

OPEN GOVERNMENT UPDATE

Washington Public Ports Association
Spring Meeting – Cle Elum, Washington
May 18, 2017

New Public Records Legislation Is Now Official

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Governor Signs Two Bills Amending Washington's Public Records Act

By [Andrea L. Bradford](#) on May 17, 2017

POSTED IN [IN THE COURTS](#), [PUBLIC RECORDS](#)

On May 16, 2017, Washington Governor Jay Inslee signed two public records bills passed by the legislature in April, [Engrossed Substitute House Bill 1594](#) and [Engrossed House Bill 1595](#).

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ABOUT

Local Open Government Blog covers the latest in open government across the Pacific Northwest, including the Public Records Act, the Open Public Meetings Act, public disclosure, campaign finance and the Freedom of Information Act.

Highlights of ESHB 1594

- Records held by certain agency volunteers not public records
 - Applies to records not otherwise required to be retained
 - Does not apply to volunteers in administrative, appointive, supervisory roles
- Clarifies “clarification” procedures in RCW 42.56.520
- Public records training and consultation services through Attorney General and State Archives
- Annual competitive grant program to update information technology systems
 - Preference given to small agencies with need and ability to improve systems

Highlights of ESHB 1594

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- Funding for training, consultation, and grant program
 - \$1 surcharge on recorded documents
 - Evaluation and reporting requirements
 - JLARC to review training, consultation, grant program
 - Agencies required to keep public records logs
 - Agencies with at least \$100,000 in annual staff and legal costs for public records requests must report to JLARC
 - Study for state records portal

Utah Public Records Portal

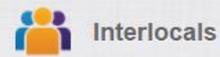


OpenRecords

The Open Records Portal is a central site from which a user can submit a records request (GRAMA request) to a governmental entity.



Request Records



Highlights of ESHB 1595

- Agencies can charge for providing copies of electronically produced public records
- Actual costs (per policy) or default fee schedule
 - 10 cents per page scanned into electronic format
 - 5 cents for every four attachments
 - 10 cents per GB transmitting records electronically
 - Alternative flat \$2 fee (if will cost at least that much)

Highlights of ESHB 1595

- Custom service charge
 - Authorized for requests that require preparation of data compilations or customized electronic access not used by the agency for other purposes
 - Must provide advance cost estimate (subject to judicial review)
- Excessive requests
 - Cannot request “all or substantially all” of agency’s records (can be all records regarding particular topic)
 - Can deny “bot requests” that cause excessive interference

Open Public Meetings Act

Meetings Exclusively By Telephone Conference

- Attorney General Opinion 2017 No. 4
- OPMA does not address, but lack of language does not mean prohibited (OPMA is a limit on authority, not a grant of authority)
- Yes, should be able to comply with OPMA if:
 - One or more specific locations designated as the meeting place
 - Proper notice and agenda posting
 - Provide a speaker phone at designated meeting location
- But, not without risk of suit (clarifying legislation ideal)

Standing To Sue Under The OPMA

- *West v. Seattle Port Commission*, 194 Wn. App. 821 (Div. 1, July 5, 2016)
 - “Any person may commence an action” to enforce the OPMA. (RCW 42.30.130)
 - Permissive standing in line with OPMA’s purpose
 - Distinguished *Kirk v. Pierce County Fire Prot. District. No. 21*, 95 Wn.2d 769 (1981) (improper notice to individual fire commissioner)
 - Distinguished federal standing (do not require concrete injury)

- *West v. Pierce County Council*, 197 Wn. App. 895 (Div. 2, Feb. 22, 2017) (same)

OPMA Preempted By Federal Shipping Act

- Federal Shipping Act purposes of developing “competitive and efficient ocean transportation” and establishing “nondiscriminatory regulatory process”
- Allows ports to work cooperatively; discuss, fix, or regulate rates or other conditions of service
- Detailed minutes required (submitted to Federal Maritime Commission), but exempt under FOIA
- OPMA would frustrate purpose of Federal Shipping Act

Reminder: Increased Penalties for OPMA Violation

- Increased personal liability for knowing violation as of June 2016
 - \$500 civil fine for first violation
 - \$1,000 civil fine for any subsequent violation
- Remedy for unintentional violation remains the same
 - Nullification of action (RCW 42.30.060)
 - Attorney's fees and costs (but, agency that prevails can recover fees if frivolous lawsuit) (RCW 42.30.120(4))

Public Records Act

Statute of Limitations

- *White v. City of Lakewood*, 194 Wn. App. 778 (Div. 2, May 2016)
 - PRA action must be filed within one year of agency's claim of exemption or last production of a record on a partial or installment basis
 - "Production" requirement satisfied when agency makes collection of documents available to a delivery service
 - City therefore "produced" records on date that responsive letter and documents placed in outgoing mail

Statute of Limitations

- *Belenski v. Jefferson County*, 186 Wn.2d 452 (Sept. 2016)
 - Lack of clarity regarding one-year or two-year “catch-all” limitations period where no responsive records or single production
 - Court confirms that a one-year limitations period applies
 - Statute applies to all possible responses under the PRA, not just the two expressly listed
 - Statute ran from agency’s definitive, final response (put requester on notice that agency did not intend to produce records)
 - But, equitable tolling might apply (remanded to trial court)

