

# The Public Records Act

## Redacting & Withholding Records – Exemptions

***February 2019***

***Washington Association of County Officials***

***Prepared by Washington State Attorney General's Office***



# Summary



- Public records are **presumed open**.
- If a record, or part of a record, is withheld from the public, the agency must cite to an **“exemption”** in law and give a brief explanation.
- Exemptions are **narrowly construed**.
- Agency must **list exemption for requester and give brief explanation**.



# Public Records Act – RCW 42.56



# RCW 42.56.070(1)



- Each agency, in accordance with published rules, shall make available for public inspection and copying all public records,
- unless the record falls within the **specific exemptions** of subsection (8) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.
- To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall **delete** identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the **justification for the deletion shall be explained fully in writing.**

## RCW 42.56.070 (cont.)

- (2) For informational purposes, each agency shall publish and maintain a current **list** containing every law, other than those listed in this chapter, that the agency believes **exempts or prohibits disclosure of specific information or records** of the agency.
- An agency's failure to list an exemption shall not affect the efficacy of any exemption.



# RCW 42.56.210(3)

- Agency responses refusing, in whole or in part, inspection of any public record shall include a **statement** of the **specific exemption** authorizing the withholding of the record (or part) and
- a brief explanation of **how the exemption applies** to the record withheld.



## RCW 42.56.080(2)

- 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 establish whether inspection and copying would violate RCW 42.56.070(8) or 42.56.240(14), or other statute which **exempts or prohibits disclosure of specific information or records to certain persons.**



# Applying These PRA Requirements to Agency Records That May Contain Exempt Information





# “Four R’s”

- **R**evue
- **R**esearch
- **R**edact/Withhold
- **R**eport



# Review



- **Review** responsive records to determine if there is **possible exempt material**.
- Possible examples, depending upon the agency and/or records: attorney client privileged information; social security numbers; certain protected health care information of covered agencies; others.
- Consider agency's list of its commonly-used exemptions (*see handout samples*).

# Research



- **Research** relevant possible exemptions.
- Information must fit **squarely within an exemption** in order to be withheld.
- Exemptions will not be presumed or inferred.
- PRA exemptions are to be narrowly construed.
- More than 500 exemptions in state law; some exemptions are also in federal law.
- Some exemptions are permissive; some mandate nondisclosure; some permit disclosure only to certain persons listed in the relevant exemption statute.
- Some exemptions require certain conditions to be present. Research as part of disclosure analysis (e.g. pending vs. completed criminal investigation).

# Research (cont.)



## > Examples of Phrases Used in Exemption Laws

- “Confidential”
- “Shall be held in confidence”
- “Exempt from public inspection and copying”
- “Shall not release”
- “Exempt from disclosure”
- “Not subject to public disclosure”
- “Exempt under this chapter [PRA]”
- “Privileged”

# Research (cont.)

- Many exemptions have been the subject of **court decisions**.
- Exemptions may be repealed or amended, or new exemptions added, by the **State Legislature**.
- For frequently-cited exemptions by an agency, and/or for frequently requested records, sometimes this research of laws and court decisions has already been done.
- Sometimes an agency will see a person is named in a record or to whom the record specifically pertains, and will notify him/her of the request. RCW 42.56.520; RCW 42.56.540.
- Sometimes records are enjoined from disclosure by a court order.
- May need to have **legal counsel** review.



# Redact/Withhold



- **Redact/withhold** exempt information.
- Deleting exempt information in copies is “**redacting**” a record; must release non-exempt information.
- Might also **withhold an entire record** or class of records (“categorical” exemption is an example).
- Methods to redact:
  - Paper copies: black out/white out
  - Electronic copies: redaction software (redact exempt information; sometimes can affix exemption code right onto redacted record)
  - Video copies: “Pixilate” or scramble exempt images in video



## Redact/Withhold (*cont.*)

- *PAWS v. UW*: When a record is **withheld in its entirety**, agency must provide identifying information to the requester about the withheld record.
  - “The identifying information need not be elaborate, but
  - should include the type of record,
  - its date and number of pages, and,
  - unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content.
  - Where use of any identifying features whatever would reveal protected content, the agency may designate the records by a numbered sequence.”

