

Public Records

Overview, duties, how-to

Jennifer Steele

Attorney General's Office

Public Records Counsel

October 2018

Public Records Counsel

- ▶ Provides expertise regarding options-based client advice and litigation strategy
- ▶ Acts as a resource throughout the office on public records issues
- ▶ Monitors public records litigation and advice
- ▶ Advises the Public Records and Constituent Services Unit
- ▶ Provides training

Public Records Act

- ▶ RCW 42.56
- ▶ Open Government - Sunshine - Transparency
- ▶ The records we prepare, own, use, or retain are public records
- ▶ Public records are open to the public
- ▶ Unless there is a statute specifying otherwise
- ▶ Transparency allows us to show the public the good work we do

Public Record

“Public record” means:

- ▶ 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.”

Writing

- ▶ “Writing” includes

Handwriting	Typewriting	Printing	Photostating
Letters	Words	Pictures	Sounds
Papers	Maps	Magnetic or paper tapes	Photographic films or prints
Film and video recording	Magnetic or punched cards	Discs	Drums
Sound recordings / voicemail	Diskettes	Motion picture	Symbols

- ▶ RCW 42.56.010

What does an Agency need to do?

- ▶ **Manage, maintain, organize records**
- ▶ Accept and respond to public records requests
- ▶ Work / communicate with requesters
- ▶ Search for records
- ▶ Gather the records
- ▶ Review the records for exemptions to disclosure
- ▶ Produce the records

Agency Response

- ▶ Search
- ▶ Gather
- ▶ Review
- ▶ Collect
- ▶ Produce

What do I need to do?

- ▶ **Manage, maintain, organize your records**
- ▶ Review public records requests
- ▶ Search for records
- ▶ *Timely* respond to your public records unit
- ▶ Gather the records
- ▶ Review the records for exemptions to disclosure
- ▶ *Timely* provide your records

Duty to Manage - Records Retention

- ▶ How long we must retain public records
- ▶ When we can destroy public records
- ▶ Records Retention Schedules determine how long we must retain our records and when we can destroy (delete) our records

Records Retention Schedules

- ▶ State General Schedule
- ▶ Agency Specific Records Retention Schedule
 - ▶ Approved by State Archives
 - ▶ Archives has records officers who can assist you with retention questions

Duty to Manage / Organize

- ▶ Organize your records - so you can find them
- ▶ Manage your records - delete what you can - delete what you do not need
- ▶ Why not just keep everything?
 - ▶ More records to search through (read: more work for you)
 - ▶ More records for you to review for possible redactions (read: more work for you)
 - ▶ Increased risk of not locating responsive record (read: liability)
 - ▶ Storage has a cost; litigation has a greater cost

Duty to Search

- ▶ **You** must search for responsive records
- ▶ What are you required to search? Who searches where?
- ▶ Know the answers to these questions – different agencies have different processes

Search

- ▶ Search must be reasonably calculated to uncover all responsive documents
- ▶ Must follow obvious leads as they are uncovered
- ▶ Must search all places records may reside, including:
 - ▶ Outlook
 - ▶ F: drive
 - ▶ Desk
 - ▶ Paper records
 - ▶ Voicemails
 - ▶ Desktop
 - ▶ Personal devices / accounts if used for work

Personal Devices - Personal Accounts

(texts, emails, voicemails etc)

- ▶ If you use or have used a personal device or personal account for work, you may have public records on your device or in your account
- ▶ Work communications/records on your personal device or in your personal account are **public records**
- ▶ You may be required to:
 - ▶ Search personal devices and personal accounts
 - ▶ transfer records to the Agency
 - ▶ sign an affidavit, or
 - ▶ take other required steps to produce and preserve the public records
- ▶ Your Agency may have **policies** that govern personal devices
- ▶ **CAUTION IS ADVISED: know your duties and responsibilities before using a personal device for Agency business**

Gather and Review Records

- ▶ Gather and collect responsive records
- ▶ Review records for exemptions to disclosure - a law that allows a record or part of a record to be withheld from the public
- ▶ Redact portions of records that are exempt

