

# PUBLIC RECORDS ACT UPDATE (AND REFRESHER TOO)

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and does not contain or convey legal advice.

## The Public Records Act – Ch. 42.56 RCW

- Adopted in 1972 under Initiative 276
  - Policy of open government
  - *“The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.”*
- Liberal interpretation
  - *“This chapter shall be liberally construed and its exemptions narrowly construed.”*

(RCW 42.56.030)

## Agencies Must Make Public Records Available

- An agency must make available for public inspection and copying all public records, unless covered by a specific exemption. (RCW 42.56.070)



## Records Policies

- Required by RCW 42.56.040, .070
- Prominently display and make policy available
- Index of records
  - Not required if “unduly burdensome” to maintain
  - But, need a “formal order” explaining this
- Include list of non-PRA exemptions that may apply
- Records retention policy

*Do your policies need updating?*

## What is a “Public Record”?

- Broadly defined at RCW 42.56.010
- Three elements:
  - 1) “any writing . . . regardless of physical form or characteristics”
  - 2) “containing information relating to the conduct of government or the performance of any governmental or proprietary function”
  - 3) “prepared, owned, used, or retained by any state or local agency”
- Questions about whether something is a “public record” are usually about (2) or (3), not (1).

## Enforcement and Penalties

- Court can order statutory penalties be awarded to the requester (per day, per record)
  - And, even per page – *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270 (Mar. 24, 2016)
- Court will order payment of requester's attorney's fees & costs
- Court can also order disclosure of all or part of withheld record, or non-disclosure of part or all of record
- Remember:
  - The PRA liberally construed; exemptions narrowly construed
  - The burden will fall on the agency to justify its conduct

## Responding to Records Requests

- Initial response – within 5 business days (RCW 42.56.520)
  - Provide records, provide reasonable estimate of time, or deny – *Hikel v. City of Lynnwood*, 197 Wn. App. 366 (2016)
  - Requesting clarification
- Installments
- Exemption logs
  - Brief explanation of how exemptions apply to the record
  - Don't simply cite the statute
- Do not charge for inspection of records

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## Judge hits Mesa with budget-breaking penalty for Public Records Act violations

### HIGHLIGHTS

Former Mayor Donna Zink vindicated in years-long battle with tiny city

City penalized for pattern of failing to follow Washington Public Records Act

Penalty is more than twice the city's annual budget



BY WENDY CULVERWELL  
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The city of Mesa faces paying more than twice its annual budget to settle a state Public Records Act dispute with its former mayor, Donna Zink.

Franklin County Superior Court Judge Bruce A. Spanner assessed a \$353,000 penalty against the tiny farm city for 33 separate infractions of the state records law during a hearing Tuesday.

33

violations of Open Records Act

\$353,000

penalties

## Keep in Mind . . .

- Do not distinguish among requesters, except in rare instances where necessary (e.g., request by employee to view file)
- Purpose of request not generally not relevant
  - But, is the requester asking for a list of persons?
- No particular form of request is required
- “Overbroad” requests – agency cannot deny a request solely because it is overbroad (RCW 42.56.080)
- The Act covers requests for *records*, not information
  - But, consider whether to provide information anyway
- Provide the “fullest assistance” to requesters

## Privacy Under the Public Records Act



## Requests for Employee Records

- Who is the requesting party?
  - Employee or former employee?
  - Union?
  - Third party?
- Remember that the Public Records Act isn't the only source of duty to disclose employment records

## Requests by Employees and Former Employees

- Employees and former employees have the right to review information in their personnel file and to challenge that information
  - RCW 49.12.240-.260; WAC 357-22-020
- Former employees retain the right of rebuttal or correction for up to two years
  - RCW 49.12.250

## Requests by Union

- Employer has general obligation to provide information needed by the bargaining representative for the proper performance of its duties
- Information about employees in the bargaining unit is presumptively relevant and must be provided
- Doesn't require a pending grievance
- "The contents of an employee's personnel file unquestionably constitute relevant information as 'intrinsic to the core of the employer-employee relationship'."

*Serv. Co. of New Mexico*, 360 NLRB No. 45 (Mar. 27, 2014) (citing cases)

## Requests by Others

- Evaluate PRA and "other statute" exemptions
  - Some are mandatory (release prohibited by law)
  - Some can be waived
- Notice to affected individuals
  - RCW 42.56.540; WAC 44-14-04003(11)
  - Optional, but must comply with contract or other law requiring notice
- No liability for loss or damage based upon release of a public record if acted in good faith in attempting to comply with the Public Records Act
  - RCW 42.56.060

## Privacy Under the Public Records Act

- There is no general “privacy” exemption in the PRA
  - See WAC 44-14-6002(2)
- But, violation of the right to privacy is an essential element of certain exemptions
  - E.g., personal information maintained in employee file
- Always consider redaction

## Privacy Under the Public Records Act

- What is a person’s right to privacy under the PRA?
- Generally, applies only to the intimate details of one’s personal and private life
- RCW 42.56.050:
  - 1) Highly offensive to a reasonable person and
  - 2) Not of legitimate concern to the public
- *It is not enough that the disclosure may cause embarrassment to the individual or to others*



## Employment Information Exemption – RCW 42.56.250

- Lists several pieces of exempt employee information, such as:
  - Test questions, scoring keys, and other examination data
  - Applications, resumes, and related materials
  - Addresses, telephone numbers, e-mail addresses, SSNs, driver's license numbers, emergency contact and dependent information
- Is not dependent on violating the employee's right to privacy

## Application Materials – 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”*
- Does it still apply after the person is hired?
  - Court of appeals has said “yes” – *Belenski v. Jefferson County*, 187 Wn. App. 724 (2015)\*
- Watch for other exemptions that may apply
  - Military records?
  - Psychological evaluations; polygraph tests?

