

# City of Langley Public Records Training

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# PUBLIC RECORDS ACT

- Act is found in Chapter 42.56 RCW
- Adopted by statewide initiative in 1972.
- Amended by the Legislature many times and interpreted by the courts extensively since then.
- Mandate for transparency in government.

# POLICY STATEMENT – RCW 42.56.030

“The people do not yield their sovereignty to the agencies that serve them. The people do not give 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 they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.”

# How Courts Interpret Act's Policy

- Purpose of the PRA is “to **provide full access** to non-exempt public records.”
- The Act is a “strongly worded **mandate for broad disclosure.**”
- “The purpose of the PRA is to keep public officials and institutions **accountable to the people.**”
- The public policy of the PRA “favors disclosure.”
- Theme – transparency of government.

# Today's Format

- What are public records?
- What are city's obligations under Act when city receives a request?
- What are your obligations?
- What is the role of the city attorney?
- Why is any of this important?

# What is a Public Record?

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 its physical form or characteristics. RCW 42.56.010(3).

# What is a “Writing”?

Public record is “any writing:”

“Writing” means “**any form of communication or representation**” including but not limited to:

- Written documentation
- Audio/sound recordings
- Visual/motion picture
- Emails

RCW 42.56.010(4).

# Even Metadata is Considered “Writing”

Supreme Court in *O’Neill v. City of Shoreline* 170 Wn.2d 138 (2010) faced with question of whether city required to provide metadata to requestor.

- What is metadata? Metadata is "data about data," or more specifically, "information describing the history, tracking, or management of an electronic document."
- Court held, metadata is a writing required to be produced.
- Meaning continuing to expand.



# Records of “Agency”

*Are records of commissioners considered “public records” under the Act?*

Yes, definition of “public records” are those records prepared, used, owned or retained by an “agency.”

“Agency” includes any city, board, commission, or other local public agency.

RCW 42.56.010(1).

# What content is required for a record to be a “public record”?

Record must:

Relate to the conduct of government  
or

The performance of any governmental or  
proprietary function.

RCW 42.56.010(3).

*Ask: Was record created while acting within capacity as city employee? Commissioner? Councilor?*

# Are my **personal** emails or documents considered “public records”?

No. A **purely personal** record having absolutely no relation to the conduct of government or its proprietary function is not a “public record.”

# Caution

However, if record contains **BOTH** personal and work related content, the **ENTIRE** document may need to be disclosed. There is no exemption for personal content.

# Another Caution

- Court in *Tiberino v. Spokane County*, 103 Wn.App 680 (2000), held that personal emails became public records when county exercised its proprietary function and terminated employee for overuse of email.
- No dispute that emails were purely personal.
- However, because the emails were basis of the termination, became public record.

# Personal Notes

Personal notes, as well as telephone messages and appointment calendars are generally not considered public records. *Yacobellis v City of Bellingham*, 55 Wn. App. 706 (1989).

- Court looks to whether the note was created for the individual's convenience or to refresh the writer's memory and are created in a way indicating a private purpose and are not under agency control.
- If question about this, City Attorney should get involved.

# Are Records Created on My Personal Device or Account “Public Records?”

They can be.

- Courts do not look to the origin or source of the record to determine whether it is in fact a public record.
- Record created on personal device or within personal account on government issued device can still be a public record.

# Are Text Messages Public Records?

Yes.

- *Nissen v. Pierce County*, 183 Wn.2d 863 (2015), the supreme court held that text messages can be a “public record.”
- Court held that because Nissen prepared and reviewed text messages in his official capacity, they are public records.



# Technology Changing Scope of PRA

Fact that employees use cell phones to conduct public business by creating public records (text messages, emails or anything else) is why the PRA must offer the public a way to obtain those records.

*Nissen v. Pierce County*, 183 Wn.2d 863 (2015).

# Takeaway of court's interpretation of definition of "public record."

- Definition is "comprehensive" and subjects "virtually any record related to the conduct of government" to public disclosure. *Nissen v. Pierce County*, 183 Wn.2d 863 (2015).
- Most records prepared by you in your official capacity will be considered a "public record" subject to disclosure regardless of source of record.
- Even some private content can be subject to disclosure.

# What is the City's Obligation When Request for Records Has Been Made?

First, has a request been made?

- No statutory required format for a request.
- No magic words need to be used.
- Can be email, verbal or on city form.
- If you receive a request for any record, alert City's Public Records Officer.
- PRO will coordinate request.

# Agency Required to Provide Prompt 5-Day Response

Statute requires that agencies **provide a response** to a request within **5 business days** of receipt. RCW 42.56.520.

# How Must Agency Respond?

Agency **NOT** required to provide record within 5 days. However, statute requires that agency must either:

- provide document
- deny request
- request clarification from requestor; or
- provide estimate of time for response.

# What if a Request is Broad?

- Cannot deny request because its overly broad.
- Recommend that agency ask requestor for clarification if request is broad.

# What if the Request is Seeking Information?

- Request for information only, is not a public records request so agency can deny request.
- However, recommend asking requestor for clarification in spirit of cooperation.