# Report



- Finally, **report** exemptions to requester.
- The agency must inform the requester in **writing** (“**report**”) why records are redacted/withheld.
- Cite **law(s)** permitting it to redact or withhold records (**specific exemptions**).
- Agency must provide requester a **brief explanation** as to how the exemptions apply to the redacted/withheld records.
- This can be accomplished in a number of ways.
  - Exemption log. (*See sample*)
  - Letter/email.
  - Redactions have a code + requester is given a list of the codes and what laws/explanations attach to exempt material+ a cover letter or email explaining how the redactions work. (*See samples*)

# Sample Exemption Code List/Log

## (Code = #'s)

List of Public Records Exemptions Commonly Applicable to AGO Records

| Code | Exemption                                                        | Brief Explanatory Description                                                                                                                                                                           | Statute/Rule/Case                    | Division |
|------|------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------|----------|
| [1a] | Attorney-Client Privilege – RCW 5.60.060(2)(a); RCW 42.56.070(1) | Communication from client to attorney for the purpose of obtaining legal advice                                                                                                                         | RCW 5.60.060(2)(a); RCW 42.56.070(1) | AGO      |
| [1b] | Attorney-Client Privilege – RCW 5.60.060(2)(a); RCW 42.56.070(1) | Communication from attorney to client for the purpose of providing legal advice                                                                                                                         | RCW 5.60.060(2)(a); RCW 42.56.070(1) | AGO      |
| [1c] | Attorney-Client Privilege – RCW 5.60.060(2)(a); RCW 42.56.070(1) | Communication between attorney and client regarding litigation                                                                                                                                          | RCW 5.60.060(2)(a); RCW 42.56.070(1) | AGO      |
| [1d] | Attorney-Client Privilege – RCW 5.60.060(2)(a); RCW 42.56.070(1) | Communication between attorneys that reflect attorney-client communications regarding advice                                                                                                            | RCW 5.60.060(2)(a); RCW 42.56.070(1) | AGO      |
| [1e] | Attorney-Client Privilege – RCW 5.60.060(2)(a); RCW 42.56.070(1) | Communication between attorneys that reflect attorney-client communications regarding litigation                                                                                                        | RCW 5.60.060(2)(a); RCW 42.56.070(1) | AGO      |
| [1f] | Attorney-Client Privilege – RCW 5.60.060(2)(a); RCW 42.56.070(1) | Communication between members of the client agency for the purpose of gathering information to obtain legal advice or to convey attorney-client communications                                          | RCW 5.60.060(2)(a); RCW 42.56.070(1) | AGO      |
| [2a] | Attorney Work Product Privilege – RCW 42.56.290                  | Drafts, notes, memoranda, or research reflecting the opinions or mental impressions of an attorney or attorney's agent prepared, collected, or assembled in litigation or in anticipation of litigation | RCW 42.56.290                        | AGO      |
| [2b] | Attorney Work Product/ Work Product Privilege – RCW 42.56.290    | Notes, memoranda, statements, records that reveal factual or investigative information prepared, collected, or assembled in litigation or in anticipation of litigation                                 | RCW 42.56.290                        | AGO      |
| [2c] | Attorney Work Product Privilege – RCW 42.56.290                  | Communication between attorney and client that reveals opinions or mental impression of attorney, or information prepared, collected, or assembled in litigation or in anticipation of litigation       | RCW 42.56.290                        | AGO      |
| [2d] | Attorney Work Product Privilege – RCW 42.56.290                  | Communication between attorneys that reveals opinions or mental impression of attorney, or information prepared, collected, or assembled in litigation or in anticipation of litigation                 | RCW 42.56.290                        | AGO      |

# Another Sample Code List/Log

## (Code = Abbreviations)

### Name of Requestor or Subject of Documents Requested – Exemption Codes for redacted e-mails



| CODE | WHAT CODE STANDS FOR | SUBJECT |  | EXEMPTION | BRIEF EXPLANATION OF HOW EXEMPTION APPLIES |
|------|----------------------|---------|--|-----------|--------------------------------------------|
|------|----------------------|---------|--|-----------|--------------------------------------------|

