

Open Public Records Act RCW 42.56



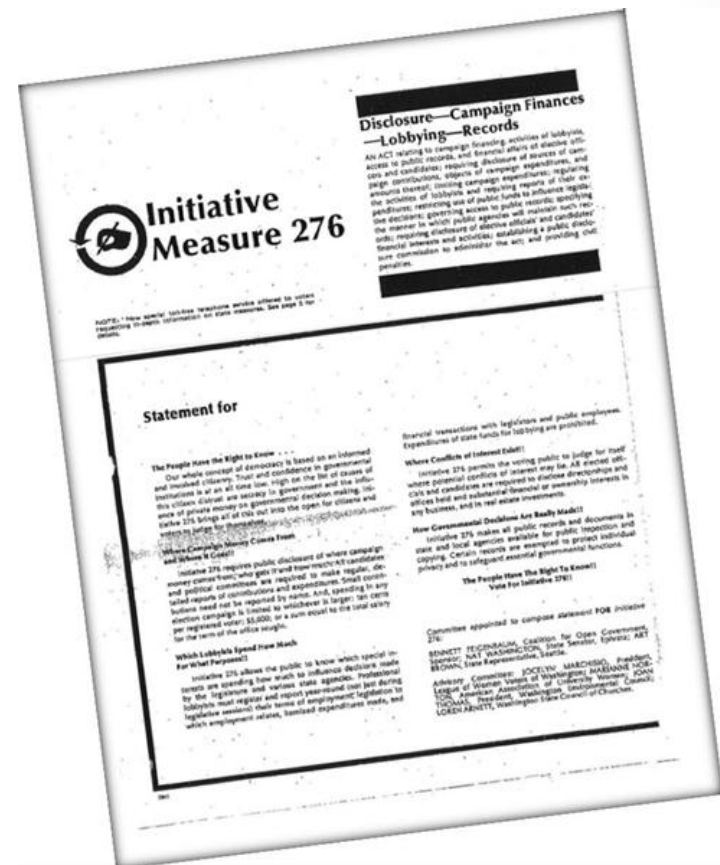
Prepared by Washington State Attorney General's Office

Last revised: April 2014



Washington's Open Public Records Act (PRA)

- Passed in 1972 – Initiative 276
- 72 percent of the popular vote
- RCW 42.56 (formerly RCW 42.17)



Purpose

- “The people do not yield their sovereignty to the agencies which serve them.”
- “The people, in delegating authority, do not give public servants the right to decide what is good for the people to know and what is not good for them to know.”
- “The people insist on remaining informed so they may retain control over the instruments they have created.”

~ *RCW 42.56.030*



Purpose (Cont.)

- The “free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.”
- Act is to be “liberally construed.”

~ *RCW 42.56.030; RCW 42.56.550*

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- “It has been said time and again in our history by political and other observers that an informed and active electorate is an essential ingredient, if not the *sine qua non** in regard to a socially effective and desirable continuation of our democratic form of representative government.”

~ *Washington State Supreme Court*

**indispensable action*



Open Government Laws Like the PRA are Often Called “Transparency Laws” or “Sunshine Laws”



This is because they “shine light” on government. U.S. Supreme Court Justice Louis Brandeis once famously said, “*Sunlight is the best disinfectant.*”



Transparency builds public confidence in government.

Touchstone:



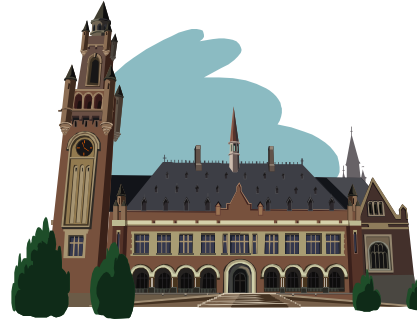
- Public records of government agencies are presumed open.
- Records or information in records can be withheld only by law (e.g. exemption in law). Exemptions must be “narrowly construed.”

