



**King County**  
**Metropolitan King County Council**  
**Committee of the Whole**

**STAFF REPORT**

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<b>Agenda Item No.:</b> 10	<b>Date:</b> 24 June 2009
<b>Ordinance No.:</b> 2009-0351	<b>Prepared by:</b> Nick Wagner

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**SUMMARY**

Chapter 2.12 of the King County Code is the chapter related to public records. Proposed Ordinance 2009-0351 (Attachment 1, pp. 7-26 of these materials) would add new sections to chapter 2.12 in response to the Washington Attorney General's model rules on public records compliance. The proposed ordinance would also clarify and make technical changes to chapter 2.12.

The proposed ordinance is before the committee today for a high-level, introductory briefing. It is not before the committee for action.

**BACKGROUND**

RCW Chapter 42.56 is the Washington Public Records Act. The Act required the Washington Attorney General, by 1 February 2006, to:

[A]dopt by rule an advisory model rule for state and local agencies, as defined in RCW 42.56.010, addressing the following subjects:

- (a) Providing fullest assistance to [public records disclosure] requestors;
- (b) Fulfilling large requests in the most efficient manner;
- (c) Fulfilling requests for electronic records; and
- (d) Any other issues pertaining to public disclosure as determined by the attorney general. (RCW 42.56.570)

**Attorney General's Model Rules**

WAC Chapter 44-14 (Attachment 2, pp. 27-68 of these materials) contains the model rules<sup>1</sup> and comments adopted by the Attorney General pursuant to RCW Chapter 42.56. The comments provide background on the origin and purpose of the Attorney General's model rules:

The model rules are the product of an extensive outreach project. The attorney general held thirteen public forums all across the state to obtain the views of

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<sup>1</sup> Although RCW 42.56.570 instructed the Attorney General to adopt "an advisory model rule" (in the singular), WAC Chapter 44-14 consistently refers in the plural to "the model rules."

[public records] requestors and agencies. Many requestors and agencies also provided detailed written comments that are contained in the rule-making file. The model rules reflect many of the points and concerns expressed in those forums.

The model rules provide one approach (or, in some cases, alternate approaches) to processing public records requests. Agencies vary enormously in size, resources, and complexity of requests received. Any “one-size-fits-all” approach in the model rules, therefore, may not be best for requestors and agencies. (WAC 44-14-00001)

Although “[t]he attorney general encourages state and local agencies to adopt the model rules (but not necessarily the comments) by regulation or ordinance” (WAC 44-14-00001), the comments make clear that “[t]he model rules, and the comments accompanying them, are advisory only and do not bind the agency.” (WAC 44-14-00003) Nevertheless, “[w]hile the model rules and comments are nonbinding, they should be carefully considered by requestors and agencies.” (WAC 44-14-00003)

### **PROPOSED ORDINANCE 2009-0351**

As described in the Executive’s transmittal letter (Attachment 5, pp. 79-80 of these materials), Proposed Ordinance 2009-0351 is intended to be King County’s response to the Attorney General’s model rules. The ordinance “seeks to clarify the policies surrounding how public records requests are handled in King County.” It was prepared by a team consisting of:

- the Clerk of the Council;
- the County Code Reviser;
- the Records and Licensing Services Division;
- the County Public Disclosure Officer; and
- the Prosecuting Attorney’s Office.

In addition, the proposed ordinance “was reviewed, commented on, and recommended for approval by the county’s Public Records Committee.” *See* transmittal letter, at p. 79 of these materials.

### **Changes proposed in county code**

The text of Proposed Ordinance 2009-0351 (Attachment 1, pp. 7-26 of these materials) shows which provisions represent changes or additions to the current county code. In addition, a table prepared by the drafters of the proposed ordinance (Attachment 3, pp. 69-72 of these materials) provides a summary of the ordinance and an indication of whether the proposed changes are substantive or merely technical. The following list includes some of the more notable proposed changes from the current code provisions:

1. The term “agency” is defined to mean any of the following: the executive branch (excluding the superior court clerk), the Council, the Sheriff, the Assessor, the

Prosecuting Attorney, or the Elections Director. (Attachment 1, lines 51-64, pp. 9-10 of these materials)

2. “A [public records] request to one agency does not constitute a request to any other agency. A separate request must be made to each agency for which access to public records is requested or assistance in making such a request is sought.” (Attachment 1, lines 233-236, p. 17 of these materials)
3. Each agency is required to appoint a public records officer, whose name and contact information must be posted at the agency’s “primary location.” (Attachment 1, lines 227-229, p. 17 of these materials)
4. The Clerk of the Council, instead of the Council Administrator, is made officially responsible for preparing permanent records of Council proceedings. (Attachment 1, lines 78-83, p. 10 of these materials)
5. An agency’s records retention schedules for current records are permitted to serve as the agency’s public records index that is required under state law (RCW 42.56.070(3)) (Attachment 1, lines 100-104, p. 11 of these materials), though there is also a provision stating that such an index is available through the county’s archives and records management program (Attachment 1, lines 250-252).
6. The county is required to “[p]rovide education and training within an agency to ensure that public records are protected from damage or disorganization.” (Attachment 1, lines 238-242)
7. Procedures are prescribed for making public records available for inspection and copying (Attachment 1, lines 245-397, pp. 18-24 of these materials). The description of these procedures constitutes most of the proposed ordinance. The proposed ordinance covers such issues as: procedures and timelines for responding to public records requests (lines 245-342), including electronic records (lines 343-356); clarification of such requests (lines 290-294, 297-301); fees to be charged for providing copies of records (lines 370-397); procedures for withholding records or portions thereof that are exempt from disclosure (lines 295-296, 357-369).
8. Procedures are prescribed for making objections to denial of public records requests and for administrative and judicial review of such denials. (Attachment 1, lines 398-408, pp. 24-25 of these materials)

### **Attorney General model rules and comments not adopted**

Though Proposed Ordinance 2009-0351 states that the rules it proposes are “based on chapter 44-14 WAC” (i.e., the Attorney General’s proposed model rules and comments), the proposed ordinance specifically provides that it is not adopting the Attorney General’s proposed model rules and comments. (Attachment 1, lines 200-202, p. 16 of these materials)

Although a comparison of Proposed Ordinance 2009-0351 with the Attorney General’s model rules and comments is not complete, some differences have been identified. For example:

1. **County as “agency.”** Unlike the proposed ordinance, which treats the county as six separate “agencies” and requires separate public records requests to each applicable agency (Attachment 1, lines 51-64, 233-236, pp. 9-10, 17 of these materials), the Attorney General’s comments provide in part: “[T]he act defines the county as a whole as an ‘agency’ subject to the act. RCW 42.17.020(2) [now RCW 42.56.010(1)]. An agency should coordinate responses to records requests across departmental lines.” (WAC 44-14-01001, p. 31 of these materials)
2. **Records request form.** The proposed ordinance does not require agencies to provide a records request form and contemplates the possibility that they may not (Attachment 1, line 261, p. 18 of these materials), whereas the Attorney General’s comments provide in part: “An agency should have a public records request form.” (WAC 44-14-03006, p. 39 of these materials)
3. **Oral requests.** The proposed ordinance does not seem to provide for a records request to be made orally (*see* Attachment 1, lines 260-270, pp. 18-19 of these materials), whereas the Attorney General’s comments, while allowing agencies to “strongly encourage” the submission of requests in writing, also provide for the possibility of oral requests: “If an agency receives an oral request, the agency staff person receiving it should immediately reduce it to writing and then verify in writing with the requester that it correctly memorializes the request.” (WAC 44-14-03006, p. 39 of these materials)
4. **Scope of explanation of withholding of records.** Although the proposed ordinance requires, when an exempt record (or part thereof) is withheld, that “the public records officer shall state the specific exemption and provide the authority for the exemption” (Attachment 1, lines 306-309, p. 20 of these materials), it does not go as far as the Attorney General’s comments, which also call upon the agency to “provide a brief explanation of how the exemption applies to the record or portion withheld,” including “enough information for a requestor to make a threshold determination of whether the claimed exemption is proper.” (WAC 44-14-04004(4)(ii), p. 50 of these materials).
5. **Training.** The proposed ordinance requires the county to “[p]rovide education and training within an agency to ensure that public records are protected from damage or disorganization.” (Attachment 1, lines 238-242, p. 17 of these materials). The Attorney General’s comments seem to contemplate a need for training staff in how to respond to records requests: “Training is critical. . . . Training can be the difference between a satisfied requestor and expensive litigation.” (WAC 44-14-00005, p. 30 of these materials).
6. **Alternative dispute resolution.** The Attorney General’s comments encourage both records requestors and agencies to resolve public records disputes through ADR mechanisms such as mediation and arbitration. (WAC 44-14-08003, p. 65 of these materials) ADR is not addressed in the proposed ordinance.

## **State Auditor's performance audit report**

In May of 2008, the Washington State Auditor's Office issued a performance audit report entitled "Open Public Records Practices at 30 Government Entities." Excerpts from the report are included as Attachment 4 (pp. 73-78 of these materials). Some of the best practices identified in the report are listed below. Although not all best practices should necessarily be specified by ordinance, they might provide a helpful framework for considering Proposed Ordinance 2009-0351.

- A "culture of compliance" within public entities (together with a "culture of cooperation" among records requestors);
- Training: "Entities should provide training to all entity staff likely to encounter members of the public requesting public records. For example, training should be provided to front-line staff who come into daily contact with the public to assist them in recognizing when a request/inquiry from the public should be considered a records request";
- Prioritizing requests;
- Tracking and effective monitoring of requests;
- Monitoring email blocked by email filters;
- Central point of contact for public records (to improve monitoring of the public entity's efficiency and effectiveness in responding to records requests): "The entity should avoid redirecting the requestor to another department, office or division."
- Visible signage (to assist requestors in directing their requests);
- Transparency and communication (e.g., a "user-friendly Web site");
- Waiver of charges for small requests (where "the costs associated with processing the payment alone will likely not be recovered by the fees collected").

## **FISCAL IMPACT**

According to the Executive, "There is no cost associated with this proposed ordinance."

## **NEXT STEPS**

The purpose of this briefing has been to give councilmembers an overview of Proposed Ordinance 2009-0351 and its origins. Staff work on the ordinance will continue, and a future briefing will include possible options for councilmembers to consider.

**INVITEES**

None

**ATTACHMENTS**

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**Signature Report**

**June 23, 2009**

**Ordinance**

**Proposed No.** 2009-0351.1

**Sponsors** Ferguson, Dunn and Phillips

1 AN ORDINANCE relating to public records and  
2 records retention; amending Ordinance 10698,  
3 Section 3, and K.C.C. 2.12.005, Ordinance 695,  
4 Section 1, and K.C.C. 2.12.010, Ordinance 695,  
5 Section 2, as amended, and K.C.C. 2.12.020,  
6 Ordinance 10698, Section 2, and K.C.C. 2.12.035,  
7 Ordinance 12485, Section 4, and K.C.C. 2.12.040,  
8 Ordinance 3606, Section 4, as amended, and K.C.C.  
9 2.12.060, Ordinance 134 (part) and K.C.C.  
10 2.12.070, Ordinance 5962, Section 2, as amended,  
11 and K.C.C. 2.12.080, Ordinance 1660, Sections 1-2,  
12 as amended, and K.C.C. 2.12.120 and Ordinance  
13 9168, Section 2, as amended, and K.C.C. 2.12.170,  
14 adding new sections to K.C.C. chapter 2.12,  
15 recodifying K.C.C. 2.12.160 and repealing  
16 Ordinance 3606, Section 3, and K.C.C. 2.12.050,  
17 Ordinance 3606, Section 5, and K.C.C. 2.12.090,

18 Ordinance 3606, Section 6, as amended, and K.C.C.  
19 2.12.110, Ordinance 12485, Section 3, and K.C.C.  
20 2.12.115, Ordinance 14266, Section 12, and K.C.C.  
21 2.12.190 and Ordinance 2165, Section 5, as  
22 amended, and K.C.C. 2.12.200.

23

24 STATEMENT OF FACTS:

25 1. Initiative 276, passed by the voters in 1972, states in part:

26 "It is hereby declared by the sovereign people to be the public policy of  
27 the state of Washington: . . . (11) That mindful of the right of individuals  
28 to privacy and of the desirability of the efficient administration of  
29 government, full access to information concerning the conduct of  
30 government on every level must be assured as a fundamental and  
31 necessary precondition to the sound governance of a free society."

32 2. The policy in Initiative 276 was adopted by the Legislature in 1992:

33 "The people of this state do not yield their sovereignty to the agencies that  
34 serve them. The people, in delegating authority, do not give their public  
35 servants the right to decide what is good for the people to know and what  
36 is not good for them to know. The people insist on remaining informed so  
37 that they may maintain control over the instruments that they have created.  
38 The public records subdivision of this chapter shall be liberally construed  
39 and its exemptions narrowly construed to promote this public policy."

40 RCW 42.56.030.



41 3. In 2005, the legislature recodified the public records act and also  
42 directed the attorney general to adopt advisory model rules to assist  
43 requestors and agencies in the public records process.

44 4. In January 2006, the attorney general promulgated model rules for the  
45 public records act, chapter 44-14 WAC.

46 5. K.C.C. chapter 2.12 contains the county's policies relating to public  
47 records.

48 BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

49 SECTION 1. Ordinance 10698, Section 3, and K.C.C. 2.12.005 are each hereby  
50 amended to read as follows:

51 The definitions in this section apply throughout this chapter unless the context  
52 clearly requires otherwise.

53 A. (~~"County records" means any document including any paper, correspondence,~~  
54 ~~completed form, bound records book, photograph, film, sound or video recording, map,~~  
55 ~~drawing, machine-readable material, or other document, regardless of physical form or~~  
56 ~~characteristics, and including copies thereof, that have been made by or received by any~~  
57 ~~agency of King County in connection with the transaction of public business.)) "Agency"  
58 means:~~

59 1. The executive branch, except the superior court clerk;

60 2. The council;

61 3. The sheriff;

62 4. The assessor;

63 5. The prosecuting attorney; or

64           6. The elections director.

65           B. "Archival records" ~~((are))~~ means those designated as having continuing  
66 historical value by the Washington State Archives or King County archivist.

67           C. "Official record" means a public record that an agency is required by law to  
68 accept or maintain, including, but not limited to, recorded documents, judgments, licenses,  
69 vital statistics and property records.

70           D. "Public record" includes any writing containing information relating to the  
71 conduct of government or the performance of any governmental or proprietary function  
72 prepared, owned, used or retained by any state or local agency regardless of physical  
73 form or characteristics.

74           E. "Public records officer" means the person appointed by the agency in  
75 accordance with section 20.A. of this ordinance.

76           SECTION 2. Ordinance 695, Section 1, and K.C.C. 2.12.010 are each hereby  
77 amended as follows:

78           ~~((The responsibility for preparation of permanent records of the proceedings of the~~  
79 ~~King County council as required of the former county auditor by RCW 36.32.110 is~~  
80 ~~defined by the County Home Rule Charter , Sections 220.30 and 220.40 to rest with staff~~  
81 ~~established by the council.)) The clerk of the council ~~((administrator, as established by the~~  
82 ~~1971 Appropriations Ordinance,)) is ~~((the employee))~~ responsible for the preparation of  
83 permanent records of the council proceedings.~~~~

84           SECTION 3. Ordinance 695, Section 2, as amended, and K.C.C. 2.12.020 are each  
85 hereby amended to read as follows:

86 All records of the King County council and records of the King County  
87 commissioners(~~(, prior to the establishment of the Home Rule Charter, other than)~~)  
88 including office files and memoranda shall be (~~(either photographed, microphotographed,~~  
89 ~~photostated or reproduced on film by the records and elections division)~~) transferred to the  
90 King County archives for permanent retention.

91 SECTION 4. Ordinance 10698, Section 2, and K.C.C. 2.12.035 are each hereby  
92 amended as follows:

93 A. An archives and records management program is hereby established in the  
94 records and (~~(elections)~~) licensing services division of the department of executive  
95 services. The archives and records management program shall be responsible for:

96 (~~(A-)~~) 1. Maintaining a facility for storage of inactive and archival records(~~(-)~~);

97 (~~(B-)~~) 2. Establishing standards for records storage media to ensure continued  
98 public access to public records during their legal retention period and for preservation of  
99 archival (~~(information-)~~) records;

100 (~~(C-)~~) 3. Maintaining (~~(a directory to)~~) records retention schedules of current  
101 records of county agencies, which (~~(shall)~~) may serve as a public (~~(disclosure)~~) records  
102 index as set forth in (~~(RCW 42.17)~~) chapter 42.56 RCW. A directory of historical,  
103 noncurrent or obsolete records designated archival shall serve as an index to King County  
104 administrative history, as provided by (~~(RCW)~~) chapter 40.14(-) RCW; and

105 (~~(D-)~~) 4. Preserving and providing public access to the archival records of King  
106 County.

107 B. The King County archives is designated as the official repository of the county's  
108 archival records. The King County archives may transfer the county's archival records to  
109 the Washington state archives for ongoing preservation.

110 SECTION 5. Ordinance 12485, Section 4, and K.C.C. 2.12.040 are each hereby  
111 amended to read as follows:

112 ~~((Archives and records management shall be charged with the task of coordinating))~~  
113 The department of executive services is responsible for maintaining ((a R))records  
114 ((R))retention and ((P))public ((D))disclosure ((M))manuals. ((This)) The manuals shall  
115 include ((identifying and describing)) each ((county)) agency's record retention schedules  
116 ((and public disclosure designation)). ((Upon its completion, this)) The manuals shall be  
117 made available by electronic means ((and in paper form)).

118 SECTION 6. Ordinance 3606, Section 3, and K.C.C. 2.12.050 are each repealed.

119 SECTION 7. Ordinance 3606, Section 4, as amended, and K.C.C. 2.12.060 are  
120 each hereby amended to read as follows:

121 Retention of all ~~((county records, both))~~ public and official records((;)) shall be in  
122 accordance with approved records retention schedules established pursuant to RCW  
123 40.14.070. In accordance with those records retention schedules, ((F))the archives and  
124 records management program shall provide for the legal retention and disposition ((policy))  
125 for ((county)) public and official records, including identification of archival records.

126 SECTION 8. Ordinance 134 (part) and K.C.C. 2.12.070 are each hereby amended  
127 to read as follows:

128 Copies of the annual King County budget shall be available from the office of ~~((the~~  
129 ~~county administrator and shall be furnished to interested persons))~~ management and budget

130 upon payment of ~~((a minimal fee in the amount of))~~ five dollars for each copy ~~((thereof))~~,  
131 which fee shall be paid to the King County treasurer.

132 SECTION 9. Ordinance 5962, Section 2, as amended, and K.C.C. 2.12.080 are  
133 each hereby amended to read as follows:

134 The records~~((elections))~~ and licensing services division may sell copies of the  
135 King County code to subscribers other than county agencies or departments for a fee of  
136 three hundred dollars plus an additional charge of fifteen cents per page for quarterly  
137 supplements.

