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Deputy Attorney General Christina Beusch
Rules Coordinator Elaine Ganga
Office of the Attorney General
1125 Washington St.
Olympia, Wash. 98504
Sent by email

Re: News Media Petition for Rulemaking
Response to Informal Comments on Proposed Public Records Rules (revised)

Dear Christina and Elaine,

Thanks for the opportunity to respond to informal comments on the Public Records Act (PRA) rulemaking petition from the News Media.[1] As you know, the petitioners want to ensure the fullest and fastest disclosure possible, consistent with the intent of Washington voters who overwhelmingly approved the PRA. The extensive feedback from agencies and citizens helped identify areas of agreement around that goal, which is encouraging and much appreciated. The comments also revealed some surprising viewpoints about what the PRA requires. The divergent views underscore the value of engaging all stakeholders in this rulemaking effort, and the importance of eliminating inconsistencies between the PRA and the model PRA rules so that everyone has a shared understanding of the law.

In the spirit of promoting consensus, this letter offers additional explanation of the rulemaking petition's reasoning and intent. The letter also identifies potential areas of compromise which the Seattle Times, as the lead petitioner, offers for discussion among stakeholders.

Prompt disclosure is a core PRA purpose

The News Media proposed to add the words "promptly" and "prompt" to WAC 44-14-010, which is the first model PRA rule and sets the tone for the chapter as a whole.[2] As noted in the

[1] The rulemaking petition was initiated by The Seattle Times and joined by Allied Daily Newspapers of Washington, The Associated Press, Cascade PBS, The Columbian, GeekWire, InvestigateWest, KING5 TV, KUOW, McClatchy, The New York Times, Prison Legal News, South Seattle Emerald, Walla Walla Union Bulletin, Washington State Association of Broadcasters and Yakima Herald-Republic.

[2] The relevant text from the petition, showing proposed changes in red type, is as follows:

petition, the proposal is designed to make the model rules conform to the PRA, which requires agencies to respond promptly to public records requests. See RCW 42.56.080(2) ("agencies shall, upon request for identifiable public records, make them promptly available") and RCW 42.56.520(1) ("[r]esponses to requests for public records shall be made promptly").

Given the longstanding PRA requirement to be prompt, it is surprising that some agencies objected to the rule proposal based on the incorrect belief that it would impose a new standard for responding to public records requests. For example, the Washington Schools Risk Management Pool commented that adding the words "prompt" and "promptly" to WAC 44-14-010 "would introduce ambiguity and subjectivity into the model rules" and added, "Instead, the model rules should rely on existing statutory language." The City of Tumwater similarly expressed the surprising belief that the current law requires only "a good faith effort to fulfill requests in a timely manner," not promptness, and that the proposed rule would encourage legal battles over whether a response has been "prompt."[3]

The fact that some agencies appear to be unaware of the PRA promptness requirement, although it was first mandated by voters more than 50 years ago, underscores the importance of granting the News Media's proposal. The model rules should help agencies comply with the PRA. It is critical for the rules to affirm that the PRA requires not just "full access" to government information, but also *prompt access*, so that agencies have accurate guidance.

Pacific County pointed out that the word "promptly" should not be attributed to RCW 42.56.070(1) because it does not appear in that statute. That point is well taken. A possible

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> **WAC 44-14-010 Authority and purpose.** (1) RCW 42.56.070(1) requires each agency to make promptly available for inspection and copying nonexempt "public records" in accordance with published rules. . . .
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> (2) The purpose of these rules is to establish the procedures (name of agency) will follow in order to provide full and prompt access to public records. These rules provide information to persons wishing to request access to public records of the (name of agency) and establish processes for both requestors and (name of agency) staff that are designed to best assist members of the public in obtaining such access.
>
> (3) The purpose of the act is to provide the public full and prompt access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. . . .

[3] An agency's "good faith" may mitigate penalties for violating the PRA, as explained in Yousoufian v. Sims, 168 Wn.2d 444 (2010). But **strict compliance** with the PRA is required. See Zink v. City of Mesa, 140 Wn.2d 328 (2007); Rental Housing Ass'n of Wash. v. City of Des Moines, 165 Wn.2d 525 (2009).

alternative is to amend WAC 44-14010(1) to say this: "RCW 42.56.070(1) *and RCW 42.56.080(2) require each agency to make promptly* available…" The key is for the model rules to make clear that promptness is not optional.

