

Public Records Disclosure

Presented by Pat Mason
MRSC Senior Legal Consultant



PRA Question 1



- You are a county department head and you receive an e-mail on your home personal computer from a citizen with a comment on county business. You respond to the comment and then delete the e-mail exchange.
- Does this raise any concerns with public records or other doctrines?

Answer PRA Question 1



- Yes. Under the public records act, the definition of public record is very broad. Whether a record is a public record is determined by its content and use.
- The topic is public business and you are a public official so it likely is a public record whether received on home computer or not.
- Also, record retention requirements.

PRA Question 2



- You are a county department head and you receive an e-mail relating to county business on your home computer. You respond to your constituent and forward the e-mail to your county e-mail account so that it can be entered into the official system. Can you delete the e-mail from your home personal computer?

Answer PRA Question 2



- Close question – check with county policy.
- Arguably in our view you can delete from your home computer because it is a secondary copy with no retention value.

PRA Question 3



- You like to start your day by accessing your agency desktop from your personal computer at home.
- Does just checking your agency desktop raise questions under the Public Records Act or record retention?

Answer PRA Question 3



- Probably does not raise record retention issues because only a portal to view the agency records.
- The agency records are the records that must be retained in a searchable format.
- May be a record that is searchable until you delete it but no requirement to retain.

PRA Question 4



- You receive an e-mail at your computer at work from a friend asking about plans for the weekend. You respond to the e-mail and then delete the original e-mail.
- Does this raise issues with the Public Records Act or records retention?

Answer PRA Question 4



- Probably not. Some types of e-mails are not public records because they do not relate to public business at all. A purely social e-mail is in that category.
- Since it is not a public record, it has no retention value.
- The fact the e-mail was received and a response sent is still part of the city electronic records.

PRA Question 5



- You are a county official who has a personal blog on which you post comments on all types of subjects, including county business on occasion.
- Does this raise public record and record retention issues?

Answer PRA Question 5



- Yes, potentially.
- If the record relates to public business and is sent by a public official, it potentially raises public disclosure and retention issues.
- Adopt policy for use of social media by public officials.

PRA Question 6



- You are attending an executive session and you take some personal notes of what is being discussed. Your intent is not to share these notes but just to use them for personal reminders of what occurred.
- Are these public records that must potentially be retained and subject to disclosure?

Answer PRA Question 6



- These notes are not public records if they are solely for your personal use in our opinion.
- If you share them or post them they may well become public records which must be disclosed if requested.

PRA Question 7



- A citizen calls one of the staff in your office and makes a public records request. He is told to fill out a public records request form but refuses to do so.
- Is this a valid public records request that must be fulfilled?

Answer PRA Question 7



- Yes, probably.
- In this state, no particular form is required – does not even have to be in writing.
- Have your staff member convert the request to a written form and treat as any other request.

PRA Question 8



- You use your personal computer (or other device) to send messages relating to public business which are public records.
- A records request is made for all such records you have sent.
- Does this mean that your personal computer (or smart phone or other device) will be subject to a third party search to locate records?

Answer PRA Question 8



- Not usually
- Pending case will balance privacy rights against such demands for a third party search.
- Normally you would be requested to provide the responsive records as part of agency search.
- No reason to require a third party search in usual situation if you provide all requested records.
- If reason to believe not all records have been provided, may be a risk of a third party search.

Public Records Act in Washington



- Passed by Initiative in 1972 – received 72% of the vote.
- Codified in Ch. 42.56 RCW (formerly in Ch. 42.17 RCW).



- Model Rules for Public Records adopted by Office of the Attorney General.
- Ch. 44-14 WAC.
- Advisory only.
- Effective March 2006.
- Information on “Best Practices” for compliance.

Basic Rule



- Each agency shall make available for inspection and copying all public records, unless exempt.
- Presumption is that public records are available for public inspection and copying.
- Electronic Records – WAC 434-662 – retained in electronic format.



- WAC 434-662
- Electronic records must be retained in electronic format and must remain usable, searchable, retrievable, and authentic for the entire length of the retention period.
- Printing and retaining a hard copy is not a substitute for the electronic version unless approved by the applicable records committee.
- Effective January 1, 2009.