138 SECTION 10. Ordinance 3606, Section 5, and K.C.C. 2.12.090 are each repealed.

139 SECTION 11. Ordinance 3606, Section 6, as amended, and K.C.C. 2.12.110 are  
140 each repealed.

141 SECTION 12. Ordinance 12485, Section 3, and K.C.C. 2.12.115 are each repealed.

142 SECTION 13. Ordinance 1660, Sections 1-2, and K.C.C. 2.12.120 are each hereby  
143 amended to read as follows:

144 The manager of the records~~((elections))~~ and licensing services division shall  
145 charge such fees for the provision of recording services as are provided for county auditors  
146 in chapters 36.18 and 36.22 RCW and RCW ~~((64.34.202))~~ 58.24.070. In addition, the  
147 following specific fees apply:

148 A. Record of survey. As authorized under RCW 58.09.100, ~~((F))~~for land surveys,  
149 which shall be eighteen by twenty-four inches or less in size, the fee schedule is:

- 150 1. Basic fee for first page \$25.00  
151 2. ~~((Department of natural resources fees — \$26.00~~  
152 3. ~~Centennial preservation fee ————— \$2.00))~~

153 4. ~~State archives fee~~ \$1.00

154 5.) Each additional page \$5.00

155 B. ~~((Short plats and boundary line adjustments.))~~ For short plats and boundary line  
156 adjustments, legal size or smaller, the manager of the records~~((elections))~~ and licensing  
157 services division shall charge such fees as are provided for county auditors in chapter 36.18  
158 RCW. For short plats and boundary line adjustments, eighteen by twenty-four inches or  
159 less in size, the fee schedule shall be the same as record of survey under ~~((K.C.C.~~  
160 ~~2.12.120))~~ subsection A. of this section.

161 C. ~~((Record of monument.))~~ The record of monument shall be filed without charge  
162 on the standard form prescribed by the state Department of Natural Resources, Bureau of  
163 Surveys and Maps.

164 D. ~~((Reservation of condominium name.))~~ As authorized under RCW 64.34.202,  
165 ~~((F))~~to reserve the right to use a specific name for a condominium, the fee is fifty dollars.  
166 ~~((A reservation is subject to RCW 64.34.202.~~

167 ~~E. Administrative surcharge. As authorized by 2002 Wash. Laws Chapter 294,~~  
168 ~~five percent of the mandatory state ten dollar surcharge on recorded instruments shall be~~  
169 ~~retained as an administrative surcharge effective June 13, 2002. Of the remaining funds,~~  
170 ~~forty percent shall be transmitted monthly to the state treasurer and the remaining sixty~~  
171 ~~percent shall be retained by the county and deposited into a fund to be used by the county~~  
172 ~~and its cities for low income housing initiatives.~~

173 ~~F. Administrative fee. As authorized by 2003 Wash. Laws 289, five percent of the~~  
174 ~~mandatory one dollar state surcharge on recorded deeds of trust shall be retained as an~~  
175 ~~administrative fee.))~~

176            SECTION 14. K.C.C. 2.12.160 shall be recodified in K.C.C. chapter 4.08.

177            SECTION 15. Ordinance 9168, Section 2, as amended, and K.C.C. 2.12.170 are  
178 each hereby amended to read as follows:

179            A. There is established within the records and ~~((elections))~~ licensing services  
180 division an enhanced program for preserving, copying, maintaining~~((;))~~ and indexing  
181 documents officially recorded and filed with the county that require preservation in the  
182 public interest against age and environmental degradation before they are irreparably  
183 damaged. The program shall take advantage of the latest technology for records  
184 preservation to include, but not limited to, photomicrographic and computerized  
185 electronic digital storage methods.

186            B. To support the program, the records and ~~((elections))~~ licensing services manager  
187 shall collect the ~~((two dollar fee provided by state law as amended))~~ fee authorized under  
188 RCW 36.22.170 for each document recorded in the recorder's office, which shall be in  
189 addition to any other authorized fee or charge. ~~((€;))~~ The fee ~~((of two dollars))~~ shall be  
190 used for only those purposes outlined by state law as amended, that is, to provide for the  
191 installation and maintenance of an improved system for copying, preserving and indexing  
192 documents recorded in King County and for the preservation of those records deemed  
193 archival.

194            SECTION 16. Ordinance 14266, Section 12, and K.C.C. 2.12.190 are each  
195 repealed.

196            SECTION 17. Ordinance 2165, Section 5, as amended, and K.C.C. 2.12.200 are  
197 each repealed.

198           NEW SECTION. SECTION 18. There is hereby added to K.C.C. chapter 2.12 a  
199 new section to read as follows:

200           A. The county adopts the rules on records in sections 19, 20, 21, 22, 23, 24 and  
201 25 of this ordinance, which are based on chapter 44-14 WAC. However, chapter 44-14  
202 WAC and its comments are not adopted.

203           B. These rules may also be further clarified and implemented by each agency to  
204 the extent that the clarifications do not conflict with state law.

205           C. King County is a political subdivision of the state of Washington and is a  
206 home rule charter county composed of multiple agencies.

207           NEW SECTION. SECTION 19. There is hereby added to K.C.C. chapter 2.12 a  
208 new section to read as follows:

209           A. RCW 42.56.070(1) requires each agency to make available for inspection and  
210 copying nonexempt "public records" in accordance with published rules. Chapter 42.56  
211 RCW defines "public record" to include any "writing containing information relating to  
212 the conduct of government or the performance of any governmental or proprietary  
213 function prepared, owned, used, or retained" by the agency.

214           B. The purpose of this chapter is to establish the procedures the county will  
215 follow in order to provide full access to public records. This chapter provides  
216 information to persons wishing to request access to public records of the county and  
217 establish processes for both requestors and county staff that are designed to best assist  
218 members of the public in obtaining such access.

219           C. The purpose of chapter 42.56 RCW is to provide the public full access to  
220 information concerning the conduct of government, mindful of individuals' privacy rights



221 and the desirability of the efficient administration of government. Chapter 42.56 RCW  
222 and this chapter will be interpreted in favor of disclosure. In carrying out its  
223 responsibilities under chapter 42.56 RCW, the county will be guided by the provisions of  
224 the act describing its purposes and interpretation.

225 NEW SECTION. SECTION 20. There is hereby added to K.C.C. chapter 2.12 a  
226 new section to read as follows:

227 A. Each agency shall appoint a public records officer. Each agency shall post at  
228 its primary location and on the agency's Internet site a notice of the public records officer,  
229 including the officer's name, address, telephone number and email address.

230 B. Any person wishing to request access to public records of an agency, or  
231 seeking assistance in making such a request, should contact the public records officer of  
232 the agency. If an agency's employee is contacted with a request for access to public  
233 records, the employee shall forward the request to the agency's public records officer. A  
234 request to one agency does not constitute a request to any other agency. A separate  
235 request must be made to each agency for which access to public records is requested or  
236 assistance in making such a request is sought.

237 C. The public records officer, or the public records officer's designee, for each  
238 agency shall oversee compliance by the agency with chapter 42.56 RCW. The county  
239 shall:

- 240 1. Provide the fullest assistance to requestors;
- 241 2. Provide education and training within an agency to ensure that public records  
242 are protected from damage or disorganization; and

243                   3. Prevent fulfillment of public records requests from causing excessive  
244 interference with essential functions of the county.

245                   NEW SECTION. SECTION 21. There is hereby added to K.C.C. chapter 2.12 a  
246 new section to read as follows:

247                   A. Public records are available for inspection and copying during normal  
248 business hours of the agency, or department thereof. Original records must be inspected  
249 at the offices of the agency, unless the agency provides an alternative.

250                   B. An index of public records of each agency is available through the archives  
251 and records management program established under K.C.C. 2.12.035. The index may be  
252 accessed on-line at the archive and records management program's web site.

253                   C.1. An agency shall maintain its records in a reasonably organized manner. An  
254 agency should take reasonable actions to protect records from damage and  
255 disorganization.

256                   2. A requestor shall not take an agency's records from the agency's offices.

257                   3. A variety of records is available on the county web site at  
258 [www.kingcounty.gov](http://www.kingcounty.gov). Requestors are encouraged to view the documents available on  
259 the web site before submitting a records request.

260                   D.1. A person wishing to inspect or copy public records of an agency is  
261 encouraged to make the request in writing on the agency's request form, if one exists.  
262 Otherwise the requestor should make the request by letter, fax, or email addressed to the  
263 public records officer and including the following information:

- 264                   a. name of requestor;
- 265                   b. address of requestor;

- 266 c. other contact information, including telephone number and any email  
267 address;
- 268 d. identification of the public records adequate for the public records officer or  
269 designee to locate the records; and
- 270 e. the date and time of day of the request.

271 2. If the requestor wishes to have copies of the records made instead of simply  
272 inspecting them, the requestor should so indicate and make arrangements to pay for  
273 copies of the records or a deposit. Charges for copies shall be made in accordance with  
274 RCW 42.56.070.

275 NEW SECTION. SECTION 22. There is hereby added to K.C.C. chapter 2.12 a  
276 new section to read as follows:

277 A. Each agency shall provide full access to public records, protect records from  
278 damage or disorganization, prevent excessive interference with other essential functions  
279 of the agency, provide fullest assistance to requestors and provide the most-timely  
280 possible action on public records requests.

281 B. The public records officer or designee shall process requests in the order  
282 allowing the most requests to be processed in the most efficient manner.

283 C.1. Within five business days of receipt of the request, the public records officer  
284 shall do one or more of the following:

- 285 a. make the records available to the requestor for inspection or copying;
- 286 b. if copies are requested and payment of a deposit for the copies, if any, is  
287 made or terms of payment are agreed upon, send the copies to the requestor;

288 c. provide to the requestor a reasonable estimate of when records will be  
289 available;

290 d. if the request is unclear or does not sufficiently identify the requested  
291 records, request clarification from the requestor. The clarification may be requested and  
292 provided by telephone. The public records officer or designee may revise the estimate of  
293 when records will be available. If the requestor fails to clarify the request, the agency  
294 need not respond to it; or

295 e. deny the request and notify the requestor of the denial. Denials of requests  
296 shall be accompanied by a written statement of the specific reasons therefor.

297 2. Additional time required to respond to a request may be based upon the need  
298 to clarify the intent of the request, to locate and assemble the information requested, to  
299 notify third persons or agencies affected by the request, or to determine whether any of  
300 the information requested is exempt and that a denial should be made as to all or part of  
301 the request.

302 D. In the event that the requested records contain information that affects other  
303 agencies or third persons, the public records officer may, before providing the records,  
304 give notice to those persons in accordance with RCW 42.56.540. The notice shall  
305 include a copy of the request.

306 E. Some records are exempt from disclosure, in whole or in part. If the agency  
307 believes that a record is exempt from disclosure and should be withheld, the public  
308 records officer shall state the specific exemption and provide the authority for the  
309 exemption. If only a portion of a record is exempt from disclosure, but the remainder is

310 not exempt, the public records officer shall redact the exempt portions, provide the  
311 nonexempt portions and indicate to the requestor the authority for the redaction.

312 F.1. Consistent with other demands, the agency shall promptly provide space to  
313 inspect public records. No member of the public may remove a document from the  
314 viewing area or disassemble or alter any document. The requestor shall indicate which  
315 documents the requestor wishes the agency to copy.

316 2. The requestor must claim or review the assembled records within thirty days  
317 of the agency's notification to the requestor that the records are available for inspection or  
318 copying. The agency shall notify the requestor in writing of this requirement and inform  
319 the requestor that the requestor should contact the agency to make arrangements to claim  
320 or review the records. If the requestor or a representative of the requestor fails to claim  
321 or review the records within the time prescribed in this subsection F.2. or make other  
322 arrangements, the agency may close the request and refile the assembled records. Other  
323 public records requests may be processed ahead of a subsequent request by the same  
324 person for the same or almost identical records, which may be processed as a new  
325 request.

326 G. After inspection is complete, the public records officer or designee shall make  
327 the requested copies or arrange for copying.

328 H. When the request is for a large number of records, the public records officer or  
329 designee shall provide access for inspection and copying in installments, if the public  
330 records officer or designee reasonably determines that it would be practical to provide the  
331 records in that way. If, within thirty days of a response under subsection C., D. or E. of  
332 this section, the requestor fails to inspect the entire set of records or one or more of the

333 installments, the public records officer or designee may stop searching for the remaining  
334 records and close the request. The requestor shall be notified in writing of this action.

335 I. When the requestor either withdraws the request or fails to fulfill his or her  
336 obligations to inspect the records or pay the deposit or final payment for the requested  
337 copies, the public records officer shall close the request and indicate to the requestor that  
338 the agency has closed the request.

339 J. If, after the agency informed the requestor that the agency has provided all  
340 available records, the agency becomes aware of additional responsive documents existing  
341 at the time of the request, the agency shall promptly inform the requestor of the additional  
342 documents and provide the documents on an expedited basis.

343 NEW SECTION. SECTION 23. There is hereby added to K.C.C. chapter 2.12 a  
344 new section to read as follows:

345 A. The process for requesting electronic public records is the same as for  
346 requesting paper public records.

347 B. When a requestor requests records in an electronic format, the agency's public  
348 records officer shall provide the nonexempt records or portions of those records that are  
349 reasonably locatable in an electronic format that is used by the agency and is generally  
350 commercially available, or in a format that is reasonably translatable from the format in  
351 which the agency keeps the record. Costs for providing electronic records are governed  
352 by section 25.B. of this ordinance.

353 C. The agency may provide customized access under RCW 43.105.280 if the  
354 record is not reasonably locatable or not reasonably translatable into the format

355 requested. The agency may charge a fee consistent with RCW 43.105.280 for the  
356 customized access.

357 NEW SECTION. SECTION 24. There is hereby added to K.C.C. chapter 2.12 a  
358 new section to read as follows:

359 A. The Public Records Act provides that a number of types of documents are  
360 exempt from public inspection and copying. In addition, documents are exempt from  
361 disclosure if any other statute exempts or prohibits disclosure. Exemptions outside the  
362 Public Records Act that restrict the availability of some documents held by the county or  
363 its agencies for inspection and copying include, but are not limited to, those set forth for  
364 counties and municipalities in the most-recent list of other such statutes posted on the  
365 web site of the Municipal Research and Services Center of Washington, which is as of  
366 the effective date of this section [www.mrsc.org/Publications/pr06.pdf](http://www.mrsc.org/Publications/pr06.pdf), Appendix C, and  
367 which is incorporated in this chapter by reference.

368 B. King County and its agencies are prohibited by statute from disclosing lists of  
369 individuals for commercial purposes.

370 NEW SECTION. SECTION 25. There is hereby added to K.C.C. chapter 2.12 a  
371 new section to read as follows:

372 A.1. There is no fee for inspecting public records. A requestor may obtain  
373 copies, for which charges shall be made in accordance with RCW 42.56.070 or other  
374 applicable law. For certified copies, eight and one-half inches by fourteen inches or  
375 smaller, for the first page the fee shall be two dollars, and for each additional page the fee  
376 shall be one dollar.

377           2. Before beginning to make the copies, the public records officer or designee  
378 may require a deposit of up to ten percent of the estimated costs of copying all the  
379 records selected by the requestor. The public records officer or designee may also  
380 require the payment of the remainder of the copying costs before providing all the  
381 records, or the payment of the costs of copying an installment before providing that  
382 installment. The agency shall not charge sales tax when it makes copies of public  
383 records.

384           B. 1. The cost of electronic copies of records shall be the actual cost of the  
385 medium used.

386           2. If the agency incurs a cost of transferring a paper record to electronic form,  
387 that cost may be charged.

388           3. If the agency uses an outside vendor, the vendor's charge to the agency,  
389 including applicable sales tax, shall be passed on to the requestor.

390           C. An agency may also charge actual costs of mailing, including the cost of the  
391 shipping container.

392           D. Payment for the costs under this section may be made to the agency or the  
393 agency's designee by cash, check or money order to the agency or its designee.

394           E. Charges for paper copies of official county records shall be in accordance with  
395 fees set forth in applicable chapters of the RCW.

396           F. Charges for copies of material in the archival collection shall follow the  
397 guidelines of the Washington state Archives and WAC 434-690-080.

398           NEW SECTION. SECTION 26. There is hereby added to K.C.C. chapter 2.12 a  
399 new section to read as follows:



400           A. Any person who objects to the initial denial or partial denial of a public  
401 records request may petition in writing to the public records officer for a review of the  
402 decision. The petition shall include a copy of or reasonably identify the written statement  
403 by the public records officer denying the request.

404           B. The public records officer shall promptly provide the petition and any other  
405 relevant information to the public records officer's supervisor or any other agency official  
406 designated by the agency to conduct the review. The reviewing officer shall review the  
407 decision and provide the requestor with a response.

408           C. Any person may obtain court review of the denial of a public records request

**Ordinance**

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409 made pursuant to RCW 42.56.550 at the conclusion of two business days after the initial  
410 denial regardless of any internal administrative appeal.  
411

KING COUNTY COUNCIL  
KING COUNTY, WASHINGTON

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ATTEST:

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APPROVED this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

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**Attachments**      None

**WAC Sections**

INTRODUCTORY COMMENTS

- [44-14-00001](#) Statutory authority and purpose.
- [44-14-00002](#) Format of model rules.
- [44-14-00003](#) Model rules and comments are nonbinding.
- [44-14-00004](#) Recodification of the act.
- [44-14-00005](#) Training is critical.
- [44-14-00006](#) Additional resources.

AUTHORITY AND PURPOSE

- [44-14-010](#) Authority and purpose.

Comments to WAC [44-14-010](#)

- [44-14-01001](#) Scope of coverage of Public Records Act.
- [44-14-01002](#) Requirement that agencies adopt reasonable regulations for public records requests.
- [44-14-01003](#) Construction and application of act.

AGENCY DESCRIPTION -- CONTACT INFORMATION -- PUBLIC RECORDS OFFICER

- [44-14-020](#) Agency description -- Contact information -- Public records officer.

Comments to WAC [44-14-020](#)

- [44-14-02001](#) Agency must publish its procedures.
- [44-14-02002](#) Public records officers.

AVAILABILITY OF PUBLIC RECORDS

- [44-14-030](#) Availability of public records.

Comments to WAC [44-14-030](#)

- [44-14-03001](#) "Public record" defined.
- [44-14-03002](#) Times for inspection and copying of records.
- [44-14-03003](#) Index of records.
- [44-14-03004](#) Organization of records.
- [44-14-03005](#) Retention of records.
- [44-14-03006](#) Form of requests.

PROCESSING OF PUBLIC RECORDS REQUESTS -- GENERAL

- [44-14-040](#) Processing of public records requests -- General.

Comments on WAC [44-14-040](#)

- [44-14-04001](#) Introduction.
- [44-14-04002](#) Obligations of requestors.
- [44-14-04003](#) Responsibilities of agencies in processing requests.

[44-14-04004](#) Responsibilities of agency in providing records.

[44-14-04005](#) Inspection of records.

[44-14-04006](#) Closing request and documenting compliance.

[44-14-04007](#) Later-discovered records.

#### PROCESSING OF PUBLIC RECORDS REQUESTS -- ELECTRONIC RECORDS

[44-14-050](#) Processing of public records requests -- Electronic records.

Comments to WAC [44-14-050](#)

[44-14-05001](#) Access to electronic records.

[44-14-05002](#) "Reasonably locatable" and "reasonably translatable" electronic records.

[44-14-05003](#) Parties should confer on technical issues.

[44-14-05004](#) Customized access.

[44-14-05005](#) Relationship of Public Records Act to court rules on discovery of "electronically stored information."

#### EXEMPTIONS

[44-14-060](#) Exemptions.

Comments to WAC [44-14-060](#)

[44-14-06001](#) Agency must publish list of applicable exemptions.

[44-14-06002](#) Summary of exemptions.

#### COSTS OF PROVIDING COPIES OF PUBLIC RECORDS

[44-14-070](#) Costs of providing copies of public records.

Comments to WAC [44-14-070](#)

[44-14-07001](#) General rules for charging for copies.

[44-14-07003](#) Charges for electronic records.

[44-14-07004](#) Other statutes govern copying of particular records.