#### DOCUMENTS WITH REDACTIONS

*For the e-mails in the file marked  
refer to this sub-table to match the code on the redacted e-mail to the applicable exemption.  
Redactions without codes pre-existed in the e-mail.*

|          |                               |                                                       |  |                                         |                                                                                                                                                                                     |
|----------|-------------------------------|-------------------------------------------------------|--|-----------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| A/C      | Attorney Client communication | Attorney-Client communications redacted               |  | RCW 42.56.070(1) and RCW 5.60.060(2)(a) | Reflects communication and advice between attorney and clients.                                                                                                                     |
| ADV COMM | Advocate Communication        | Advocate – client communications redacted             |  | RCW 5.60.060(7)                         | A sexual assault advocate may not, without the consent of the victim, be examined as to any communication between the victim and the sexual assault advocate.                       |
| EPI      | Employee Personal Information | Employee's address or phone number redacted           |  | RCW 42.56.250(3)                        | Personal wireless telephone numbers, residential addresses, residential telephone numbers of public employees are exempt from public disclosure.                                    |
| GP       | Graphic Photograph            | Graphic photographs of the victim's injuries redacted |  | RCW 42.56.240(1)                        | Specific investigative records compiled by law enforcement, the non-disclosure of which is essential for the protection of a person's right to privacy, are exempt from disclosure. |
| MED REC  | Medical Record                | Medical Record redacted                               |  | RCW 70.02                               | Medical records are exempt from release unless being released to subject of record or representative.                                                                               |

# Sample Redactions with Exemption Codes #'s Affixed

| INTRODUCTION TO THE 1998 VOTERS PAMPHLET                                                                                                                                                                                                                                                                                                                |                                                                                    |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------|
| Greetings:                                                                                                                                                                                                                                                                                                                                              |                                                                                    |
|                                                                                                                                                                                                                                                                                                                                                         | [7]                                                                                |
| measures appearing on the November 3 General Election ballot, including arguments for and against each proposal, an official ballot title and explanatory statement, and the full text of each measure. In addition, the pamphlet contains photographs and statements from candidates running for a variety of offices appearing on this year's ballot. |                                                                                    |
| As we approach the bicentennial of the Lewis and Clark Expedition, the cover of the Voters Pamphlet celebrates a unique moment in this historic undertaking — [8]                                                                                                                                                                                       |                                                                                    |
| [redacted] and eloquently described by David Nicandri of the Washington State Historical Society. We hope you enjoy this account and take a moment to reflect on our heritage of democracy and citizen participation.                                                                                                                                   |                                                                                    |
|                                                                                                                                                                                                                                                                        |  |
|                                                                                                                                                                                                                                                                                                                                                         | RALPH MUNRO<br>Secretary of State                                                  |
| ABOUT THE COVER:                                                                                                                                                                                                                                                                                                                                        |                                                                                    |
|                                                                                                                                                                                                                                                                                                                                                         | [9]                                                                                |
| [redacted]                                                                                                                                                                                                                                                                                                                                              |                                                                                    |
| and the most of them were of the opinion, that it would be best, in the first place, to go over to the south side of the river,                                                                                                                                                                                                                         |                                                                                    |

*Code # corresponds to exemption on agency's list/log of its commonly-used exemptions*

# Sample Cover Letter/Email Excerpt Explaining Exemption Codes



- “Enclosed please find Production 1, pages 1 through 265, which have been printed. **Please note there are redactions (black boxes) on various pages of the responsive documents.** This redaction may be small or large, depending on the size of the redaction, and there may be multiple redactions on a page.
- **Within the redaction is a white code, which will look something along the lines of [1]. The code printed within the redaction corresponds to the exemption for that redaction identified on the redaction log. Also provided with these responsive documents is a redaction log that identifies the statutory basis for the exemption as well as a brief explanation for why the exemption applies.**
- As you review these responsive documents, you will be able to refer to the exemption log to identify the exemptions and their application.”



