Advanced Public Records Act Training Materials

Prepared for:

Washington Association of County Officials

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Presenter:

Nancy Krier
Assistant Attorney General for Open Government
Washington State Attorney General's Office
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
Ph: (360) 586-7842
Email: nancyk1@atg.wa.gov

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I. Introduction – Open Government Principles

"A popular Government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance...."
~ James Madison

"...a nation that is afraid to let its people judge the truth and falsehood in an open market is afraid of its people."
~ John F. Kennedy

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

"The people of this state do not yield their sovereignty to the agencies that serve them."
~ RCW 42.56, RCW 42.30

"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."
~ RCW 42.56, RCW 42.30

"The people insist on remaining informed so that they may maintain control over the instruments that they have created."
~ RCW 42.56, RCW 42.30

The "free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others."
~ RCW 42.56

II. Roles of the Attorney General's Office (AGO) & PRA

A. Public Records Act – RCW 42.56

RCW 42.56.570 - Explanatory pamphlet

(1) The **attorney general's office** shall publish, and update when appropriate, a pamphlet, written in plain language, explaining this chapter.

(2) The **attorney general**, by February 1, 2006, shall adopt 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 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**.

(3) The **attorney general**, in his or her discretion, may from time to time revise the model rule.

RCW 42.56.155 Assistance by attorney general – The **attorney general's office** may provide information, technical assistance, and training on the provisions of this chapter [RCW 42.56].

RCW 42.56.530 Review of state agency denial

Whenever a state agency concludes that a public record is exempt from disclosure and denies a person opportunity to inspect or copy a public record for that reason, the person may request the **attorney general** to review the matter. The **attorney general** shall provide the person with his or her written opinion on whether the record is exempt.

Nothing in this section shall be deemed to establish an attorney-client relationship between the **attorney general** and a person making a request under this section.

RCW 42.56.140 Public records exemptions accountability committee (Sunshine Committee)

(1)(a) The public records exemptions accountability committee is created to review exemptions from public disclosure, with thirteen members as provided in this subsection.

… (ii) The **attorney general** shall appoint two members, one of whom represents the **attorney general** and one of whom represents a statewide media association.

(5) The **office of the attorney general** and the office of financial management shall provide staff support to the committee.

…

(7)… (d) For each public disclosure exemption, the committee shall provide a recommendation as to whether the exemption should be continued without modification, modified, scheduled for sunset review at a future date, or terminated. By November 15th of each year, the committee shall transmit its recommendations to the governor, the **attorney general**, and the appropriate committees of the house of representatives and the senate.

B. Assistant Attorney General for Open Government

The Attorney General has appointed an Assistant Attorney General for Open Government who can assist citizens and agencies with Public Records Act and Open Public Meetings Act compliance. Here are some common examples of what the office does:

- A citizen emails a question to the office to ask whether an agency's response (or lack of a response) violates the Public Records Act. If the office has enough information in the email (a copy of the request and the agency's response), it might provide a short analysis of the law and apply it to the facts presented by the citizen.
- A state or local agency calls the office to ask if its approach to providing public records is correct or not. The office might agree with the agency or suggest an alternate approach.
- A citizen or agency asks the office if an agency meeting must be open to the public. The office would analyze the issue and provide an informal opinion by phone, email, or sometimes by letter.
- A citizen or the media contacts the office about a complaint involving the Public Records Act or the Open Public Meetings Act. The office may contact the agency to see if the office can give guidance to resolve the problem.

In this role, the Assistant Attorney General for Open Government also coordinates the Attorney General's legislative and policy efforts on the Public Records Act and Open Public Meetings Act. The office drafts legislation and works with the Legislature to pass it. The office also drafts the Attorney General's model rules for public records and works on updating them. Finally, the office speaks to citizen and agency groups about open government laws and writes resource materials such as the Attorney General's Open Government Internet Manual and online training materials, and provides other training assistance.

C. AGO Open Government Website

http://www.atg.wa.gov/OpenGovernment.aspx

1. **Web page includes information and links to:**
   - Open Government Training Materials
   - Public Records and Open Public Meetings – Overviews
   - Open Government Internet Manual *(currently being updated)*
   - Model Rules
   - Open Government Ombud Function
   - Sunshine Committee

2. **AGO Open Government Training Page**
   (*new as of January 2014*)
   http://www.atg.wa.gov/OpenGovernmentTraining.aspx
   Web page includes:
   - Links to training materials on Public Records Act (RCW 42.56), Open Public Meetings Act (RCW 42.30), records retention (RCW 40.14), including Power Point presentations and videos
   - Links to websites with other training resources
   - Sample training documentation forms

III. Risk Management Tips – Examples of PRA Procedures You Would Not Know By Reading the PRA in July 2014

The Public Records Act is codified in RCW 42.56. The PRA includes many procedural steps that an agency must follow, and some procedures courts are to follow in PRA litigation.

However, simply reading the PRA does not describe all the PRA procedures. RCW 42.56 also does not codify many of the PRA procedures required through court decisions.[1] And, there are laws outside the PRA that govern certain records.

Therefore, as a risk management tool, it is important that a public agency --- including its public records officer and legal counsel --- stay on top of legislative developments and court decisions that identify all PRA steps. It is also important an agency consider if there are statutes outside of the PRA that may require certain procedures with respect to its particular records (example, health care records).

The enclosed chart provides examples of records procedures that are not found in RCW 42.56 as of July 2014, but are described in some court decisions or statutes outside the PRA. **This chart is illustrative only and is not a comprehensive list, nor does it constitute legal advice.**

And, several unpublished decisions are referenced in the chart. They cannot be cited as authority and are not binding upon an agency that was not a party in those cases; however, they are noted here to give further examples of PRA procedures identified by some courts in some cases. In addition, some of the unpublished decisions may have been published after these materials were prepared. Some of the referenced decisions (published and unpublished) may have appealed further after these materials were prepared. Finally, court decisions issued after these materials were prepared, or statutes enacted after July 2014, may modify the summaries in the attached chart.

The chart focuses mainly on PRA procedures; many other court decisions analyze other legal issues concerning the PRA (applicability of particular exemptions, etc.).

[1] The AGO PRA Model Rules describe many of those additional steps created by the courts through at least 2007, and other recommended procedures. The AGO will begin a process in 2014 to review and possibly update the Model Rules. Contact Nancy Krier if you are interested in receiving information on this project.

Procedure	Source
AGENCY RECORDS PROCEDURES – CURRENT STATUTES OUTSIDE PRA	
OTHER LAWS GOVERNING AGENCY RECORDS. *Other laws may govern certain records or information. See, e.g., RCW 42.56.510; RCW 42.56.070(1).*	*Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994)
EXAMPLES. Health care records.	RCW 70.02; federal Health Insurance Portability and Accountability Act (HIPAA)
Records retention procedures.	RCW 40.14
Employee access to his/her own personnel file.	RCW 49.12.240 - .260
Student education records.	RCW 28A.605.030; Family Educational and Privacy Rights Act of 1974 (FERPA) at 20 U.S.C. 1232 *et seq*.
Juvenile dependency records.	RCW 13.50; *Deer v. Department of Social and Health Services*, 122 Wn. App. 84 (2004); *Wright v. State*, 176 Wn. App. 585 (2013)
AGENCY PRA PROCEDURES – ADDED BY COURTS	
REQUESTS. *PRA is silent on <u>how</u> a request must be made to an agency, or <u>what</u> it must contain (except that it must be for "identifiable" records – RCW 42.56.080). An agency may prescribe means of requests in its rules. RCW 42.56.040, RCW 42.56.100. PRA does not define some terms that may be used in a request, such as "metadata."* However, courts have provided more information about requests.	