[44-14-07005](#) Waiver of copying charges.

[44-14-07006](#) Requiring partial payment.

#### REVIEW OF DENIALS OF PUBLIC RECORDS

[44-14-080](#) Review of denials of public records.

Comments to WAC [44-14-080](#)

[44-14-08001](#) Agency internal procedure for review of denials of requests.

[44-14-08002](#) Attorney general's office review of denials by state agencies.

[44-14-08003](#) Alternative dispute resolution.

[44-14-08004](#) Judicial review.

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#### **44-14-00001** **Statutory authority and purpose.**

The legislature directed the attorney general to adopt advisory model rules on public records compliance and

to revise them from time to time. RCW 42.17.348 (2) and (3)/42.56.570 (2) and (3). The purpose of the model rules is to provide information to records requestors and state and local agencies about "best practices" for complying with the Public Records Act, RCW 42.17.250/42.56.040 through 42.17.348/42.56.570 ("act"). The overall goal of the model rules is to establish a culture of compliance among agencies and a culture of cooperation among requestors by standardizing best practices throughout the state. The attorney general encourages state and local agencies to adopt the model rules (but not necessarily the comments) by regulation or ordinance.

The act applies to all state agencies and local units of government. The model rules use the term "agency" to refer to either a state or local agency. Upon adoption, each agency would change that term to name itself (such as changing references from "name of agency" to "city"). To assist state and local agencies considering adopting the model rules, an electronic version of the rules is available on the attorney general's web site, [www.atg.wa.gov/records/modelrules](http://www.atg.wa.gov/records/modelrules).

The model rules are the product of an extensive outreach project. The attorney general held thirteen public forums all across the state to obtain the views of requestors and agencies. Many requestors and agencies also provided detailed written comments that are contained in the rule-making file. The model rules reflect many of the points and concerns presented in those forums.

The model rules provide one approach (or, in some cases, alternate approaches) to processing public records requests. Agencies vary enormously in size, resources, and complexity of requests received. Any "one-size-fits-all" approach in the model rules, therefore, may not be best for requestors and agencies.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00001, filed 1/31/06, effective 3/3/06.]

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#### **44-14-00002** **Format of model rules.**

We are publishing the model rules with comments. The comments have five-digit WAC numbers such as WAC [44-14-04001](#). The model rules themselves have three-digit WAC numbers such as WAC [44-14-040](#).

The comments are designed to explain the basis and rationale for the rules themselves as well as provide broader context and legal guidance. To do so, the comments contain many citations to statutes, cases, and formal attorney general's opinions.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00002, filed 1/31/06, effective 3/3/06.]

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#### **44-14-00003** **Model rules and comments are nonbinding.**

The model rules, and the comments accompanying them, are advisory only and do not bind any agency. Accordingly, many of the comments to the model rules use the word "should" or "may" to describe what an agency or requestor is encouraged to do. The use of the words "should" or "may" are permissive, not mandatory, and are not intended to create any legal duty.

While the model rules and comments are nonbinding, they should be carefully considered by requestors and agencies. The model rules and comments were adopted after extensive statewide hearings and voluminous comments from a wide variety of interested parties.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00003, filed 1/31/06, effective 3/3/06.]

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**44-14-00004**  
**Recodification of the act.**

On July 1, 2006, the act will be recodified. Chapter 274, Laws of 2005. The act will be known as the "Public Records Act" and will be codified in chapter 42.56 RCW. The exemptions in the act are recodified and grouped together by topic. The recodification does not change substantive law. The model rules provide dual citations to the current act, chapter 42.17 RCW, and the newly codified act, chapter 42.56 RCW (for example, RCW 42.17.340/42.56.550).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00004, filed 1/31/06, effective 3/3/06.]

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**44-14-00005**  
**Training is critical.**

The act is complicated, and compliance requires training. Training can be the difference between a satisfied requestor and expensive litigation. The attorney general's office strongly encourages agencies to provide thorough and ongoing training to agency staff on public records compliance. All agency employees should receive basic training on public records compliance and records retention; public records officers should receive more intensive training.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00005, filed 1/31/06, effective 3/3/06.]

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**44-14-00006**  
**Additional resources.**

Several web sites provide information on the act. The attorney general office's web site on public records is [www.atg.wa.gov/records/deskbook.shtml](http://www.atg.wa.gov/records/deskbook.shtml). The municipal research service center, an entity serving local governments, provides a public records handbook at [www.mrsc.org/Publications/prdpub04.pdf](http://www.mrsc.org/Publications/prdpub04.pdf). A requestor's organization, the Washington Coalition for Open Government, has materials on its site at [www.washingtoncog.org](http://www.washingtoncog.org).

The Washington State Bar Association is publishing a twenty-two-chapter deskbook on public records in 2006. It will be available for purchase at [www.wsba.org](http://www.wsba.org).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00006, filed 1/31/06, effective 3/3/06.]

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#### 44-14-010

##### Authority and purpose.

(1) RCW 42.17.260(1)/42.56.070(1) requires each agency to make available for inspection and copying nonexempt "public records" in accordance with published rules. The act defines "public record" to include 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 the agency. RCW 42.17.260(2)/42.56.070(2) requires each agency to set forth "for informational purposes" every law, in addition to the Public Records Act, that exempts or prohibits the disclosure of public records held by that agency.

(2) The purpose of these rules is to establish the procedures (name of agency) will follow in order to provide full access to public records. These rules provide information to persons wishing to request access to public records of the (name of agency) and establish processes for both requestors and (name of agency) staff that are designed to best assist members of the public in obtaining such access.

(3) The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. The act and these rules will be interpreted in favor of disclosure. In carrying out its responsibilities under the act, the (name of agency) will be guided by the provisions of the act describing its purposes and interpretation.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-010, filed 1/31/06, effective 3/3/06.]

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#### 44-14-01001

##### Scope of coverage of Public Records Act.

The act applies to an "agency." RCW 42.17.260(1)/42.56.070(1). "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." RCW 42.17.020(2).

Court files and judges' files are not subject to the act.<sup>1</sup> Access to these records is governed by court rules and common law. The model rules, therefore, do not address access to court records.

An entity which is not an "agency" can still be subject to the act when it is the functional equivalent of an agency. Courts have applied a four-factor, case-by-case test. The factors are:

- (1) Whether the entity performs a government function;
- (2) The level of government funding;
- (3) The extent of government involvement or regulation; and
- (4) Whether the entity was created by the government. Op. Att'y Gen. 2 (2002).<sup>2</sup>

Some agencies, most notably counties, are a collection of separate quasi-autonomous departments which are governed by different elected officials (such as a county assessor and prosecuting attorney). However, the act defines the county as a whole as an "agency" subject to the act. RCW 42.17.020(2). An agency should coordinate responses to records requests across departmental lines. RCW 42.17.253(1) (agency's public records officer must "oversee the agency's compliance" with act).

Notes: <sup>1</sup>*Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986).

<sup>2</sup>See also *Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 149, 162, 974 P.2d 886, review denied, 138 Wn.2d 1015, 989 P.2d 1143 (1999); Op. Att'y Gen. 5 (1991).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-01001, filed 1/31/06, effective 3/3/06.]

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#### **44-14-01002**

##### **Requirement that agencies adopt reasonable regulations for public records requests.**

The act provides: "Agencies shall adopt and enforce reasonable rules and regulations...to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency.... Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.17.290/42.56.100. Therefore, an agency must adopt "reasonable" regulations providing for the "fullest assistance" to requestors and the "most timely possible action on requests."

At the same time, an agency's regulations must "protect public records from damage or disorganization" and "prevent excessive interference" with other essential agency functions. Another provision of the act states that providing public records should not "unreasonably disrupt the operations of the agency." RCW 42.17.270/42.56.080. This provision allows an agency to take reasonable precautions to prevent a requestor from being unreasonably disruptive or disrespectful to agency staff.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-01002, filed 1/31/06, effective 3/3/06.]

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#### **44-14-01003**

##### **Construction and application of act.**

The act declares: "The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their 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 that they may maintain control over the instruments that they have created." RCW 42.17.251/42.56.030. The act further provides: "...mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17.010(11). The act further provides: "Courts shall take into account the policy of (the act) that 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." RCW 42.17.340(3)/42.56.550(3).

Because the purpose of the act is to allow people to be informed about governmental decisions (and therefore help keep government accountable) while at the same time being "mindful of the right of individuals to privacy," it should not be used to obtain records containing purely personal information that has absolutely no bearing on the conduct of government.

The act emphasizes three separate times that it must be liberally construed to effect its purpose, which is the disclosure of nonexempt public records. RCW 42.17.010, 42.17.251/42.56.030, 42.17.920.<sup>1</sup> The act places



the burden on the agency of proving a record is not subject to disclosure or that its estimate of time to provide a full response is "reasonable." RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2). The act also encourages disclosure by awarding a requestor reasonable attorneys fees, costs, and a daily penalty if the agency fails to meet its burden of proving the record is not subject to disclosure or its estimate is not "reasonable." RCW 42.17.340(4)/42.56.550(4).

An additional incentive for disclosure is RCW 42.17.258, which provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply" with the act.

Note: <sup>1</sup> See *King County v. Sheehan*, 114 Wn. App. 325, 338, 57 P.3d 307 (2002) (referring to the three legislative intent provisions of the act as "the thrice-repeated legislative mandate that exemptions under the Public Records Act are to be narrowly construed.").

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-01003, filed 1/31/06, effective 3/3/06.]

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#### 44-14-020

#### Agency description — Contact information — Public records officer.

(1) The (name of agency) (describe services provided by agency). The (name of agency's) central office is located at (describe). The (name of agency) has field offices at (describe, if applicable).

(2) Any person wishing to request access to public records of (agency), or seeking assistance in making such a request should contact the public records officer of the (name of agency):

Public Records Officer

(Agency)

(Address)

(Telephone number)

(fax number)

(e-mail)

Information is also available at the (name of agency's) web site at (web site address).

(3) The public records officer will oversee compliance with the act but another (name of agency) staff member may process the request. Therefore, these rules will refer to the public records officer "or designee." The public records officer or designee and the (name of agency) will provide the "fullest assistance" to requestors; create and maintain for use by the public and (name of agency) officials an index to public records of the (name of agency, if applicable); ensure that public records are protected from damage or disorganization; and prevent fulfilling public records requests from causing excessive interference with essential functions of the (name of agency).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-020, filed 1/31/06, effective 3/3/06.]

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#### **44-14-02001**

##### **Agency must publish its procedures.**

An agency must publish its public records policies, organizational information, and methods for requestors to obtain public records. RCW 42.17.250(1)/42.56.040(1).<sup>1</sup> A state agency must publish its procedures in the Washington Administrative Code and a local agency must prominently display and make them available at the central office of such local agency. RCW 42.17.250(1)/42.56.040(1). An agency should post its public records rules on its web site. An agency cannot invoke a procedure if it did not publish or display it as required (unless the party had actual and timely notice of its contents). RCW 42.17.250(2)/42.56.040(2).

Note: <sup>1</sup> See, e.g., WAC 44-06-030 (attorney general office's organizational and public records methods statement).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-02001, filed 1/31/06, effective 3/3/06.]

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#### **44-14-02002**

##### **Public records officers.**

An agency must appoint a public records officer whose responsibility is to serve as a "point of contact" for members of the public seeking public records. RCW 42.17.253(1). The purpose of this requirement is to provide the public with one point of contact within the agency to make a request. A state agency must provide the public records officer's name and contact information by publishing it in the state register. A state agency is encouraged to provide the public records officer's contact information on its web site. A local agency must publish the public records officer's name and contact information in a way reasonably calculated to provide notice to the public such as posting it on the agency's web site. RCW 42.17.253(3).

The public records officer is not required to personally fulfill requests for public records. A request can be fulfilled by an agency employee other than the public records officer. If the request is made to the public records officer, but should actually be fulfilled by others in the agency, the public records officer should route the request to the appropriate person or persons in the agency for processing. An agency is not required to hire a new staff member to be the public records officer.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-02002, filed 1/31/06, effective 3/3/06.]

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#### **44-14-030**

##### **Availability of public records.**

(1) **Hours for inspection of records.** Public records are available for inspection and copying during normal business hours of the (name of agency), (provide hours, e.g., Monday through Friday, 8:00 a.m. to 5:00 p.m., excluding legal holidays). Records must be inspected at the offices of the (name of agency).

(2) **Records index.** *(If agency keeps an index.)* An index of public records is available for use by members of the public, including (describe contents). The index may be accessed on-line at (web site address). (If there are multiple indices, describe each and its availability.)

*(If agency is local agency opting out of the index requirement.)* The (name of agency) finds that maintaining an index is unduly burdensome and would interfere with agency operations. The requirement would unduly burden or interfere with (name of agency) operations in the following ways (specify reasons).

(3) **Organization of records.** The (name of agency) will maintain its records in a reasonably organized manner. The (name of agency) will take reasonable actions to protect records from damage and disorganization. A requestor shall not take (name of agency) records from (name of agency) offices without the permission of the public records officer or designee. A variety of records is available on the (name of agency) web site at (web site address). Requestors are encouraged to view the documents available on the web site prior to submitting a records request.

(4) **Making a request for public records.**

(a) Any person wishing to inspect or copy public records of the (name of agency) should make the request in writing on the (name of agency's) request form, or by letter, fax, or e-mail addressed to the public records officer and including the following information:

Name of requestor;

Address of requestor;

Other contact information, including telephone number and any e-mail address;

Identification of the public records adequate for the public records officer or designee to locate the records; and

The date and time of day of the request.

(b) If the requestor wishes to have copies of the records made instead of simply inspecting them, he or she should so indicate and make arrangements to pay for copies of the records or a deposit. Pursuant to section (insert section), standard photocopies will be provided at (amount) cents per page.

(c) A form is available for use by requestors at the office of the public records officer and on-line at (web site address).

(d) The public records officer or designee may accept requests for public records that contain the above information by telephone or in person. If the public records officer or designee accepts such a request, he or she will confirm receipt of the information and the substance of the request in writing.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-030, filed 1/31/06, effective 3/3/06.]

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**44-14-03001**  
**"Public record" defined.**

Courts use a three-part test to determine if a record is a "public record." The document must be: A "writing," containing information "relating to the conduct of government" or the performance of any governmental or proprietary function, "prepared, owned, used, or retained" by an agency.<sup>1</sup>

(1) **Writing.** A "public record" can be any writing "regardless of physical form or characteristics." RCW 42.17.020(41). "Writing" is defined very broadly as: "...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 42.17.020(48). An e-mail is a "writing."

(2) **Relating to the conduct of government.** To be a "public record," a document must relate to the "conduct of government or the performance of any governmental or proprietary function." RCW 42.17.020(41). Almost all records held by an agency relate to the conduct of government; however, some do not. A purely personal record having absolutely no relation to the conduct of government is not a "public record." Even though a purely personal record might not be a "public record," a record of its existence might be. For example, a record showing the existence of a purely personal e-mail sent by an agency employee on an agency computer would probably be a "public record," even if the contents of the e-mail itself were not.<sup>2</sup>

(3) **"Prepared, owned, used, or retained."** A "public record" is a record "prepared, owned, used, or retained" by an agency. RCW 42.17.020(41).

A record can be "used" by an agency even if the agency does not actually possess the record. If an agency uses a record in its decision-making process it is a "public record."<sup>3</sup> For example, if an agency considered technical specifications of a public works project and returned the specifications to the contractor in another state, the specifications would be a "public record" because the agency "used" the document in its decision-making process.<sup>4</sup> The agency could be required to obtain the public record, unless doing so would be impossible. An agency cannot send its only copy of a record to a third party for the sole purpose of avoiding disclosure.<sup>5</sup>

Sometimes agency employees work on agency business from home computers. These home computer records (including e-mail) were "used" by the agency and relate to the "conduct of government" so they are "public records." RCW 42.17.020(41). However, the act does not authorize unbridled searches of agency property.<sup>6</sup> If agency property is not subject to unbridled searches, then neither is the home computer of an agency employee. Yet, because the home computer documents relating to agency business are "public records," they are subject to disclosure (unless exempt). Agencies should instruct employees that all public records, regardless of where they were created, should eventually be stored on agency computers. Agencies should ask employees to keep agency-related documents on home computers in separate folders and to routinely blind carbon copy ("bcc") work e-mails back to the employee's agency e-mail account. If the agency receives a request for records that are solely on employees' home computers, the agency should direct the employee to forward any responsive documents back to the agency, and the agency should process the request as it would if the records were on the agency's computers.

Notes: <sup>1</sup>*Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 748, 958 P.2d 260 (1998). For records held by the secretary of the senate or chief clerk of the house of representatives, a "public record" is a "legislative record" as defined in RCW 40.14.100. RCW 42.17.020(41).

<sup>2</sup>*Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000).

<sup>3</sup>*Concerned Ratepayers v. Public Utility Dist. No. 1*, 138 Wn.2d 950, 958-61, 983 P.2d 635 (1999).

<sup>4</sup>*Id.*

<sup>5</sup>See Op. Att'y Gen. 11 (1989), at 4, n.2 ("We do not wish to encourage agencies to avoid the provisions of the public disclosure act by transferring public records to private parties. If a record otherwise meeting the statutory definition were transferred into private hands solely to prevent its public disclosure, we expect courts would take appropriate steps to require the agency to make

disclosure or to sanction the responsible public officers.")

<sup>6</sup>See *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03001, filed 1/31/06, effective 3/3/06.]

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#### **44-14-03002**

##### **Times for inspection and copying of records.**

An agency must make records available for inspection and copying during the "customary office hours of the agency." RCW 42.17.280/42.56.090. If the agency is very small and does not have customary office hours of at least thirty hours per week, the records must be available from 9:00 a.m. to noon, and 1:00 p.m. to 4:00 p.m. The agency and requestor can make mutually agreeable arrangements for the times of inspection and copying.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03002, filed 1/31/06, effective 3/3/06.]

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#### **44-14-03003**

##### **Index of records.**

State and local agencies are required by RCW 42.17.260/42.56.070 to provide an index for certain categories of records. An agency is not required to index every record it creates. Since agencies maintain records in a wide variety of ways, agency indices will also vary. An agency cannot use, rely on, or cite to as precedent a public record unless it was indexed or made available to the parties affected by it. RCW 42.17.260(6)/42.56.070(6). An agency should post its index on its web site.

The index requirements differ for state and local agencies.

A state agency must index only two categories of records:

- (1) All records, if any, issued before July 1, 1990 for which the agency has maintained an index; and
- (2) Final orders, declaratory orders, interpretive statements, and statements of policy issued after June 30, 1990. RCW 42.17.260(5)/42.56.070(5).

A state agency must adopt a rule governing its index.

A local agency may opt out of the indexing requirement if it issues a formal order specifying the reasons why doing so would "unduly burden or interfere with agency operations." RCW 42.17.260 (4)(a)/42.56.070 (4)(a). To lawfully opt out of the index requirement, a local agency must actually issue an order or adopt an ordinance specifying the reasons it cannot maintain an index.

The index requirements of the act were enacted in 1972 when agencies had far fewer records and an index was easier to maintain. However, technology allows agencies to map out, archive, and then electronically search for electronic documents. Agency resources vary greatly so not every agency can afford to utilize this technology. However, agencies should explore the feasibility of electronic indexing and retrieval to assist both the agency and requestor in locating public records.