As it is, promptness is too often absent. As stated by the Washington Coalition for Open Government in support of the petition, "excessive delay in releasing public records is a critical obstacle to government transparency" and jeopardizes public trust in government.

Public records officers must provide the most timely possible action on requests

The News Media proposed to add "the most timely possible action on requests" to the description of a records officer's duties in WAC 44-14-020(3).[4] The goal was, again, to make the model rule consistent with the PRA so that agencies have accurate guidance. RCW 42.56.100 requires *both* "the fullest assistance to inquirers" *and* "the most timely possible action on requests for information," but WAC 44-14-020(3) only mentions the former requirement and not the latter.[5]

Some agencies reacted as if they are unaware of the "most timely possible" requirement, although it has been part of the PRA for more than 50 years. For example, the South Whatcom Fire Authority said: "Statements such as '...most timely possible...' are again subjective and provide no value when there are already statutory deadlines in place." The Washington State Patrol and City of Sultan expressed fear of increased litigation if the words from RCW 42.56.100 are added to the model rule as proposed. The City of Woodinville asserted that the phrase "most timely possible action" is "too extreme."

These comments demonstrate the failure of the current model rules to clearly explain existing law. It appears that some agencies believe that, because WAC 44-14-020(3) incorporates only the "fullest assistance" requirement and not the "most timely possible action" requirement from RCW 42.56.100, the latter requirement must be optional. But agency rules cannot eliminate or reduce statutory obligations. In fact, Washington courts have repeatedly

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[4] The relevant text from the petition, showing proposed changes in red type, is as follows:

> . . .The public records officer or designee and the (name of agency) will provide the "fullest assistance" to requestors and the most timely possible action on requests . . .

[5] The "most timely possible action" requirement is mentioned in a comment accompanying WAC 44-14-010, but not in the rule itself. Agencies are encouraged to adopt the model rules and "not necessarily the comments." See WAC 44-14-00001. Thus, the petition addresses only the rules. A different model rule, WAC 44-14-040(1), accurately states that agencies must adopt regulations providing for "fullest assistance" as well as "the most timely possible action" on requests. The rules as a whole do not make clear that those principles are enforceable PRA duties.

recognized that RCW 42.56.100 imposes enforceable duties to provide the fullest assistance to requesters and most timely possible action on requests.[6] As it is, pervasively slow PRA responses demonstrate that some agencies are misunderstanding those duties. The Attorney General should not tacitly sanction disclosure delays by omitting PRA requirements to be prompt and as timely as possible from the relevant model rules.

Fulfilling PRA requests is an essential function

The News Media also proposed to amend WAC 44-14-020(3) to use the exact words of RCW 42.56.100 regarding the intent of the PRA. The goal is to clarify that providing full access to public records is – itself – one of the essential functions of agencies. More specifically, the proposal would bring the rule into conformance with RCW 42.56.100, which describes the intent of the PRA as follows: "to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with *other essential functions of the agency*."

As it is, the last clause of the last sentence of WAC 44-14-020(3) omits the word "other" to suggest that PRA disclosure is *not* among essential agency functions, contrary to what the PRA itself says. Several comments reflect an incorrect attitude which may be fostered by the incorrect rule. One records officer mocked the notion that her job is essential, calling it "flattery." Two other agency commenters asserted that if PRA disclosure is treated as an essential function, it would jeopardize duties they view as truly important.

In fact, the News Media proposed to use the *exact wording* of RCW 42.56.100 on this issue. The goal is not to change the law or take away anything. It is to ensure the existing law is properly understood. That is, providing full access to records is indeed an essential function, although it must not interfere "excessively" with "other essential functions." This has been the law for more than 50 years and should be clearly reflected in the model rules so that PRA functions will be taken as seriously as the voters intended.