Exemptions

- ▶ Records are presumed open
- ▶ To withhold a record, or part of a record, an agency must cite to an “exemption” in law and give a brief explanation
- ▶ Exemptions are **narrowly construed**
- ▶ An agency withholds only the exempt information and releases the rest
- ▶ Exemptions must be authorized in law --- in PRA or other laws

	A	B	C	D	E
1	Code	Exemption	Brief Explanatory Description	Statute/Rule/Case	Division
2	[1a]	Attorney-Client Privilege – RCW 5.60.060(2)(a); RCW 42.56.070(1)	Communication from client to attorney for the purpose of obtaining legal advice	RCW 5.60.060(2)(a); RCW 42.56.070(1)	AGO
3	[1b]	Attorney-Client Privilege – RCW 5.60.060(2)(a); RCW 42.56.070(1)	Communication from attorney to client for the purpose of providing legal advice	RCW 5.60.060(2)(a); RCW 42.56.070(1)	AGO
4	[1c]	Attorney-Client Privilege – RCW 5.60.060(2)(a); RCW 42.56.070(1)	Communication between attorney and client regarding litigation	RCW 5.60.060(2)(a); RCW 42.56.070(1)	AGO
5	[1d]	Attorney-Client Privilege – RCW 5.60.060(2)(a); RCW 42.56.070(1)	Communication between attorneys that reflect attorney-client communications regarding advice	RCW 5.60.060(2)(a); RCW 42.56.070(1)	AGO
6	[1e]	Attorney-Client Privilege – RCW 5.60.060(2)(a); RCW 42.56.070(1)	Communication between attorneys that reflect attorney-client communications regarding litigation	RCW 5.60.060(2)(a); RCW 42.56.070(1)	AGO
7	[1f]	Attorney-Client Privilege – RCW 5.60.060(2)(a); RCW 42.56.070(1)	Communication between members of the client agency for the purpose of gathering information to obtain legal advice or to convey attorney-client communications	RCW 5.60.060(2)(a); RCW 42.56.070(1)	AGO
8	[2a]	Attorney Work Product Privilege – RCW 42.56.290	Drafts, notes, memoranda, or research reflecting the opinions or mental impressions of an attorney or attorney's agent prepared, collected, or assembled in litigation or in anticipation of litigation	RCW 42.56.290	AGO
9	[2b]	Attorney Work Product/ Work Product Privilege – RCW 42.56.290	Notes, memoranda, statements, records that reveal factual or investigative information prepared, collected, or assembled in litigation or in anticipation of litigation	RCW 42.56.290	AGO
10	[2c]	Attorney Work Product Privilege – RCW 42.56.290	Communication between attorney and client that reveals opinions or mental impression of attorney, or information prepared, collected, or assembled in litigation or in anticipation of litigation	RCW 42.56.290	AGO
11	[2d]	Attorney Work Product Privilege – RCW 42.56.290	Communication between attorneys that reveals opinions or mental impression of attorney, or information prepared, collected, or assembled in litigation or in anticipation of litigation	RCW 42.56.290	AGO
12	[2e]	Attorney Work Product Privilege – Common Interest or Joint Defense Protection – RCW 42.56.290	Communication between attorneys who have a common interest or a joint defense agreement that reveals opinions or mental impression of attorney, or information prepared, collected, or assembled in litigation or in anticipation of litigation	RCW 42.56.290	AGO
13	[2f]	Attorney Work Product Privilege – Mediation Privilege – RCW 7.07; RCW 42.56.290	RCW 7.07.030 provides for confidentiality relating to mediations. RCW 42.56.290 provides for an exemption from disclosure things that are not discoverable when an agency is a party to a controversy	RCW 7.07; RCW 42.56.290; RCW 42.56.070(1)	AGO
14	[3a]	Deliberative Process – RCW 42.56.280	Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended, except that a specific record is not exempt when publicly cited by an agency in connection with any agency action	RCW 42.56.280	AGO
15	[4a]	Public Employees – Applications – 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	RCW 42.56.250(2)	AGO
	[4b]	Public Employees/Volunteers – Address; Phone; Email; SSN; Driver's License; Emergency Contact; Names and DOB (for dependents); RCW	The residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, driver's license numbers, identicaid numbers, and emergency contact information of employees, consultants, or public	RCW 42.56.250(3)	AGO

