

# WHEN IS IT TOO PERSONAL?: PUBLIC RECORDS ACT UPDATE ON PERSONNEL RECORDS

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## 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

- Public records policy 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

## 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

## And, Some Lessons from *Wade's Eastside Gun Shop*

- 1) (Again...) Provide enough explanation for exemptions
- 2) Don't release records to one while withholding from another
- 3) Reasonable estimates are just that – if records are ready sooner, then release
- 4) Don't delay in sending third-party notice
- 5) 15 days to obtain a protective order is too long (“realistic opportunity”)

## And, Some Lessons from *Wade's Eastside Gun Shop*

- 6) If a protective order is not forthcoming, release
- 7) Either way, release what you can
- 8) Prove your case with evidence
- 9) Be able to justify your actions
- 10) Be ready to disclose records if ordered to do so

*Trial courts have broad discretion on penalties*

## 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, 742-44 (Div. II, 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.”

## 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

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## SERVICES

Litigation & Dispute Resolution

Airports

Class Action Litigation

Constitutional Law & Statutory Rights

Land Use, Planning & Zoning

Municipal Government  
Ports

Real Estate

Senior & Affordable Housing

Transportation

## PRACTICE OVERVIEW

Adrian represents public and private clients in complex litigation and class actions at both the trial and appellate court levels, as well as matters involving municipal governance, the Public Records Act and the Open Public Meetings Act. She also advises clients regarding condemnation, public housing, and real estate and land use matters.

## REPRESENTATIVE MATTERS – Appellate Decisions

- *Public Utility District No. 1 of Okanogan County v. State*, 182 Wn.2d 519, 342 P.3d 308 (2015): Representation of public utility district in condemnation of easements over State lands for transmission corridor project
- *Admasu v. Port of Seattle*, 185 Wn. App. 23, 340 P.3d 873 (2014), *review denied*, 183 Wn.2d 1009 (2015): Representation of municipal airport operator in class action seeking damages and injunctive relief based on alleged inverse condemnation, nuisance and trespass caused by airport noise
- *McCleary v. State*, 173 Wn.2d 477 (2012): Representation of petitioners in action to enforce State Constitution’s public education clause

## REPRESENTATIVE MATTERS – Municipal Government

- Ongoing assistance to housing authorities, public hospital districts, and other public entities in development and adoption of policies regarding disclosure of public records and records retention
- Representation of city in Public Records Act litigation and property acquisition and condemnation matters for flood project
- Representation of port district in connection with compliance with the Open Public Meetings Act
- Representation of port district on matters involving use of airport property, FAA compliance issues, and condemnation
- Representation of city in condemnation of property necessary for road improvement project

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- Representation of major public institution in condemnation of property necessary for campus expansion
- Representation of Class 1 railroad in matters involving easement crossing tribal land
- Representation of private developer in challenge of preliminary plat application and associated environmental impact statement under SEPA
- Representation of property owner at trial court and appellate levels in successful action to quiet title to rights under easement

## RECOGNITION

- Rising Star, Washington Super Lawyers list, 2014-2016

## ACTIVITIES

- Washington State Bar Association Civil Procedure Deskbook, Contributing Author and Editor, 2014 edition
- Washington Public Ports Association
- Association of Washington Housing Authorities
- Washington State Association of Municipal Attorneys
- Tacoma-Pierce County Bar Association
- Federal Bar Association
- Housing Justice Project, Volunteer Attorney, 2009 - 2011

## QUOTED

- "Judge Dismisses 237 of 291 Plaintiffs Suing Port Over Noise from New Runway," *Airport Noise Report*, Volume 25, Number 15, May 2013

## PUBLICATIONS

- Author, Chapters 20 and 21 of the Washington State Bar Association Civil Procedure Deskbook (2014 edition)
- Contributor, Foster Pepper's [Local Open Government Blog](#)
- "Court of Appeals Reaffirms Public Utility District Authority to Condemn State School Trust Lands," Co-author, Foster Pepper News Alert, May 2013
- "Court Enforces Avigation Easements, Dismisses Claims Based on Flights on Third Runway at Seattle-Tacoma International Airport," Co-Author, Foster Pepper News, March 2013
- "Court Denies Certification of Alleged Takings Class Action Based on Noise from Third Runway at Seattle-Tacoma International Airport," Co-Author, Foster Pepper News, June 2012

## PRESENTATIONS

- "[Open Government Update: Per Page Penalties, 'Commercial Purpose' Requests, and Other Developments](#)," Speaker, Washington Public Ports Association Spring Meeting, May 2016
- "Aviation Legal Trends: Proposed FAA Rules on Small Unmanned Aircraft Systems (Drones)," Speaker, Washington Public Ports Association Fall Aviation Committee Meeting, November 2015
- "Open Public Meetings Act Training," Speaker, Verdant Health Board of Commissioners Annual Retreat, June 2015
- "[Lobbying Rules for Housing Authorities](#)," Speaker, Association of Washington Housing Authorities Spring Meeting, April 2015

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- “Mandatory Reporting Requirements for Child Abuse,” Speaker, Association of Washington Housing Authorities Winter Meeting, February 2015
- “Recent Legal Developments for Airports,” Speaker, Washington Public Ports Association Fall Aviation Committee Meeting, December 2014
- “Public Records Act and Open Public Meetings Act Update,” Speaker, Washington Public Ports Association Fall Legal Committee Meeting, December 2014
- “Next Up in *McCleary* and What It Means for Districts,” Co-presenter, Washington State School Directors’ Association Annual Conference, November 2014
- “Public Records Act Training,” Co-presenter, Association of Washington Housing Authorities webinar, November 2014
- [“Getting Personal About Personnel Records: Public Records Act Update,”](#) Speaker, 33rd Annual Civil Service Conference, September 2014
- “Open Public Meetings Act Training,” Co-presenter, Association of Washington Housing Authorities webinar, August 2014
- “Recent Legal Developments for Airport Managers,” Speaker, Washington Airport Management Association 2014 Conference, May 2014
- “Public Records Act: Tenant and Employee Privacy,” Speaker, Association of Washington Housing Authorities Spring Meeting, April 2014
- “Like a Good Neighbor - Planning For and Defending Airport Noise Claims,” Speaker, Washington Public Ports Association Fall Aviation Committee Meeting, November 2013
- “Public Records Act: Key Lessons Learned (and Some Reminders),” Speaker, Washington Public Ports Association Continuing Legal Education Seminar: Environmental Compliance and Increased Public Scrutiny, November 2013
- “Like a Good Neighbor - Planning For and Defending Airport Noise Claims,” Speaker, Washington Airport Management Association Spring Conference, May 2013

## EXPERIENCE

- Foster Pepper PLLC
  - + Member, 2016-Present
  - + Associate, 2008-2015
- U.S. District Court (Beaumont, TX), Law Clerk to the Hon. Marcia A. Crone, 2006-2008
- U.S. District Court (Eugene, OR) Extern to the Hon. Ann L. Aiken, January 2006-May 2006
- Stevens, Baldo, Freeman & Lighty, L.L.P. (Beaumont, TX), Summer Associate, 2004-2005

## BAR ADMISSIONS

- Washington, 2006

## EDUCATION

- J.D., University of Oregon School of Law, 2006
  - + Order of the Coif
  - + Managing Editor, Oregon Law Review
  - + Teaching Assistant, Legal Research & Writing Program
  - + Business Officer, Moot Court Board
  - + ABA National Appellate Advocacy Competition

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+ Phi Beta Kappa Honor Society