

# What You Need to Know About Public Records and Open Meetings



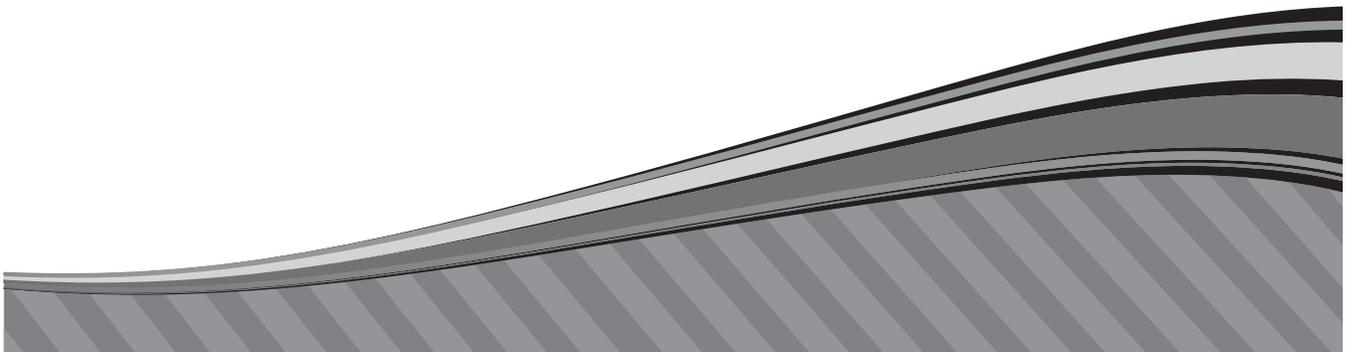
*This manual was originally created for the seminar  
What You Need to Know About Public Records and Open  
Meetings  
in Federal Way, Washington, on May 9, 2013.*

# Speaker Biographies

## Jessica L. Goldman

---

- Litigation/media law attorney at Summit Law Group
- Focuses on commercial litigation – including insurance coverage, contract, fraud, construction defect, and intellectual property cases – and First Amendment litigation – including commercial speech, defamation, privacy, access, prior restraint, reporters’ shield laws, public records, and newsgathering torts
- Represents clients in diverse commercial litigation, including newspapers, Internet service providers, Internet content providers, and book publishers
- Co-writer of chapters on Alaska and Washington in the Media Law Resource Center’s 50-state libel survey; co-writer, Washington Chapter of the Reporters Committee for Freedom of the Press’ 50-state survey of freedom of information laws
- Member of the American Bar Association Forum on Communication Law, Media Law and Defamation Torts Committee of the ABA Tort and Insurance Practice Section
- Named Lawyer of the Year, Litigation - First Amendment Seattle by The Best Lawyers in America (2013); Rising Star (2006) and Super Lawyer (2011 to 2012) by Washington Law and Politics and in The Best Lawyers in America® (2007 to 2013)
- J.D. degree, Order of the Coif, Washington University School of Law; B.A. degree, Oberlin College



# **OVERVIEW OF WASHINGTON PUBLIC RECORDS LAW**

---

**Jessica L. Goldman**  
Summit Law Group PLLC

## THE PUBLIC POLICY OBJECTIVE OF OPEN GOVERNMENT

In 1972, the citizens of the State of Washington approved a broad freedom of information initiative. The cornerstone of this initiative is codified at RCW 42.56.030:

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. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

The purpose of this citizens' initiative "is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." *Progressive Animal Welfare Soc'y ("PAWS") v. University of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

The Supreme Court recognizes that:

Achieving an informed citizenry is a goal sometimes counterpoised against other important societal aims. Indeed, as the act recognizes, society's interest in an open government can conflict with its interest in protecting personal privacy rights and with the public need for preserving the confidentiality of criminal investigatory matters, among other concerns. Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable formula which encompasses, balances and appropriately protects all interests, while placing emphasis on responsible disclosure. It is this task of accommodating opposing concerns, with disclosure as the primary objective, that the state freedom of information act seeks to accomplish.

*Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 33-34, 769 P.2d 283 (1989).

This public policy is achieved through the Public Records Act (“PRA”), a statutory regime which heavily favors public disclosure. Since 2006, the PRA has been codified at Chapter 42.56 RCW.

### **I. Agencies Subject to the Public Records Act**

The PRA applies to all government agencies in Washington, other than those within the federal government or Native American tribes. Specifically, the term “agency”

includes all state agencies and local agencies. “State agency” includes every state office, department, division, bureau, board, commission, or other state agency. “Local agency” includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

RCW 42.56.010(1). The statute does not apply to courts or court records, although a common law right to court records exists. *Nast v. Michels*, 107 Wn.2d 300, 305-07, 730 P.2d 54 (1986).