PRA requesters are not the ones destroying records

[6] See Freedom Found. v. Wash. State Dep't of Soc. & Health Servs., 9 Wn.App.2d 654, 673 (2019) ("courts have recognized that agencies are required to comply with the principles embodied in RCW 42.56.100"); Andrews v. Wash. State Patrol, 183 Wn.App. 644, 646 (2014) ("RCW 42.56.100 requires that an agency responding to public records requests provide 'the fullest assistance to inquirers and the most timely possible action on requests for information'"); Mitchell v. Dep't. of Corr., 164 Wn.App. 597, 607 (2011) (referring to a statutory duty of fullest assistance); ACLU of Washington v. Blaine Sch. Dist. No. 503, 86 Wn.App. 688, 695 (1997) (recognizing "a statutory duty of the agency to give 'fullest assistance to inquirers' ").

The News Media proposed to amend WAC 44-14-030(3) to accurately reflect the law and present-day realities regarding how public records are lost. The current rule is outdated and unhelpful on this issue. Although the rule recognizes an agency duty to protect records from damage, it says nothing specific about how to accomplish that duty, other than this: "A requestor shall not take (name of agency) records from (name of agency) offices without the permission of the public records officer or designee." This wrongly suggests that the duty to prevent damage is concerned solely with requesters surreptitiously (or accidentally) absconding with original records when visiting agency offices.[7]

In fact, RCW 42.56.100 requires agencies to protect records from damage generally – saying nothing about damage by requesters. To have any vitality, WAC 44-14-030(3) must address *both* internal and external threats of destruction.

Recent years are replete with stories about agency officials destroying or losing records of public interest. See, for example:

- Ferguson suspends auto-deletion of public records after $225K settlement | The Seattle Times
- After Seattle protests, texts from mayor's phone were deleted, court filing shows [NBC News]
- Ex-Seattle police chief testifies she deleted text messages in bulk - Axios Seattle
- WA state admits Redistricting Commissioner Sims deleted texts | The Olympian
- Richland school official says she deleted text messages | Tri-City Herald

Because the greatest threat of destruction is from within agencies, the News Media proposed to clarify that agencies must prevent damage by employees and officials as well as by others (including requesters).[8] This part of the proposal did not generate significant controversy.

A couple of agencies expressed concern about lack of control over employees and possible liability for accidental losses. But the current model rule requires only "reasonable actions to

[7] Requesters usually receive records through electronic transmission or mail, affording no opportunity for unauthorized removal. Even when inspecting records in person, which is increasingly rare, requesters are highly unlikely to risk criminal liability by taking records without permission.

[8] The relevant text of the petition, with proposed replacement language in red, is as follows:

> The (name of agency) will take reasonable actions to protect records from damage and disorganization, including preventing unauthorized destruction or removal of original records by employees, elected officials and others.

protect records from damage," not absolute perfection, and the News Media did not propose to change the "reasonable" standard. The intent is to make clear that the PRA duty to protect records – which already exists under RCW 42.56.100 – is not limited to preventing requesters from walking off with records.[9]

Public records are disorganized if the only copies are on private devices

Besides preventing damage to records, agencies also must prevent "disorganization" of records. WAC 44-14-030(3), the model rule on organization, provides no meaningful guidance on what that means. It says only this: "The (name of agency) will maintain its records in a reasonably organized manner. The (name of agency) will take reasonable actions to protect records from . . . disorganization."[10] The rule does not say what is "reasonable." Nor does it mention the duty under Nissen v. Pierce County, 183 Wn.2d 863 (2015), to provide public access to public records even if they are maintained only on private devices.[11] This does not ensure that records are organized in a manner allowing prompt and full disclosure.

Nissen held that the PRA applies to government-related records that "an agency employee prepares, owns, uses, or retains on a private cell phone within the scope of employment." Nissen said agencies "should develop ways to capture public records" from employee phones, adding: "E-mails can be routed through agency servers, documents can be cached to agency-controlled cloud services, and instant messaging apps can store conversations. Agencies could provide employees with an agency-issued device that the agency retains a right to access, or they could prohibit the use of personal devices altogether." In the absence of such common-sense organizational practices, when the *only* copies of requested records are on private devices, Nissen requires employees to search their devices and turn over requested records to agencies for PRA processing. This is not a recommended system but a last resort.

The Attorney General, who is charged with promoting best practices, can be more helpful on this issue. An agency's records are not organized if they are scattered across private devices outside of the agency's control. The News Media proposed to flesh out WAC 44-14-030(3) to capture public records from private devices as soon as possible (*before* anyone requests them

[9] The News Media's proposed rule change refers to "original records" because, if an agency retains the originals, destruction of copies does not threaten the public's right to know. The key is to prevent destruction of the only copies of public records by anyone (not just requesters).