#### **44-14-03004**

##### **Organization of records.**

An agency must "protect public records from damage or disorganization." RCW 42.17.290/42.56.100. An agency owns public records (subject to the public's right, as defined in the act, to inspect or copy nonexempt records) and must maintain custody of them. RCW 40.14.020; chapter 434-615 WAC. Therefore, an agency should not allow a requestor to take original agency records out of the agency's office. An agency may send original records to a reputable commercial copying center to fulfill a records request if the agency takes reasonable precautions to protect the records. See WAC [44-14-07001\(5\)](#).

The legislature encourages agencies to electronically store and provide public records:

Broad public access to state and local government records and information has potential for expanding citizen access to that information and for providing government services. Electronic methods of locating and transferring information can improve linkages between and among citizens...and governments. ...

It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public. RCW 43.105.250. An agency could fulfill its obligation to provide "access" to a public record by providing a requestor with a link to an agency web site containing an electronic copy of that record. Agencies are encouraged to do so. For those without access to the internet, an agency could provide a computer terminal at its office.

#### **44-14-03005**

##### **Retention of records.**

An agency is not required to retain every record it ever created or used. The state and local records committees approve a general retention schedule for state and local agency records that applies to records that are common to most agencies.<sup>1</sup> Individual agencies seek approval from the state or local records committee for retention schedules that are specific to their agency, or that, because of particular needs of the agency, must be kept longer than provided in the general records retention schedule. The retention schedules for state and local agencies are available at [www.secstate.wa.gov/archives/gs.aspx](http://www.secstate.wa.gov/archives/gs.aspx).

Retention schedules vary based on the content of the record. For example, documents with no value such as internal meeting scheduling e-mails can be destroyed when no longer needed, but documents such as periodic accounting reports must be kept for a period of years. Because different kinds of records must be retained for different periods of time, an agency is prohibited from automatically deleting all e-mails after a short period of time (such as thirty days). While many of the e-mails could be destroyed when no longer needed, many others must be retained for several years. Indiscriminate automatic deletion of all e-mails after a short period may prevent an agency from complying with its retention duties and could complicate performance of its duties under the Public Records Act. An agency should have a retention policy in which employees save retainable documents and delete nonretainable ones. An agency is strongly encouraged to train employees on

retention schedules.

The lawful destruction of public records is governed by retention schedules. The unlawful destruction of public records can be a crime. RCW 40.16.010 and 40.16.020.

An agency is prohibited from destroying a public record, even if it is about to be lawfully destroyed under a retention schedule, if a public records request has been made for that record. RCW 42.17.290/42.56.100. Additional retention requirements might apply if the records may be relevant to actual or anticipated litigation. The agency is required to retain the record until the record request has been resolved. An exception exists for certain portions of a state employee's personnel file. RCW 42.17.295/42.56.110.

Note: <sup>1</sup>An agency can be found to violate the act and be subject to the attorneys' fees and penalty provision if it prematurely destroys a requested record. See *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03005, filed 1/31/06, effective 3/3/06.]

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#### **44-14-03006** **Form of requests.**

There is no statutorily required format for a valid public records request.<sup>1</sup> A request can be sent in by mail. RCW 42.17.290/42.56.100. A request can also be made by e-mail, fax, or orally. A request should be made to the agency's public records officer. An agency may prescribe means of requests in its rules. RCW 42.17.250/42.56.040 and 42.17.260 (1)/42.56.070(1); RCW 34.05.220 (state agencies). An agency is encouraged to make its public records request form available on its web site.

A number of agencies routinely accept oral public records requests (for example, asking to look at a building permit). Some agencies find oral requests to be the best way to provide certain kinds of records. However, for some requests such as larger ones, oral requests may be allowed but are problematic. An oral request does not memorialize the exact records sought and therefore prevents a requestor or agency from later proving what was included in the request. Furthermore, as described in WAC [44-14-04002\(1\)](#), a requestor must provide the agency with reasonable notice that the request is for the disclosure of public records; oral requests, especially to agency staff other than the public records officer or designee, may not provide the agency with the required reasonable notice. Therefore, requestors are strongly encouraged to make written requests. If an agency receives an oral request, the agency staff person receiving it should immediately reduce it to writing and then verify in writing with the requestor that it correctly memorializes the request.

An agency should have a public records request form. An agency request form should ask the requestor whether he or she seeks to inspect the records, receive a copy of them, or to inspect the records first and then consider selecting records to copy. An agency request form should recite that inspection of records is free and provide the per-page charge for standard photocopies.

An agency request form should require the requestor to provide contact information so the agency can communicate with the requestor to, for example, clarify the request, inform the requestor that the records are available, or provide an explanation of an exemption. Contact information such as a name, phone number, and address or e-mail should be provided. Requestors should provide an e-mail address because it is an efficient means of communication and creates a written record of the communications between them and the agency. An agency should not require a requestor to provide a driver's license number, date of birth, or photo identification. This information is not necessary for the agency to contact the requestor and requiring it might

intimidate some requestors.

An agency may ask a requestor to prioritize the records he or she is requesting so that the agency is able to provide the most important records first. An agency is not required to ask for prioritization, and a requestor is not required to provide it.

An agency cannot require the requestor to disclose the purpose of the request with two exceptions. RCW 42.17.270/42.56.080. First, if the request is for a list of individuals, an agency may ask the requestor if he or she intends to use the records for a commercial purpose.<sup>2</sup> An agency should specify on its request form that the agency is not authorized to provide public records consisting of a list of individuals for a commercial use. RCW 42.17.260(9)/42.56.070(9).

Second, an agency may seek information sufficient to allow it to determine if another statute prohibits disclosure. For example, some statutes allow an agency to disclose a record only to a claimant for benefits or his or her representative. In such cases, an agency is authorized to ask the requestor if he or she fits this criterion.

An agency is not authorized to require a requestor to indemnify the agency. Op. Att'y Gen. 12 (1988).<sup>3</sup>

Notes: <sup>1</sup> *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004) ("there is no official format for a valid PDA request.").

<sup>2</sup>Op. Att'y Gen. 12 (1988), at 11; Op. Att'y Gen. 2 (1998), at 4.

<sup>3</sup>RCW 42.17.258/42.56.060 provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter." Therefore, an agency has little need for an indemnification clause. Requiring a requestor to indemnify an agency inhibits some requestors from exercising their right to request public records. Op. Att'y Gen. 12 (1988), at 11.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03006, filed 1/31/06, effective 3/3/06.]

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#### 44-14-040

#### Processing of public records requests — General.

(1) **Providing "fullest assistance."** The (name of agency) is charged by statute with adopting rules which provide for how it will "provide full access to public records," "protect records from damage or disorganization," "prevent excessive interference with other essential functions of the agency," provide "fullest assistance" to requestors, and provide the "most timely possible action" on public records requests. The public records officer or designee will process requests in the order allowing the most requests to be processed in the most efficient manner.

(2) **Acknowledging receipt of request.** Within five business days of receipt of the request, the public records officer will do one or more of the following:

(a) Make the records available for inspection or copying;

(b) If copies are requested and payment of a deposit for the copies, if any, is made or terms of payment are agreed upon, send the copies to the requestor;



(c) Provide a reasonable estimate of when records will be available; or

(d) If the request is unclear or does not sufficiently identify the requested records, request clarification from the requestor. Such clarification may be requested and provided by telephone. The public records officer or designee may revise the estimate of when records will be available; or

(e) Deny the request.

(3) **Consequences of failure to respond.** If the (name of agency) does not respond in writing within five business days of receipt of the request for disclosure, the requestor should consider contacting the public records officer to determine the reason for the failure to respond.

(4) **Protecting rights of others.** In the event that the requested records contain information that may affect rights of others and may be exempt from disclosure, the public records officer may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure. Such notice should be given so as to make it possible for those other persons to contact the requestor and ask him or her to revise the request, or, if necessary, seek an order from a court to prevent or limit the disclosure. The notice to the affected persons will include a copy of the request.

(5) **Records exempt from disclosure.** Some records are exempt from disclosure, in whole or in part. If the (name of agency) believes that a record is exempt from disclosure and should be withheld, the public records officer will state the specific exemption and provide a brief explanation of why the record or a portion of the record is being withheld. If only a portion of a record is exempt from disclosure, but the remainder is not exempt, the public records officer will redact the exempt portions, provide the nonexempt portions, and indicate to the requestor why portions of the record are being redacted.

(6) **Inspection of records.**

(a) Consistent with other demands, the (name of agency) shall promptly provide space to inspect public records. No member of the public may remove a document from the viewing area or disassemble or alter any document. The requestor shall indicate which documents he or she wishes the agency to copy.

(b) The requestor must claim or review the assembled records within thirty days of the (name of agency's) notification to him or her that the records are available for inspection or copying. The agency will notify the requestor in writing of this requirement and inform the requestor that he or she should contact the agency to make arrangements to claim or review the records. If the requestor or a representative of the requestor fails to claim or review the records within the thirty-day period or make other arrangements, the (name of agency) may close the request and refile the assembled records. Other public records requests can be processed ahead of a subsequent request by the same person for the same or almost identical records, which can be processed as a new request.

(7) **Providing copies of records.** After inspection is complete, the public records officer or designee shall make the requested copies or arrange for copying.

(8) **Providing records in installments.** When the request is for a large number of records, the public records officer or designee will provide access for inspection and copying in installments, if he or she reasonably determines that it would be practical to provide the records in that way. If, within thirty days, the requestor fails to inspect the entire set of records or one or more of the installments, the public records officer or designee may stop searching for the remaining records and close the request.

(9) **Completion of inspection.** When the inspection of the requested records is complete and all requested copies are provided, the public records officer or designee will indicate that the (name of agency) has completed a diligent search for the requested records and made any located nonexempt records available for inspection.

(10) **Closing withdrawn or abandoned request.** When the requestor either withdraws the request or fails

to fulfill his or her obligations to inspect the records or pay the deposit or final payment for the requested copies, the public records officer will close the request and indicate to the requestor that the (name of agency) has closed the request.

(11) **Later discovered documents.** If, after the (name of agency) has informed the requestor that it has provided all available records, the (name of agency) becomes aware of additional responsive documents existing at the time of the request, it will promptly inform the requestor of the additional documents and provide them on an expedited basis.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-040, filed 1/31/06, effective 3/3/06.]

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#### **44-14-04001 Introduction.**

Both requestors and agencies have responsibilities under the act. The public records process can function properly only when both parties perform their respective responsibilities. An agency has a duty to promptly provide access to all nonexempt public records.<sup>1</sup> A requestor has a duty to request identifiable records, inspect the assembled records or pay for the copies, and be respectful to agency staff.<sup>2</sup>

Requestors should keep in mind that all agencies have essential functions in addition to providing public records. Agencies also have greatly differing resources. The act recognizes that agency public records procedures should prevent "excessive interference" with the other "essential functions" of the agency. RCW 42.17.290/42.56.100. Therefore, while providing public records is an essential function of an agency, it is not required to abandon its other, nonpublic records functions. Agencies without a full-time public records officer may assign staff part-time to fulfill records requests, provided the agency is providing the "fullest assistance" and the "most timely possible" action on the request. The proper level of staffing for public records requests will vary among agencies, considering the complexity and number of requests to that agency, agency resources, and the agency's other functions.

The burden of proof is on an agency to prove its estimate of time to provide a full response is "reasonable." RCW 42.17.340(2)/42.56.550(2). An agency should be prepared to explain how it arrived at its estimate of time and why the estimate is reasonable.

Agencies are encouraged to use technology to provide public records more quickly and, if possible, less expensively. An agency is allowed, of course, to do more for the requestor than is required by the letter of the act. Doing so often saves the agency time and money in the long run, improves relations with the public, and prevents litigation. For example, agencies are encouraged to post many nonexempt records of broad public interest on the internet. This may result in fewer requests for public records. See RCW 43.105.270 (state agencies encouraged to post frequently sought documents on the internet).

Notes: <sup>1</sup>RCW 42.17.260(1)/42.56.070(1) (agency "shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions" listed in the act or other statute).

<sup>2</sup>See RCW 42.17.270/42.56.080 ("identifiable record" requirement); RCW 42.17.300/42.56.120 (claim or review requirement); RCW 42.17.290/42.56.100 (agency may prevent excessive interference with other essential agency functions).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04001, filed 1/31/06, effective 3/3/06.]

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#### 44-14-04002

#### Obligations of requestors.

(1) **Reasonable notice that request is for public records.** A requestor must give an agency reasonable notice that the request is being made pursuant to the act. Requestors are encouraged to cite or name the act but are not required to do so.<sup>1</sup> A request using the terms "public records," "public disclosure," "FOIA," or "Freedom of Information Act" (the terms commonly used for federal records requests) should provide an agency with reasonable notice in most cases. A requestor should not submit a "stealth" request, which is buried in another document in an attempt to trick the agency into not responding.

(2) **Identifiable record.** A requestor must request an "identifiable record" or "class of records" before an agency must respond to it. RCW 42.17.270/42.56.080 and 42.17.340 (1)/42.56.550(1). An "identifiable record" is one that agency staff can reasonably locate.<sup>2</sup> The act does not allow a requestor to search through agency files for records which cannot be reasonably identified or described to the agency.<sup>3</sup> However, a requestor is not required to identify the exact record he or she seeks. For example, if a requestor requested an agency's "2001 budget," but the agency only had a 2000-2002 budget, the requestor made a request for an identifiable record.<sup>4</sup>

An "identifiable record" is not a request for "information" in general.<sup>5</sup> For example, asking "what policies" an agency has for handling discrimination complaints is merely a request for "information."<sup>6</sup> A request to inspect or copy an agency's policies and procedures for handling discrimination complaints would be a request for an "identifiable record."

Public records requests are not interrogatories. An agency is not required to conduct legal research for a requestor.<sup>7</sup> A request for "any law that allows the county to impose taxes on me" is not a request for an identifiable record. Conversely, a request for "all records discussing the passage of this year's tax increase on real property" is a request for an "identifiable record."

When a request uses an inexact phrase such as all records "relating to" a topic (such as "all records relating to the property tax increase"), the agency may interpret the request to be for records which directly and fairly address the topic. When an agency receives a "relating to" or similar request, it should seek clarification of the request from the requestor.

(3) **"Overbroad" requests.** An agency cannot "deny a request for identifiable public records based solely on the basis that the request is overbroad." RCW 42.17.270/42.56.080. However, if such a request is not for identifiable records or otherwise is not proper, the request can still be denied. When confronted with a request that is unclear, an agency should seek clarification.

Notes: <sup>1</sup> *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000).

<sup>2</sup> *Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999) ("identifiable record" requirement is satisfied when there is a "reasonable description" of the record "enabling the government employee to locate the requested records.").

<sup>3</sup> *Limstrom v. Ladenburg*, 136 Wn.2d 595, 604, n.3, 963 P.2d 869 (1998), *appeal after remand*, 110 Wn. App. 133, 39 P.3d 351 (2002).

<sup>4</sup> *Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, n.4, 59 P.3d 109 (2002).

<sup>5</sup> *Bonamy*, 92 Wn. App. at 409.

<sup>6</sup> *Id.*

<sup>7</sup> See *Limstrom*, 136 Wn.2d at 604, n.3 (act does not require "an agency to go outside its own records and resources to try to identify or locate the record requested."); *Bonamy*, 92 Wn. App. at 409 (act "does not require agencies to research or explain public records, but only to make those records accessible to the public.").

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04002, filed 1/31/06, effective 3/3/06.]

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#### 44-14-04003 Responsibilities of agencies in processing requests.

(1) **Similar treatment and purpose of the request.** The act provides: "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request" (except to determine if the request is for a commercial use or would violate another statute prohibiting disclosure). RCW 42.17.270/42.56.080.<sup>1</sup> The act also requires an agency to take the "most timely possible action on requests" and make records "promptly available." RCW 42.17.290/42.56.100 and 42.17.270/42.56.080. However, treating requestors similarly does not mean that agencies must process requests strictly in the order received because this might not be providing the "most timely possible action" for all requests. A relatively simple request need not wait for a long period of time while a much larger request is being fulfilled. Agencies are encouraged to be flexible and process as many requests as possible even if they are out of order.<sup>3</sup>

An agency cannot require a requestor to state the purpose of the request (with limited exceptions). RCW 42.17.270/42.56.080. However, in an effort to better understand the request and provide all responsive records, the agency can inquire about the purpose of the request. The requestor is not required to answer the agency's inquiry (with limited exceptions as previously noted).

(2) **Provide "fullest assistance" and "most timely possible action."** The act requires agencies to adopt and enforce reasonable rules to provide for the "fullest assistance" to a requestor. RCW 42.17.290/42.56.100. The "fullest assistance" principle should guide agencies when processing requests. In general, an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an "excessive interference" with the agency's "other essential functions." RCW 42.17.290/42.56.100. The agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others.

The act also requires agencies to adopt and enforce rules to provide for the "most timely possible action on requests." RCW 42.17.290/42.56.100. This principle should guide agencies when processing requests. It should be noted that this provision requires the most timely "possible" action on requests. This recognizes that an agency is not always capable of fulfilling a request as quickly as the requestor would like.

(3) **Communicate with requestor.** Communication is usually the key to a smooth public records process for both requestors and agencies. Clear requests for a small number of records usually do not require pre-delivery communication with the requestor. However, when an agency receives a large or unclear request, the agency should communicate with the requestor to clarify the request. If the request is modified orally, the public records officer or designee should memorialize the communication in writing.

For large requests, the agency may ask the requestor to prioritize the request so that he or she receives the most important records first. If feasible, the agency should provide periodic updates to the requestor of the progress of the request. Similarly, the requestor should periodically communicate with the agency and promptly answer any clarification questions. Sometimes a requestor finds the records he or she is seeking at the beginning of a request. If so, the requestor should communicate with the agency that the requested records

have been provided and that he or she is canceling the remainder of the request. If the requestor's cancellation communication is not in writing, the agency should confirm it in writing.

(4) **Failure to provide initial response within five business days.** Within five business days of receiving a request, an agency must provide an initial response to requestor. The initial response must do one of four things:

(a) Provide the record;

(b) Acknowledge that the agency has received the request and provide a reasonable estimate of the time it will require to fully respond;

(c) Seek a clarification of the request; or

(d) Deny the request. RCW 42.17.320/42.56.520. An agency's failure to provide an initial response is arguably a violation of the act.<sup>2</sup>

(5) **No duty to create records.** An agency is not obligated to create a new record to satisfy a records request.<sup>4</sup> However, sometimes it is easier for an agency to create a record responsive to the request rather than collecting and making available voluminous records that contain small pieces of the information sought by the requestor or find itself in a controversy about whether the request requires the creation of a new record. The decision to create a new record is left to the discretion of the agency. If the agency is considering creating a new record instead of disclosing the underlying records, it should obtain the consent of the requestor to ensure that the requestor is not actually seeking the underlying records. Making an electronic copy of an electronic record is not "creating" a new record; instead, it is similar to copying a paper copy. Similarly, eliminating a field of an electronic record can be a method of redaction; it is similar to redacting portions of a paper record using a black pen or white-out tape to make it available for inspection or copying.

(6) **Provide a reasonable estimate of the time to fully respond.** Unless it is providing the records or claiming an exemption from disclosure within the five-business day period, an agency must provide a reasonable estimate of the time it will take to fully respond to the request. RCW 42.17.320/42.56.520. Fully responding can mean processing the request (assembling records, redacting, preparing a withholding index, or notifying third parties named in the records who might seek an injunction against disclosure) or determining if the records are exempt from disclosure.

An estimate must be "reasonable." The act provides a requestor a quick and simple method of challenging the reasonableness of an agency's estimate. RCW 42.17.340(2)/42.56.550(2). See WAC [44-14-08004](#) (5)(b). The burden of proof is on the agency to prove its estimate is "reasonable." RCW 42.17.340(2)/42.56.550(2).