# Sample Exemption/Withholding Log That Accompanies a Particular Request (PRR)

Coyote, Wile E.  
PRR-2018-0001  
REDACTION LOG

| BEG DOC  | END DOC  | DATE    | TYPE                            | SUBJECT      | AUTHOR                         | RECIPIENT                      | EXEMPTION                                                                                                                                      | BRIEF EXPLANATION                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|----------|----------|---------|---------------------------------|--------------|--------------------------------|--------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| WC-00001 | WC-00002 | 10/5/18 | Email String                    | FW: Redacted | Bodnar, Kathy, Agency Employee | Bodnar, Kathy, Agency Employee | <b>Redacted 1:</b> Attorney-Client Privilege – RCW 5.60.060(2)(a); RCW 42.56.070(1)                                                            | Communication between members of the client agency for the purpose of gathering information to obtain legal advice or to convey attorney-client communications                                                                                                                                                                                                                                                                                                                                                                        |
| WC-00001 | WC-00002 | 10/4/18 | Email String (2 <sup>nd</sup> ) | Redacted     | <u>Wapro</u>                   | Bodnar, Kathy, Agency Employee | <b>Redacted 2 - 4:</b> Attorney-Client Privilege – RCW 5.60.060(2)(a); RCW 42.56.070(1)<br><br>Attorney Work Product Privilege – RCW 42.56.290 | Communication between attorney and client regarding litigation<br><br>Drafts, notes, memoranda, or research reflecting the opinions or mental impressions of an attorney or attorney's agent prepared, collected, or assembled in litigation or in anticipation of litigation;<br><br>Communication between attorneys who have a common interest or a joint defense agreement that reveals opinions or mental impression of attorney, or information prepared, collected, or assembled in litigation or in anticipation of litigation |
| WC-00001 | WC-00002 | 10/4/18 | Email String                    | Redacted     | <u>Wapro</u>                   | Bodnar, Kathy, Agency Employee | <b>Redacted 5:</b> Personal Information – Financial Information – RCW 42.56.230(5); RCW 9.35.005                                               | Credit card numbers, debit card numbers, electronic check numbers, card expiration dates, social security numbers, bank or other financial information identified in RCW 9.35.005. <u>Information in RCW 9.35.005 is information</u>                                                                                                                                                                                                                                                                                                  |

# FYI: Other Exemption “Reports”... PRA Request Log

## RCW 40.14.026(4):

Each agency shall **maintain a log of public records requests** submitted to and processed by the agency, which shall include but not be limited to the following information for each request:

- The identity of the requestor if provided by the requestor,
- the date the request was received,
- the text of the original request,
- a description of the records produced in response to the request,
- **a description of the records redacted or withheld and the reasons therefor,**
- and the date of the final disposition of the request.

The log must be retained by the agency in accordance with the relevant record retention schedule, and shall be a public record subject to disclosure under chapter 42.56 RCW.



# FYI: Other Exemption “Reports” ...

## JLARC Report

### RCW 40.14.026(5):

- Each agency with actual staff & legal costs associated with fulfilling public records requests of at least **\$100,000** during the prior fiscal year *must*, and each agency with such estimated costs of *less* than \$100,000 during the prior fiscal year *may*, **report to the Joint Legislative Audit and Review Committee (JLARC)** by July 1st of each subsequent year 17 PRA data metrics, including:
  - “The number of requests **denied** and the most **common reasons for denying requests.**”
  - “The estimated costs incurred by the agency in fulfilling records requests, including costs for staff compensation and **legal review**, and a measure of the average cost per request.”
  - “The number of claims filed alleging a violation of chapter 42.56 RCW or other public records statutes in the past year involving the agency, **categorized by type and exemption at issue**, if applicable.”