• There is no official format for a PRA request. However, procedures describing PRA requests must be public and reasonable.	*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.") However, the courts have also upheld reasonable PRA procedures provided by an agency, including those related to request procedures. *See, e.g.*, *Parmelee v. Clarke*, 147 Wn. App. 1035 (2008). But see *Zink v. City of Mesa*, 140 Wn. App. 328 (2007) (procedures must strictly comply with PRA). *See also Resident Action Council v. Seattle Housing Authority*, __ P.3d __ (2014), 2013 WL 7024095 ("The PRA requires each relevant agency to facilitate the full disclosure of public records to interested parties. An agency must publish its methods of disclosure and the rules that will govern its disclosure of public records. RCW 42.56.040(1). A requester cannot be required to comply with any such rules not published unless the requester receives actual and timely notice. RCW 42.56.040(2). More generally, an agency's applicable rules and regulations must be reasonable and must provide full public access, protect public records from damage or disorganization, and prevent excessive interference with other essential functions of the agency. RCW 42.56.100. The agency's rules and regulations also must 'provide for the fullest assistance to inquirers and the most timely possible action on requests for information.'")
• A request must give "fair notice" that it is a PRA request.	*Wood v. Lowe*, 102 Wn. App. 7, 994 P.2d 857 (2000); *Germeau v. Mason County*, 166 Wn. App. 789, 271 P.2d 932 (2012).
• A request for "information" is not a PRA request for identifiable records.	*Bonamy v. City of Seattle*, 92 Wn. App. 403, 960 P.2d 447 (1998); *Beal v. City of Seattle*, 150 Wn. App. 865, 209 P.3d 872 (2009); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004) (must be a request for "identifiable" records); *Fisher Broadcasting v. City of Seattle*, __ Wn.2d __, 326 P.3d 688 (2014) (requester is not required to use the exact name of the record but requests must be for identifiable records or class of records).
• A "complex and broad" request may require an agency to provide records in installments, and use additional time to locate and assemble records, notify third parties, and determine if information is exempt.	*West v. Department of Licensing*, Div. I Court of Appeals No. 7-643-3-1 (June 9, 2014) (unpublished) (Note: motion to publish and motion for reconsideration filed).
• There is no constitutional right to access records.	*City of Seattle v. Egan*, 179 Wn. App.333, 317 P.3d 568 (2014) (Note: petition for review filed).
• If specifically asked for (in the PRA request)	*O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010) (court defines "metadata" as "data about

non-exempt "metadata" must be produced.	data" or hidden information about electronic documents contained in software programs.)
REQUESTERS. *RCW 42.56.080 & the intent section following RCW 42.56.050 say agencies shall not distinguish among requesters absent statutory authority. Statutory examples include (1) inmate/SVP requesters subject to injunction obtained under RCW 42.56.565 or RCW 71.09.120(3), (2) media requesters for records identified in RCW 42.56.250(8) – photographs and dates of birth of criminal justice agency employees, (3) requesters seeking lists of individuals for commercial purposes unless authorized under RCW 42.56.070(9), or (4) other requesters seeking information or records that can only be provided to specific requesters per statute.* However, the courts have also looked at specific requests or requesters on occasion, with respect to agency's response.	
• In assessing penalties, the Supreme Court has said courts are to consider some factors relevant to a particular request or to a particular requester. This suggests agencies should consider certain facts about a request or requester when determining how to process a particular request.	*Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444 (2010). "Aggravating" penalty factors include: • A delayed response by the agency "especially in circumstances making time of the essence"; • When considering the "public importance of the issue" to which the request is related, where importance was "foreseeable" to the agency; and, • "Any actual personal economic loss to the requestor" resulting from the agency's misconduct, where the loss was "foreseeable" to the agency.
• PRA does not provide a right of a requester to indiscriminately search through an agency's	*Limstrom v. Ladenburg (Limstrom II),* 136 Wn.2d 595, 963 P.2d 896 (1998) (PRA does not provide "a right of citizens to indiscriminately sift through an agency's files in search of records or information which cannot

files.	be reasonably identified or described by the agency.")
• A requester's attorney can make the request on behalf of the client.	*Kleven v. City of Des Moines,* 111 Wn. App. 284, 289–93, 44 P.3d 887, 889–91 (2002).
• A requester's union representative can make the request on behalf of a union member.	*Germeau v. Mason County,* 166 Wn. App. 789, 271 P.3d 932 (2012).
FIVE BUSINESS DAY RESPONSE. *Except for using 5 "business" day response, PRA does not give further details about counting days.* However, courts and other statutes provide guidance.	
• When counting the five-day response time for a PRA request, don't count the day of receipt.	RCW 1.12.040; *Limstrom v. Ladenburg*, 98 Wn. App. 612, 989 P.2d 1257 (1999) (see how court counted days)
• Remember that emailed PRA requests can go into an agency employee's junk mail folders or spam folders; or to an email address of an employee who is out of the office for several days. That fact does not necessarily stop the 5-day clock. So, agencies may want to have rules or procedures identifying which email address must be used for PRA requests.	*See, e.g.*, Mason County Superior Court case, *Carey v. Mason County*. (Unpublished, no appeals). One of the several issues in the case was that the public records requests allegedly went into an employee's spam mail box, were subsequently blocked, and thus not responded to by the agency. Penalties awarded.
RESPONSES – OTHER PROCEDURES. *The PRA does not provide many other details about response formats or procedures, except to provide that responses can include an estimate of time for further response, request for clarification, internet address/link to records on the agency's website, and that denials must be in writing with a*	

brief explanation. See, e.g., RCW 42.56.210; RCW 42.56.520; *RCW 42.56.070(1).* However, the courts have explained other procedures.	
• In an injunction hearing, a court could order an agency to publish its PRA procedures.	*See Resident Action Council v. Seattle Housing Authority*, __ P.3d __ (2014), 2013 WL 7024095.
• Agencies are not required by PRA to give an explanation for estimates of time for further response at the time of the explanation.	*Ockerman v. King County Department of Developmental and Environmental Services*, 102 Wn. App. 212, 214, 6 P.3d 1214, 1215 (2000) (RCW 42.56.520 "does not require an agency to provide a written explanation of its reasonable estimate of time when it does not provide the records within five days of the request.") [However, recall that agencies carry the burden of proof to establish an estimate of time is reasonable if challenged under RCW 42.56.550, so a suggested practice could include providing some information on the estimate, particularly if the time estimate is significant. See comments at WAC 44-14-04003(6).]
• A "complex and broad" request may require an agency to provide records in installments, and use additional time to locate and assemble records, notify third parties, and determine if information is exempt.	*West v. Department of Licensing*, Div. I Court of Appeals No. 7-643-3-1 (June 9, 2014) (unpublished) (Note: motion to publish and motion for reconsideration filed).
• An estimate of time for further response can take into account an agency's resources and amount of work.	*Anderson v. Spokane Police Department*, Div. III Court of Appeals No. 3-568-1-III (July 17, 2014) (unpublished).
• Agencies are not required to conduct legal research or explain public records they provide.	*Bonamy v. City of Seattle*, 92 Wn. App. 403, 960 P.2d 447 (1998); *Limstrom v. Ladenburg (Limstrom II*); 136 Wn.2d 595, 963 P.2d 896 (1998).
• An agency has no duty to create a public record in response to a request.	*Smith v. Okanogan County*, 100 Wn. App. 7, 994 P.2d 857 (2000); *Fisher Broadcasting v. City of Seattle*, __ Wn.2d __, 326 P.3d 688 (2014).
• However, with electronically store data, there will not always be a "simple	*Fisher Broadcasting v. City of Seattle*, __ Wn.2d __, 326 P.3d 688 (2014).