To provide a "reasonable" estimate, an agency should not use the same estimate for every request. An agency should roughly calculate the time it will take to respond to the request and send estimates of varying lengths, as appropriate. Some very large requests can legitimately take months or longer to fully provide. There is no standard amount of time for fulfilling a request so reasonable estimates should vary.

Some agencies send form letters with thirty-day estimates to all requestors, no matter the size or complexity of the request. Form letter thirty-day estimates are rarely "reasonable" because an agency, which has the burden of proof, could find it difficult to prove that every single request it receives would take the same thirty-day period.

In order to avoid unnecessary litigation over the reasonableness of an estimate, an agency should briefly explain to the requestor the basis for the estimate in the initial response. The explanation need not be elaborate but should allow the requestor to make a threshold determination of whether he or she should question that estimate further or has a basis to seek judicial review of the reasonableness of the estimate.

An agency should either fulfill the request within the estimated time or, if warranted, communicate with the requestor about clarifications or the need for a revised estimate. An agency should not ignore a request and

then continuously send extended estimates. Routine extensions with little or no action to fulfill the request would show that the previous estimates probably were not "reasonable." Extended estimates are appropriate when the circumstances have changed (such as an increase in other requests or discovering that the request will require extensive redaction). An estimate can be revised when appropriate, but unwarranted serial extensions have the effect of denying a requestor access to public records.

(7) **Seek clarification of a request or additional time.** An agency may seek a clarification of an "unclear" request. RCW 42.17.320/42.56.520. An agency can only seek a clarification when the request is objectively "unclear." Seeking a "clarification" of an objectively clear request delays access to public records.

If the requestor fails to clarify an unclear request, the agency need not respond to it further. RCW 42.17.320/42.56.520. If the requestor does not respond to the agency's request for a clarification within thirty days of the agency's request, the agency may consider the request abandoned. If the agency considers the request abandoned, it should send a closing letter to the requestor.

An agency may take additional time to provide the records or deny the request if it is awaiting a clarification. RCW 42.17.320/42.56.520. After providing the initial response and perhaps even beginning to assemble the records, an agency might discover it needs to clarify a request and is allowed to do so. A clarification could also affect a reasonable estimate.

(8) **Preserving requested records.** If a requested record is scheduled shortly for destruction, and the agency receives a public records request for it, the record cannot be destroyed until the request is resolved. RCW 42.17.290/42.56.100.<sup>5</sup> Once a request has been closed, the agency can destroy the requested records in accordance with its retention schedule.

(9) **Searching for records.** An agency must conduct an objectively reasonable search for responsive records. A requestor is not required to "ferret out" records on his or her own.<sup>6</sup> A reasonable agency search usually begins with the public records officer for the agency or a records coordinator for a department of the agency deciding where the records are likely to be and who is likely to know where they are. One of the most important parts of an adequate search is to decide how wide the search will be. If the agency is small, it might be appropriate to initially ask all agency employees if they have responsive records. If the agency is larger, the agency may choose to initially ask only the staff of the department or departments of an agency most likely to have the records. For example, a request for records showing or discussing payments on a public works project might initially be directed to all staff in the finance and public works departments if those departments are deemed most likely to have the responsive documents, even though other departments may have copies or alternative versions of the same documents. Meanwhile, other departments that may have documents should be instructed to preserve their records in case they are later deemed to be necessary to respond to the request. The agency could notify the requestor which departments are being surveyed for the documents so the requestor may suggest other departments. It is better to be over inclusive rather than under inclusive when deciding which staff should be contacted, but not everyone in an agency needs to be asked if there is no reason to believe he or she has responsive records. An e-mail to staff selected as most likely to have responsive records is usually sufficient. Such an e-mail also allows an agency to document whom it asked for records.

Agency policies should require staff to promptly respond to inquiries about responsive records from the public records officer.

After records which are deemed responsive are located, an agency should take reasonable steps to narrow down the number of records to those which are responsive. In some cases, an agency might find it helpful to consult with the requestor on the scope of the documents to be assembled. An agency cannot "bury" a requestor with nonresponsive documents. However, an agency is allowed to provide arguably, but not clearly, responsive records to allow the requestor to select the ones he or she wants, particularly if the requestor is unable or unwilling to help narrow the scope of the documents.

(10) **Expiration of reasonable estimate.** An agency should provide a record within the time provided in its reasonable estimate or communicate with the requestor that additional time is required to fulfill the request

based on specified criteria. Unjustified failure to provide the record by the expiration of the estimate is a denial of access to the record.

(11) **Notice to affected third parties.** Sometimes an agency decides it must release all or a part of a public record affecting a third party. The third party can file an action to obtain an injunction to prevent an agency from disclosing it, but the third party must prove the record or portion of it is exempt from disclosure.<sup>7</sup> RCW 42.17.330/42.56.540. Before sending a notice, an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requestor's access to a disclosable record.

The act provides that before releasing a record an agency may, at its "option," provide notice to a person named in a public record or to whom the record specifically pertains (unless notice is required by law). RCW 42.17.330/42.56.540. This would include all of those whose identity could reasonably be ascertained in the record and who might have a reason to seek to prevent the release of the record. An agency has wide discretion to decide whom to notify or not notify. First, an agency has the "option" to notify or not (unless notice is required by law). RCW 42.17.330/42.56.540. Second, if it acted in good faith, an agency cannot be held liable for its failure to notify enough people under the act. RCW 42.17.258/42.56.060. However, if an agency had a contractual obligation to provide notice of a request but failed to do so, the agency might lose the immunity provided by RCW 42.17.258/42.56.060 because breaching the agreement probably is not a "good faith" attempt to comply with the act.

The practice of many agencies is to give ten days' notice. Many agencies expressly indicate the deadline date to avoid any confusion. More notice might be appropriate in some cases, such as when numerous notices are required, but every additional day of notice is another day the potentially disclosable record is being withheld. When it provides a notice, the agency should include the notice period in the "reasonable estimate" it provides to a requestor.

The notice informs the third party that release will occur on the stated date unless he or she obtains an order from a court enjoining release. The requestor has an interest in any legal action to prevent the disclosure of the records he or she requested. Therefore, the agency's notice should inform the third party that he or she should name the requestor as a party to any action to enjoin disclosure. If an injunctive action is filed, the third party or agency should name the requestor as a party or, at a minimum, must inform the requestor of the action to allow the requestor to intervene.

(12) **Later discovered records.** If the agency becomes aware of the existence of records responsive to a request which were not provided, the agency should notify the requestor in writing and provide a brief explanation of the circumstances.

Notes: <sup>1</sup>See also Op. Att'y Gen. 2 (1998).

<sup>2</sup>See *Smith v. Okanogan County*, 100 Wn. App. 7, 13, 994 P.2d 857 (2000) ("When an agency fails to respond as provided in RCW 42.17.320 (42.56.520), it violates the act and the individual requesting the public record is entitled to a statutory penalty.").

<sup>3</sup>While an agency can fulfill requests out of order, an agency is not allowed to ignore a large request while it is exclusively fulfilling smaller requests. The agency should strike a balance between fulfilling small and large requests.

<sup>4</sup>*Smith*, 100 Wn. App. at 14.

<sup>5</sup>An exception is some state-agency employee personnel records. RCW 42.17.295/42.56.110.

<sup>6</sup>*Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909 (2002) ("an applicant need not exhaust his or her own ingenuity to 'ferret out' records through some combination of 'intuition and diligent research'").

<sup>7</sup>The agency holding the record can also file a RCW 42.17.330/42.56.540 injunctive action to establish that it is not required to release the record or portion of it.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-04003, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04003, filed 1/31/06, effective 3/3/06.]

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#### 44-14-04004 Responsibilities of agency in providing records.

(1) **General.** An agency may simply provide the records or make them available within the five-business day period of the initial response. When it does so, an agency should also provide the requestor a written cover letter or e-mail briefly describing the records provided and informing the requestor that the request has been closed. This assists the agency in later proving that it provided the specified records on a certain date and told the requestor that the request had been closed. However, a cover letter or e-mail might not be practical in some circumstances, such as when the agency provides a small number of records or fulfills routine requests.

An agency can, of course, provide the records sooner than five business days. Providing the "fullest assistance" to a requestor would mean providing a readily available record as soon as possible. For example, an agency might routinely prepare a premeeting packet of documents three days in advance of a city council meeting. The packet is readily available so the agency should provide it to a requestor on the same day of the request so he or she can have it for the council meeting.

(2) **Means of providing access.** An agency must make nonexempt public records "available" for inspection or provide a copy. RCW 42.17.270/42.56.080. An agency is only required to make records "available" and has no duty to explain the meaning of public records.<sup>1</sup> Making records available is often called "access."

Access to a public record can be provided by allowing inspection of the record, providing a copy, or posting the record on the agency's web site and assisting the requestor in finding it (if necessary). An agency must mail a copy of records if requested and if the requestor pays the actual cost of postage and the mailing container.<sup>2</sup> The requestor can specify which method of access (or combination, such as inspection and then copying) he or she prefers. Different processes apply to requests for inspection versus copying (such as copy charges) so an agency should clarify with a requestor whether he or she seeks to inspect or copy a public record.

An agency can provide access to a public record by posting it on its web site. If requested, an agency should provide reasonable assistance to a requestor in finding a public record posted on its web site. If the requestor does not have internet access, the agency may provide access to the record by allowing the requestor to view the record on a specific computer terminal at the agency open to the public. An agency is not required to do so. Despite the availability of the record on the agency's web site, a requestor can still make a public records request and inspect the record or obtain a copy of it by paying the appropriate per-page copying charge.

(3) **Providing records in installments.** The act now provides that an agency must provide records "if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure." RCW 42.17.270/42.56.080. The purpose of this provision is to allow requestors to obtain records in installments as they are assembled and to allow agencies to provide records in logical batches. The provision is also designed to allow an agency to only assemble the first installment and then see if the requestor claims or reviews it before assembling the next installments.

Not all requests should be provided in installments. For example, a request for a small number of



documents which are located at nearly the same time should be provided all at once. Installments are useful for large requests when, for example, an agency can provide the first box of records as an installment. An agency has wide discretion to determine when providing records in installments is "applicable." However, an agency cannot use installments to delay access by, for example, calling a small number of documents an "installment" and sending out separate notifications for each one. The agency must provide the "fullest assistance" and the "most timely possible action on requests" when processing requests. RCW 42.17.290/42.56.100.

(4) **Failure to provide records.** A "denial" of a request can occur when an agency:

Does not have the record;

Fails to respond to a request;

Claims an exemption of the entire record or a portion of it; or

Without justification, fails to provide the record after the reasonable estimate expires.

(a) **When the agency does not have the record.** An agency is only required to provide access to public records it has or has used.<sup>3</sup> An agency is not required to create a public record in response to a request.

An agency must only provide access to public records in existence at the time of the request. An agency is not obligated to supplement responses. Therefore, if a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive to the request and need not be provided. A requestor must make a new request to obtain subsequently created public records.

Sometimes more than one agency holds the same record. When more than one agency holds a record, and a requestor makes a request to the first agency, the first agency cannot respond to the request by telling the requestor to obtain the record from the second agency. Instead, an agency must provide access to a record it holds regardless of its availability from another agency.<sup>4</sup>

An agency is not required to provide access to records that were not requested. An agency does not "deny" a request when it does not provide records that are outside the scope of the request because they were never asked for.

(b) **Claiming exemptions.**

(i) **Redactions.** If a portion of a record is exempt from disclosure, but the remainder is not, an agency generally is required to redact (black out) the exempt portion and then provide the remainder. RCW 42.17.310(2)/42.56.210(1). There are a few exceptions.<sup>5</sup> Withholding an entire record where only a portion of it is exempt violates the act.<sup>6</sup> Some records are almost entirely exempt but small portions remain nonexempt. For example, information revealing the identity of a crime victim is exempt from disclosure. RCW 42.17.310(1)(e)/42.56.240(2). If a requestor requested a police report in a case in which charges have been filed, the agency must redact the victim's identifying information but provide the rest of the report.

Statistical information "not descriptive of any readily identifiable person or persons" is generally not subject to redaction or withholding. RCW 42.17.310(2)/42.56.210(1). For example, if a statute exempted the identity of a person who had been assessed a particular kind of penalty, and an agency record showed the amount of penalties assessed against various persons, the agency must provide the record with the names of the persons redacted but with the penalty amounts remaining.

Originals should not be redacted. For paper records, an agency should redact materials by first copying the record and then either using a black marker on the copy or covering the exempt portions with copying tape, and then making a copy. It is often a good practice to keep the initial copies which were redacted in case there is a need to make additional copies for disclosure or to show what was redacted. For electronic records such

as data bases, an agency can sometimes redact a field of exempt information by excluding it from the set of fields to be copied. However, in some instances electronic redaction might not be feasible and a paper copy of the record with traditional redaction might be the only way to provide the redacted record. If a record is redacted electronically, by deleting a field of data or in any other way, the agency must identify the redaction and state the basis for the claimed exemption as required by RCW 42.56.210(3). See (b)(ii) of this subsection.

(ii) **Brief explanation of withholding.** When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld. RCW 42.17.310(4)/42.56.210(3). The brief explanation should cite the statute the agency claims grants an exemption from disclosure. The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as "proprietary" or "privacy" are insufficient.

One way to properly provide a brief explanation of the withheld record or redaction is for the agency to provide a withholding index. It identifies the type of record, its date and number of pages, and the author or recipient of the record (unless their identity is exempt).<sup>7</sup> The withholding index need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption.

(5) **Notifying requestor that records are available.** If the requestor sought to inspect the records, the agency should notify him or her that the entire request or an installment is available for inspection and ask the requestor to contact the agency to arrange for a mutually agreeable time for inspection.<sup>8</sup> The notification should recite that if the requestor fails to inspect or copy the records or make other arrangements within thirty days of the date of the notification that the agency will close the request and refile the records. An agency might consider on a case-by-case basis sending the notification by certified mail to document that the requestor received it.

If the requestor sought copies, the agency should notify him or her of the projected costs and whether a copying deposit is required before the copies will be made. The notification can be oral to provide the most timely possible response.

(6) **Documenting compliance.** An agency should have a process to identify which records were provided to a requestor and the date of production. In some cases, an agency may wish to number-stamp or number-label paper records provided to a requestor to document which records were provided. The agency could also keep a copy of the numbered records so either the agency or requestor can later determine which records were or were not provided. However, the agency should balance the benefits of stamping or labeling the documents and making extra copies against the costs and burdens of doing so.

If memorializing which specific documents were offered for inspection is impractical, an agency might consider documenting which records were provided for inspection by making an index or list of the files or records made available for inspection.

Notes: <sup>1</sup>*Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999).

<sup>2</sup>*Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997).

<sup>3</sup>*Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004).

<sup>4</sup>*Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978).

<sup>5</sup>The two main exceptions to the redaction requirement are state "tax information" (RCW 82.32.330 (1)(c)) and law enforcement case files in active cases (*Newman v. King County*, 133 Wn.2d 565, 574, 947 P.2d 712 (1997)). Neither of these two kinds of records must be redacted but rather may be withheld in their entirety.

<sup>6</sup>*Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 132, 737 P.2d 1302 (1987).

<sup>7</sup> *Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 271, n.18, 884 P.2d 592 (1994) ("*PAWS II*").

<sup>8</sup> For smaller requests, the agency might simply provide them with the initial response or earlier so no notification is necessary.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-04004, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04004, filed 1/31/06, effective 3/3/06.]

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#### 44-14-04005 Inspection of records.

(1) **Obligation of requestor to claim or review records.** After the agency notifies the requestor that the records or an installment of them are ready for inspection or copying, the requestor must claim or review the records or the installment. RCW 42.17.300/42.56.120. If the requestor cannot claim or review the records him or herself, a representative may do so within the thirty-day period. Other arrangements can be mutually agreed to between the requestor and the agency.

If a requestor fails to claim or review the records or an installment after the expiration of thirty days, an agency is authorized to stop assembling the remainder of the records or making copies. RCW 42.17.300/42.56.120. If the request is abandoned, the agency is no longer bound by the records retention requirements of the act prohibiting the scheduled destruction of a requested record. RCW 42.17.290/42.56.100.

If a requestor fails to claim or review the records or any installment of them within the thirty-day notification period, the agency may close the request and refile the records. If a requestor who has failed to claim or review the records then requests the same or almost identical records again, the agency, which has the flexibility to prioritize its responses to be most efficient to all requestors, can process the repeat request for the now-refiled records as a new request after other pending requests.

(2) **Time, place, and conditions for inspection.** Inspection should occur at a time mutually agreed (within reason) by the agency and requestor. An agency should not limit the time for inspection to times in which the requestor is unavailable. Requestors cannot dictate unusual times for inspection. The agency is only required to allow inspection during the agency's customary office hours. RCW 42.17.280/42.56.090. Often an agency will provide the records in a conference room or other office area.

The inspection of records cannot create "excessive interference" with the other "essential functions" of the agency. RCW 42.17.290/42.56.100. Similarly, copying records at agency facilities cannot "unreasonably disrupt" the operations of the agency. RCW 42.17.270/42.56.080.

An agency may have an agency employee observe the inspection or copying of records by the requestor to ensure they are not destroyed or disorganized. RCW 42.17.290/42.56.100. A requestor cannot alter, mark on, or destroy an original record during inspection. To select a paper record for copying during an inspection, a requestor must use a nonpermanent method such as a removable adhesive note or paper clip.

Inspection times can be broken down into reasonable segments such as half days. However, inspection times cannot be broken down into unreasonable segments to either harass the agency or delay access to the timely inspection of records.

Note: <sup>1</sup> See, e.g., WAC 296-06-120 (department of labor and industries provides thirty days to claim or review

records).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04005, filed 1/31/06, effective 3/3/06.]

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#### **44-14-04006**

##### **Closing request and documenting compliance.**

(1) **Fulfilling request and closing letter.** A records request has been fulfilled and can be closed when a requestor has inspected all the requested records, all copies have been provided, a web link has been provided (with assistance from the agency in finding it, if necessary), an unclear request has not been clarified, a request or installment has not been claimed or reviewed, or the requestor cancels the request. An agency should provide a closing letter stating the scope of the request and memorializing the outcome of the request. A closing letter may not be necessary for smaller requests. The outcome described in the closing letter might be that the requestor inspected records, copies were provided (with the number range of the stamped or labeled records, if applicable), the agency sent the requestor the web link, the requestor failed to clarify the request, the requestor failed to claim or review the records within thirty days, or the requestor canceled the request. The closing letter should also ask the requestor to promptly contact the agency if he or she believes additional responsive records have not been provided.

(2) **Returning assembled records.** An agency is not required to keep assembled records set aside indefinitely. This would "unreasonably disrupt" the operations of the agency. RCW 42.17.270/42.56.080. After a request has been closed, an agency should return the assembled records to their original locations. Once returned, the records are no longer subject to the prohibition on destroying records scheduled for destruction under the agency's retention schedule. RCW 42.17.290/42.56.100.

(3) **Retain copy of records provided.** In some cases, it may be wise for the agency to keep a separate copy of the records it copied and provided in response to a request. This allows the agency to document what was provided. A growing number of requests are for a copy of the records provided to another requestor, which can easily be fulfilled if the agency retains a copy of the records provided to the first requestor. The copy of the records provided should be retained for a period of time consistent with the agency's retention schedules for records related to disclosure of documents.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04006, filed 1/31/06, effective 3/3/06.]