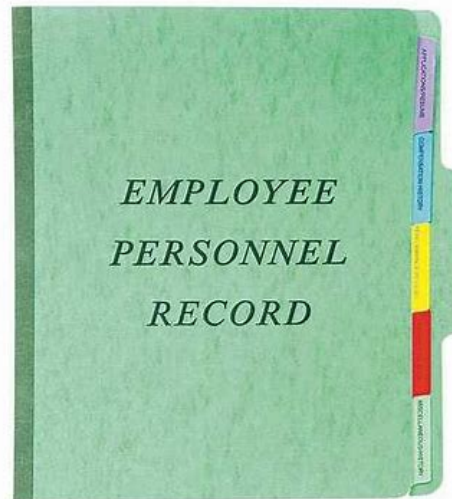



# A Few Common Exemptions

**DRAFT**

**Confidential Document  
Attorney-Client Privilege**

**ATTORNEY  
WORK  
PRODUCT**



- 

25

# Preliminary Drafts (*cont.*)



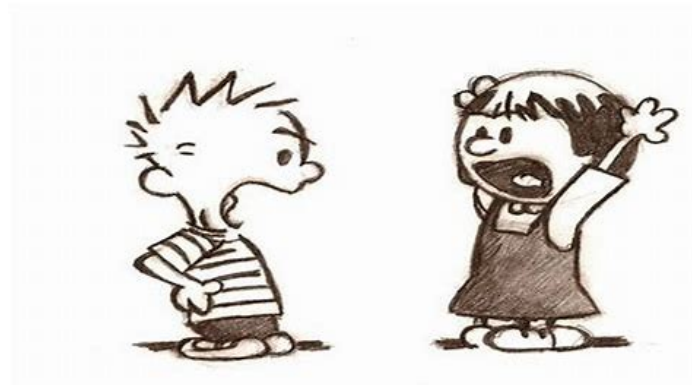
## Washington Supreme Court:

- “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 raw factual data on which a decision is based.
- It is not, however, required that documents be prepared by subordinates to be exempt.”



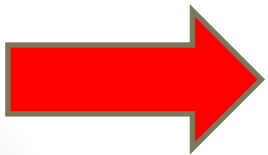
# RCW 42.56.290 – Controversy Exemption

- “Records that are **relevant to a controversy**
- to which an agency is a party
- but which records would **not be available** to another party under the rules of pretrial discovery [**court rules**] for causes pending in the superior courts
- are exempt from disclosure under this chapter.”



# Controversy Exemption (cont.)

- A "controversy" covered by this exemption includes threatened, actual, or completed litigation.
- **Attorney Work Product** Records
  - A document is work product if an attorney prepares it in confidence and in anticipation of litigation, or it is prepared by or for a party's representative, in anticipation of litigation.
- **Attorney Client Privileged** Records (also RCW 5.60.060 - Privilege)
  - Client advice records to/from agency's legal counsel
  - Litigation (threatened, actual or completed) not required



*Just because an attorney is mentioned in a record, or is cc'ed on a record, does that mean the record is work product or legal advice, no matter what the content or context? **NO.***

# Investigative Records – RCW 42.56.240

- Many sections address investigations, law enforcement, crime victim records, including body camera recordings
- **Subsection (1):**
  - “**Specific intelligence information and**
  - **specific investigative records**
  - compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession,
  - the nondisclosure of which is essential to
    - effective law enforcement or
    - for the protection of any person's right to privacy.”



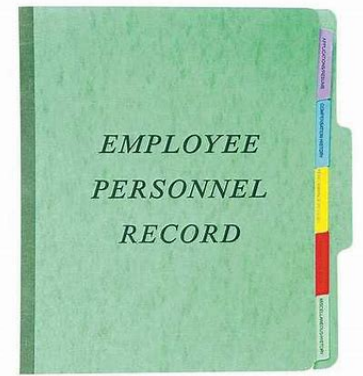
# Investigative Records (*cont.*)

## Washington Courts:

- **"Specific . . . investigative records"** are the result of an investigation focusing on a particular person, or an investigation to ferret out criminal activity or to shed light on specific misconduct.
- “Categorically” exempt while investigation is ongoing,
- If a law enforcement agency maintains reports as part of a routine administrative procedure, and not as the result of a specific complaint or allegation of misconduct, the reports are not investigative records within the terms of this exemption.



# Public Employment Records Exemptions – A Few Examples



## RCW 42.56.230:

- “**Personal information in files maintained for employees, appointees, or elected officials** of any public agency to the extent that disclosure would violate their right to privacy.”
  - A person's "right to privacy" is invaded or violated only if disclosure of information about the person:
    - (1) Would be highly offensive to a reasonable person, and
    - (2) is not of legitimate concern to the public.

## RCW 42.56.250(2):

- “All **applications for public employment**, including the names of applicants, resumes, and other related materials submitted with respect to an applicant.”