~ RCW 42.56.030



PRA Applies to Records of:

- State government agencies*
- Local government agencies*
- Limited extent to Legislature



~ RCW 42.56.010

* And to agencies that are the functional equivalent of public agencies.

PRA Does Not Apply to:

- Court records (court files)
- Private organizations or persons*



* Unless, for example, the records are used or retained by a government agency.

Public Record



“**Public record**” means:

- any writing
- containing information
- relating to
- the conduct of government or
- the performance of any governmental or proprietary function
- prepared, owned, used, or retained
- by any state or local agency
- regardless of physical form or characteristics.”

~ RCW 42.56.030

Writing

- “**Writing**” includes “handwriting, typewriting, printing, photostating, photographing, and **every other means of recording any form of communication** or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.”

~ RCW 42.56.030

- So, “public record” is **broadly defined.**



***Note:* Public Records Can Include...**

...records of agency business when they are created or retained by agency employees or officials on home computers or in non-agency email accounts.



General PRA Procedures



Under PRA, agencies must:



- Appoint a **public records officer**.
- Publish **procedures** describing certain agency organization, operations, rules of procedure, and other items listed in PRA.
- Adopt **rules/procedures** to:
 - Provide full public access to public records,
 - Protect public records from damage/disorganization
 - Prevent excessive interference with other agency functions.
 - Provide fullest assistance to requesters
 - Provide most timely possible action on requests.
- If charging actual costs of copies of records, **publish fee schedule**.
- Maintain a **list of laws** the agency believes exempts or prohibits disclosure.
- Provide certain **indexes** of records.
- Make non-exempt records **available for inspection and copying** during **customary business hours** for a minimum of 30 hours per week, excluding holidays.
 - ❖ Post customary business hours on the agency's website and make hours known by other public means.



~ RCW 42.56.040, RCW 42.56.070 - .090, RCW 42.56.580, RCW 42.56.580.

Requests for Public Records



- Persons can request **identifiable public records** from public agencies.
 - Requester can use agency public records request form.
 - If agency request form not used, requester must provide “fair notice” that he/she is seeking public records.
 - A request for “information” is not a request for “records” under the PRA.
- Requesters can ask to **inspect** records, or request **copies** of records.
- Agencies can adopt procedures explaining where requests must be submitted and other procedures.

~ *RCW 42.56.520; RCW 42.56.080, RCW 42.56.040, RCW 42.56.100.*

Agency Responses to Requests

- The agency has **five business days** to respond to a public records request.



- Agency response can:
 1. **Acknowledge receipt of the request and provide a reasonable estimate for a further response;** or
 2. **Fulfill the request;** or
 3. **Provide an internet address and link** to the records on the agency's website (which fulfills part or all of the request); or
 4. **Seek clarification;** or,
 5. **Deny** the request with an accompanying written statement of the specific reasons.

~ RCW 42.56.520

respond

Seeking Clarification

- An agency can seek clarification of a request if it is **not reasonably clear**, or does not request “**identifiable records**.”
- Remember: agency is to give “fullest assistance.”
- Agency should explain why it needs clarification, in order to provide fullest assistance to requester and to search for potentially responsive records.
- If requester does not respond to request for clarification, the agency may close the request.

~ *RCW 42.56.520*



Estimate of Time for Further Response



- An agency can provide an **estimate of time for further response**.
- Estimate is to be **reasonable**.
- It is a good practice to briefly **explain why** more time is needed to process a request. If challenged in court, it is an agency's burden to show why an estimate of time is reasonable.
- **Factors** may include, for example, time needed to:
 - Get clarification if necessary.
 - Search for records. More time may be needed if request is large or complex.
 - Assemble and review records.
 - Provide notice to affected third persons/agencies if necessary.
 - Prepare an exemption log if necessary.
 - Perform other essential agency functions, considering agency resources including staff availability.
- An agency can extend the time if needed. Again, it is a good practice to explain why.
- If an agency can't produce all the records at once (particularly for large requests), an agency can provide records in installments.