Deliberative Process and Drafts

- ▶ RCW 42.56.280
- ▶ For exemption to apply, agency must show:
 - ▶ Records contain predecisional opinions or recommendations as part of deliberative process, and
 - ▶ Disclosure would be harmful to deliberative process, and
 - ▶ Disclosure would inhibit recommendations, observations, and opinions, and
 - ▶ Records covered reflect policy recommendations and opinions, not raw factual data decision based on
- ▶ only protects records while the action is “pending”
- ▶ withheld records are no longer exempt after final action is taken

Privacy

- ▶ There is no general “privacy” exemption in the PRA
- ▶ If privacy is an express element of another exemption, privacy is invaded only if disclosure about the person would be:
 - ▶ “Highly offensive to the reasonable person”
and
 - ▶ “Not of legitimate concern to the public”

Failure to follow PRA

- ▶ \$ \$ \$
- ▶ A court can impose civil penalties
- ▶ No proof of “damages” required
- ▶ A court is to consider factors in requiring an agency to pay a penalty
- ▶ A court will award the prevailing requester’s attorneys fees and costs
- ▶ Special penalty provisions and court procedures apply to lawsuits involving inmate requests

Resources

- ▶ Public Records Unit
- ▶ Records Retention Schedules
- ▶ State Archives Retention Specialists
- ▶ AGO Open Government page
 - ▶ Open Government Resource Manual
- ▶ MRSC: Municipal Research and Services Center



OPEN GOVERNMENT



"Government accountability means that public officials — elected and un-elected — have an obligation to explain their decisions and actions to the citizens. Government accountability is achieved through the use of a variety of mechanisms — political, legal and administrative — designed to prevent corruption and ensure that public officials remain answerable and accessible to the people they serve. In the absence of such mechanisms, corruption may thrive."

— U.S. Department of State

The Washington Public Records Act is one of the strongest open government laws in the nation and reflects the desire of

Washington citizens to know what their government is doing. A transparent and accessible government is essential to a successful free society, and fosters trust and confidence in government.

Strong "sunshine laws" are crucial to assuring government accountability and transparency. In Washington State, those laws provide for open public records and open public meetings.

Since Washington voters approved the Public Disclosure Act more than 40 years ago, a growing number of exemptions have been added to public records laws.

Also, under the Open Public Meetings Act, some parts of open public meetings may be closed to the public, but only if certain requirements are met.

To assist the public and public agencies in understanding and implementing the sunshine laws, the Office of the Attorney General provides several resources.

[The Attorney General's Ombuds Function](#)

The Office of the Attorney General provides an Ombuds function that works with other assistant attorneys general as they advise their clients and coordinates with and offers training to local government on open government issues.

[Open Government Training](#)

The Office of the Attorney General provides open government training materials and resources to assist agencies in complying with the laws.

[Open Government Resource Manual](#)

Public Records Brochures

[Obtaining Public Records \(pdf\)](#)

[Denials of Public Records \(pdf\)](#)

Open Government

[Request AGO Public Records](#)

[Open Government Training](#)

[Public Records & Open Public Meetings](#)

[Open Government Resource Manual](#)

[Model Rules](#)

[Open Government Ombuds Function](#)

[Sunshine Committee](#)



WASHINGTON STATE



Sunshine Laws 2016

An Open Government Resource Manual



Washington State Office of the Attorney General

Bob Ferguson

Chapter 2: Public Records Act - Exemptions

2.1 Exemptions Permit Withholding or Redaction of Records

- A. Application of Exemptions
- B. No Stand-Alone "Privacy" Exemption

2.2 There Are Several Types of Exemptions

- A. Exemptions of General Applicability
- B. Personal Information
- C. Public Employee Records
- D. Several Exemptions Relate to Law Enforcement Information
- E. Certain Business-Related Information is Exempt
- F. Health Information Exemptions
- G. Government Services and Benefits
- H. Miscellaneous Exemptions

Questions?

The background features abstract, overlapping geometric shapes in various shades of blue, ranging from light to dark, creating a modern and professional aesthetic.