Foster Garvey

New Public Records Act Legislation Taking Effect on July 23, 2017 – Are Your Policies and Practices Up-To-Date?

Legal Alert
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On July 23, 2017, recent legislation on public records will take effect, impacting local governments across the state. Engrossed Substitute House Bill 1594 and Engrossed House Bill 1595 make a number of changes to the Public Records Act, Chapter 42.56 RCW ("PRA"), and Washington's laws regarding preservation and destruction of public records, Chapter 40.14 RCW. In many cases, preparing for these changes will require revisions to agency policies on public records and updates to agency practices in processing requests. Below are some highlights of the new legislation.

Charging for Electronic Records

Agencies will now be authorized to charge for the cost of producing electronic records, including the costs of delivery, the physical media device provided to the requester, and the costs of electronic file transfer or cloud-based data storage. Default fees are $0.10 per page for scanning records; $0.05 for every four files delivered to the requester electronically; and $0.10 per gigabyte for electronically transmitted records. Alternatively, an agency may charge a flat fee of up to $2.00 for the entire request as long as the agency reasonably estimates the cost will equal or exceed that amount.

In order to charge the default amounts provided for by statute, agencies must adopt "rules or regulations" declaring why calculating the actual costs of producing electronic records would be "unduly burdensome." Agencies should therefore adopt an ordinance, resolution, or policy before charging for electronic records using the default structure. Additionally, agencies whose existing policies include fee schedules should update the policies to reflect the new charges if they wish to implement the default charges for electronic records. For additional detail on charges for electronic records, see Sections 1 and 3 of EHB 1595.

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Related Services

Public Finance & Municipal Government

Maintaining Public Records Logs; Reporting Requirements

Although many agencies already keep a log or other record to track public records requests, a log will now be required by law. This log should include, at minimum, the identity of the requester, the date of the request, the text of the request, a description of the records produced, a description of any redacted or withheld records, the reasons for any redactions or withholding, and the date of the final disposition of the request. The log must be retained by the agency consistent with the archivist's records retention schedule and is a public record subject to disclosure. Additionally, agencies that have spent at least $100,000 on staff and legal costs associated with fulfilling records requests in the past fiscal year should review the detailed reporting requirements in Section 6(5) of ESHB 1594, and incorporate these provisions into agency policies.

Requests for Clarification

The amendments also address the appropriate method for requesting clarification from the requester as part of the agency's initial response (often referred to as a "five-day letter"). An agency may request clarification of an unclear request in its five-day letter, but it must also provide "to the greatest extent possible" a reasonable estimate of the time it will take the agency to respond if the request is not clarified. If a requester fails to clarify a request that is unclear in its entirety, then the agency need not respond to the request; however, agencies must still respond to portions of a request that are clear.

Importantly, "overbroad" or large requests are not necessarily unclear—clarification is generally directed at understanding what the requester seeks, not how much. Unless the request is for "all" or "substantially all" of the agency's records (see below), the agency is not permitted to deny the request solely because it is overbroad (RCW 42.56.080). It is therefore important to understand the distinction between asking the requester for clarification and asking if the requester wishes to narrow the scope of a large request (which the requester is not obligated to do).

Requesting "All" Agency Records; Bot Requests; Training for Public Records Officers

The amendments make clear that a request for "all or substantially all records" of a public agency is not a valid request for "identifiable" records under the PRA. Requesters may still request all records regarding a particular topic or keyword. Agencies may also deny frequent (multiple within a 24-hour period), automatically generated "bot requests" where the agency establishes that responding to the multiple requests would cause excessive interference with other essential functions of the agency. A "bot request" is defined as a request that an agency reasonably believes was automatically generated by a computer program or script.

Of final note, the existing law requiring training for public records officers (implemented in 2014) is amended to require that the training address the retention, production, and disclosure of electronic records, including updating and improving technology information services. Public records officers are required to receive training within 90 days after assuming their responsibilities, with refresher training at least every four years (RCW 42.56.152).

If you have any questions or need assistance reviewing or implementing changes to your public records policies or practices, please contact Foster Pepper attorneys Adrian Winder, Lee Marchisio, or Andrea Bradford. Additional information on the recent legislation, as well as other developments in the area of open government, is available at Foster Garvey's Local Open Government blog.