The Public Records Act applies to some private entities which perform public functions and come within the statute’s undefined “other local public agency” category. The courts apply

a

four-factor “functional equivalent” balancing test to determine if an entity is to be regarded as a public agency for purposes of the [PRA]: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government.

*Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 192, 181 P.3d 881 (2008). The requestor need not establish each of these criteria is satisfied equally. Rather, the evidence “on balance should suggest that the entity in question is the functional equivalent of a state or local agency.” *Id.* In *Clarke*, the court held that the PRA applied to a privately-run, for-profit corporation which contracted with a public agency to provide animal control services.

Each agency must appoint and publicly identify a public records officer to manage that agency's responses to public records requests. RCW 42.56.580.

## II. "Public Records" Defined

Pursuant to the PRA, a "public record"

includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

RCW 42.56.010(3). "Writing," in turn,

means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

RCW 42.56.010(4). Emails sent to or received from an agency official's personal email address are public records if the message discusses agency business. *Mechling v. City of Monroe*, 152 Wn. App. 830, 846, 222 P.3d 808 (2009). Metadata associated with public records also is subject to disclosure under the PRA. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 141, 240 P.3d 1149 (2010). However, metadata must be specifically requested. *Id.* at 151-52.

If litigation ensues over a public records request, the burden of proving that the records at issue are "public records" – although plainly not a significant hurdle – rests with the requesting

party. *Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn. App. 433, 441, 161 P.3d 428 (2007).

### III. Responding to a Public Records Request

While a request need not be in writing, a requestor must supply a reasonable description of requested public records to enable the agency to locate the requested records. *Beal v. City of Seattle*, 150 Wn. App. 865, 872, 876, 209 P.3d 872 (2009). “Although requestors are not required to cite to the PRA itself, they must state their request with sufficient clarity to give the agency fair notice that it has received a request for a public record.” *Id.* at 872-73. A “request for information about public records or for the information contained in a public record is not a PRA request.” *Id.* at 876. A requestor must show that an oral request for information made during the course of a meeting with an agency was unambiguously a request under the PRA and not merely a request to collaboratively share information. *Id.* at 875.

An agency must respond “promptly” to a public records request. No later than five business days after receiving a request, it must respond by either

- (1) providing the record; (2) providing an internet address and link on the agency’s web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer; (3) acknowledging that the agency ... has received the request and providing a reasonable estimate of the time the agency ... will require to respond to the request; or (4) denying the public record request.

RCW 42.56.520; *West v. Wash. State Dep’t of Natural Resources*, 163 Wn. App. 235, 244, 258 P.3d 78 (2011) (failure to respond within five days violates the PRA; no “reasonableness test” applied to overdue response), *review denied*, 173 Wn.2d 1020, 272 P.3d 850 (2012). The agency may base its need for additional time on its need to “clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or

to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.” *Id.* The agency will bear the burden of proving that the time estimate it provided to the requestor was reasonable. *Zink v. City of Mesa* (“*Zink II*”), 162 Wn. App. 688, 712, 256 P.3d 384 (2011), *review denied*, 173 Wn.2d 1001, 268 P.3d 943 (2012). “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.” *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 720, 261 P.2d 119 (2011). “[T]he focus of the judicial inquiry into a reasonable-search requirement is the agency’s search process not the result of that process ....” *Forbes v. City of Gold Bar*, 171 Wn. App. 857, \_\_\_, 288, P.3d 384, 388 (2012). “The issue is *not* whether any further documents might conceivably exist but rather whether the government’s search for responsive document was adequate, which is determined under a standard of reasonableness, and is dependent upon the circumstances of the case. The reasonableness of an agency’s search turns on the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives.” *Id.* (citations, quotation marks & brackets omitted). A delay may later be approved if the agency has pending a high volume of other public records requests. *Zink II*, 162 Wn. App. at 717. In *Forbes*, the court held that one of the factors which supported a finding that the City of Gold Bar conducted a reasonable search within a reasonable time period was the fact that the city spent 12% of its income responding to PRA requests in the year in question. *Forbes*, 288 P.3d at 387.

If the requested documents are “public records,” they must be disclosed unless a specific statutory exemption applies. RCW 42.56.070(1). Public records requests are not prospective; they apply only to presently existing public records. *Sargent v. Seattle Police Dep’t*, 167 Wn.