dichotomy" between producing an existing record and creating a new one.	
• Merely because information is in a database designed for a different purpose does not exempt it from disclosure. Nor does it necessarily make the production of information a creation of a record.	*Fisher Broadcasting v. City of Seattle*, __ Wn.2d __, 326 P.3d 688 (2014) (Whether a particular request asks an agency to produce or create a record will likely often turn on the specific facts of the case).
• Be careful if the agency's response describes that exemptions may be applicable, even if the agency has not yet produced records or prepared exemption log/brief explanation.	*Mitchell v. Department of Corrections*, 164 Wn. App. 597, 277 P.3d 670 (2011) (In processing step, DOC had responded that the requested records would "have redactions that are mandatory exempt from disclosure" so they would not be able to be provided electronically to the inmate; court found that triggered exemption explanation requirements at that point).
• If an agency does not find responsive records, should let requester know and give explanation.	*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011) ("An adequate response to the initial PRA request where records are not disclosed should explain, at least in general terms, the places searched."); *Fisher Broadcasting v. City of Seattle*, __ Wn.2d __, 326 P.3d 688 (2014) (The response "should show at least some evidence that the agency sincerely attempted to be helpful.")
SEARCHES. *PRA says agencies are to give "fullest assistance" to requester, and can ask requester for clarification, but PRA is silent as to details about searches or what constitutes an adequate search.* However, several court decisions have addressed searches.	
• When deciding the scope of search, don't read the request too narrowly. Seek clarification if uncertain.	*Helton v. Seattle Police Department*, No. 68016-1-1 (Div. 1) (As amended April 23, 2013) 2013 WL 1488998 (unpublished) (Agency gave "too short a shrift" to the request); *Gale v. City of Seattle*, 2014 WL 545844 (Feb. 10, 2014) (unpublished) (requester's failure to clarify).
• The adequacy of a search for records under the PRA is the	*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011).

same as exists under the federal Freedom of Information Act (FOIA).	
• Searches for potentially responsive records must be adequate – "reasonably calculated to uncover all relevant documents."	*Yousoufian v. Office of Ron Sims*, 162 Wn.2d 1011 (2008) (later decision was issued in 2010) (court noted county's search was "grossly negligent.") *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011) (scope of search, including new and old computers). "The focus of the inquiry is not whether responsive documents do in fact exist, but whether the search was adequate. • The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. • What will be considered reasonable will depend upon the facts of each case. • Agencies are required to do make more than a perfunctory search and to follow obvious leads as they are uncovered. • The search should not be limited to one or more places if there are additional sources for the information requested. • Indeed, the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested. • This is not to say, of course, that an agency must search every possible place a record may conceivably be stored, but only those places where it is likely to be found." *See also Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012) (scope of search by city, including home computers); *Greenhalgh v. State Attorney General*, No. 41249-7-II (Div. II) (Dec. 6, 2011), 2011 WL 6039556 (unpublished) (scope of search by AGO); *Francis v. Department of Corrections*, 178 Wn. App. 42, 313 P.3d 457 (2013) (currently on appeal) (search by DOC - "The evidence before the trial court showed that McNeill staff spent no more than 15 minutes considering Francis's request and did not check any of the usual record storage locations."); *Gale v. City of Seattle*, 2014 WL 545844 (Feb. 10, 2014) (unpublished) (use of reasonable search terms; requester's failure to clarify; failure to locate a responsive record does not indicate search was inadequate).
• Searches must be "sincere and adequate."	*Fisher Broadcasting v. City of Seattle*, __ Wn.2d __, 326 P.3d 688 (2014).
• Inadequate search can show bad faith [relevant to inmate	*Francis v. Department of Corrections,* 178 Wn. App. 42, 313 P.3d 457 (2013) (currently on appeal) (court found agency staff spent no more than 15 minutes

requests – RCW 42.56.565].	considering a request and did not check any of the usual storage locations, thus was indicative of bad faith under the facts of that case).
• PRA does not require agency to "go outside its own records and resources to identify or locate the records requested."	*Limstrom v. Ladenburg (Limstrom II),* 136 Wn.2d 595, 963 P.2d 896 (1998); *Bldg. Indus. Ass'n of Wash. v. McCarthy,* 152 Wn. App. 720, 218 P.3d 196 (2009). *See also Worthington v. WestNet* __ Wn. App. __, 320 P.3d 721 (Div. 2, 2014) (currently on appeal) (request made to task force, which was not a separate legal entity); and, *Reid v. Pullman Police Department*, 2014 WL 465634 (Div. III, Jan. 28, 2014) (unpublished).
• Agency needs to search non-agency owned computers & possibly other devices if agency personnel used those devices for agency business. *(Note: Some cases pending).*	*O'Neill v. City of Shoreline* 170 Wn.2d 138, 240 P.3d 1149 (2010) (agency emails on personal computers); *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012) (personal computers & agency emails, but also noting that "purely personal" emails are not public records); *see also Mechling v. Monroe*, 152 W. App. 830, 222 P.3d 808 (2009) (personal email addresses). Note pending appellate cases: *Nissen v. Pierce County*, Court of Appeals Div. II No. 44852-1 (personal cell phone & text messages); *Paulson v. City of Bainbridge Island*, Court of Appeals Div. II No. 46381-2 (personal computers & emails – search of hard drives).
• PRA does not require "mining data from two distinct systems and creating a new document." However "partially responsive" records must be produced.	*Fisher Broadcasting v. City of Seattle*, __ Wn.2d __, 326 P.3d 688 (2014), also citing *Citizens for Fair Share v. Dep't of Corrections,* 117 Wn. App. 41 (2003) and *Smith v. Okanogan County*, 100 Wn. App. 7 (2000).
• Agencies should document their search efforts and search terms. Be able to "show your work" if search is challenged so you can include the search details in affidavits or declarations.	*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011) ("[A]n agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. They should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched.") *See, e.g., Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012) (examples of what city documented regarding search and provided the court in affidavits); *Greenhalgh v. State Attorney General*, No. 41249-7-II (Div. II) (Dec. 6, 2011), 2011 WL 6039556 (unpublished) (examples of agency declarations describing search); *Gale v. City of Seattle* (No. 70212-2-1) (Feb. 10, 2014) (Div. I) 2014 WL 545844 (unpublished decision) (agency described search terms used); *Reid v. Pullman Police Department*, 2014 WL 465634 (Div. III, Jan. 28, 2014) (unpublished) (city's explanation with respect to absence of records was credible; purely speculative claims about the existence and discoverability of other documents will not

	overcome agency's affidavit).
• An inadequate search is "comparable" to a denial but court does not create new cause of action regarding search (see next box).	*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011).
• An inadequate search is an aggravating factor to be considered in assessing penalties.	*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011).
• If an agency does not find responsive records, it should let requester know and give explanation.	*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011) ("An adequate response to the initial PRA request where records are not disclosed should explain, at least in general terms, the places searched."); *Fisher Broadcasting v. City of Seattle*, __ Wn.2d __, 326 P.3d 688 (2014) (The response "should show at least some evidence that the agency sincerely attempted to be helpful.")