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#### **44-14-04007**

##### **Later-discovered records.**

An agency has no obligation to search for records responsive to a closed request. Sometimes an agency discovers responsive records after a request has been closed. An agency should provide the later-discovered records to the requestor.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04007, filed 1/31/06, effective 3/3/06.]

#### 44-14-050

##### Processing of public records requests — Electronic records.

(1) **Requesting electronic records.** The process for requesting electronic public records is the same as for requesting paper public records.

(2) **Providing electronic records.** When a requestor requests records in an electronic format, the public records officer will provide the nonexempt records or portions of such records that are reasonably locatable in an electronic format that is used by the agency and is generally commercially available, or in a format that is reasonably translatable from the format in which the agency keeps the record. Costs for providing electronic records are governed by WAC [44-14-07003](#).

(3) **Customized access to data bases.** With the consent of the requestor, the agency may provide customized access under RCW 43.105.280 if the record is not reasonably locatable or not reasonably translatable into the format requested. The (agency) may charge a fee consistent with RCW 43.105.280 for such customized access.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-050, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-050, filed 1/31/06, effective 3/3/06.]

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#### 44-14-05001

##### Access to electronic records.

The Public Records Act does not distinguish between paper and electronic records. Instead, the act explicitly includes electronic records within its coverage. The definition of "public record" includes a "writing," which in turn includes "existing data compilations from which information may be obtained or translated." RCW 42.17.020(48) (incorporated by reference into the act by RCW 42.56.010). Many agency records are now in an electronic format. Many of these electronic formats such as Windows<sup>®</sup> products are generally available and are designed to operate with other computers to quickly and efficiently locate and transfer information. Providing electronic records can be cheaper and easier for an agency than paper records. Furthermore, RCW 43.105.250 provides: "It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public." In general, an agency should provide electronic records in an electronic format if requested in that format. Technical feasibility is the touchstone for providing electronic records. An agency should provide reasonably locatable electronic public records in either their original generally commercially available format (such as an Acrobat PDF<sup>®</sup> file) or, if the records are not in a generally commercially available format, the agency should provide them in a reasonably translatable electronic format if possible. In the rare cases when the requested electronic records are not reasonably locatable, or are not in a generally commercially available format or are not reasonably translatable into one, the agency might consider customized access. See WAC [44-14-05004](#). An agency may recover its actual costs for providing electronic records, which in many cases is de minimis. See WAC [44-14-050\(3\)](#). What is technically feasible in one situation may not be in another. Not all agencies, especially smaller units of local government, have the electronic resources of larger agencies and some of the generalizations in these model rules may not apply every time. If an agency initially believes it cannot provide electronic records in an electronic format, it should confer with the requestor and the two parties should attempt to cooperatively resolve any technical difficulties. See WAC [44-14-05003](#). It is usually a purely technical question whether an agency can provide electronic records in a particular format in a specific case.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05001, filed 6/15/07, effective 7/16/07.]

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#### 44-14-05002

#### "Reasonably locatable" and "reasonably translatable" electronic records.

(1) **"Reasonably locatable" electronic records.** The act obligates an agency to provide nonexempt "identifiable...records." RCW 42.56.080. An "identifiable record" is essentially one that agency staff can "reasonably locate." WAC [44-14-04002\(2\)](#). Therefore, a general summary of the "identifiable record" standard as it relates to electronically locating public records is that the act requires an agency to provide a nonexempt "reasonably locatable" record. This does not mean that an agency can decide if a request is "reasonable" and only fulfill those requests. Rather, "reasonably locatable" is a concept, grounded in the act, for analyzing electronic records issues.

In general, a "reasonably locatable" electronic record is one which can be located with typical search features and organizing methods contained in the agency's current software. For example, a retained e-mail containing the term "XYZ" is usually reasonably locatable by using the e-mail program search feature. However, an e-mail search feature has limitations, such as not searching attachments, but is a good starting point for the search. Information might be "reasonably locatable" by methods other than a search feature. For example, a request for a copy of all retained e-mails sent by a specific agency employee for a particular date is "reasonably locatable" because it can be found utilizing a common organizing feature of the agency's e-mail program, a chronological "sent" folder. Another indicator of what is "reasonably locatable" is whether the agency keeps the information in a particular way for its business purposes. For example, an agency might keep a data base of permit holders including the name of the business. The agency does not separate the businesses by whether they are publicly traded corporations or not because it has no reason to do so. A request for the names of the businesses which are publicly traded is not "reasonably locatable" because the agency has no business purpose for keeping the information that way. In such a case, the agency should provide the names of the businesses (assuming they are not exempt from disclosure) and the requestor can analyze the data base to determine which businesses are publicly traded corporations.

(2) **"Reasonably translatable" electronic records.** The act requires an agency to provide a "copy" of nonexempt records (subject to certain copying charges). RCW 42.56.070(1) and 42.56.080. To provide a photocopy of a paper record, an agency must take some reasonable steps to mechanically translate the agency's original document into a useable copy for the requestor such as copying it in a copying machine. Similarly, an agency must take some reasonable steps to prepare an electronic copy of an electronic record or a paper record. Providing an electronic copy is analogous to providing a paper record: An agency must take reasonable steps to translate the agency's original into a useable copy for the requestor.

The "reasonably translatable" concept typically operates in three kinds of situations:

- (a) An agency has only a paper record;
- (b) An agency has an electronic record in a generally commercially available format (such as a Windows! product); or
- (c) An agency has an electronic record in an electronic format but the requestor seeks a copy in a different electronic format.

The following examples assume no redactions are necessary.

(i) **Agency has paper-only records.** When an agency only has a paper copy of a record, an example of a "reasonably translatable" copy would be scanning the record into an Adobe Acrobat PDF<sup>1</sup> file and providing it to the requestor. The agency could recover its actual cost for scanning. See WAC [44-14-07003](#). Providing a PDF copy of the record is analogous to making a paper copy. However, if the agency lacked a scanner (such as a small unit of local government), the record would not be "reasonably translatable" with the agency's own resources. In such a case, the agency could provide a paper copy to the requestor.

(ii) **Agency has electronic records in a generally commercially available format.** When an agency has an electronic record in a generally commercially available format, such as an Excel<sup>®</sup> spreadsheet, and the requestor requests an electronic copy in that format, no translation into another format is necessary; the agency should provide the spreadsheet electronically. Another example is where an agency has an electronic record in a generally commercially available format (such as Word<sup>®</sup>) and the requestor requests an electronic copy in Word<sup>®</sup>. An agency cannot instead provide a WordPerfect<sup>®</sup> copy because there is no need to translate the electronic record into a different format. In the paper-record context, this would be analogous to the agency intentionally making an unreadable photocopy when it could make a legible one. Similarly, the WordPerfect<sup>®</sup> "translation" by the agency is an attempt to hinder access to the record. In this example, the agency should provide the document in Word<sup>®</sup> format. Electronic records in generally commercially available formats such as Word<sup>®</sup> could be easily altered by the requestor. Requestors should note that altering public records and then intentionally passing them off as exact copies of public records might violate various criminal and civil laws.

(iii) **Agency has electronic records in an electronic format other than the format requested.** When an agency has an electronic record in an electronic format (such as a Word<sup>®</sup> document) but the requestor seeks a copy in another format (such as WordPerfect<sup>®</sup>), the question is whether the agency's document is "reasonably translatable" into the requested format. If the format of the agency document allows it to "save as" another format without changing the substantive accuracy of the document, this would be "reasonably translatable." The agency's record might not translate perfectly, but it was the requestor who requested the record in a format other than the one used by the agency. Another example is where an agency has a data base in a unique format that is not generally commercially available. A requestor requests an electronic copy. The agency can convert the data in its unique system into a near-universal format such as a comma-delimited or tab-delimited format. The requestor can then convert the comma-delimited or tab-delimited data into a data base program (such as Access<sup>®</sup>) and use it. The data in this example is "reasonably translatable" into a comma-delimited or tab-delimited format so the agency should do so. A final example is where an agency has an electronic record in a generally commercially available format (such as Word<sup>®</sup>) but the requestor requests a copy in an obscure word processing format. The agency offers to provide the record in Word<sup>®</sup> format but the requestor refuses. The agency can easily convert the Word<sup>®</sup> document into a standard text file which, in turn, can be converted into most programs. The Word<sup>®</sup> document is "reasonably translatable" into a text file so the agency should do so. It is up to the requestor to convert the text file into his or her preferred format, but the agency has provided access to the electronic record in the most technically feasible way and not attempted to hinder the requestor's access to it.

(3) **Agency should keep an electronic copy of the electronic records it provides.** An electronic record is usually more susceptible to manipulation and alteration than a paper record. Therefore, an agency should keep, when feasible, an electronic copy of the electronic records it provides to a requestor to show the exact records it provided. Additionally, an electronic copy might also be helpful when responding to subsequent electronic records requests for the same records.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05002, filed 6/15/07, effective 7/16/07.]

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#### 44-14-05003

#### Parties should confer on technical issues.

Technical feasibility can vary from request to request. When a request for electronic records involves technical issues, the best approach is for both parties to confer and cooperatively resolve them. Often a telephone conference will be sufficient. This approach is consistent with the requirement that agencies provide the "fullest assistance" to a requestor. RCW 42.56.100 and WAC [44-14-04003\(2\)](#). Furthermore, if a requestor files an enforcement action under the act to obtain the records, the burden of proof is on the agency to justify its refusal to provide the records. RCW 42.56.550(1). If the requestor articulates a reasonable technical alternative to the agency's refusal to provide the records electronically or in the requested format, and the

agency never offered to confer with the requestor, the agency will have difficulty proving that its refusal was justified.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05003, filed 6/15/07, effective 7/16/07.]

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**44-14-05004**  
**Customized access.**

When locating the requested records or translating them into the requested format cannot be done without specialized programming, RCW 43.105.280 allows agencies to charge some fees for "customized access." The statute provides: "Agencies should not offer customized electronic access services as the primary way of responding to requests or as a primary source of revenue." Most public records requests for electronic records can be fulfilled based on the "reasonably locatable" and "reasonably translatable" standards. Resorting to customized access should not be the norm. An example of where "customized access" would be appropriate is if a state agency's old computer system stored data in a manner in which it was impossible to extract the data into comma-delimited or tab-delimited formats, but rather required a programmer to spend more than a nominal amount of time to write computer code specifically to extract it. Before resorting to customized access, the agency should confer with the requestor to determine if a technical solution exists not requiring the specialized programming.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05004, filed 6/15/07, effective 7/16/07.]

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**44-14-05005**  
**Relationship of Public Records Act to court rules on discovery of "electronically stored information."**

The December 2006 amendments to the Federal Rules of Civil Procedure provide guidance to parties in litigation on their respective obligations to provide access to, or produce, "electronically stored information." See Federal Rules of Civil Procedure 26 and 34. The obligations of state and local agencies under those federal rules (and under any state-imposed rules or procedures that adopt the federal rules) to search for and provide electronic records may be different, and in some instances more demanding, than those required under the Public Records Act. The federal discovery rules and the Public Records Act are two separate laws imposing different standards. However, sometimes requestors make public records requests to obtain evidence that later may be used in non-Public Records Act litigation against the agency providing the records. Therefore, it may be prudent for agencies to consult with their attorneys regarding best practices of retaining copies of the records provided under the act so there can be no question later of what was and what was not produced in response to the request in the event that electronic records, or records derived from them, become issues in court.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05005, filed 6/15/07, effective 7/16/07.]

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**44-14-060**  
**Exemptions.**

- (1) The Public Records Act provides that a number of types of documents are exempt from public inspection



and copying. In addition, documents are exempt from disclosure if any "other statute" exempts or prohibits disclosure. Requestors should be aware of the following exemptions, outside the Public Records Act, that restrict the availability of some documents held by (name of agency) for inspection and copying:

(List other laws)

(2) The (agency) is prohibited by statute from disclosing lists of individuals for commercial purposes.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-060, filed 1/31/06, effective 3/3/06.]

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#### 44-14-06001

##### Agency must publish list of applicable exemptions.

An agency must publish and maintain a list of the "other statute" exemptions from disclosure (that is, those exemptions found outside the Public Records Act) that it believes potentially exempt records it holds from disclosure. RCW 42.17.260(2)/42.56.070(2). The list is "for informational purposes" only and an agency's failure to list an exemption "shall not affect the efficacy of any exemption." RCW 42.17.260(2)/42.56.070(2). A list of possible "other statute" exemptions is posted on the web site of the Municipal Research Service Center at [www.mrsc.org/Publications/prdpub04.pdf](http://www.mrsc.org/Publications/prdpub04.pdf) (scroll to Appendix C).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-06001, filed 1/31/06, effective 3/3/06.]

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#### 44-14-06002

##### Summary of exemptions.

(1) **General.** The act and other statutes contain hundreds of exemptions from disclosure and dozens of court cases interpret them. A full treatment of all exemptions is beyond the scope of the model rules. Instead, these comments to the model rules provide general guidance on exemptions and summarize a few of the most frequently invoked exemptions. However, the scope of exemptions is determined exclusively by statute and case law; the comments to the model rules merely provide guidance on a few of the most common issues.

An exemption from disclosure will be narrowly construed in favor of disclosure. RCW 42.17.251/42.56.030. An exemption from disclosure must specifically exempt a record or portion of a record from disclosure. RCW 42.17.260(1)/42.56.070(1). An exemption will not be inferred.<sup>1</sup>

An agency cannot define the scope of a statutory exemption through rule making or policy.<sup>2</sup> An agency agreement or promise not to disclose a record cannot make a disclosable record exempt from disclosure. RCW 42.17.260(1)/42.56.070(1).<sup>3</sup> Any agency contract regarding the disclosure of records should recite that the act controls.

An agency must describe why each withheld record or redacted portion of a record is exempt from disclosure. RCW 42.17.310(4)/42.56.210(4). One way to describe why a record was withheld or redacted is by using a withholding index.

After invoking an exemption in its response, an agency may revise its original claim of exemption in a

response to a motion to show cause.<sup>4</sup>

Exemptions are "permissive rather than mandatory." Op. Att'y Gen. 1 (1980), at 5. Therefore, an agency has the discretion to provide an exempt record. However, in contrast to a waivable "exemption," an agency cannot provide a record when a statute makes it "confidential" or otherwise prohibits disclosure. For example, the Health Care Information Act generally prohibits the disclosure of medical information without the patient's consent. RCW 70.02.020(1). If a statute classifies information as "confidential" or otherwise prohibits disclosure, an agency has no discretion to release a record or the confidential portion of it.<sup>5</sup> Some statutes provide civil and criminal penalties for the release of particular "confidential" records. See RCW 82.32.330(5) (release of certain state tax information a misdemeanor).

(2) **"Privacy" exemption.** There is no general "privacy" exemption. Op. Att'y Gen. 12 (1988).<sup>6</sup> However, a few specific exemptions incorporate privacy as one of the elements of the exemption. For example, personal information in agency employee files is exempt to the extent that disclosure would violate the employee's right to "privacy." RCW 42.17.310 (1)(b)/42.56.210 (1)(b). "Privacy" is then one of the elements, in addition to the others in RCW 42.17.310 (1)(b)/42.56.210 (1)(b), that an agency or a third party resisting disclosure must prove.

"Privacy" is defined in RCW 42.17.255/42.56.050 as the disclosure of information that "(1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." This is a two-part test requiring the party seeking to prevent disclosure to prove both elements.<sup>7</sup>

Because "privacy" is not a stand-alone exemption, an agency cannot claim RCW 42.17.255/42.56.050 as an exemption.<sup>8</sup>

(3) **Attorney-client privilege.** The attorney-client privilege statute, RCW 5.60.060 (2)(a), is an "other statute" exemption from disclosure.<sup>9</sup> In addition, RCW 42.17.310 (1)(j)/42.56.210 (1)(j) exempts attorney work-product involving a "controversy," which means completed, existing, or reasonably anticipated litigation involving the agency.<sup>10</sup> The exact boundaries of the attorney-client privilege and work-product doctrine is beyond the scope of these comments. However, in general, the attorney-client privilege covers records reflecting communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties and an attorney serving in the capacity of legal advisor for the purpose of rendering or obtaining legal advice, and records prepared by the attorney in furtherance of the rendition of legal advice. The attorney-client privilege does not exempt records merely because they reflect communications in meetings where legal counsel was present or because a record or copy of a record was provided to legal counsel if the other elements of the privilege are not met.<sup>11</sup> A guidance document prepared by the attorney general's office on the attorney-client privilege and work-product doctrine is available at [www.atg.wa.gov/records/modelrules](http://www.atg.wa.gov/records/modelrules).

(4) **Deliberative process exemption.** RCW 42.17.310 (1)(i)/42.56.210 (1)(i) exempts "Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended" except if the record is cited by the agency.

In order to rely on this exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.<sup>12</sup> Courts have held that this exemption is "severely limited" by its purpose, which is to protect the free flow of opinions by policy makers.<sup>13</sup> It applies only to those portions of a record containing recommendations, opinions, and proposed policies; it does not apply to factual data contained in the record.<sup>14</sup> The exemption does not apply to records or portions of records concerning the implementation of policy or the factual basis for the policy.<sup>15</sup> The exemption does not apply merely because a record is called a "draft" or stamped "draft." Recommendations

that are actually implemented lose their protection from disclosure after they have been adopted by the agency.<sup>16</sup>

(5) **"Overbroad" exemption.** There is no "overbroad" exemption. RCW 42.17.270/42.56.080. See WAC [44-14-04002\(3\)](#).

(6) **Commercial use exemption.** The act does not allow an agency to provide access to "lists of individuals requested for commercial purposes." RCW 42.17.260(9)/42.56.070(9). An agency may require a requestor to sign a declaration that he or she will not put a list of individuals in the record to use for a commercial purpose.<sup>17</sup> This authority is limited to a list of individuals, not a list of companies.<sup>18</sup> A requestor who signs a declaration promising not to use a list of individuals for a commercial purpose, but who then violates this declaration, could arguably be charged with the crime of false swearing. RCW 9A.72.040.<sup>19</sup>

(7) **Trade secrets.** Many agencies hold sensitive proprietary information of businesses they regulate. For example, an agency might require an applicant for a regulatory approval to submit designs for a product it produces. A record is exempt from disclosure if it constitutes a "trade secret" under the Uniform Trade Secrets Act, chapter 19.108 RCW.<sup>20</sup> However, the definition of a "trade secret" can be very complex and often the facts showing why the record is or is not a trade secret are only known by the potential holder of the trade secret who submitted the record in question.

When an agency receives a request for a record that might be a trade secret, often it does not have enough information to determine whether the record arguably qualifies as a "trade secret." An agency is allowed additional time under the act to determine if an exemption might apply. RCW 42.17.320/42.56.520.

When an agency cannot determine whether a requested record contains a "trade secret," usually it should communicate with the requestor that the agency is providing the potential holder of the trade secret an opportunity to object to the disclosure. The agency should then contact the potential holder of the trade secret in question and state that the record will be released in a certain amount of time unless the holder files a court action seeking an injunction prohibiting the agency from disclosing the record under RCW 42.17.330/42.56.540. Alternatively, the agency can ask the potential holder of the trade secret for an explanation of why it contends the record is a trade secret, and state that if the record is not a trade secret or otherwise exempt from disclosure that the agency intends to release it. The agency should inform the potential holder of a trade secret that its explanation will be shared with the requestor. The explanation can assist the agency in determining whether it will claim the trade secret exemption. If the agency concludes that the record is arguably not exempt, it should provide a notice of intent to disclose unless the potential holder of the trade secret obtains an injunction preventing disclosure under RCW 42.17.330/42.56.540.