Requests for “Commercial Purposes”



“(9) This chapter shall not be construed as giving authority to any agency . . . to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies . . . shall not do so unless specifically authorized or directed by law”

RCW 42.56.070

Requests for “Commercial Purposes”

- Series of cases involving SEIU and Freedom Foundation
- Last year, *SEIU Healthcare 775NW v. DSHS*, 193 Wn. App. 377 (Div. 2, April 12, 2016)
 - Request to DSHS for lists of in-home care providers and contact information
 - SEIU sued to enjoin disclosure

Requests for “Commercial Purposes”

- First, construe the statute in favor of disclosure whether an “exemption” or a “prohibition”
- Second, define the terms:
 - AGO 1975 No. 15; AGO 1998 No. 2
 - Held: “commercial purposes” includes “*a business activity by any form of business enterprise intended to generate revenue or financial benefit*”
 - Direct vs. indirect profit generation

Requests for “Commercial Purposes”

- Third, agencies must investigate if some indication the list may be used for commercial purposes
 - Case-by-case determination based on:
 - identity of requestor
 - nature of records requested and
 - other information available to the agency
 - Simple affirmation from requestor not enough
 - Must “at least require a party requesting a list of individuals to state the purpose of the request”

Requests for “Commercial Purposes”

- *SEIU Local 925 v. Freedom Foundation*, 197 Wn. App. 203 (Div. 2, Dec. 20, 2016)
 - Similar, but requested names of childcare providers in Washington’s “Family, Friends and Neighbors” program
 - Reiterated previous holding
 - Rejected, again, “linkage” argument
 - Rejected constitutional privacy argument

Requests for “Commercial Purposes”

- Reminder: RCW 42.56.070(9) only applies to lists of individuals
 - “Individuals” are natural persons, not companies or businesses – WAC 44-14-06002(6)
 - Does not prohibit “access to raw data from which a person could construct his own list of individuals for commercial purposes.” AGO 1975 No. 15.

A Clarification About Requesting Clarification

- *Hikel v. City of Lynnwood*, 197 Wn. App. 366 (Div. 1, Dec. 27 (2016))
 - City's initial response requested "clarification" and did not provide reasonable estimate of response time until 11 days after request
 - Failure to include estimate violated PRA
 - Reasonable estimate of the time for a first installment of records has been found compliant (citing *Hobbs v. Wash. State Auditor's Office*, 183 Wn. App. 925 (2014))
 - Has now been clarified by HB 1594

“Other Statute” Exemption and PECBA

- *SEIU 775 v. DSHS*, __ Wn. App. __, 2017 WL 1469319 (Div. 2, Apr. 25, 2017)
 - Training presentations at DSHS facilities for individual care providers, which provide time for SEIU under collective bargaining agreement
 - Request for records regarding these meetings
 - SEIU argued records were exempt under Public Employees Collective Bargaining Act (PECBA) as an unfair labor practice
 - Held: PECBA does not explicitly preempt or prohibit release of records – not an “other statute”

Private Accounts and Constitutional Privacy Rights

- *West v. Vermillion*, 196 Wn. App. 627 (Div. 2, 2016), review denied, 187 Wn.2d 1024 (2017)
 - Request for communications regarding city councilmember's private website and email account related to city governance
 - Used during election; forwarded to city account when "official response" warranted
 - Case controlled by *Nissen v. Pierce County*
 - Court rejected executive vs. legislative distinction
 - Court rejected constitutional arguments and remanded

Private Accounts and Constitutional Privacy Rights

LOCAL

MAY 04, 2017 3:15 PM

Former councilman from Puyallup takes email privacy case to US Supreme Court



BY JOHN GILLIE

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Having lost three attempts to persuade Washington courts to protect city-related emails on his private server from public disclosure, a former Puyallup city councilman is asking the nation's highest court to consider his case.

Steve Vermillion petitioned the U.S. Supreme Court to review the decision of a Pierce County judge to force him to reveal email communications on city business handled on his personal email address.

Ramsey Ramerman, an Everett attorney who represents Vermillion, said his client has asked him to take the question one step higher to the Supreme Court. Ramerman's services are funded by the city of Puyallup because of Vermillion's status as a former public official.

Lost Records

- *Jones v. Wash. State Dep't of Corr.*, 195 Wn. App. 1048 (Div. 3, Aug. 18, 2016) (unpublished)
 - Inmate sought records, which agency could not locate after reasonable search
 - PRA did not impose liability for lost records or a burden to prove when the document was lost
 - No evidence of intentional destruction
 - PRA “is not intended to penalize inadvertent loss, a phenomenon endemic to a large organization”

Washington Supreme Court Adopts *Telford*

- *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509 (2017)
- Officially adopts “*Telford* test” as standard in Washington for assessing whether functional equivalent of public agency
- Balance four factors:
 - Whether the entity performs a governmental function
 - The level of government funding
 - The extent of government involvement or regulation and
 - Whether the entity was created by government

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