SUMMARY OF STEPS IN CONSIDERING EXEMPTIONS.
PRA does not list specific steps in considering how exemptions apply. It does provide that third parties can be notified to determine if they want to seek court order enjoining disclosure, even if agency does not cite exemption. RCW 42.56.540.
 	
However, Supreme Court has described other steps.
	Resident Action Council v. Seattle Housing Authority, __ P.3d __ (2014), 2013 WL 7024095:
	"In sum, an agency facing a request for disclosure under the PRA should take the following steps:
	• First, determine whether any public records are responsive to the request—if not, the PRA does not apply.
	• Second, insofar as certain public records are responsive,
	  ○ determine whether any exemptions apply generally to those types of records or to any of the types of information contained therein.
	  ○ An agency should be sure to consider any specified limitations to an exemption when discerning the exemption's scope of potential application.
	  ○ If no exemption applies generally to the relevant types of records or information, the requested public records must be disclosed.
	• Third, if an exemption applies generally to a relevant type of information or record,
	  ○ then determine whether the exemption is categorical or conditional.
	  ○ If the exemption is conditional and the condition is not satisfied in the given case, the records must be disclosed.
	• Fourth, if the exemption is categorical, or if the exemption is conditional and the condition is satisfied, then the agency must consider whether the exemption applies to entire records or only to

	certain information contained therein. o If the exemption applies only to certain information, then the agency must consider whether the exempted information can be redacted from the records such that no exemption applies (and some modicum of information remains). o If the exemption applies to entire records, then those records are exempted and need not be disclosed, unless redaction can transform the record into one that is not exempted (and some modicum of information remains). o If effective redaction is possible, records must be so redacted and disclosed. Otherwise, disclosure is not required under the PRA. • These are the indispensable steps that an agency should take in order to properly respond to a PRA request. • These steps are visually represented in the flowchart contained in figure 1." *[Flow chart provided in decision]*.
EXEMPTION LOG/INDEX; BRIEF EXPLANATION. *The PRA says denials of records must be in writing, and contain specific reasons (brief explanation of how exemption applies to record withheld).* *RCW 42.56.210;* *RCW 42.56.070(1).* *PRA contains no reference to an exemption log or index, or other specific details about how to describe record or information withheld.* However, the courts have described further details of what must be included in a denial, and have referenced exemptions logs or indexes, although some decisions say they are not required.	*PAWS v. University of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994). Response must include "specific means of identifying individual records." • "The identifying information need not be elaborate • but should include o the type of record, o its date and o number of pages, o and unless otherwise protected, the author and recipient, o 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 records by numbered sequence." *See also, Rental Housing Association of Puget Sound v. City of Des Moines*, 165 Wn.2d 525 (2009) (describing the need to have sufficient identifying information about withheld documents in order to effectuate the goals of the PRA and noting statute of limitations did not run until agency had produced a *PAWS II* exemption log); *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010) (discussion of "brief explanation" requirement). *But see Smith v. Okanogan County*, 100 Wn. App. 7, 994 P.2d 857 (2000) and *Simpson v. Okanogan County*, No. 28966-4-III (Div. 3) (April 26, 2011) (unpublished) (no requirement in PRA to create an exemption log, although may be a better practice to create such a log).
PRA LITIGATION PROCEDURES – ADDED BY COURTS OR IN SOME CASES BY OTHER STATUTES	
JURISDICTION & VENUE. *PRA provides jurisdiction to superior courts, and describes venues at RCW 42.56.550(1), (2) and (5). PRA is silent as to federal courts but does reference judicial review by "courts" in (3) and (4).* However, some PRA actions have proceeded against cities in federal court.	*Reed v. City of Asotin*, 917 F.Supp. 1156 (E.D. Wash., 2013) (directing PRA claim "to proceed to trial"); *Lindell v. City of Mercer Island*, 833 F.Supp. 1276 (W.D.Wash. 2011) (awarding PRA penalties and fees).
REQUESTER'S STATUS. *PRA is silent on requester's status in litigation, if not the Plaintiff.* However, the courts have held that the requester must be joined as a necessary party.	*Burt v. Wash. State Dep't of Corr.*, 168 Wn.2d 828, 833, 231 P.3d 196 (2009) (holding that a person who requests public records is a necessary party and must be joined in any action brought under RCW 42.56.540).
SERVICE. *PRA is silent on service procedures.*	

However, a court has held that a county can be dismissed when the proper county entity is not served.	RCW 36.01.010; RCW 4.28.080(1); *Day v. Pierce Co. Prosecuting Attorney's Office*, No. 40730-2-II (April 23, 2012) (Div. II) (unpublished) (dismissal proper where requester failed to properly serve Pierce County Auditor and failed to re-file and serve before one-year statute of limitations ended); see also *Roth v. Drainage Improvement Dist. No. 5*, 64 Wn.2d 586 (1964) (service).
DISCOVERY. *PRA is silent on discovery.* However, Supreme Court has addressed discovery in PRA cases.	
• General civil rules control discovery in PRA cases.	*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011); CR 81; *Spokane Research and Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005); see also *Block v. City of Gold* Bar, 2013 WL 5408645 (Sept. 23, 2013) (unpublished)(trial court awarded city attorney fees and dismissed case when requester failed to pay fees or appear for deposition).
• PRA does not create special proceeding subject to special rules.	*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011); *Spokane Research and Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005).
• Discovery about reasons behind a decision not to disclose records is relevant.	*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011); *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010).
• It may be within the trial court's discretion to narrow discovery but it must not do so in a way that prevents discovery of information relevant to the issues that may arise in a PRA lawsuit.	*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011).
• Court can sanction a party for failing to comply with discovery in PRA case.	*Block v. City of Gold* Bar, 2013 WL 5408645 (Sept. 23, 2013) (unpublished)(trial court awarded city attorney fees and dismissed case when requester failed to pay fees or appear for deposition).
INTERVENTION. *PRA is silent on intervention.* However, Supreme Court has said intervention is permissible in PRA cases.	*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011); *Spokane Research and Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005).
HEARINGS GENERALLY.	