~ RCW 42.56.520, RCW 42.56.520, RCW 42.56.080, RCW 42.56.550

Searches



- An agency should **read the request carefully** to understand what records are requested.
 - Clarify the request if needed.
 - An agency can also ask the requester to suggest search terms.
- An agency must conduct an **adequate search** for responsive records.
 - Consider all formats (paper, electronic, etc.)
 - Consider records of current staff/officials, and former staff/officials, if potentially responsive.
 - Consider possible locations (e.g., file cabinets, agency website, audio files, etc.)
- The search should be **reasonably calculated to uncover responsive records**.
- The search should follow **obvious leads** to possible locations where records are likely to be found.
- It is a good idea to **document** search efforts (locations, search terms used, etc.) The agency bears the **burden of proof** to show the adequacy of the search.

~ RCW 42.56.520



Installments

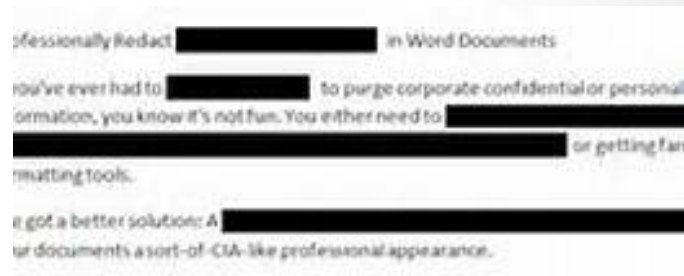


- Agencies can provide records in **installments**, particularly for larger requests.
- Agencies can request a deposit up front (not to exceed 10 percent).
- Agencies can provide an installment by providing links to records on its website.
 - ❑ Note: Agencies are encouraged to post commonly-requested records on their websites. This:
 - Makes records more accessible.
 - Enables quicker agency responses.
 - Enables requesters to choose to view or copy only those records they want.

~ RCW 42.56.080, RCW 42.56.120



Exemptions



- Records are presumed open.
- If a record, or part of a record, is withheld from the public, the agency must cite to an **“exemption”** in law and give a brief explanation.
- Exemptions are **narrowly construed**.
- The general rule is the agency withholds only the exempt information, and releases the rest.
- Exemptions must be authorized in law --- in PRA or other laws.

~ RCW 42.56.050, RCW 42.56.210 - .510, RCW 42.56.550

Exemptions (Cont.)



- When withholding part (redacting) or all of a record, agency must **describe record** by date, type, authors/recipients, and total number of pages.
- Agency must **list exemption and give brief explanation.**
- This information can be provided to the requester in an “**exemption log**” or in other formats, so long as the required information is provided.
- Common exemptions are certain information in student or employment records, attorney-client privileged information, pending investigative records in certain investigations, and protected health care information.
- Agencies are not generally authorized in the PRA to provide lists of individuals for commercial purposes.
- The **agency bears the burden of proof** to justify the exemption.

~ RCW 42.56.050, RCW 42.56.210 - .510, RCW 42.56.550

Privacy

- There is no general “privacy” exemption in the PRA.
- If privacy is an express element of another exemption, privacy is invaded only if disclosure about the person would be:
 1. “Highly offensive to the reasonable person” and
 2. “Not of legitimate concern to the public.”

This means that if information does not satisfy both these factors, it cannot be withheld as “private” information under other statutes.



~ RCW 42.56.050

Fees



- Agencies cannot charge fees to allow requesters to **inspect** records.
- Agencies cannot charge fees for **searching, reviewing or redacting** records.
- Agencies cannot charge a requester for **staff salaries, benefits or general overhead or administrative costs**, unless they are directly related to the actual cost of copying records (the charges must be reasonable, and documented).
- Agencies can charge fees for the **copies** themselves (15 cents per page, or actual costs). Agencies can pass along to the requester the cost of sending records to an outside vendor or service so the records can be copied.
- Agencies can charge for costs of **mailing** records (postage, shipping container, etc.)
- Agencies are to make their **fee schedules** available to the public.
- There may be other laws, outside the PRA, that permit an agency to charge fees for records.