[10] A comment accompanying the rule (labeled "Organization of records") provides a link to a Secretary of State website where it is possible to ferret out advice on retaining and organizing electronic and paper records. That website is not focused on PRA compliance.

[11] Nissen is mentioned in a comment on the definition of public records, WAC 44-14-00031(3), not in the actual rules which agencies are encouraged to adopt, and not in reference to preventing disorganization.

under the PRA, as Nissen advised).[12] While the exact language in the petition is not dictated by any statute or case law, it is based on the principles of Nissen and adheres to the "reasonable" standard in the current model rule.

A number of agencies, including Clallam County and the City of Shoreline, supported the News Media's proposal to prohibit storage of public records solely on personal devices. Several library districts commented that the proposal "aligns with most agency practices." Other agencies agreed with the concept, if not the exact wording, or agreed that more specific guidance would be helpful.

The Washington Association of Sewer and Water Districts noted that the petition "does not specify how quickly a document must be transferred into the agency system," and expressed concern about lawsuits "without a court having a basis to judge compliance." The proposed term "as soon as practicable" was intended to provide some leeway, but if agencies would rather have a specific deadline, that could work. As it is, the official comment accompanying WAC 44-14-030 states that all public records "should eventually be stored on agency computers," which lacks any sense of urgency. Any rule for bringing public records into agency control should be quick, not "eventual," to ensure that disorganization does not delay disclosure requested by the public.

Processing is not "most efficient" when easy requests take as long as hard ones

The current model rule on PRA processing, WAC 44-14-040, states in the first section: "The public records officer or designee will process requests *in the order allowing the most requests to be processed in the most efficient manner*." That is good advice, but there is no explanation of how to do it.

The News Media proposed to be more specific about the most efficient order of processing. This would include "*when appropriate, triaging requests into simple and complex tracks to ensure that processing times are proportionate to the difficulty of each request*." Also under the proposal, agencies would "*endeavor to complete requests for a single record within one business day*" and "*prioritize completion of simple requests for a small number of records ahead of completing larger more complex requests*."

[12] The News Media proposed to add the following language to the model rule: "The (name of agency) shall not maintain any public records solely on a personal device or in a personal account, and shall take reasonable steps to ensure that public records are readily available to the public records officer through a centralized electronic system or, for nonelectronic records, in an organized storage system. If (name of agency) employees create or receive public records on personal devices or in personal message accounts, such employees shall transfer the records to work devices or work accounts as soon as practicable."

This part of the petition arose from the News Media's frustration with long delays in completing simple requests. If a journalist must wait weeks or months for a single record (such as a contract, permit, final investigation report or budget request), the record likely will have lost its news value upon disclosure. More importantly, if small and simple records requests must wait in line behind large complex requests, the public will lose opportunities for informed participation in matters of urgent interest (such as imminent elections and policy decisions). Requirements for "prompt" access and "fullest assistance" cannot be met if easy requests take just as long as hard ones.

The fast-track proposal drew ardent reactions. Many agencies objected to "endeavoring" to provide single records in one day, asserting either that it is too prescriptive (as if setting a hard deadline) or that it is too vague (lacking a hard deadline). To clarify, the intent was to strive for – but not strictly require – completion of all single-record requests in a day. Language that is more clearly aspirational, such as "make a reasonable effort" or "make every effort" instead of "endeavor," might be an alternative. The point is to produce single records within one business day when possible, consistent with RCW 42.56.100.

Some agencies objected that a fast track for simple requests would violate the PRA prohibition against distinguishing among requesters. See RCW 42.56.080(2). The News Media is sensitive to equity concerns, but believes the triaging proposal is consistent with the PRA. RCW 42.56.520(2) identifies permissible reasons for delay, which are all based on the difficulty of the *particular request* being processed.[13] Thus, the PRA contemplates that processing times will vary according to the actual work needed. It is not discriminatory to process an easy request more quickly than a hard request – it is precisely what RCW 42.56.520(2) envisions.