PRA describes hearings are "show cause" hearings and courts may conduct a hearing based solely on affidavits. RCW 42.56.550. However, courts have said this hearing can also be in the form of a summary judgment motion, or other civil proceedings, although most hearings are "show cause" procedures.	*See generally Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005); *Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004) and *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997) (summary judgment); *CLEAN v. City of Spokane*, 133 Wn.2d 455, 947 P.2d 1169 (1997) (declaratory and injunctive relief); *Amren v. City of Kalama*, 131 Wn.2d 25 , 29-30, 929 P.2d 389 (1997) (writ of mandamus).
HEARINGS – AGENCY INITIATED. *Under PRA, agencies can also initiate hearings to enjoin inspection. RCW 42.56.540; RCW 42.56.565 (inmate requests); RCW 71.09.120(3)(sexually violent predator requests).* Courts have also said agencies can seek hearing for declaratory ruling when issue of law presented.	*See, e.g., City of Seattle v. Egan*, 2014 WL 645381(Feb. 18, 2014) (unpublished); *City of Seattle v. Egan*, __ Wn. App. __, 317 P.3d 568 (2014) (Note: petition for review filed).
BURDEN OF PROOF. *PRA specifies burden of proof if agency is sued for non-disclosure, or for unreasonable estimate of time – burden is on agency. RCW 42.56.550. PRA is silent on burden of proof in other contexts.* However, courts addressed burden of proof in PRA actions in this and other contexts.	
• The burden rests upon the person seeking nondisclosure.	*Spokane Police Guild v. Liquor Control Board*; 112 Wn.2d 30, 796 P.2d 283 (1989); *Dragonslayer, Inc. v. Wash. State Gambling Comm'n,* 139 Wn. App. 433, 191 P.3d 428 (2007*); see also Robbins, Geller et al. v. State et al*., 179 Wn. App. 711, ___P.3d ___ (2014).
• When "executive privilege" asserted, burden applies to Plaintiff to overcome that constitutional privilege.	*Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 310 P.3d 1252 (2013).

• A court may shift the burden if it finds exemption applies but is argued as unnecessary.	*Ameriquest Mortgage Co. v. Wash. State Office of Attorney General*, 177 Wn.2d 467, 300 P.3d 799 (2013) ("A court may even allow for the inspection and copying of exempt records if it finds "that the exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital government function." RCW 42.56.210(2); *Oliver v. Harborview Med. Ctr.*, 94 Wash.2d 559, 567–68, 618 P.2d 76 (1980) (burden shifts to the party seeking disclosure to establish that the exemption is clearly unnecessary)).")
• It is possible a court might look at other burdens if records are governed by other statutes *(not entirely clear).*	*See, e.g., Ameriquest Mortgage Co. v. Wash. State Office of Attorney General*, 177 Wn.2d 467, 300 P.3d 799 (2013)*; see also Robbins, Geller et al. v. State et al.*, ___ P.3d ___ (2014), 2014 WL 83985 (published).
• Court will consider agency affidavits in determining whether agency met its burden.	*Reid v. Pullman Police Department*, 2014 WL 465634 (Div. III, Jan. 28, 2014) (unpublished) (city's explanation with respect to absence of records was credible; purely speculative claims about the existence and discoverability of other documents will not overcome agency's affidavit).
IN CAMERA REVIEW. *PRA provides that courts may review records in camera (RCW 42.56.550(3)) but does not provide other details about this process.* However, courts have referenced *in camera* review procedures in some circumstances.	
• The Supreme Court has suggested courts are familiar with the procedures.	*Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 310 P.3d 1252 (2013) ("Our courts are already familiar with the in camera review process mandated by the PRA to determine whether an exemption applies. RCW 42.56.550.")
• As an example, the Supreme Court has noted it is appropriate in the work product context.	*Freedom Foundation v. Gregoire* ("In camera review is, similarly, warranted to establish the judicially created PRA exemption for attorney work product. *Soter v. Cowles Publ'g* Co., 162 Wn.2d 716, 744, 174 P.3d 60 (2007).")
• And, in court rule, some courts may have provided a PRA litigation process, including an *in camera* review process.	*See, e.g., Thurston County Local Rule 16(c)* "Public Records Act Cases" (PRA and *in camera* review procedures set out in local rule).
VIOLATIONS. *RCW 42.56.550 sets out*	

violations of the PRA for denying a request to inspect/copy a public record, and not providing a reasonable estimate of time. It also references judicial review of agency actions under RCW 42.56.030 - .520. There has also been case law describing violations.	
• Failing to provide a "partially responsive" response violates the PRA.	*Fisher Broadcasting v. City of Seattle*, __ Wn.2d __, 326 P.3d 688 (2014).
• Failure to respond within 5 business days is a violation of the PRA.	*West v. Department of Natural Resources*, 163 Wn. App. 235 (2011).
PRA PENALTIES. *Except for setting penalty ranges in RCW 42.56.550, PRA is silent on how penalties are to be assessed.* However, Supreme Court held that a court is to consider a nonexclusive list of mitigating and aggravating factors in assessing PRA penalties.	*Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444 (2010) --- **Aggravating** factors are: 1. A delayed response by the agency, especially in circumstances making time of the essence 2. Lack of strict compliance by the agency with all PRA procedural requirements and exceptions 3. Lack of proper training and supervision of agency personnel 4. Unreasonableness of any explanation for noncompliance by the agency [and failure to briefly explain exemptions – see *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011); and, *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010)] 5. Negligent, reckless, wanton, bad faith or intentional noncompliance with the PRA by the agency 6. Agency dishonesty 7. The public importance of the issue to which the request is related, where importance was foreseeable to the agency 8. Any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency 9. A penalty amount necessary to deter future

	misconduct by the agency considering the size of the agency and the facts of the case. *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011) --- 10. An inadequate search is an additional aggravating factor in assessing penalties. * * * *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444 (2010) --- **Mitigating** factors are: 1. Lack of clarity in PRA request 2. Agency's prompt response or legitimate follow-up inquiry for clarification 3. Agency's good faith, honest, timely and strict compliance with all PRA procedural requirements and exemptions 4. Proper training and supervision of agency personnel 5. The reasonableness of any explanation for noncompliance by the agency 6. The helpfulness of the agency to the requestor 7. The existence of agency systems to track and retrieve records
ATTORNEY'S FEES. *PRA provides prevailing party against an agency per claims specified in PRA (inspect/copy, or estimate of time) shall be awarded costs including reasonable attorney fees, incurred in connection with such action. RCW 42.56.550. PRA is silent on status of pro se litigants.* However, courts have held that attorney's fees in PRA do not extend to *pro se* litigants who are not attorneys, in same manner they do not extend to *pro se* parties in other litigation.	*Mitchell v. Department of Corrections*, 164 Wn. App. 597, 277 P.3d 670 (2011); see also *In re Marriage of Brown*, 159 Wn. App. 931, 247 P.3d 466 (2011) (no *pro se* fees); *Leen v. Demopolis*, 62 Wn. App. 473, 815 P.2d 269 (1991) (no *pro se* fees).
APPELLATE REVIEW *PRA says judicial review is de novo. RCW 42.56.550.* The courts have provided more information about appeals.	
• Trial court's decision to grant injunction, and its terms, are reviewed for abuse of discretion. • The same is true for fee awards.	*Resident Action Council v. Seattle Housing Authority*, __ P.3d __ (2014), 2013 WL 7024095; *City of Kucera v. Dep't of Transp.,* 140 Wn.2d 200, 995 P.2d 63 (2000). *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110, 231 P.2d 219 (2010).

IV. Public Records Legislative Update from 2014 Session 

(Note: UPDATED ON APRIL 22, 2014. See the Washington State Legislature website at http://www.leg.wa.gov/pages/home.aspx. Also, unless otherwise specified in the bill, laws passed during the 2014 regular session were effective June 12, 2014).