# Agency Must Provide **Fullest Assistance** to Requestor

## Why?

- Courts have determined that city is in best position to decide which records should be included in response.
- City cannot deny request because requestor did not properly name document.
- If requestor wants response in a specific format, recommend that agency provide record in said format.

RCW 42.56.100.



# Agency Obligated to Conduct Reasonable Search for Records

Request has been made, now what?

- Agency must search for responsive records.
- Adequacy of search is judged by standard of reasonableness.
- “The search must be reasonably calculated to uncover all relevant documents.”
- What is “reasonable” depends on the facts of the case.

# Search Need Not Be Perfect

- Search need not be perfect, only adequate.
- When courts look at this issue, look to whether search was **reasonably calculated to uncover relevant documents** and not whether additional documents exists but were not found.

# Agency Must Follow Leads

- Agencies required to make more than a perfunctory search.
- Agencies required to follow obvious leads as they are uncovered.
- Continuing duty on agency throughout search for records.
- Recommendation – over-inclusive rather than under-inclusive in search.

# Does Agency Have Duty to Create Records?

No. Agency has no duty to create records in response to a request.

- Agency can deny request.
- But agency may decide to create document anyway.

Request cannot be for ongoing records.  
Standing requests are not permitted.

# Agency Can Respond to Request in Installments

- Some requests are complex and will take weeks if not months to respond.
- Agency can provide responsive documents in installments.

# After Search Is Complete, Now What?

After PRO searches and gather documents, the records must be reviewed for redactions.

# Some Records May be Redacted

- Hundreds of exemptions under the PRA and other statutes that allow for redaction.
- Courts mandate redaction, rather than withholding entire record, when possible.

# Role of City Attorney

- Consult with PRO when deciding on whether redactions or exemptions should be made.
- Involvement of City Attorney recommended in light of extensive case law that interprets the Act, and due to the penalties a court may impose for wrongful withholding of records.



# Is my personnel file exempt from disclosure?

- Not wholly exempt from disclosure.
- May contain information inside file that is exempt.

# Is my employment application subject to disclosure?

No. RCW 42.56.250(2) exempts applications, resumes and “other” related materials submitted with respect to applicant from disclosure.

# Is my salary subject to disclosure?

Yes.

- Salary, vacation leave, sick leave and any other fringe-benefit is public record.
- Public has right to know what where it's tax dollars are being spent.
- However, contributions and deductions are not. So, for example, union dues are not public record.

# Is my performance evaluation subject to disclosure?

Generally, a performance evaluation is held to be exempt under RCW 42.56.230(3).

- Considered personal information in employment related files disclosure of which violate right to privacy.
- However specific instances of misconduct within report may be disclosed.

# What if a record is embarrassing?

No exemption for **embarrassing** records.

“In reviewing an agency's action with regard to a public disclosure request, we must consider the [Act's] policy that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment.” *Tiberino v. Spokane County* (2000).

# What if record violates my right to privacy?

No stand alone exemption for privacy rights.  
Only if record is highly offensive and is not of legitimate concern to the public will it be redacted.

# Are my emails to the City Attorney privileged?

Most likely.

Attorney-client communications are privileged under RCW 5.60.060(2). Protect confidential communications between attorney and client.

- Documents between attorney and client must be redacted or privilege can be waived.
- Disclosure to 3<sup>rd</sup> party waives privilege.

Tip- if you think email is confidential, mark it so.

# What are my obligations to the agency when a request is made?

Agency can be held liable for **failing to adequately search** for records and **failing to provide timely response**. Your actions may create risk to agency in failing to adequately search or delaying response.



# PRO will notify you of your role

PRO will coordinate the agency's response to the request and inform you if you have an obligation to search your records.

# Recommended Actions

- **Promptly search** for responsive record if asked by the PRO.
- Be over-inclusive not under-inclusive in search.
- Concerned with content of record, not source.
- If you have questions, ask the PRO.
- Remember, City is under certain timelines to provide a response. City relying on your compliance and understanding.

# Tips on Managing Your Records

- To comply with obligations, it is recommended that your records be kept in **searchable manner**.
  - Keep private and public records separate.
  - Separate files on hard drive or cloud.
  - If you use agency email address, only use it for work related email.
  - If agency cannot provide agency email address, create own distinct email address used only for public work.
  - If received work email on private account, inform sender that you cannot respond on private account and forward to work related account.

# Exemption Log

After consultation with the City Attorney, the PRO must create an exemption log detailing the records which have been redacted along with the statutory authority for the redaction. Must also include a brief description of why particular record is redacted.

# What happens if City finds document after it has already provided response?

- City should notify the requestor in writing and provide a brief explanation of the circumstances.
- WAC 44-14-04003(12).

# Why is any of this important?

- Penalties are severe.
- May be required to pay requestor's attorney's fees.
- Per day penalties of up to \$100 per document wrongly withheld.
- Penalties for inadequate search, untimely response, improper exemption log etc.
- Can bankrupt cities.

# What Agency Can do to Reduce Risk?

- Adopt a spirit of cooperation and transparency.
- Customer service oriented approach.
- Work with PRO when asked.
- Strive for over-inclusivity rather than under-inclusivity.
- Questions – ask PRO throughout process.