In fact, the News Media proposal to prioritize easy requests ahead of hard ones is consistent with the official comments accompanying WAC 44-14-040, which state:

> [T]reating requestors similarly does not mean that agencies must process requests strictly in the order received because this might not be providing the 'most timely possible action' for all requests. A relatively simple request need not wait for a long period of time while a much larger or more complex request is being fulfilled. Agencies are encouraged to be flexible and process as many requests as possible even if they are out of order.

See WAC 44-14-04003(1). The proposal would incorporate that important concept in the rule.

[13] It says: "Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt . . . ." (Emphasis added). Thus, the easiness of a request is supposed to matter.

To be clear, the News Media does not seek preferential treatment for itself (contrary to perceptions of some commenters). But it bears mentioning that journalists play an important role in informing the public about government policies and programs. When the media lacks timely access to records of public importance, the larger public loses opportunities to be fully informed through news reports. An informed public is the cornerstone of democracy. In that sense, the News Media serves as a voice for the general public regarding timely disclosure.

Finally, it should be noted that the proposal is to triage requests "when appropriate," not necessarily always. An agency may not need a fast track for simple requests if it is already processing such requests quickly. The key is for PRA processing times to be proportionate to the work involved, so that public access to important records is not held hostage to backlogs.

Breaking large requests into installments is supposed to speed up disclosure

The PRA specifically requires the Attorney General to develop model rules on "fulfilling large requests in the most efficient manner."[14] But the current rules offer no clear guidance on that, and efficiency is sorely lacking in many agencies.[15] This is a pressing issue for reporters and other requesters routinely facing long delays in obtaining records of public importance.

WAC 44-14-040(10) says: "When the request is for a large number of records, the public records officer or designee will provide access for inspection and copying in installments, if he or she reasonably determines that *it would be practical* to provide the records in that way." The focus on what is "practical" for a records officer has no basis in the PRA. In fact, RCW 42.56.080(2) is the statute authorizing installments and it says nothing about being practical. Rather, it requires agencies to make records "*promptly available* to any person including, if applicable, on a partial or installment basis as records that are part of a larger set . . . are assembled or made ready for . . . disclosure." Thus, the PRA authorizes installments so that requesters can get records promptly, once they are "ready," rather than waiting to receive an entire large set all at once. It is about promptness, not practicality.

Many agencies have fallen into a pattern of producing nearly all records by installments over an extended period. Too often, this process stretches over months or years. The News Media proposed to amend WAC 44-14-040(10) to conform to RCW 42.56.080(2), using almost

[14] See RCW 42.56.570(2)(b).

[15] See Agencies+ranked+on+records+responses+4-30-2024.pdf (some agencies reported taking an average of more than 100 days to fulfill requests).

identical words.[16] This would make clear that installments must be prompt and are designed to *speed up* public access – a critical point that is missing from the current rule.

One agency employee, speaking only for herself, called the proposed change "reasonable."[17] But the City of Woodinville asserted: "Limiting use of installments to when it is 'necessary' is not supported by law and provides no guidance for PROs making that determination." It is true that the PRA uses the term "if applicable" rather than "if necessary" when authorizing prompt disclosure through installments. Although the term "if necessary" is clearer, using the statutory term "if applicable" is a possible compromise. The key is to make clear that the purpose of installments is to be *prompt* for the requester, not to be "practical" for the records officer.

Courts require diligence

Courts have held that agencies must be diligent when processing requests.[18] The model rule on processing does not mention this requirement. The News Media proposed to add diligence to the section on providing installments, since it is common for requesters to experience long delays between installments.[19] This proposal was not controversial.

Use of snail mail is not "fullest assistance"

Some agencies[20] still do not allow requesters to pay copying fees online, the fastest method. Requesters must put checks in the mail, wait for the postal service to deliver them, and wait for agencies to process the checks before they can receive records. This is not the "fullest assistance" that the PRA requires. Most agencies have stopped insisting on payment by snail mail and the model rules should prohibit it, absent some credible reason not to comply.

The same is true for electronic records delivery. Most agencies now provide records through

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[16] The relevant text of the petition, with proposed changes in red type, is as follows:
"When the request is for a large number of records, the public records officer or designee shall make records promptly available including, if necessary, providing records on a partial or installment basis once they are ready for disclosure."