A. Senate Bills

- **Engrossed Senate Bill 5964** – Open Government Trainings Act. Effective July 1, 2014. Requires records officers and local and statewide elected officials to receive records training. *Governor signed. Chap. 66, 2014 Laws.* [See Q & A for more information.] *[Note: Act now codified at RCW 42.56.150, RCW 42.56.152, RCW 42.30.205]*
- **Substitute Senate Bill 6007** – Exemption for customer information held by public utilities (customer addresses, telephone numbers, electronic contact information, and specific billing usage and billing information in increments less than a billing cycle). *Governor signed. Chap. 33, 2014 Laws.*
- **Senate Bill 6141** – Exemption for certain records filed by waste collection companies with the utilities and transportation commission or the attorney general. *Governor signed. Chap. 170, 2014 Laws.*
- **Second Substitute Senate Bill 6062** – Requiring internet access to school data for school districts, charter schools and state-tribal compact schools. Collective bargaining information and student association funding information to be posted on website. *Governor signed. Chap. 211, 2014 Laws.*
- **Engrossed Substitute Senate Bill 6265** – Effective July 1, 2014, except for Section 8 which became effective April 4, 2014. Procedures for public agencies that hold health care information when they are not health care facilities or providers authorized to receive that information. Agencies must adopt rules and policies regarding destruction of records and notification of persons whose health care information has been improperly disclosed, and rules and policies must be posted on each agency's website. *Governor signed and partially vetoed (Sec. 16 vetoed). Chap. 220, 2014 Laws.*
- **Engrossed Substitute Senate Bill 6517** – Exemption for public employees' and volunteers' driver's license numbers and identicard numbers. *Governor signed. Chap. 106, 2014 Laws.*
- **Engrossed Second Substitute Senate Bill 6518** – Terminates "Innovate Washington" program and removes reference to it in Public Records Act. *Governor signed. Chap. 174, 2014 Laws.*
- **Senate Bill 6522** – Exemption for certain records of industrial insurance claims resolution structured settlement negotiations. *Governor signed. Chap. 142, 2014 Laws.*

B. House Bills

- **Second Substitute House Bill 1651** – Juvenile court records. Requires court to hold regular hearings to seal certain juvenile court records, which will occur administratively unless court receives an objection or court notes compelling reason not to seal, at which point a hearing will be held. With certain exceptions, requires courts to seal certain juvenile court records administratively after an individual turns 18 and completes probation, confinement, or parole. *Governor signed. Chap. 175, 2014 Laws.*

- **Engrossed Substitute House Bill 2023 -** Exemption for financial information supplied to the Department of Financial Institutions for purpose obtaining exemption from state securities registration for small securities offerings (crowd funding). *Governor signed. Chap. 144, 2014 Laws.*

- **Engrossed Substitute House Bill 2304** – Exemption for financial information for applications for marijuana producers, processors or retailers. *Governor signed. Chap. 192, 2014 Laws.*

- **House Bill 2515** – Exemption for population enumeration data. Office of Financial Management must destroy data after it is used. *Governor signed. Chap. 14, 2014 Laws.*

- **Substitute House Bill 2724** – Exemption for archaeological information (archaeological resources and traditional cultural places information obtained by certain agencies, or shared between certain agencies with tribes). *Governor signed. Chap. 165, 2014 Laws*

- ~~**Engrossed House Bill 2789** - Imposes restrictions on state and local agency procurement and usage of "extraordinary sensing devices," defined as sensing devices attached to unmanned aircraft systems. Restricts use of "personal information" acquired and requires destruction of certain information.~~ *Governor vetoed; Governor issuing moratorium for state agencies and has convened task force.*

V. New Open Government Training Requirements (ESB 5964) Effective July 1, 2014 *[Note: Act now codified at RCW 42.56.150, RCW 42.56.152, RCW 42.56.155, RCW 42.30.205]*

2014 Open Government Trainings Act

The Open Government Trainings Act, Chap. 66, 2014 Laws (Engrossed Senate Bill 5964) was enacted by the 2014 Washington State Legislature, effective July 1, 2014. Here is a guide.

1. Why did the Legislature enact this new law?

Answer: The bill was introduced at the request of the Attorney General, with bipartisan support. A 2012 Auditor's Office report noted more than 250 "open government-related issues" among local governments. These included issues concerning the Open Public Meetings Act (OPMA) at RCW 42.30. In addition, in recent years the courts have imposed some significant monetary penalties against state and local public agencies due to their non-compliance with the Public Records Act (PRA) at RCW 42.56. Most violations are not malicious or intentional; they are often the result of insufficient training and knowledge. The comments to the Attorney General's Office advisory Model Rules on the PRA, and case law, have recognized that PRA training for records officers is a best practice. See, for example, WAC 44-14-00005.

The Legislature passed ESB 5964 in March 2014 and the Governor signed it on March 27, 2014. The Act is designed to foster open government by making open government education a recognized obligation of public service. The Act is also designed to reduce liability by educating agency officials and staff on the laws that govern them, in order to achieve greater compliance with those laws. Thus, the Act is a risk management requirement for public agencies. The Act provides for open public meetings and records trainings. In sum, the Act is intended to improve trust in government and at the same time help prevent costly lawsuits to government agencies. *[Section 1]*

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2. What is the Act called? 

Answer: The Open Government Trainings Act. *[Section 6]*

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3. When it is the Act effective? 

Answer: July 1, 2014. *[Section 7]*

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4. What is a quick summary of the Act's requirements? 

Answer: The Act requires basic open government training for local and statewide officials and records officers. Training covers two subjects: public records and records retention ("records training"), and open public meetings. *[Sections 1-4]* Whether you are required to take trainings on one or both subjects depends on what governmental position you fill.

5. What is the Attorney General's Office role?

Answer: The Attorney General's Office may provide information, technical assistance, and training. *[Section 5]* See also RCW 42.56.570 and RCW 42.30.210. The office maintains and provides a public web page with training videos as well as training resources.

The office is also providing other assistance such as this Q & A guidance. The Assistant Attorney General for Open Government (ombudsman) is also available as a resource. See Q & A Nos. 13 and 22.

6. Who is subject to the Act's training requirements?

Answer:

► **Members of governing bodies.**

Members of a governing body of a public agency subject to the OPMA must receive **open public meetings training (OPMA training concerning RCW 42.30)**. "Public agency" and "governing body" are defined in the OPMA. RCW 42.30.020.

They include members of city councils, boards of county commissioners, school boards, fire district boards, state boards and commissions, and other public agency boards, councils and commissions subject to the OPMA. Effective July 1, 2014, those members must receive OPMA training no later than 90 days after they take their oath of office or assume their duties. They can take the training before they are sworn in or assume their duties of office. They must also receive "refresher" training at intervals of no more than four years, so long as they are a member of a governing body. *[Section 2]*

Note: *If a member of a "governing body" is also an elected local or statewide official, he or she must receive both open public meetings and records trainings (see next bullet).*

* * *

► **Elected local and statewide officials.**

Every local elected official, and every statewide elected official, must receive **records training** (**PRA training concerning RCW 42.56, plus records retention training concerning RCW 40.14**).

Effective July 1, 2014, they must receive this training no later than 90 days after they take their oath of office or assume their duties. They can take the training before they are sworn in or assume their duties of office. They must also receive "refresher" training at intervals of no more than four years. *[Section 3]*

Note: *If an elected local or statewide official is also a member of a "governing body," the official must receive <u>both</u> open public meetings and records trainings.*

* * *

► **<u>Records officers</u>.** 

Public records officers for state and local agencies, and state agency records (retention) officers designated under RCW 40.14.040, must receive **<u>records training</u>** (**PRA training concerning RCW 42.56 and records retention training concerning RCW 40.14).** Effective July 1, 2014, they must receive this training no later than 90 days after they assume their duties. They must also receive "refresher" training at intervals of no more than four years. *[Section 4]*

Note: While Section 4(2) of the bill refers to "public records officers" in the training schedule, the act's training requirements were intended to apply to both public records officers under the PRA and to state agency records officers designated under RCW 40.14.

