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# GETTING PERSONAL ABOUT PERSONNEL RECORDS: PUBLIC RECORDS ACT UPDATE

*33<sup>rd</sup> Annual Civil Service Conference  
Yakima, Washington*

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# The Open Government Trainings Act

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- New law effective this year
- Two types of training:
  - Records Training (public records and records retention)
  - Open Public Meetings Act
- Minimum training requirements



*Bluedisk at en.wikipedia*

# The Public Records Act – Ch. 42.56 RCW

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- 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

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



# Reminder: Records Policies

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- 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
- List of non-PRA exemptions that may apply
- Records retention policy

# What is a “Public Record”?

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- Broadly defined at RCW 42.56.010
- Three elements:
  - “any writing . . . regardless of physical form or characteristics”
  - “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”

# Responding to Public Records Requests

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- Initial response – within 5 business days (RCW 42.56.520)
  - Provide records, provide reasonable estimate of time, or deny
  - 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

## Keep in Mind . . .

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- Do not distinguish among requestors
- No statement of reasons is necessary
- No particular form of request is required
- “Overbroad” requests
  - An agency cannot deny a request solely because it is overbroad
- The Act covers requests for records, not information
  - But, consider whether to provide information anyway
- Provide the “fullest assistance” to requestors

# Enforcement and Penalties

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- Court can impose statutory penalties to be awarded to the requester (per day, per record)
- 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

# Privacy Under the Public Records Act

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- 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:
  - Highly offensive to a reasonable person and
  - Not of legitimate concern to the public
- *It is not enough that the disclosure may cause embarrassment to the individual or to others*

# Requests for Employee Records

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- 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

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- Employees and former employees have the right to review information in 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

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- 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)

# Personal Information Exemption – RCW 42.56.230

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- *"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, 211 (2008).
- Must violate the employee's right to privacy

# Employment Information Exemption – RCW 42.56.250

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- 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

# Requests for Employee Disciplinary Records

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- Depends on whether complaint substantiated or resulted in some sort of discipline
  - Substantiated / discipline → disclose
  - Unsubstantiated → personal info may be exempt if highly offensive
- Performance evaluations may be protected
  - Instances of misconduct? (if not, presumed highly offensive)
  - Legitimate concern of the public? Elected official? Redaction of identity?
- Remember to redact if possible

# Recent Case Law

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- Unsubstantiated misconduct records released with redaction of identifying information
  - *Martin v. Riverside Sch. Dist. No. 416*, 180 Wn. App. 28 (2014)
  - *Predisik v. Spokane Sch. Dist. No. 81*, 179 Wn. App. 513 (2014)
- Unsubstantiated misconduct records released with no redaction of identifying information
  - *West v. Port of Olympia*, \_\_ Wn. App. \_\_, 2014 WL 4212738 (Aug. 26, 2014)

# Technology: Separating Agency Business

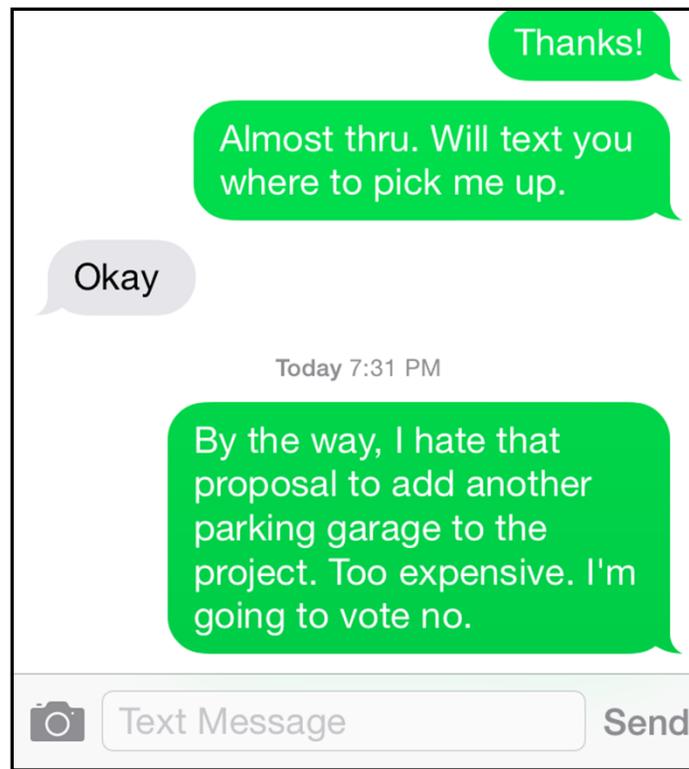
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- Problems arise when agency officials, employees use personal e-mail or electronic devices for agency business
- Can subject personal devices to search
  - *“Government employees and public officials who conduct business on private computers cannot reasonably expect those records to be classified as private; business conducted in . . . official capacities is not the personal property of that employee and is not subject to protections afforded to private property.”*  
*Paulson v. City of Bainbridge Island*, Kitsap County Cause No. 13-2-01839-1  
(Memorandum Opinion, November 1, 2013).
- Evolving area of law

# Technology: Separating Agency Business

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- Text messages can be public records
- *Nissen v. Pierce County*, \_\_ Wn. App. \_\_, 2014 WL 4435860 (Sept. 9, 2014)



# Technology: Manage Risk

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- Dedicated e-mail accounts and devices for agency business
- Central servers and other electronic document sharing solutions
- E-mail and telecommute policies
- Disable features (such as text) on agency devices
- Use the records retention schedules to your advantage
  - [http://www.sos.wa.gov/\\_assets/archives/RecordsManagement/CORE-3.0.pdf](http://www.sos.wa.gov/_assets/archives/RecordsManagement/CORE-3.0.pdf)
  - PRA expressly does not prevent agency from destroying information related to employee misconduct or alleged misconduct under RCW 41.06.450  
(See RCW 42.56.110)



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