As a general matter, many agencies do not assert the trade secret exemption on behalf of the potential holder of the trade secret but rather allow the potential holder to seek an injunction.

Notes: <sup>1</sup>*Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) ("PAWS II").

<sup>2</sup>*Servais v. Port of Bellingham*, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995).

<sup>3</sup>*Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 40, 769 P.2d 283 (1989); *Van Buren v. Miller*, 22 Wn. App. 836, 845, 592 P.2d 671, *review denied*, 92 Wn.2d 1021 (1979).

<sup>4</sup>*PAWS II*, 125 Wn.2d at 253.

<sup>5</sup>Op. Att'y Gen. 7 (1986).

<sup>6</sup>See RCW 42.17.255/42.56.050 ("privacy" linked to rights of privacy "specified in (the act) as express exemptions").

<sup>7</sup>*King County v. Sheehan*, 114 Wn. App. 325, 344, 57 P.3d 307 (2002).

<sup>8</sup>Op. Att'y Gen. 12 (1988), at 3 ("The legislature clearly repudiated the notion that agencies could withhold records based solely on general concerns about privacy.").

<sup>9</sup>*Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004).

<sup>10</sup>*Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993).

<sup>11</sup>This summary comes from the attorney general's proposed definition of the privilege in the first version of House Bill No. 1758 (2005).

<sup>12</sup>*PAWS II*, 125 Wn.2d at 256.

<sup>13</sup>*Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978); *PAWS II*, 125 Wn.2d at 256.

<sup>14</sup>*PAWS II*, 125 Wn.2d at 256.

<sup>15</sup>*Cowles Pub. Co. v. City of Spokane*, 69 Wn. App. 678, 685, 849 P.2d 1271 (1993).

<sup>16</sup>*Dawson*, 120 Wn.2d at 793.

<sup>17</sup>Op. Att'y Gen. 12 (1988). However, a list of individuals applying for professional licensing or examination may be provided to professional associations recognized by the licensing or examination board. RCW 42.17.260(9)/42.56.070(9).

<sup>18</sup>Op. Att'y Gen. 2 (1998).

<sup>19</sup>RCW 9A.72.040 provides: "(1) A person is guilty of false swearing if he makes a false statement, which he knows to be false, under an oath required or authorized by law. (2) False swearing is a gross misdemeanor." RCW 42.17.270/42.56.080 authorizes an agency to determine if a requestor will use a list of individuals for commercial purpose. See Op. Att'y Gen. 12 (1988), at 10-11 (agency could require requestor to sign affidavit of noncommercial use).

<sup>20</sup>*PAWS II*, 125 Wn.2d at 262.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-06002, filed 1/31/06, effective 3/3/06.]

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#### 44-14-070

#### Costs of providing copies of public records.

(1) **Costs for paper copies.** There is no fee for inspecting public records. A requestor may obtain standard black and white photocopies for (amount) cents per page and color copies for (amount) cents per page.

(If agency decides to charge more than fifteen cents per page, use the following language:) The (name of agency) charges (amount) per page for a standard black and white photocopy of a record selected by a requestor. A statement of the factors and the manner used to determine this charge is available from the public records officer.

Before beginning to make the copies, the public records officer or designee may require a deposit of up to ten percent of the estimated costs of copying all the records selected by the requestor. The public records officer or designee may also require the payment of the remainder of the copying costs before providing all the records, or the payment of the costs of copying an installment before providing that installment. The (name of agency) will not charge sales tax when it makes copies of public records.

(2) **Costs for electronic records.** The cost of electronic copies of records shall be (amount) for information on a CD-ROM. (If the agency has scanning equipment at its offices: The cost of scanning existing (agency) paper or other nonelectronic records is (amount) per page.) There will be no charge for e-mailing

electronic records to a requestor, unless another cost applies such as a scanning fee.

(3) **Costs of mailing.** The (name of agency) may also charge actual costs of mailing, including the cost of the shipping container.

(4) **Payment.** Payment may be made by cash, check, or money order to the (name of agency).

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-070, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-070, filed 1/31/06, effective 3/3/06.]

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#### 44-14-07001

##### General rules for charging for copies.

(1) **No fees for costs of inspection.** An agency cannot charge a fee for locating public records or for preparing the records for inspection or copying. RCW 42.17.300/42.56.120.<sup>1</sup> An agency cannot charge a "redaction fee" for the staff time necessary to prepare the records for inspection, for the copying required to redact records before they are inspected, or an archive fee for getting the records from offsite. Op. Att'y Gen. 6 (1991). These are the costs of making the records available for inspection or copying and cannot be charged to the requestor.

(2) **Standard photocopy charges.** Standard photocopies are black and white 8x11 paper copies. An agency can choose to calculate its copying charges for standard photocopies or to opt for a default copying charge of no more than fifteen cents per page.

If it attempts to charge more than the fifteen cents per page maximum for photocopies, an agency must establish a statement of the "actual cost" of the copies it provides, which must include a "statement of the factors and the manner used to determine the actual per page cost." RCW 42.17.260(7)/42.56.070(7). An agency may include the costs "directly incident" to providing the copies such as paper, copying equipment, and staff time to make the copies. RCW 42.17.260 (7)(a)/42.56.070 (7)(a).<sup>2</sup> An agency failing to properly establish a copying charge in excess of the default fifteen cents per page maximum is limited to the default amount. RCW 42.17.260 (7)(a) and (b)/42.56.070 (7)(a) and (b) and 42.17.300/42.56.120.

If it charges more than the default rate of fifteen cents per page, an agency must provide its calculations and the reasoning for its charges. RCW 42.17.260(7)/42.56.070(7) and 42.17.300 /42.56.120.<sup>3</sup> A price list with no analysis is insufficient. An agency's calculations and reasoning need not be elaborate but should be detailed enough to allow a requestor or court to determine if the agency has properly calculated its copying charges. An agency should generally compare its copying charges to those of commercial copying centers.

If an agency opts for the default copying charge of fifteen cents per page, it need not calculate its actual costs. RCW 42.17.260(8)/42.56.070(8).

(3) **Charges for copies other than standard photocopies.** Nonstandard copies include color copies, engineering drawings, and photographs. An agency can charge its actual costs for nonstandard photocopies. RCW 42.17.300/42.56.120. For example, when an agency provides records in an electronic format by putting the records on a disk, it may charge its actual costs for the disk. The agency can provide a requestor with documentation for its actual costs by providing a catalog or price list from a vendor.

(4) **Copying charges apply to copies selected by requestor.** Often a requestor will seek to inspect a large number of records but only select a smaller group of them for copying. Copy charges can only be charged for the records selected by the requestor. RCW 42.17.300/42.56.120 (charges allowed for "providing" copies to requestor).

The requestor should specify whether he or she seeks inspection or copying. The agency should inform the requestor that inspection is free. This can be noted on the agency's request form. If the requestor seeks copies, then the agency should inform the requestor of the copying charges for the request. An agency should not assemble a large number of records, fail to inform the requestor that inspection is free, and then attempt to charge for copying all the records.

Sometimes a requestor will choose to pay for the copying of a large batch of records without inspecting them. This is allowed, provided that the requestor is informed that inspection is free. Informing the requestor on a request form that inspection is free is sufficient.

(5) **Use of outside vendor.** An agency is not required to copy records at its own facilities. An agency can send the project to a commercial copying center and bill the requestor for the amount charged by the vendor. An agency is encouraged to do so when an outside vendor can make copies more quickly and less expensively than an agency. An agency can arrange with the requestor for him or her to pay the vendor directly. An agency cannot charge the default fifteen cents per page rate when its "actual cost" at a copying vendor is less. The default rate is only for agency-produced copies. RCW 42.17.300/42.56.120.

(6) **Sales tax.** An agency cannot charge sales tax on copies it makes at its own facilities. RCW 82.12.02525.

(7) **Costs of mailing.** If a requestor asks an agency to mail copies, the agency may charge for the actual cost of postage and the shipping container (such as an envelope). RCW 42.17.260 (7)(a)/42.56.070 (7)(a).

Notes: <sup>1</sup> See *also* Op. Att'y Gen. 6 (1991).

<sup>2</sup> The costs of staff time is allowed only for making copies. An agency cannot charge for staff time for locating records or other noncopying functions. See RCW 42.17.300/42.56.120 ("No fee shall be charged for locating public documents and making them available for copying.").

<sup>3</sup> See *also* Op. Att'y Gen. 6 (1991) (agency must "justify" its copy charges).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07001, filed 1/31/06, effective 3/3/06.]

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#### **44-14-07003** **Charges for electronic records.**

Providing copies of electronic records usually costs the agency and requestor less than making paper copies. Agencies are strongly encouraged to provide copies of electronic records in an electronic format. See RCW 43.105.250 (encouraging state and local agencies to make "public records widely available electronically to the public."). As with charges for paper copies, "actual cost" is the primary factor for charging for electronic records. In many cases, the "actual cost" of providing an existing electronic record is de minimis. For example, a requestor requests an agency to e-mail an existing Excel<sup>®</sup> spreadsheet. The agency should not charge for the de minimis cost of electronically copying and e-mailing the existing spreadsheet. The agency cannot attempt to charge a per-page amount for a paper copy when it has an electronic copy that can be easily provided at nearly no cost. However, if the agency has a paper-only copy of a record and the requestor requests an Adobe Acrobat PDF<sup>®</sup> copy, the agency incurs an actual cost in scanning the record (if the agency has a scanner at its offices). Therefore, an agency can establish a scanning fee for records it scans. Agencies are encouraged to compare their scanning and other copying charges to the rates of outside vendors. See WAC [44-14-07001](#).

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-07003, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07003, filed 1/31/06, effective 3/3/06.]

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#### **44-14-07004** **Other statutes govern copying of particular records.**

The act generally governs copying charges for public records, but several specific statutes govern charges for particular kinds of records. RCW 42.17.305/42.56.130. The following nonexhaustive list provides some examples: RCW 46.52.085 (charges for traffic accident reports), RCW 10.97.100 (copies of criminal histories), RCW 3.62.060 and 3.62.065 (charges for certain records of municipal courts), and RCW 70.58.107 (charges for birth certificates).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07004, filed 1/31/06, effective 3/3/06.]

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#### **44-14-07005** **Waiver of copying charges.**

An agency has the discretion to waive copying charges. For administrative convenience, many agencies waive copying charges for small requests. For example, the attorney general's office does not charge copying fees if the request is for twenty-five or fewer standard photocopies.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07005, filed 1/31/06, effective 3/3/06.]

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#### **44-14-07006** **Requiring partial payment.**

(1) **Copying deposit.** An agency may charge a deposit of up to ten percent of the estimated copying costs of an entire request before beginning to copy the records. RCW 42.17.300/42.56.120.<sup>1</sup> The estimate must be reasonable. An agency can require the payment of the deposit before copying an installment of the records or the entire request. The deposit applies to the records selected for copying by the requestor, not all the records made available for inspection. An agency is not required to charge a deposit. An agency might find a deposit burdensome for small requests where the deposit might be only a few dollars. Any unused deposit must be refunded to the requestor.

When copying is completed, the agency can require the payment of the remainder of the copying charges before providing the records. For example, a requestor makes a request for records that comprise one box of paper documents. The requestor selects the entire box for copying. The agency estimates that the box contains three thousand pages of records. The agency charges ten cents per page so the cost would be three hundred dollars. The agency obtains a ten percent deposit of thirty dollars and then begins to copy the records. The total number of pages turns out to be two thousand nine hundred so the total cost is two hundred ninety dollars. The thirty dollar deposit is credited to the two hundred ninety dollars. The agency requires payment of the remaining two hundred sixty dollars before providing the records to the requestor.

(2) **Copying charges for each installment.** If an agency provides records in installments, the agency may charge and collect all applicable copying fees (not just the ten percent deposit) for each installment. RCW

42.17.300/42.56.120. The agency may agree to provide an installment without first receiving payment for that installment.

Note: <sup>1</sup>See RCW 42.17.300/42.56.120 (ten percent deposit for "a request").

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07006, filed 1/31/06, effective 3/3/06.]

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**44-14-080**  
**Review of denials of public records.**

(1) **Petition for internal administrative review of denial of access.** Any person who objects to the initial denial or partial denial of a records request may petition in writing (including e-mail) to the public records officer for a review of that decision. The petition shall include a copy of or reasonably identify the written statement by the public records officer or designee denying the request.

(2) **Consideration of petition for review.** The public records officer shall promptly provide the petition and any other relevant information to (public records officer's supervisor or other agency official designated by the agency to conduct the review). That person will immediately consider the petition and either affirm or reverse the denial within two business days following the (agency's) receipt of the petition, or within such other time as (name of agency) and the requestor mutually agree to.

(3) **(Applicable to state agencies only.) Review by the attorney general's office.** Pursuant to RCW 42.17.325/42.56.530, if the (name of state agency) denies a requestor access to public records because it claims the record is exempt in whole or in part from disclosure, the requestor may request the attorney general's office to review the matter. The attorney general has adopted rules on such requests in WAC 44-06-160.

(4) **Judicial review.** Any person may obtain court review of denials of public records requests pursuant to RCW 42.17.340/42.56.550 at the conclusion of two business days after the initial denial regardless of any internal administrative appeal.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-080, filed 1/31/06, effective 3/3/06.]

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**44-14-08001**  
**Agency internal procedure for review of denials of requests.**

The act requires an agency to "establish mechanisms for the most prompt possible review of decisions denying" records requests. RCW 42.17.320/42.56.520. An agency internal review of a denial need not be elaborate. It could be reviewed by the public records officer's supervisor, or other person designated by the agency. The act deems agency review to be complete two business days after the initial denial, after which the requestor may obtain judicial review. Large requests or requests involving many redactions may take longer than two business days for the agency to review. In such a case, the requestor could agree to a longer internal review period.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-08001, filed 1/31/06, effective 3/3/06.]



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#### 44-14-08002

##### Attorney general's office review of denials by state agencies.

The attorney general's office is authorized to review a state agency's claim of exemption and provide a written opinion. RCW 42.17.325/42.56.530. This only applies to state agencies and a claim of exemption. See WAC 44-06-160. A requestor may initiate such a review by sending a request for review to Public Records Review, Office of the Attorney General, P.O. Box 40100, Olympia, Washington 98504-0100 or publicrecords@atg.wa.gov.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-08002, filed 1/31/06, effective 3/3/06.]

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#### 44-14-08003

##### Alternative dispute resolution.

Requestors and agencies are encouraged to resolve public records disputes through alternative dispute resolution mechanisms such as mediation and arbitration. No mechanisms for formal alternative dispute resolution currently exist in the act but parties are encouraged to resolve their disputes without litigation.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-08003, filed 1/31/06, effective 3/3/06.]

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#### 44-14-08004

##### Judicial review.

(1) **Seeking judicial review.** The act provides that an agency's decision to deny a request is final for purposes of judicial review two business days after the initial denial of the request. RCW 42.17.320/42.56.520.<sup>1</sup> Therefore, the statute allows a requestor to seek judicial review two business days after the initial denial whether or not he or she has exhausted the internal agency review process.<sup>2</sup> An agency should not have an internal review process that implies that a requestor cannot seek judicial review until internal reviews are complete because RCW 42.17.320/42.56.520 allows judicial review two business days after the initial denial.

The act provides a speedy remedy for a requestor to obtain a court hearing on whether the agency has violated the act. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2). The purpose of the quick judicial procedure is to allow requestors to expeditiously find out if they are entitled to obtain public records.<sup>3</sup> To speed up the court process, a public records case may be decided merely on the "motion" of a requestor and "solely on affidavits." RCW 42.17.340 (1) and (3)/42.56.550 (1) and (3).

(2) **Statute of limitations.** The statute of limitations for an action under the act is one year after the agency's claim of exemption or the last production of a record on a partial or installment basis. RCW 42.17.340(6)/42.56.550(6).

(3) **Procedure.** To initiate court review of a public records case, a requestor can file a "motion to show cause" which directs the agency to appear before the court and show any cause why the agency did not

violate the act. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2).<sup>4</sup> The case must be filed in the superior court in the county in which the record is maintained. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2). In a case against a county, the case may be filed in the superior court of that county, or in the superior court of either of the two nearest adjoining counties. RCW 42.17.340(5)/42.56.550(5). The show-cause procedure is designed so that a nonattorney requestor can obtain judicial review himself or herself without hiring an attorney. A requestor can file a motion for summary judgment to adjudicate the case.<sup>5</sup> However, most cases are decided on a motion to show cause.<sup>6</sup>

(4) **Burden of proof.** The burden is on an agency to demonstrate that it complied with the act. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2).

(5) **Types of cases subject to judicial review.** The act provides three mechanisms for court review of a public records dispute.

(a) **Denial of record.** The first kind of judicial review is when a requestor's request has been denied by an agency. RCW 42.17.340(1)/42.56.550(1). This is the most common kind of case.

(b) **"Reasonable estimate."** The second form of judicial review is when a requestor challenges an agency's "reasonable estimate" of the time to provide a full response. RCW 42.17.340(2)/42.56.550(2).

(c) **Injunctive action to prevent disclosure.** The third mechanism of judicial review is an injunctive action to restrain the disclosure of public records. RCW 42.17.330/42.56.540. An action under this statute can be initiated by the agency, a person named in the disputed record, or a person to whom the record "specifically pertains." The party seeking to prevent disclosure has the burden of proving the record is exempt from disclosure.<sup>7</sup> The party seeking to prevent disclosure must prove both the necessary elements of an injunction and that a specific exemption prevents disclosure.<sup>8</sup>

(6) **"In camera" review by court.** The act authorizes a court to review withheld records or portions of records "in camera." RCW 42.17.340(3)/42.56.550(3). "In camera" means a confidential review by the judge alone in his or her chambers. Courts are encouraged to conduct an in camera review because it is often the only way to determine if an exemption has been properly claimed.<sup>9</sup>

An agency should prepare an in camera index of each withheld record or portion of a record to assist the judge's in camera review. This is a second index, in addition to a withholding index provided to the requestor. The in camera index should number each withheld record or redacted portion of the record, provide the unredacted record or portion to the judge with a reference to the index number, and provide a brief explanation of each claimed exemption corresponding to the numbering system. The agency's brief explanation should not be as detailed as a legal brief because the opposing party will not have an opportunity to review it and respond. The agency's legal briefing should be done in the normal course of pleadings, with the opposing party having an opportunity to respond.

The in camera index and disputed records or unredacted portions of records should be filed under seal. The judge should explain his or her ruling on each withheld record or redacted portion by referring to the numbering system in the in camera index. If the trial court's decision is appealed, the in camera index and its attachments should be made part of the record on appeal and filed under seal in the appellate court.

(7) **Attorneys' fees, costs, and penalties to prevailing requestor.** The act requires an agency to pay a prevailing requestor's reasonable attorneys' fees, costs, and a daily penalty. RCW 42.17.340(4)/42.56.550(4). Only a requestor can be awarded attorneys' fees, costs, or a daily penalty under the act; an agency or a third party resisting disclosure cannot.<sup>10</sup> A requestor is the "prevailing" party when he or she obtains a judgment in his or her favor, the suit was reasonably necessary to obtain the record, or a wrongfully withheld record was provided for another reason.<sup>11</sup> In an injunctive action under RCW 42.17.330/42.56.540, the prevailing requestor cannot be awarded attorneys' fees, costs, or a daily penalty against an agency if the agency took the position that the record was subject to disclosure.<sup>12</sup>

The purpose of the act's attorneys' fees, costs, and daily penalty provisions is to reimburse the requestor for vindicating the public's right to obtain public records, to make it financially feasible for requestors to do so, and to deter agencies from improperly withholding records.<sup>13</sup> However, a court is only authorized to award "reasonable" attorneys' fees. RCW 42.17.340(4)/42.56.550(4). A court has discretion to award attorneys' fees based on an assessment of reasonable hourly rates and which work was necessary to obtain the favorable result.<sup>14</sup>

The award of "costs" under the act is for all of a requestor's nonattorney-fee costs and is broader than the court costs awarded to prevailing parties in other kinds of cases.<sup>15</sup>

A daily penalty of between five dollars to one hundred dollars must be awarded to a prevailing requestor, regardless of an agency's "good faith."<sup>16</sup> An agency's "bad faith" can warrant a penalty on the higher end of this scale.<sup>17</sup> The penalty is per day, not per-record per-day.<sup>18</sup>

Notes: <sup>1</sup>*Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) ("PAWS II") (RCW 42.17.320/42.56.520 "provides that, regardless of internal review, initial decisions become final for purposes of judicial review after two business days.").