# Public Employment Records

## Exemptions – A Few Examples (*cont.*)

### RCW 42.56.250(4):

- Exempts the following information held in **personnel records, public employment related records, volunteer rosters, or included in any mailing list of employees or volunteers** of any public agency:
  - “Residential addresses, residential telephone numbers, personal wireless telephone numbers, personal email addresses, social security numbers, driver's license numbers, identicard numbers, and emergency contact information of employees or volunteers of a public agency.”
  - This statute also exempts certain listed information of **dependents** of employees or volunteers of a public agency.




# County Jail Records – Some Exemptions



- **Jail records generally**
  - **RCW 70.48.100** – Jail register & other jail records
  - *Zabala v. Okanogan County* – RCW 70.48.100 exempts requests of records of monitored jail phone calls
- **Investigative records** (*prior slide*)
- **Criminal history and arrest records**
  - **RCW 10.97**
- **Juvenile records**
  - **RCW 13.50**
- **Medical and postmortem records**
  - **RCW 42.56.360; RCW 70.02** (Health Care Information Act)
  - Federal Health Insurance Portability and Accountability Act (HIPPA)
  - **RCW 68.50.105** (autopsy or post mortem records)
- **Security videos**
  - **RCW 42.56.240**



# Some Resources on Law Enforcement & Medical Records



Have a Research Question?

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## Law Enforcement Records Management and Disclosure

MRSC created this series of webpages in partnership with the State Auditor's [Center for Government Innovation](#) to help police and sheriff departments in Washington State manage their records and comply with disclosure and retention requirements under the [Public Records Act](#) and other statutes.



Hospital and Law Enforcement: Guide to Disclosure of Protected Health Information, 8th Edition (November 2017)



Secretary of State  
*Tina Wiegman*

## Washington State Archives

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## Managing Law Enforcement Records

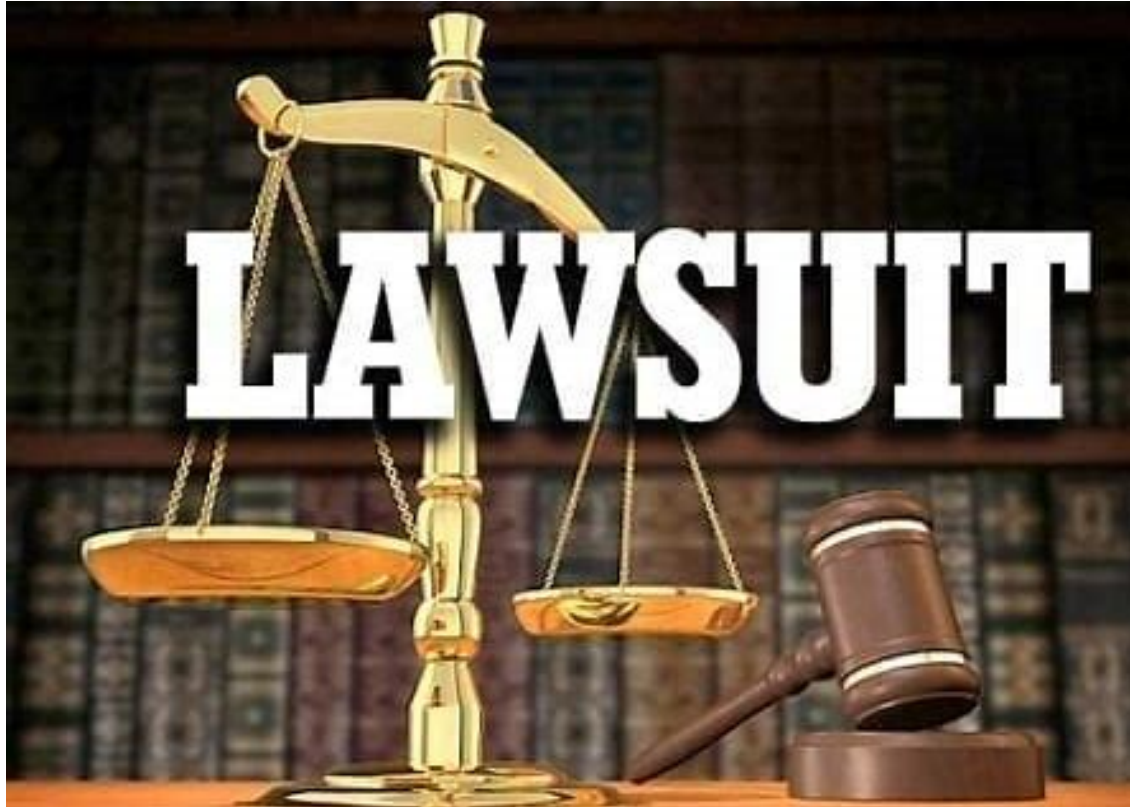
### Records Retention...