App. 1, 260 P.3d 1006 (2011), *pet'n for review granted*, 175 Wn.2d 1001, 285 P.3d 884 (2012). The statutory exemptions are delineated in the PRA and other statutes. RCW 42.56.070(1). Exemptions to disclosure in federal statutes apply alongside exemptions in Washington's statutes. *Ameritrust Mortgage Co. v. Wash. State Office of the Attorney Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010). The government agency may not consider why a request for public records is being made. RCW 42.56.080. The PRA "does not place a limit on the number of record requests an individual can make." *Zink v. City of Mesa* ("*Zink I*"), 140 Wn. App. 328, 340, 166 P.3d 738 (2007). If reasonable under the circumstances, an agency may produce records in installments. *Bartz v. State Dept. of Corrections Public Disclosure Unit*, \_\_\_ P.3d \_\_\_, 2013 WL 506605 \*11 (Ct. App. Feb. 12, 2013).

An agency may not justify its failure to disclose public records on the basis that the agency "substantially complied" with the records request. *Zink I*, 140 Wn. App. at 340. Rather, agencies must strictly comply with the PRA's mandates. *Id.* at 348-49. "It has long been recognized that compliance with the [PRA] may impose an administrative burden on an agency entrusted with public records. Yet, administrative inconvenience or difficulty does not excuse strict compliance with the [PRA]." *Id.* at 337. An agency's good faith or reasonableness is irrelevant to determining if it complied with the PRA (though it is relevant to determining penalties in the event of wrongful nondisclosure). *Id.* at 338. An agency may not "silently withhold" a public record "because it gives requestors the misleading impression that all documents relevant to the request have been disclosed." *Zink II*, 162 Wn. App. at 711.

The party seeking to avoid disclosure bears the burden of proving that the public record comes within a specific exemption. *Tiberino v. Spokane County*, 103 Wn. App. 680, 686, 13 P.3d 1104 (2000). Courts view with caution any interpretation of the PRA which would frustrate

its purpose of public access to government. *Kleven v. City of Des Moines*, 111 Wn. App. 284, 289, 44 P.3d 887 (2002). Unless specifically stated by the legislature, new exemptions do not apply retroactively. *Dragonslayer*, 139 Wn. App. at 449.

While there is no overarching “privacy” exemption, several of the PRA exemptions address privacy concerns. The statute supplies a definition of privacy which governs those particular exemptions.

A person’s “right to privacy,” “right of privacy,” “privacy,” or “personal privacy,” as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public’s right to inspect, examine, or copy public records.

RCW 42.56.050. Where an agency concludes that specific information should not be disclosed based on personal privacy interests protected by a specific exemption, the agency must explain in writing the justification for the nondisclosure of such information. RCW 42.56.070(1).

To the degree possible, the agency must redact exempt information and produce nonexempt information in public records. RCW 42.56.210(1). When an agency refuses in whole or in part to disclose a public record, it must set forth the applicable exemption and a brief explanation of how the exemption applies to the record at issue. RCW 42.56.210(3); RCW 42.56.520. It is not enough for the agency to identify the record and cite to an exemption because “[c]laimed exemptions cannot be vetted for validity if they are unexplained.” *Sanders v. Washington*, 169 Wn.2d 827, 846, 240 P.3d 120 (2010). The agency’s failure to properly respond is treated as a denial of records. *Soter v. Cowles Pub’g Co.*, 162 Wn.2d 716, 750, 174 P.2d 60 (2007).

An agency has no obligation to create or produce a requested public record which does not exist. *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004). Failure to create a public record required by some other statute does not violate the PRA. *Zink II*, 162 Wn. App. at 718. A requestor may not conduct a forensic search of the agency's databases where there is no evidence to suggest that the agency has failed to produce existing public records. *Building Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 739, 218 P.3d 196 (2009). However, an agency may not destroy a public record once a request to which it would be responsive has been made.

The Attorney General's office prepared advisory Model Rules setting forth the "best practices" for compliance with the PRA. Chapter 44-14 WAC.

#### **IV. Copying Public Records**

Agencies may charge a requestor for copying public records. Specific guidelines govern the imposition of such charges:

Each agency shall establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.

RCW 42.56.070(7). The agency may charge for "all costs directly incident to copying such public records," including the actual costs of the paper, the cost of the use of agency copying equipment, and the cost of shipping the records to the requestor. RCW 42.56.070(7)(a). However, agencies may not charge requestors for overhead expenses which are not directly related to the actual copying costs. RCW 42.56.070(7)(b). Agencies which do not calculate the actual per-page cost due to the burdensomeness of doing so may not charge more than 15 cents per page. RCW 42.56.070(8).

Agencies may not charge a fee for the mere inspection of public records. RCW 42.56.120.