\*Reversed in part on other grounds, Supreme Court No. 92161-0, 2016 WL 4574356 (Sept. 1, 2016).

## Personal Information Exemption – 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”
- What is “personal information”?
  - Information relating to or affecting a particular individual, associated with private concerns, or that is not public or general. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199 (2008)
- Must violate the employee’s right to privacy (highly offensive and not of legitimate concern to the public)

## Performance Evaluations

- Performance evaluations may be protected
- Discuss instances of misconduct?
  - If yes, that information must be disclosed
  - If not, disclosure of evaluation is presumed highly offensive
- But, who is being evaluated?
  - Legitimate concern of the public?
  - Elected official?

## Employee Disciplinary Records

- No right to privacy in the mere fact of investigation (as distinguished from the factual allegations)
  - *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896 (2015)
- Depends on whether complaint substantiated or resulted in some sort of discipline
  - Substantiated / discipline → disclose
  - Unsubstantiated → personal info may be exempt if alleged misconduct highly offensive (e.g., sexual misconduct with a student)

## Health Care Information

- Public agencies generally not subject to HIPAA or Washington's Health Care Information Act (Ch. 70.02 RCW)
- HIPAA's privacy rules generally do not protect a person's employment records, even if the information in those records is health-related
- Private rights of action
  - Cannot sue for privacy violation under HIPAA. *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1082 (9th Cir. 2007).
  - HCIA allows private cause of action for noncompliance, but only against a "health care provider or facility." RCW 70.02.170.

## Health Care Information Exemption

- Public Records Act exemption incorporating Health Care Information Act. RCW 42.56.360(2).
- But only as to “health care information of patients”
- Employer-mandated evaluations likely don’t qualify
  - *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356 (2005)
  - Release of drug test result not a violation of HCIA – purpose was not health care or medical treatment; required as condition of employment after work injury

## Health Care Information Exemption

- 1) Does the record contain health care information of a patient?
  - E.g., is it a record from a doctor to support a disability claim?
  - Yes? → withhold, or redact if appropriate  
If redaction of identity enough, must do that instead. *Prison Legal News, Inc. v. Dep’t of Corr.*, 154 Wn.2d 628, 645 (2005); see also RCW 42.56.210(1).
  - No? → consider other exemptions, such as . . .

## Health Care Information Exemption

2) Does the record contain information that would violate the employee's right to privacy if disclosed?

- Highly offensive to a reasonable person and
- Not of legitimate concern to the public

*Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129 (1987)

- PRA request for files of retired disabled firefighters and police officers held by the Department of Retirement Systems
- Information pertaining to back injury, asthma, emphysema, ulcers, and possible arterial problems
- *"None of these are unpleasant, disgraceful, or humiliating illnesses. They are not the kinds of illnesses that would be highly offensive to reasonable people."*

## SEIU I & II: Agency Lists

### ▪ SEIU I

- *SEIU Healthcare 775NW v. DSHS*, 193 Wn. App. 377 (Apr. 2016).
- Freedom Foundation request: lists of home care providers
- Purpose: to notify of right to **not** join union and pay dues
- Not a "commercial" request, but agency must ask the question

### ▪ SEIU II

- *SEIU 925 v. Freedom Foundation*, 197 Wn. App. 203 (Dec. 2016).
- Request: lists of **family member** childcare providers
- "Linkage" of family member provider names to identity of children does not prohibit release
- Constitutional privacy right not implicated

## SEIU III: Union Meetings

- **SEIU III**
  - *SEIU 775 v. DSHS*, 198 Wn. App. 745, 396 P.3d 369 (Apr. 2017)
  - CBA requires DSHS to set aside time during employee trainings for meetings with SEIU representatives
  - Request for times/locations of SEIU rep. meetings
  - Public Employees Collective Bargaining Act does not expressly prohibit release
  - Legislative policy to protect public employees' free exercise of right to organize?
- PECBA is not an "other statute" exemption to disclosure

## Closing Observations

- Employee files can present difficult judgment calls
- Privacy test standards evolve
  - What is "highly offensive to a reasonable person"?
  - What is of legitimate concern to the public?
- Court cases provide guidance (and reliance can lessen penalties if a violation), but are not necessarily determinative
- Public records issues are fact-specific
- Consider third-party notice
- Risk analysis

The logo features a dark gray square with a thin black border. The top-left corner of the square is cut off by a diagonal line, creating a triangular section filled with a fine, light gray dot pattern. The text "FOSTER PEPPER" is centered in the square in a white, serif font, with "PLLC" in a smaller font size to the right of "PEPPER".