~ RCW 42.56.060, RCW 42.56.120, RCW 42.56.130

Enforcement & Penalties



- PRA enforced by **courts** for claims listed in PRA.
- A court can impose **civil penalties**. No proof of “damages” required.
- A court is to consider the **factors** in requiring an agency to pay a penalty:
- Plus, a court will award the requester’s **attorneys fees and costs**.
- Special penalty provisions and court procedures apply to lawsuits involving inmate requests.

~ *RCW 42.56.550, RCW 42.56.565; Yousoufian v. Sims*

Penalty Factors

A court must consider these nonexclusive **factors** in deciding whether an agency should pay a penalty:

❑ **Mitigating factors** (factors that can reduce a penalty):

- A lack of clarity in the PRA request.
- The agency's prompt response or legitimate follow-up inquiry for clarification.
- The agency's good faith, honest, timely, & strict compliance with all PRA procedural requirements & exceptions.
- Proper training & supervision of the agency's personnel.
- The reasonableness of any explanation for noncompliance by the agency.
- The helpfulness of the agency to the requester.
- The existence of agency systems to track and retrieve public records.

❑ **Aggravating factors** (factors that can increase a penalty):

- A delayed response by the agency, especially in circumstances making time of the essence.
- Lack of strict compliance by the agency with all the PRA procedural requirements and exceptions.
- Lack of proper training & supervision of the agency's personnel.
- Unreasonableness of any explanation for noncompliance by the agency.
- Negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency.
- Agency dishonesty.
- The public importance of the issue to which the request is related, where the importance was foreseeable to the agency.
- Any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency.
- A penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.
- The inadequacy of an agency's search for records.

~ *Yousoufian v. Sims; Neighborhood Alliance v. Spokane County*



Penalties Outside of PRA



Penalties in Other Laws:

There can be criminal liability for willful destruction or alteration of a public record.

~ *RCW 40.16.010*

For state employees, penalties can be assessed under the State Ethics Law if an employee intentionally conceals a record that must be disclosed under the PRA, unless decision to withhold was in good faith.

~ *RCW 42.52.050*

Risk Management Tips

- Establish a culture of compliance with the PRA, beginning with agency leadership and support.
- Train appropriate staff and officials about the PRA's requirements. (See next slide).
- Review agency's PRA procedures.
- Review available resources; institute best practices.
- Review penalty factors.
- Keep updated on current developments in PRA; correctly apply law.
- Consult with agency's legal counsel.



Training

- A new law effective July 1, 2014 amends the PRA to require records training. Chapter 66, 2014 Laws (ESB 5964) (“Open Government Trainings Act”).
- Elected local and statewide officials, and records officers, are to receive records training on the PRA, and records management/retention under RCW 40.14.
- They can take training sooner than July 1. Refresher training occurs no later than every 4 years.
- Training can be taken online, in person, or by other means.



- Training resources, videos, and more information about the Act (a “Q & A”) are available on the Attorney General’s Office Open Government Training Web Page:

<http://www.atg.wa.gov/OpenGovernmentTraining.aspx>

PRA Assistance

- The **Washington State Attorney General's Office** has provided an explanatory pamphlet and other materials about the PRA.
- The Attorney General's Office has also published Model Rules.
- The Attorney General has also appointed an Assistant Attorney General for Open Government. The AGO can provide technical assistance and training.
- The Attorney General's Office materials about the PRA, and other open government topics and resources, are on its website at www.atg.wa.gov.
- The Attorney General's Office Open Government Training Web Page with training resources, videos and other materials is at: <http://www.atg.wa.gov/OpenGovernmentTraining.aspx>
- The Attorney General's Office may also review a state agency denial of a record when the agency concludes the record is exempt.
- The Attorney General's Office may issue formal opinions about the PRA for qualified requesters.

~ RCW 42.56.570, RCW 42.56.530,
Chap. 66, 2014 Laws



