition of
4 what is a public record and merging that with the PRA
5 definition in a way that just says, if you're talking about
6 work, it's work related. And this whole concept that
7 something is political or not, everything in government is
8 political, especially with something like Mark Lindquist.
9 So to the extent you can incorporate in your rules the
10 education and training, and recommendations for policies
11 that simply put off limits destroying this kind of stuff or
12 not retaining this kind of stuff is really essential. And
13 then please, please, please don't buy into the fact that
14 there is a narrower definition of a public record.
15 NANCY KRIER: Thank you.
16 JOAN MELL: I'm happy to answer any questions.
17 NANCY KRIER: No, this is your chance.
18 JOAN MELL: Okay.
19 NANCY KRIER: Thank you. We are going to be
20 here until 8:00 just in case anybody else -- just for the
21 record, we did not only provide notice by formal filings,
22 but we did, as I was discussing with some others on the
23 break, media releases. We tweeted out about these rules.
24 We sent e-mails. We posted it on our website. So there
25 has been multiple platforms to get the word out to

1 associations as well as individuals about these rules. So
2 I appreciate all of you coming here tonight, but there were
3 many notices.
4 HOWARD GALE: Thank you for a second bite of
5 the apple. Howard Gale from Seattle. So I just want to
6 get three things that I didn't really address, and they're
7 kind of slightly more complex issues. One is the -- it's
8 been touched on today, repeated confusion around 42.56.100,
9 the protection of public records and public access. In
10 your rules and again in your proposed rules -- I don't have
11 the page -- you state, quote, an agency should devote
12 sufficient staff time to processing requests consistent
13 with the act's requirement that fulfilling requests should
14 not be an excessive interference with the agency's other
15 essential functions.
16 I think that is actually a gross misrepresentation
17 of 42.56.100. 42.56.100 says: Consonant with the intent
18 of this chapter to provide full public access to records,
19 to protect public records from damage or disorganization,
20 and to prevent excessive interference with the other
21 essential functions of the agency.
22 I think another way of reading that is that there's
23 a duty to preserve and organize records -- and this was
24 spoken to a number of times today -- there's a duty to
25 preserve records to not excessively interfere with the

1 other functions of an agency. I think the way that it's
2 worded in your current proposed rules, it actually
3 encourages an agency to hire maybe one incompetent person
4 that can't get the job done, and then they can appeal to
5 the Court and say, you know, this is just interfering with
6 our function.
7 So it goes back to the issue that's been raised
8 repeatedly, and that is this is kind of an essential part
9 of democracy. It's about transparency. We wouldn't say in
10 a fire district we're having too many fires, so we just
11 can't provide fire services. If there's a need for
12 transparency, then agencies need to figure out a way to get
13 that fulfilled. And, again, it was spoken to earlier, a
14 lot of these problems could be resolvable by proper
15 searches and proper organization of records.
16 And then the other thing I want to get to is
17 installments. Installments is noted on page 20, 26, 27.
18 And there's a conflict here. The original PRA, up until
19 2005, so from '72 to 2005, it stated: Public records shall
20 be available to any person for inspection or copy. An
21 agency shall, upon request for identifiable records, make
22 them properly available to any person. That's the full
23 statement.
24 In 2005, 33 years later, there was one clause
25 including: If applicable, on a partial or installment

1 basis as records that are a part of a larger set. This is
2 the problem. I have now submitted numerous public records
3 requests to Seattle, and I'm hit with, here's your first
4 installment. In two months, you'll get your first
5 installment. I'm now working on my third installment, and
6 after five months, no indication when the last installment
7 will be. No indication of how many installments there will
8 be. Now the problem is I don't think that clause that was
9 added in 2005 somehow subverts "make them promptly
10 available." I know there's a recent decision in both Hikel
11 and Hobbs that says your only requirement right now, as the
12 appeals court understands it, is for an agency to provide
13 the first installment in a timely fashion. That is a
14 problem, and that is encouraging agencies to use this
15 installment ploy to avoid production.
16 So right now I'm on my third installment, and I
17 have no idea. It could be a year, two years off. And what
18 do I do? If I take the City of Seattle to court, they say
19 Mr. Gale hasn't been patient. He's not waiting for
20 installment number 563. So I think the installments issue
21 is a very serious concern.
22 And then the last point briefly is the 30-day issue
23 of picking up documents I think for -- we have lawyers. We
24 have newspaper organizations. There's also average
25 citizens. That's why the Public Records Act was passed in

1 '72, to empower average citizens. If an average citizen
2 goes on vacation, if there is health issues, if there is
3 family issues, having that 30-day requirement is an
4 unnecessary burden, and it often gives an agency the chance
5 to do a reset and say, okay, we're going to start over. So
6 that's it. Thank you.
7 NANCY KRIER: Do we have any other sheets? I
8 don't think so. So we'll go off the record now and see if
9 anyone -- I'll stay here until 8:00 to see if anyone else
10 comes. If you want to stay with us, that's fine. I
11 haven't ordered pizza, but if you don't want to stay, I
12 won't take any offense. So we'll go off the record.
13 (Off the record from 7:18 p.m. to 8:00 p.m.)
14 NANCY KRIER: So we're back on the record.
15 It's now 8:00 p.m., and there is no one else signed up to
16 testify, so we're closing out this evening's hearing
17 record. Thank you.
18 (Proceedings concluded at 8:00 p.m.)
19
20
21
22
23
24
25