[17] At the commenter's request, this letter was revised to clarify that she was not speaking for an agency.

[18] See, e.g., Cantu v. Yakima School Dist. No. 7, 23 Wn.App.2d 57, 93-94 (Div. 3 2022) (lack of diligence is a constructive denial of records); Freedom Foundation v. Wash. St. Dept. of Social and Health Services, 9 Wn.App.2d 654, 673 (Div. 2 2019) (providing fullest assistance requires thoroughness and diligence).

[19] The proposed new language is: "The (name of agency) will be diligent when processing requests by installment."

[20] As a recent example, on Dec. 31, 2024, the Department of Social and Health Services required a check to be mailed to Olympia before it would release an installment to a requester.

electronic portals or by email, which ordinarily is the fastest and most helpful method of transmission. A dwindling number of agencies still insist on mailing records on a thumb drive or disc, needlessly adding days of delay for public access.

The News Media proposed to require agencies to accept payment online and to offer electronic delivery when possible.[21] Some agencies raised concerns about costs of online payment systems. A potential compromise could involve limited carve-outs for small agencies based on budget constraints.

A "reasonable" time estimate must involve some investigation of the request

RCW 42.56.520(1) requires initial responses to records requests within five days, and the most common response is to estimate the additional time needed to produce records. The PRA requires such time estimates to be "reasonable." But too often, requesters receive generic estimates based on the size of the agency's backlog (or guesswork) rather than the actual size or difficulty of the request. Such stock estimates are inherently unreasonable. They also are harmful because agencies treat them as internal deadlines for producing records, often resulting in longer delays than are truly necessary.

When sections 3 and 4 of WAC 44-14-040 are read together (along with the official comment cautioning against generic estimates), it can be gleaned that agencies already are required to evaluate the volume and availability of requested records *before* providing initial time estimates to requesters.[22] The News Media proposed to state that requirement more explicitly.[23]

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[21] The proposed new language is: "When charging for copies, the (name of agency) will accept payments online and not solely by mail. Installments will be sent electronically or, to the extent that electronic transmission is not reasonably possible or not preferred by the requestor, by the fastest alternative method."

[22] WAC 44-14-040 says: "(3) The public records officer or designee will evaluate the request according to the nature of the request, volume, and availability of requested records. (4) …*Following the initial evaluation of the request under (3) of this subsection, and within five business days of receipt of the request,* the public records officer will do one or more of the following: (a) Make the records available . . .(b) Acknowledge receipt of the request and *provide a reasonable estimate* of when records or an installment of records will be available . . .; or (c) Acknowledge receipt of the request and ask the requestor to provide clarification . . . or (d) Deny the request." (Italics added).

The accompanying comment, WAC 44-14-04003(7), says: "To provide a 'reasonable' estimate, an agency should not use the same estimate for every request. An agency should roughly calculate the time it will take to respond to the request and send estimates of varying lengths, as appropriate."

[23] The relevant text of the petition, with proposed new language in red, is as follows:

In response, a couple of agencies suggested they sometimes need more than five days to assess PRA requests. The State Department of Health expressed concern that assessing requests within five days would require scanning boxes of old records so they can be reviewed electronically, a "huge financial burden." These comments illustrate a lack of understanding that the current rule already requires assessment of requests within the first five days and before time estimates are provided, underscoring the need for more explicit language.

Ensuring time estimates are reasonable is a serious obligation. In fact, RCW 42.56.550(2) authorizes lawsuits solely to establish whether an agency provided a reasonable estimate of the time required to respond to a public record request. The statute places the burden on the agency "to show that the estimate it provided is reasonable." The proposed rule change would help to ensure time estimates are reasonable, averting disputes and shortening response times.

Time sensitivity matters

In addition to pre-estimate assessments, the following addition to WAC 44-14-040 was proposed by the News Media: "*When evaluating the nature of the request, the [name of agency] should consider whether time is of the essence such as when records are needed for participation in a hearing, public comment process or election or to deal with an urgent safety or health issue or other matter that is known to be of pressing and time-sensitive importance*."