FOSTER PEPPER PLLC

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### SERVICES

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Litigation & Dispute  
Resolution

Ports

Public Finance

School Districts

### PRACTICE OVERVIEW

Lee focuses his practice on general municipal law and dispute resolution for public and private clients throughout the state. He assists general purpose governments and special purpose districts on a wide range of issues, including with municipal entity formation, governance, legal authority and constitutional limitations, as well as counseling on open meetings, public records, real and personal property transactions, right-of-way franchises, operator agreements and utility rate setting.

Lee's litigation experience includes representations in public records injunction actions, local improvement district formation and assessment challenges, state constitutional matters and general commercial disputes.

Lee has published and presented on public records law and on state constitutional issues, including separation of powers. He is a regular contributor to Foster Pepper's [Open Local Government Blog](#).

Prior to joining private practice, Lee served more than four years in Governor Chris Gregoire's administration as liaison to local government and community groups and as the Governor's outreach director.

### RECOGNITION

– Order of the Coif

### ACTIVITIES

– International Community Health Services, Board Member, 2017-Present

### QUOTED

– [“Unpacking Government: What Are the Limits of Executive Power?”](#) KNKX, March 2017



## PUBLICATIONS

- Lee Marchisio is a contributor to Foster Pepper's Local Open Government Blog. Check out the latest news in this fast-changing area at: <http://www.localopengovernment.com>.
  - + "[No Right of Access to Security Video Footage Revealing Security Capacity for Surveillance System](#)," December 2016
  - + "[Sunshine Committee 2016 Recommendations to Washington Legislature](#)," November 2016
  - + "[In a 5-4 decision, the Washington Supreme Court unscrews the hinges from the already open door on PRA penalties](#)," March 2016
  - + "[Open Meetings Laws Not Applicable To Informal Discussion Groups](#)," October 2015
  - + "[No Privacy Interest In Employee's Identity Connected To Existence Of Investigation When Allegations Are Not Described](#)," April 2015
  - + "[Recent PRA Litigation Missteps: Abandoned Claims, False Starts](#)," October 2014
  - + "[Case Law Update: "fullest assistance," redactions for effective law enforcement, disclosure of non-agency phone logs](#)," September 2014
  - + "[Anti-SLAPP Statute Held Inapplicable to PRA Injunction Actions that Do Not Primarily Seek to Limit Protected Activities](#)," February 2014
  - + "[Constitutional Separation of Powers Protects Gubernatorial Decision Making](#)," October 2013 "[The Record Counts: Properly Asserting and Explaining PRA Exemptions Before and During Litigation](#)," August 2013
  - + "[Under the PRA, Non-Physicians are Peers of Physicians](#)," April 2013
  - + "[Production on a "Partial or Installment Basis" Also Means Just One Production](#)," February 2013
  - + "[Pace of PRA Legislation Mirrors PRA Requests](#)," February 2013
  - + "[Washington's Constitution Guarantees Public Access to Court Documents When Relevant to a Motion Actually Decided](#)," January 2013
  - + "[Arkansas FOIA: Soliciting Individual Board Approval Constitutes a Meeting, Providing Background Information Does Not](#)," January 2013
  - + "[Metadata: You \[Only\] Get What You Ask For](#)," November 2012
  - "[Washington Supreme Court Levels the Playing Field in Real Estate and Land Use Litigation](#)," Co-author, Foster Pepper News Alert, June 2015
  - "[Executive Privilege Under Washington's Separation of Powers Doctrine](#)," Author, 87 Wash. L. Rev. 813, October 2012
- \* This article was cited by Washington State Supreme Court Justice Jim Johnson, dissenting, in *Freedom Foundation v. Gregoire* (2013).

## PRESENTATIONS

- "Public Records Act Training," Co-presenter, Association of Washington Housing Authorities webinar, November 2014
- "Open Public Meetings Act Training," Co-presenter, Association of Washington Housing Authorities webinar, August 2014
- "Public Records Requests: Disclosure with a Positive Attitude," Speaker, Association of Washington Housing Authorities (AWHA) Meeting, April 2013
- "Executive Privilege and Washington's Separation of Powers Doctrine," Speaker, The Legislative Process: Insights Into How it Really Works and Tools to Help You Navigate the Process, September 2012

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## EXPERIENCE

- Foster Pepper PLLC
  - + Associate, 2012-Present
  - + Summer Associate, 2011
- T-Mobile USA, Legal Extern, 2010
- Office of Governor Christine Gregoire
  - + Outreach Director, 2008-2009
  - + Public Liaison Officer, 2005-2007

## BAR ADMISSIONS

- Washington, 2012

## EDUCATION

- J.D., University of Washington School of Law (with high honors), 2012
  - + Washington Law Review, Associate Editor-in-Chief
  - + Puget Sound Area Minority Clerkship Program Recipient, 2010
- B.A., University of Washington (*cum laude*), 2003