* * *

► **<u>Others</u>.** 

Other public agency officials and employees who are not listed in the Act are not required to receive training. However, this Act sets only minimum training. Agencies may wish to provide or arrange for additional or more frequent training, or training for additional staff.

Training is essential because even one unintentional mistake can amount to a violation of the PRA or OPMA. PRA training reduces risks of lawsuits. As the State Supreme Court has explained, "An agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain. If an agency employee along the line fails to comply, the agency's response will be incomplete, if not illegal." *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243 (1995). And the Supreme Court has held that PRA training can reduce PRA penalties. *Yousoufian v. Office of Ron Sims,* 168 Wn.2d 244 (2010).

As a consequence, an agency may want persons who are not listed in the Act to receive training. How much training each employee receives may depend on his or her role. For example, an agency may want all employees to be trained on the basics of records management, search requirements, how to identify a request for records, and what is a public record. An agency could include basic records training in all its new employee orientations, covering both PRA and records retention.

Other employees may benefit from additional training. For example, public records officers may have other designated staff to assist them in responding to records requests. Thus, records training would be useful for those staff. And, that records training for those who regularly assist public records officers may be more detailed or frequent than, say, that provided to a board member.

Or, while a local government agency is not required to formally designate a records retention officer under RCW 40.14.040, as a practical matter, the agency may have staff who is key in maintaining records using the local government records schedules. Therefore, those local government agencies may want to provide or arrange for those staff to receive training on RCW 40.14.

Or, a board may have a staff member or clerk who posts meeting notices and agendas, and maintains minutes, so that person may likely benefit from training on the open public meetings requirements under the OPMA.

And, regular refresher training may be appropriate for any of these employees, depending upon the person's governmental position and developments in the law.

In sum, while training is not required for governmental positions not listed in the Act, the Attorney General's Office encourages agencies to consider that persons in other positions are subject to or working with these laws, and would likely benefit from receiving training, if feasible. Training on the laws is a best practice, even if not specifically required by the Act. Education helps support transparency in government and reduces risk to agencies.

7. Who is not subject to the Act's training requirements?

Answer: As noted in Q & A No. 6, public agency employees and officials not listed in the Act are not required to receive training. The courts and the State Legislature are also not required to receive training (unless the person also holds another governmental position where training is required, for example, serving on a governing body subject to the OPMA). Even so, the Act does not restrict them from receiving or participating in open government training.

Others not subject to the Act include board members, officials or employees of purely private organizations. Examples are nonprofit boards, homeowners associations, or other private entities that are not a public agency or the functional equivalent of a public agency.

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8. What if I am in my elected position (an incumbent) on July 1, 2014, and I am <u>not</u> up for re-election in 2014? How does the training schedule work for me? What if I already received training in 2014?

Answer: Even if not specifically required by the Act, we recommend that incumbents in office on July 1, 2014 receive training for each of the required sections of law during 2014, <u>if</u> they have not already received such training. If they have already received training in 2014 for the required sections of law, we suggest they <u>document</u> it. (See Q & A No. 17). Then, calendar refresher trainings at intervals of no later than four years (as long as you are a member of the governing body or public agency). We suggest this approach for several reasons.

- First, the training will help establish a "**culture of compliance**" with open government laws in the agency if officials and others subject to the Act demonstrate they have recently received or are quickly willing to receive the training.

- Second, it will help set a similar "**base year**" for scheduling four-year refresher trainings if several officials in a public agency are required to receive that training.

- Third, it is a **good idea** for an elected official to receiving training in 2014, even if the training covers some of the same topics previously reviewed during an earlier year's orientation or training. Given the public interest in these laws, it is good to keep them in the forefront of the official's or employee's base knowledge. And, there may be new developments in the statutes or court decisions that were not covered in a prior training.

- Finally, the **sooner training is received and documented, the sooner that information will be available** to a court or others if needed. Since 2010, the State Supreme Court has said it will consider PRA training in assessing penalties for public records violations specified in the PRA. (See more discussion under Q & A No. 20 discussing non-compliance with the Act.)

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9. What if I am in my elected position (an incumbent) on July 1, 2014, and I <u>am</u> seeking re-election in 2014? How does the training schedule work for me?

Answer: Incumbents who are re-elected in November 2014 must receive training no later than 90 days after they take their new oath of office or otherwise assume their duties. However, they can take the training sooner. Therefore, they could either take the training some time by the end of 2014 (perhaps with other officials and staff receiving training in 2014), or they could wait to take the training within 90 days after they take their oath of office or otherwise assume their duties of office if re-elected in November.

Then, refresher training must be taken no later than every four years (as long as you are a member of the governing body or public agency). .

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10. What if I am in my position as an incumbent public records officer or records officer on July 1, 2014? How does the training schedule work for me?

Answer: If you were in your position prior to July 1, 2014, and you have already received training in 2014, we recommend you document it. However, if you did not receive any records training in 2014, we recommend you receive training this

year, given the reasons and approach stated in Q & A No. 8, and document that training. (See Q & A No. 17). Then, 2014 becomes your "base year" from which you schedule the refresher trainings that are required no more than four years later (as long as you are in the records officer position).

If you are appointed on or after July 1, 2014, you will need to receive training no later than 90 days after assuming your duties, and then receive refresher trainings no more than four years later.

You can receive more frequent trainings, too, if feasible. More frequent trainings are not restricted in the Act.

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11. What must the training include?

Answer:

- **Open public meetings training** should cover the basics of the OPMA.

[Section 2]

The Act does not provide further details. However, for example, the training could cover the purpose of the act, requirements for regular and special meetings, public notice, executive sessions, and penalties. The training may also include the requirement to maintain minutes and have them open for public inspection, as described in another law at RCW 42.32.030.

The Attorney General's Office online OPMA video and OPMA Power Point cover the basics of the OPMA and satisfy this requirement.

- **Records training – PRA.** Training on the Public Records Act should cover the basics of the PRA at RCW 42.56. Training must be consistent with the Attorney General's Office Model Rules. *[Sections 3, 4]* The Act does not provide further details.

However, for example, the training could cover the purpose of the PRA, what is a "public record," basic public records procedures, how an agency responds to requests, searches, what an agency must do before withholding information in a record from the public, and penalties. The training might also cover an agency's particular PRA procedures set out in its rules or policies.

The Attorney General's Office online PRA video and PRA Power Point cover the basics of the PRA and satisfy this requirement.

Records training – records retention. Record retention training should cover the basics of RCW 40.14. *[Sections 3, 4]*

The Act does not provide further details. However, for example, the training could cover basic retention requirements, what is a records retention schedule, and a brief description of what schedule(s) apply to the agency. For board members, it may also specifically cover how to manage emails and other electronic records. For a records officer, the training may be much more detailed, addressing more specifically the agency's records retention schedules and categories of records.

The Washington State Archives records retention training covers the basics of records retention and satisfies this requirement.

- **The four-year "refresher" training** should cover the basic requirements in effect at the time of the training. It is a good idea to cover any recent developments in the law since the last training. Under the Act, the refresher trainings must occur at intervals of no more than four years.