- Records requests must be processed in the same manner as when requesting written records.
- Agency should provide the requestor with the record in the format requested if it is reasonably able to do so.
- If a paper copy, and wants it in electronic format, should scan it and provide it in electronic format if reasonably able to do so but may recover scanning costs.



What Is a Public Record?

- Any “writing” that contains information relating to the conduct of government or the performance of any governmental or proprietary function that is prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.
- Writing includes all forms of written or recorded communication – very broad definition.

Responding to Request



- Within five business days must respond in one of five ways:
 - Provide the record
 - Deny the request – must provide accompanying written reason for denial
 - Acknowledge receipt and estimate how long a time it will take to provide record
 - Seek clarification
 - Provide an internet address and link to the records on the agency's web site



- Cannot recover costs for staff to locate and produce records for inspection.
- Cannot recover costs for review of records to redact protected information.
- May recover actual copying costs.
- Default fee is 15 cents a page.
- Make fee schedules available to public.

Not Agency Obligations



- Immediately respond.
- Create records that don't exist.
- Obtain records from somewhere else if agency does not have records.
- Respond to requests for information as opposed to a request for an identifiable public record.

Agency Obligations



- Appoint a Public Records Officer – in county may be by department.
- Adopt rules and procedures to provide full public access to public records.
- Publish fee schedule of costs.
- Maintain a list of laws that agency believes exempts or prohibits disclosure – MRSC has such a list posted on web site.
- Provide index of records or adopt resolution indicating why this would be unduly burdensome.
- Make records available during customary business hours.

Search Obligations



- The focus is on whether the search itself was adequate – not whether you located all responsive records.
- The adequacy is judged by a standard of reasonableness.
- The search must be reasonably calculated to uncover all relevant documents.
- Agency must search every place a record is reasonably likely to be found.
- Document your search carefully.



- How to handle huge request for records?
- Can process in installments – if requestor does not return to review records within reasonable time, may consider request closed.
- Usually thirty days is considered a reasonable time – from Model Rules.

Third Party Notification



- One strategy specifically allowed by Model Rules.
- Notify third party with interest in records that agency intends to release records within identified time period.
- Allow third party time to obtain court injunction prohibiting release of records – ten days likely sufficient.

Exemptions and Prohibitions



- Many exemptions from public disclosure in Ch. 42.56.
- Exemptions are discretionary – disclosure allowed but not required.
- Prohibitions may not be disclosed.
- When in doubt, check with legal counsel.

Prohibitions



- Medical records.
- Addresses of victims of domestic violence.
- Industrial insurance claims.
- Autopsy reports and records.
- License applications for concealed weapons permits.
- Many more.



- PRA enforced by court actions.
- Civil penalties may be imposed from \$0 to \$100 a day that records improperly withheld.
- Per day or per record?
- A court will award attorney fees and costs if the plaintiff prevails.
- Court has adopted list of factors to consider when imposing daily penalty – good faith of agency in attempting to comply a key factor.
- *Yousoufian v. Office of Robert Sims*, 168 Wn.2d 444 (2010) – factors set out.

Factors in Calculating Penalties



- Existence or absence of bad faith on part of agency is principal factor in setting penalty within range but other factors can be considered.
- Promptness of agency response to request.
- Agencies good faith compliance with all procedural requirements of PRA.
- Proper training and supervision of personnel.
- Helpfulness of agency to requestor.
- Existence of agency systems to track and retrieve records.

Aggravating Factors for Penalty



- Delayed response by the agency.
- Lack of compliance with PRA rules and procedures.
- Lack of proper training of personnel.
- Public importance of the issue.
- Any actual economic loss to requestor.
- Penalty amount necessary to deter future misconduct.

Good News – Some Immunity



- No public official, agency or employee will be liable nor cause of action exist for damage based on release of public record if acted in good faith to comply with public records law – RCW 42.56.060.

Resources for Public Records Act



- County Prosecuting Attorney or City Attorney.
- Nancy Krier, Office of the Attorney General, Ombudsman.
- Attorney General's web site – www.atg.wa.gov.
- MRSC Web site: articles, forms, sample ordinances, links – www.mrsc.org.
- Public Records Act for Washington Cities, Counties and Special Purpose Districts, MRSC Report No. 61 – on web site.
- MRSC legal consultants.