<sup>2</sup>See, e.g., WAC 44-06-120 (attorney general's office internal review procedure specifying that review is final when the agency renders a decision on the appeal, or the close of the second business day after it receives the appeal, "whichever occurs first").

<sup>3</sup>*Spokane Research & Def. Fund v. City of Spokane*, 121 Wn. App. 584, 591, 89 P.3d 319 (2004), reversed on other grounds, 155 Wn.2d 89, 117 P.3d 1117 (2005) ("The purpose of the PDA is to ensure speedy disclosure of public records. The statute sets forth a simple procedure to achieve this.").

<sup>4</sup>See generally *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005).

<sup>5</sup>*Id.* at 106.

<sup>6</sup>*Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003).

<sup>7</sup>*Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 735, 744, 958 P.2d 260 (1998).

<sup>8</sup>PAWS II, 125 Wn.2d at 257-58.

<sup>9</sup>*Spokane Research & Def. Fund v. City of Spokane*, 96 Wn. App. 568, 577 & 588, 983 P.2d 676 (1999), review denied, 140 Wn.2d 1001, 999 P.2d 1259 (2000).

<sup>10</sup>RCW 42.17.340(4)/42.56.550(4) (providing award only for "person" prevailing against "agency"); *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691-92, 13 P.3d 1104 (2000) (third party resisting disclosure not entitled to award).

<sup>11</sup>*Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, 59 P.3d 109 (2002); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 104, 117 P.3d 1117 (2005).

<sup>12</sup>*Confederated Tribes*, 135 Wn.2d at 757.

<sup>13</sup>*Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999) ("ACLU II") ("permitting a liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access to public records.").

<sup>14</sup>*Id.* at 118.

<sup>15</sup>*Id.* at 115.

<sup>16</sup>*American Civil Liberties Union v. Blaine School Dist. No. 503*, 86 Wn. App. 688, 698-99, 937 P.2d 1176 (1997) ("ACLU I").

<sup>17</sup>*Id.*

<sup>18</sup>*Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-08004, filed 1/31/06, effective 3/3/06.]

<b>Ordinance Section</b>	<b>Effect</b>	<b>Type of change</b>
Sec. 1	Defines agency to include executive, council, sheriff or prosecuting attorney Defines "official", "public" and "archival" records Defines "public record officer"	NEW TECH Moved from K.C.C. 2.12.050 NEW
Sec. 2	Amends code to provide that clerk of the council is responsible for records of council proceedings	NEW
Sec. 3	Requires that council records should be stored in the Archives for permanent retention	Clarification
Sec. 4	Outlines responsibilities of the archives and records management program Designates that the records retention schedules are to serve as public records index	TECH Clarification
	Designates Archives as the official repository of the county's records, but that Archives may send records to state for permanent retention	Clarification
Sec. 5	Places responsibility for maintaining a records retention and public disclosure manual on the Depart. of Exec. Servs.	New Changed from archives and records management section
Sec. 6	Repeals K.C.C. 2.12.050	TECH

Sec. 7	Clarifies that retention of public and official records is in accordance with RCW			Moved to K.C.C. 2.12.005 Clarification
Sec. 8	Places responsibility for furnishing copies of annual budget in office of management and budget		Moved from office of county administrator; price of copy remains at \$5	NEW
Sec. 9	Corrects name of records and licensing services division			TECH
Sec. 10	Repeals 2.12.090			TECH Provisions moved to secs. 1, 18, 21
Sec. 11	Repeals 2.12.110			TECH Provisions moved to sec. 25
Sec. 12	Repeals 2.12.115, which required that exec establish policy for electronic copies of records			TECH Policy has been established by ordinance and statute
Sec. 13	Corrects name of records and licensing services division and ties fees for particular recording services to RCW			TECH
Sec. 14	Recodifies 2.12.160 in K.C.C. chapter 4.08			TECH
Sec. 15	Corrects name of records and licensing services division			TECH
Sec. 16	Repeals 2.12.190			TECH Provision moved to sec. 4
Sec. 17	Repeals 2.12.200			TECH Exemptions from disclosure now in sec. 24

Sec. 18	Sets out that sec. 19 – 25 are the rules on records; affirmatively does not adopt model rules (ch. 44-14 WAC); Defines KC as "home rule charter county composed of multiple agencies"		NEW
Sec. 19	Sets out -purpose of chapter: "to establish procedures the county will follow in order to provide full access to public records" -intent of chapter: "interpreted in favor of disclosure"		NEW
Sec. 20	Requires each agency to appoint a public records officer (PRO) and sets out duties of PRO		NEW
Sec. 21	B. "A request to one agency does not constitute a request to any other agency. A separate request must be made to each agency..." Availability of public records and indexes; process for requesting records; cost for copies as set forth in RCW		NEW
Sec. 22	Sets out process for responding to paper records requests		NEW

**Proposed Ordinance on Public Records Requests and Retention**

	Provides an appeal process for agency exempting a record		
Sec. 23.	Process for responding to electronic records requests		NEW
Sec. 24	Exemptions; refers to list maintained by Municipal Research and Services Center of Washington		NEW (modeled after Pierce County)
Sec. 25	Fees and costs		NEW Relies on RCW for costs of various kinds of records; no fee to inspect records
Sec. 26	Appeal process		NEW Provides that an appeal of a decision to exempt or partially exempt a record can be made to the Public Records Officer's supervisor and, if no satisfaction, to Superior Court



## Best practices identified during the audit

We observed during the audit that entities that receive a large volume of public records requests are beginning to use many of the practices found in the Attorney General's Office model rules to address the public's perception of accountability and transparency.

Our audit identified elements and processes we consider to be best practices in responding to public records requests. Some of these also are found in the Attorney General's Office model rules and are addressed in the audit findings. They are:

- **Entity management's attitude** toward customer service partly determines how it will respond to public records requests. This element is addressed in the Attorney General's Office model rules with an overall goal of establishing a "culture of compliance" for the public entities and a "culture of cooperation" among the requestors. Public records officers and coordinators stated that when public records requests are given a priority, it positively affects the entity's efficiency and effectiveness in filling those requests. An entity with a commitment to customer service and that responds to records requests in a positive manner demonstrates the entity's commitment to accountability and transparency. Such an entity will likely diffuse tension, reduce conflict, and more importantly build goodwill and trust with the public. A positive attitude is also demonstrated when entities follow up after the request has been filled to ensure that the information requested was provided and useful to the requestor.
- **Training** is necessary to an entity's success in responding to records requests. An entity must be knowledgeable of the Act and of exemptions to public disclosure.

Public records training should extend beyond the entity's management and supervisors. Entities should provide training to all entity staff likely to encounter members of the public requesting public records. For example, training should be provided to front-line staff who come into daily contact with the public to assist them in recognizing when a request/inquiry from the public should be considered a records request.

When all appropriate entity staff receive training in the Public Records Act and in their own entities' policies, they are in a better position to provide the fullest assistance to the public and to take the most timely possible action in responding to requests.

- **Prioritizing requests.** When a records request is received, entities should assess its complexity. Requests that are easy to accommodate should be processed more quickly than the larger and more complex requests. Entities should avoid the "one size fits all" approach to responding to public records requests.

In the case of more complex records requests, entities may want to do a more detailed evaluation to determine the record's existence, location, sensitivity to exemptions and the time needed to locate the records and then get them to the requestor. The Act, however requires the entity to acknowledge the request within five business days, and states if the record(s) can't be provided at that time, a

reasonable estimate of when the records will be provided must be given.

- **Tracking requests.** Agencies should have a process for tracking requests that begins when the request is received. Tracking requests reduces the risk of losing or overlooking requests, can speed up responsiveness and provides a paper trail in the event of disputes. All entities indicated they had a variety of mechanisms established for tracking requests received, however these ranged from informal, manual tracking to database software applications. The level of sophistication was determined by the quantity of requests an entity receives. Further, these vary based on the department or office within the entity.
- **Effective monitoring.** Effectively managing and monitoring records requests from receipt to completion provides a more timely and complete response to requests. Further, monitoring public records requests helps verify that record(s) provided were reviewed for consistency with the letter of the request(s) prior to being provided to the requestor(s). This was evident from the number of requests that received correct responses, as noted in our “Overall Results in Appendix J.”
- **Monitoring e-mail blocked by e-mail filters.** Effective monitoring of incoming e-mails ensures e-mails of a legitimate business nature are identified and provides improved assurance the entity will be responsive to records requests.
- **Central point of contact for public records.** The administration of public records should be centralized in some fashion to improve effective monitoring of the entity's efficiency and effectiveness in responding to public records requests. The concept of centralization is more than the entity using a central location for public records administration. For large and complex entities, centralization can occur when the departments, offices, or divisions have separately designated public records officers and elected officials who field and process requests specific to their offices.

Regardless of the entity's organizational structure, it is important that no matter where the request is received, the request must be referred internally to the appropriate department, office or division. The entity should avoid redirecting the requestor to another department, office or division.

Our analysis of the responsiveness of the entities using centralized monitoring systems versus those with a decentralized monitoring process shows centralized methods were more likely to provide correct responses. Entities who exhibited centralized processing functions are as follows:

- City of Bellevue
- City of Kent
- City of Spokane Valley
- City of Vancouver
- City of Yakima
- Clark County
- Kitsap County
- Snohomish County
- Spokane County
- Whatcom County
- Yakima County
- All 10 State Agencies

- Visible signage. Providing signage to assist requestors in directing their requests provides a customer-friendly atmosphere and demonstrates a culture of openness. Entities should evaluate signage to determine if it assists the public in making successful public records requests. For example, Kitsap County's administration building houses a kiosk with a touch screen listing all services provided by the County, including public disclosure requests. Entities where visible signage was observed by those who submitted our walk-in requests were:
  - Pierce County
  - Kitsap County
  - City of Seattle
  - City of Tacoma
  - City of Yakima
  - Department of General Administration
- **Transparency and communication.** Providing tools such as a Web site to assist requestors is a best practice that should be considered. Keeping requestors informed of the status of their requests, in particular, seeking clarification of the requests and/or requesting additional time to fulfill the request(s) demonstrates accountability and transparency. Providing an accurate and reasonable estimate of when the records will be provided is also critical. One challenge identified in our interviews result from instances when the entity seeks clarification from the requestor to ensure the specific elements of the request are being addressed. Entities expressed concern about balancing the need for clarification while avoiding asking the requestors "why" they are making the request. We observed entity responses which exceeded the intent of the request. We identified these as best practices. In summary, requestor expectations are exceeded when the entity provides additional information identified during gathering which may help the requestor, or provide detailed communication to ensure the requestor is informed throughout the process.
- **User-friendly Web site.** When entities provide guidance and information to the public for making public records request on its Web site, this communicates a culture of openness to the public and reinforces the entity's commitment to accountability and transparency. Conversely, when an entity does not provide this kind of information on its Web site, potential requestors may become frustrated and question the entity's commitment to openness, accountability and transparency. Our audit discovered a number of entities that use Web sites to provide assistance in making an effective public records request. One of the best examples we found was Whatcom County's Web site (<http://www.whatcomcounty.us/publicrecords/>), which provides a direct link to the county's Public Records Officer under a heading of "Hot Topics". The county's "Public Disclosure Information" page provides extensive information to assist the public in submitting a public records request; For example:
  - Public Records Officer's name, address, phone number, fax number and e-mail address.
  - Electronic public records request form.
  - Link to the County's public records policy
  - Link to the Public Records Act
  - Link to a listing of exempt records
  - Link to other laws that define exempt records
  - List of online sources of public records
  - Cost for copying public records
  - Role of the Public Records Officer

- Summary of key elements of the County's public record's policy

Other entities whose Web sites were easy to use during our initial planning included:

- City of Bellevue
- City of Everett
- City of Federal Way
- City of Kent
- City of Seattle
- City of Spokane
- City of Spokane Valley
- City of Tacoma
- City of Vancouver
- Clark County
- King County
- Kitsap County
- Snohomish County
- Spokane County
- Whatcom County
- Department of Revenue
- Department of Corrections
- Department of Labor and Industries\*
- Office of the Insurance Commissioner
- Washington State Patrol

\*We noted the Department of Labor and Industries Web site received national recognition in winning the 2005 "People's Voice" Webby award for Insurance related sites (See [http://www.webbyawards.com/webbys/winners-2005.php#webby\\_entry\\_government](http://www.webbyawards.com/webbys/winners-2005.php#webby_entry_government))

- Records management and information technology. The use of information technology can assist entities in being more responsive to records requests and demonstrates transparency and accountability. Specifically, providing commonly requested public records on Web sites is in our opinion, a best practice based on the results of our unannounced records requests.

Public Records Officers and Coordinators told us that they want their entities to convert more records to electronic form, which would facilitate retrieval and expedite the process of providing records to the public. We believe this was verified by the results of our unannounced requests, in which a number of entities provided the requested records to us in a timely manner using the e-mail addresses we provided in our requests.

During our audit, 23 percent of the requests we made via e-mail were nonresponsive. While the Open Public Records Act does not specifically address e-mail requests, public entities are to provide the fullest assistance to requestors and take the most timely possible action in responding to requests. Entities that do not accept public records requests electronically may want to reassess this position, as it appears to conflict with the spirit of the Act and Attorney General's Office's model rules. Public entities should consider establishing an e-mail address dedicated to public records requests and provide that address on their Web sites. During our audit, we noted some entities are using filters to trap unwanted e-mails. One way to avoid issues with e-mail being filtered is the use of a Web form to be used for making records requests. See Finding 2 for additional discussion of this element.

- **Copying charges.** For entities with established policies on charges for copies of public records should consider establishing a de minimis copy policy, which states that if it costs more to charge requestors for records than it costs to reproduce the records, the entity will waive copying charges. We estimate the cost of processing copy fee payments by an entity at approximately \$4 just for labor. This estimate is based on the assumption that it takes approximately 20 minutes for an employee, averaging an hourly pay rate of approximately \$12 - \$14, to make copies. Therefore charging for copies for amounts totaling less than the \$4, would be less costly to the entity if the copying fees were waived, based on these assumptions. Entities are encouraged to assess their costs in processing payments and develop their own thresholds as costs and time can differ from one entity to another.

We prepared a simple analysis for determining when it is more cost effective to waive copying charges for small records requests.

RCW 42.56.120 permits an agency to charge a maximum of 15 cents per page unless that agency has established and published the actual costs of copying. In the event the agency determines its own fee rate, the law stipulates that it may not include amounts for “locating public documents and making them available for copying.”

Nineteen of the 30 entities charged for records in at least one instance. Because 15 of these 19 (79 percent) charged the standard 15 cents per page, we opted to use this rate for our analysis.

We estimate it takes roughly 20 minutes of employee time to prepare and mail an invoice and to receipt and record the subsequent payment. Developing a conservative estimate, we used an hourly rate of \$12.63 determined by averaging the middle ranges (steps F and G) for an Office Assistant 1 (\$11.91 and \$12.18, respectively) and a Fiscal Technician 1 (\$13.06 and \$13.36, respectively) as shown on the state’s Department of Personnel website.

The break-even calculation is shown as follows:

Break-even based on the number of pages provided (at \$0.15 per copy):

$$\begin{aligned} \$0.15x &= \$12.63 \times (20 \text{ minutes} \div 60 \text{ minutes}) \\ x &\approx 28 \text{ pages} \end{aligned}$$

Determining the costs associates with processing payment for copies charged by entities in establishing a “break-even” point:

$$\begin{aligned} x &= \$12.63 \times (20 \text{ minutes} \div 60 \text{ minutes}) \\ x &= \$4.21 \end{aligned}$$

Conclusion: This analysis implies that it is inefficient to charge requestors for requests of fewer than 28 pages when using the standard 15 cents per page. Further, if total fees sought are less than \$4.21, the costs associated with processing the payment alone will likely not be recovered by the fees collected.

- Using the installment method for large public records requests. The intent of the installment method is to allow an entity to respond to requests without adversely impacting its operations.

In 2005, the Legislature authorized agencies to ask requestors to pay deposits on copying charges and to respond to records requests in installments. For large records requests, a public entity may require a deposit of not more than 10 percent of the estimated cost of providing copies. If a public entity makes a request available in installments, the entity may charge for each part of the request as it is provided. If an installment is not claimed or reviewed, the public entity is not obligated to fulfill the balance of the request. When considering using the installment method, the entity should seek clarification from the requestor because the information the requestor is seeking may not require the volume of records originally requested. However, in any event, the entity should provide the records in the most timely possible manner.

- Communicate the appeals process for records denials. If a public records request is denied or the requestor believes records were improperly redacted, it is important the entity provide the requestor information about the appeal process available that would allow for an independent assessment of the denial. From our analysis of the responses to our unannounced records requests and in our interviews, we noted that some entities, as a matter of policy, do not inform the requestor of their rights to appeal if a request is denied. The table below details those entities who communicated the appeals process to the requestor in their response.
- Documenting the request process. It is important for entities to set up a system to create a record of the request. In the event a denied request is litigated, documenting the process provides a paper trail of what happened with the request. See finding 1 for the entities who told us they sent information but did not keep a record of the communication.

Other best practices observed at the entities during the audit are presented below:

May 27, 2009

The Honorable Dow Constantine  
Chair, King County Council  
Room 1200  
C O U R T H O U S E

Dear Councilmember Constantine:

I am pleased to transmit for King County Council review and approval an ordinance relating to public records and records retention, amending Ordinance 10698, and sections of King County Code Chapter 2.12.

The proposed amendment clarifies and makes technical changes to King County Code §2.12 in addition to adding new sections relating to the Public Records Act. Specifically, in response to the Attorney General's Model Rules this proposed ordinance seeks to clarify the policies surrounding how public records requests are handled in King County.

This amendment is a collaborative product from a team composed of the Clerk of the Council, King County Code Reviser, Records and Licensing Services Division, King County Public Disclosure Officer, and the Prosecuting Attorney's Office. The proposed ordinance was reviewed, commented on, and recommended for approval by the county's Public Records Committee.

The Honorable Dow Constantine

May 27, 2009

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There is no cost associated with this proposed ordinance and I recommend your approval.

Should you have any questions please call Carolyn Ableman, Director, Records and Licensing Services Division at 206-296-3185.

Sincerely,

Kurt Triplett  
King County Executive

Enclosures:

cc: King County Councilmembers  
ATTN: Tom Bristow, Interim Chief of Staff  
Saroja Reddy, Policy Staff Director  
Anne Noris, Clerk of the Council  
Frank Abe, Communications Director  
Bob Cowan, Director, Office of Management and Budget, OMB  
James J. Buck, County Administrative Officer, Department of Executive Services  
(DES)  
Carolyn Ableman, Director, Records and Licensing Services Division, DES