## V. Litigating Public Records Requests

A third party who is the subject of the records at issue, a party denied access to a public record, or a party who challenges the time estimate asserted by the agency to respond to a records request may initiate proceedings in Superior Court. RCW 42.56.540. An agency also may petition for a judicial determination that records are exempt from disclosure. *Soter*, 162 Wn.2d at 723. In any such proceedings, the agency bears the burden of proving that the denial is in accordance with a statutory exemption, RCW 42.56.550(1), or that the time estimate is reasonable. RCW 42.56.550(2). The presiding court must “take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3).

A party that prevails against a public agency

shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

RCW 42.56.550(4). This is true irrespective of which party initiates suit. *Soter*, 162 Wn.2d at 757. Prevailing against an agency requires an order that withheld records must be disclosed. *City of Lakewood v. Koenig*, 160 Wn. App. 883, 896, 250 P.3d 113 (2011). A penalty must be imposed if the agency violated the PRA. *Zink I*, 140 Wn. App. at 347.

[A]ny per diem penalty imposed for an agency’s refusal to disclose public records must be assessed for each day the records were wrongfully withheld. The trial court’s discretion lies in the amount of the per day penalty, but the court may not adjust the number of

days for which the agency is fined. As can be seen, an agency denies a public records request at great peril.

*Soter*, 162 Wn.2d at 751 (citations omitted).

In determining the per-day penalty, courts are to consider the following nonexclusive mitigating factors which may decrease the penalty:

(1) a lack of clarity in the PRA request, (2) the agency's prompt response or legitimate follow-up inquiry for clarification, (3) the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions, (4) proper training and supervision of the agency's personnel, (5) the reasonableness of any explanation for noncompliance by the agency, (6) the helpfulness of the agency to the requestor, and (7) the existence of agency systems to track and retrieve public records.

*Yousoufian v. Sims*, 168 Wn.2d 444, 467, 229 P.3d 735 (2010) (nn. omitted). Nonexclusive aggravating factors which may support increasing the penalty 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 the PRA procedural requirements and exceptions, (3) lack of proper training and supervision of the agency's personnel, (4) unreasonableness of any explanation for noncompliance by the agency, (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 the 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, and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

*Id.* at 467-68 (nn. omitted). Where an agency wrongfully withholds a record, an additional penalty is warranted where the agency violated the PRA in some other way such as failing to provide a brief explanation of how its claimed exemption applies to a withheld record (a proper explanation in litigation does not compensate for an initially incomplete response). *Sanders*, 169

Wn.2d at 842, 847, 860-61 (approving additional \$3/day penalty per record for failure to supply brief explanation).

The number of days required for the court to adjudicate a public records request case is properly included in calculating the number of days to which a penalty applies under RCW 42.56.550(4). *Sanders*, 169 Wn.2d at 843, 864 (“the PRA requires the agency to pay a penalty for each day the requester is unable to inspect or copy a nonexempt record, regardless of whether the agency created the delay”). Penalties will be assessed even where wrongfully withheld public records are disclosed prior to litigation. *Zink II*, 162 Wn. App. at 729. Penalties continue to run through any disclosure order by the appellate courts. *Id.* at 707. Unless “time is of the essence,” penalties will not begin to run until the five-day response period of RCW 42.56.520 has expired. *Id.* at 709-10.

The trial court has discretion to group improperly withheld documents into a number of “records” reflective of broad subject matter for purposes of calculating penalties. *Sanders*, 169 Wn.2d at 864. “[T]he PRA’s purpose is better served by increasing the penalty based upon the agency’s culpability rather than by basing the penalty on the size of the record request.” *Zink II*, 162 Wn. App. at 712.

If a party prevails in obtaining an order directing the release of withheld public records, the party is entitled to an award of attorney’s fees. However, the amount of that award is subject to the court’s discretion. *Sanders*, 169 Wn.2d at 867. It is proper for the court to “apportion an award of costs and fees so that it does not relate to any exempt documents.” *Id.*

A lawsuit must be filed within one year of the agency’s claim of exemption or the production, or final installment in a production. RCW 42.56.550(6).

## **VI. No Penalties for Disclosure**

Supporting its policy of disclosure, the PRA provides a safe-haven for government employees who disclose public records in good faith:

No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter.

RCW 42.56.060.

## **VII. Appeals**

Appellate review of Public Records Act cases is *de novo* where the trial court decision is based on affidavits. *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 904, 25 P.3d 426 (2001). If the trial court makes factual determinations based on testimonial evidence, the appellate court will review these findings under the substantial evidence standard. *Zink I*, 140 Wn. App. at 336-37. The appellate courts review penalty awards for abuse of discretion. *Yousoufian v. King Cnty. Executive*, 152 Wn.2d 421, 430-31, 98 P.3d 463 (2004).

An agency appealing a disclosure order may assert new grounds on appeal. *PAWS*, 125 Wn.2d at 253.