  There may be options an agency wants to consider for giving refresher training. For example, it may be useful to have a refresher training once a year such as at a board meeting or staff workshop. In that way, officials and employees subject to these laws can receive ongoing refreshers as well as updates on the laws, without needing to individually calendar the four-year cycle.

12. Who will provide the training?

Answer: That choice is up to each agency official and employee, depending on the agency's needs and resources. The Attorney General's Office has provided a web page with training information. That web page includes resources for PRA and OPMA training. Examples include Power Point presentations, videos, manuals, and links to other training resources. The web page also provides links to the Washington State Archives online training materials and other information describing records retention requirements. Other training options are available as well. See Q & A No. 13.

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13. What are the training options for an official or employee?

Answer: There are many options to receive training. To illustrate, an official or employee could take training in any of the following ways:

- **In-House Training at the Agency.**
  - In-house training provided by the agency's legal counsel, assigned Assistant Attorney General, or agency staff familiar with the requirements of the law.

- Training through videos or Power Points at a board meeting or staff meeting or workshop, perhaps with someone available to answer follow-up questions.
- Training as part of the orientation for new members and new staff.

- **Internet or Remote-Technology Based Training**. *[Sections 2, 3, 4]*

  - Online or internet-based training, webinar training, or training via Skype.
  - The training resources provided on the Attorney General's Office training web page includes videos and links to training materials. The Attorney General's Office OPMA and PRA videos and two Power Point presentations linked there satisfy the OPMA and PRA training requirements. The State Archives records retention training linked there satisfies the records retention training requirements.

- **Training from Public Agencies or Public Agency Associations**.

  - Training offered by or at other public agencies or associations.
  - For example, training may be provided by a school board association, a fire district association, a public records officer association, and similar entities.
  - The Attorney General's Office is also examining whether its training videos can be made available online on the State of Washington Department of Enterprise Services "Learning Management System" website for state employees.

- **Outside Training**.

  - Training from an outside private trainer.
  - For example, a resource for local governments is the Municipal Research and Services Center.
  - The Washington State Bar Association may also provide Continuing Legal Education (CLE) programs, particularly on the PRA and OPMA. These may be useful for persons who are attorneys who must receive training under the Act and who are also required by the WSBA to obtain CLE credits.

- **Washington State Archives - Records Retention Training**.

  - The Washington State Archives provides guidance and support to state and local government agencies in public records management by offering education and training opportunities.
  - Information about the State Archives training for state agencies and local agencies is available online.
  - Another option is to ask the State Archives staff to provide records retention training or to guide the agency to other useful records retention training resources. An agency can contact the State Archives by email at recordsmanagement@sos.wa.gov or by telephone at (360) 586-4901.

- **Attorney General's Office In-Person Training.** *[Section 5]*
  - Ask the Assistant Attorney General for Open Government to provide PRA or OPMA training.
  - *Note:* There may be minimum audience size, travel and other factors to consider.

- **Other Training.**
  - Consider other training options that cover the open public meetings and records training requirements.

The Act was designed to be flexible so an agency official or employee could select a training option that best fits his/her needs, governmental position, and agency resources.

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14. What does it mean when the Act says that the PRA training must be consistent with the Attorney General's Office PRA Model Rules?

Answer: The Attorney General has, in chapter 44-14 WAC, adopted "Model Rules" on PRA compliance to provide information to agencies and to requestors about "best practices" for complying with the PRA. While the PRA Model Rules are advisory (RCW 42.56.570), they are also noted as a training tool in the Act. *[Sections 3, 4]*. We believe they are used and referenced by many agencies today. As such, they are a good training foundation from which an agency can conduct or design PRA training. The Model Rules are also available on the office's Open Government Training web page.

The Attorney General's Office PRA training video available on our web page is consistent with the Model Rules.

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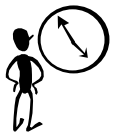
15. Does the Act require the Attorney General's Office to approve or certify training?

Answer: No.



16. Are there a minimum number of hours required for training?

Answer: No.

However, basic training for the OPMA and PRA should probably last no less than 15 – 20 minutes each, and basic records retention training should probably last 10-15 minutes. More detailed and longer training may be appropriate for some positions. For example, records officers may want to receive more detailed

training on the PRA and records retention schedules, and/or receive training more often than once every four years.

17. Should an official or employee document the training? If so, how?

Answer: The Act does not require training to be documented. Even so, we recommend officials and employees subject to the Act document this training, and we recommend that their agencies assist them. An agency will want to have training information available to a court or to others if needed. (See Q & A No. 20 regarding possible consequences of non-compliance.)

The Act also contains no requirements describing how to document training. Every agency may be different in how it maintains its employees' or officials' training records. Or, if the training is conducted at a board meeting, the minutes can reflect that the training was provided and who attended. The minutes would also qualify as documentation.

The AGO has prepared sample documentation forms (a sample certificate and a sample training roster) which are available on the open government training web page. Other forms or methods of documenting training are fine as well.

If an incumbent official or staff member has already received training during 2014, we recommend the official or staff member, or agency, document that training, too, if they have not already done so.

18. Is an official, employee or agency required under the Act to report completed trainings or provide training documentation or data to the Attorney General's Office?

Answer: No.

19. What is the training cost to the official, employee or agency?

Answer: The cost depends on what trainings the officials or employees take. They may incur travel costs on behalf of their agency, but if they take online training, the "cost" is primarily only their time. There is no cost to take the online trainings available on the Attorney General's Office website; they are free. There is no cost to take the State Archives online trainings on records retention; they are also free.

Many agencies that currently arrange for training on these open government laws, or other topics, already either use their own staff to conduct the trainings (such as their attorneys) or seek out other trainings from other organizations/associations. Thus, those are the types of costs currently taken into account by agencies.

20. What is the penalty for an official's or employee's non-compliance with the Act?

Answer: The Act does not provide any new penalties for an official or staff member not receiving required training. The Act does not provide any new penalties for an agency not providing training. The Act does not create a new cause of action in court regarding training under the OPMA, PRA, or records retention laws. Remember, the Act is intended to reduce liability, not create new lawsuits. *[See, e.g., Section 1]*

However, under current case law, a court can consider whether agency staff received training when it is determining whether to assess a penalty for violations of other sections of the PRA (as specified in the PRA). That is, under current case law, evidence of training can mitigate an agency's exposure to penalties; absence of training can aggravate penalties.

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21. What is the bottom line?

Answer: In sum, training is required by the new Act effective July 1, 2014. And, under current law and guidance, training is also in the agency's and the public's best interests. That is, it is already a best practice for officials and other employees who work with those open government laws to receive training, so they can better comply. The new Act simply takes that best practice one step further, by requiring training for many officials and records officers.

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22. Who can we contact for more information? 

Answer: You may contact the Attorney General's Office:

Nancy Krier
Assistant Attorney General for Open Government
(360) 586-7842
Nancyk1@atg.wa.gov

Attorney General's Office Open Government Training Page:
http://www.atg.wa.gov/OpenGovernmentTraining.aspx

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Information about State Archives records management and retention training for state and local agencies is available at:
http://www.sos.wa.gov/archives/RecordsManagement/

Agencies can contact the State Archives by email at recordsmanagement@sos.wa.gov or by telephone at (360) 586-4901.

Thank You!