- [Common Records \(CORE\) v.4.0 \(May 2017\)](#)
- [Animal Services v.2.0 \(Oct 2013\)](#)
- [Emergency Comm \(911\) v.1.0 \(Nov 2012\)](#)
- [Law Enforcement v.7.2 \(Jan 2017\)](#)
- [More Help with Records Retention...](#)

### Need Help Managing...

- [Board/Committee Meeting Records](#)
- [Body Cam Recordings](#)
- [Dash Cam Recordings](#)
- [Electronic Records...](#)
  - [Audio/Visual Records](#)
  - [Cloud Services/Storage](#)

# A Few Last Words ... Litigation



# Enforcement & Penalties



- PRA enforced by **courts** for claims listed in PRA.
- A court can impose **civil penalties** if an **agency improperly withholds records** (incorrectly cites an exemption).
  - No proof of “damages” required.
  - A court considers ***Yousoufian* factors** in requiring an agency to pay a penalty.
  - Plus, a court will award the prevailing requester’s **attorneys fees and costs**.

# Enforcement & Penalties (cont.)

- What if an agency **discloses information someone argues it could or should have withheld** under an exemption?
  - Some exemptions are permissive (meaning an agency can use them, or not). Some exemptions are mandatory. **Do your research.**
- **RCW 42.56.060 - Disclaimer of public liability.**
  - “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.”
- **RCW 42.56.540 – Third party notice.** Prior to release, can also give “third party” notice to persons named in the record or to whom the record pertains, giving them a time period to seek an injunction prohibiting disclosure, if they believe an exemption applies.

# Enforcement & Penalties (*cont.*)

**UPCOMING WEBINAR**

**February 27, 2019**

**Litigation –  
Enforcement and Penalties**



# Open Government Risk Management Tips

- Establish a culture of compliance with the PRA.
- Receive training on the PRA.
- Review available resources; institute best practices.
- Keep updated on current developments in PRA; correctly apply law.

*The PRA changes through:  
Legislative amendments,  
or  
Develops through case law.*

- Consult with agency's legal counsel.



# AGO Open Government Resource Manual – Available on AGO Website\*



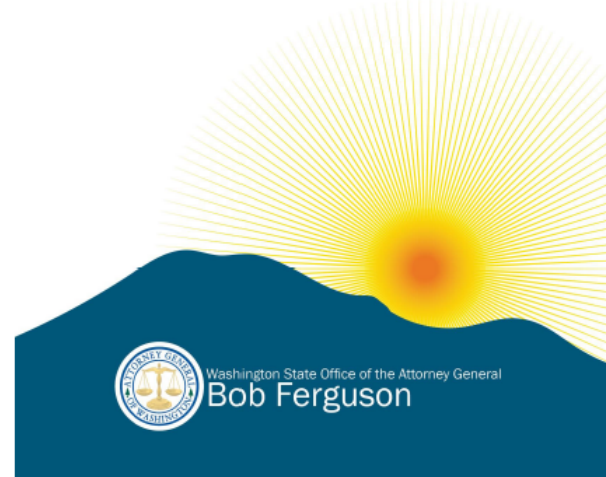
Updated  
October 31,  
2016\*\*

## WASHINGTON STATE



**Sunshine**  
Laws 2016

An Open Government Resource Manual



\* <http://www.atg.wa.gov/open-government-resource-manual>

\*\*Does not yet include statutory changes resulting from 2017-18 sessions.



# QUESTIONS?