This language is not drawn directly from the PRA. Rather, it reflects a principle in case law that a known time sensitivity, when disregarded, increases PRA culpability. Specifically, Washington courts consider whether circumstances made "time of the essence" – such as when requested records relate to an imminent ballot measure - when imposing penalties for unlawful disclosure delays.[24]

Some agencies objected that the News Media proposal would require them to proactively look into time sensitivities for each request, expanding potential PRA liability. To clarify, that was

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"The public records officer or designee will evaluate the request according to the nature of the request, volume, and availability of requested records before providing the initial response."

[24] "These aggravating factors may justify an increase in the assigned penalty: (1) a delayed response by the agency, especially in circumstances making time of the essence; (2) lack of strict compliance by the agency with all the PRA procedural requirements and exceptions; (3) lack of proper training and supervision of the agency's personnel; (4) unreasonableness of any explanation for noncompliance by the agency; (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency; (6) agency dishonesty; (7) the public importance of the issue to which the request is related, where the importance was foreseeable to the agency; (8) any actual personal economic loss to the requestor resulting from the agency's misconduct,

not the intent. The proposal used the words "should" rather than "shall" and "consider" rather than "investigate." The intent was to encourage agencies to be mindful of known time sensitivities so that the PRA will function as a tool for informed democracy, as voters envisioned. A potential compromise could involve less prescriptive words.

It does no good to notify third partes about requests when records are not exempt

The News Media has grave concerns about WAC 44-14-040(6), which sets no meaningful boundaries for inviting third parties to seek injunctions against disclosure. The rule says: *"*In the event that the requested records contain information that *may affect rights of others and may be exempt from disclosure,* the public records officer may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure." That overly expansive language can lead to third-party injunction suits that have no chance of success. As the petition explained, an applicable exemption is part of the test for courts to grant PRA injunctions. [25] So it is pointless to give third-party notice when requested records are not actually exempt. Instead of protecting privacy, it merely causes needless delay and expense for all involved, including the third-party plaintiff and the agency and requester named as defendants.

The official comments accompanying WAC 44-14-040 acknowledge this problem. WAC 44-14-04003(1) says:

> The third party can file an action to obtain an injunction to prevent an agency from disclosing it, but the third party must prove the record or portion of it is exempt from disclosure. RCW 42.56.540. Before sending a notice, an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requestor's access to a disclosable record.

Unfortunately, the model rule itself contains no such caution against notifying third parties of injunction opportunities when requested records are not exempt. It also fails to explain that injunctions are not available unless disclosure would substantially and irreparably damage a person or vital government interest. Accordingly, and because the term "may affect the rights of others" is too vague, the News Media proposed the following new language:

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where the loss was foreseeable to the agency; and (9) a penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case." Sargent v. Seattle Police Dep't, 179 Wn.2d 376, 398, 314 P.3d 1093 (2013).

[25] See Lyft Inc. v. City of Seattle, 190 Wn.2d 769, 786 (2018) (to impose an injunction under RCW 42.56.540, a court "must find that a specific exemption applies *and* that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest").

> In the event that a requested record contains information that may substantially and irreparably damage a person if disclosed, the (name of agency) will first determine if that record is exempt from disclosure. If no exemption applies, the (name of agency) will make the record available to the requestor without notifying a third party of an opportunity to obtain an injunction. If (name of agency) is unable to determine applicability of an exemption to a record that may substantially and irreparably damage a person if disclosed, the public records officer may, but is not required to, give notice to such person. Before giving such notice, the records officer shall contact the requester and offer an opportunity to revise the request to avoid a third-party process. Any third-party notice will include a copy of the request and shall inform the third party that disclosure will occur unless an injunction is obtained under RCW 42.56.540 within 10 days of the notice.

This language is consistent with the Attorney General's comments accompanying the rule and is intended to protect agencies, third parties and requesters from wasting time and expense on futile litigation. Nevertheless, many agencies objected that it would take away privacy rights from third parties.

In fact, there is no privacy right for non-exempt records. If an agency believes a record is not exempt, it has no justification for withholding it. Subjecting a requester to a third-party process is a particularly onerous way to withhold non-exempt records because it forces the requester to either drop the request or endure litigation (without recovering attorney fees). The informal comments on the rulemaking petition illustrate the need for more dialogue and better guidance about the risks of third-party notice for all concerned.

Agencies strongly opposed limitations on closing requests

The most-protested proposal by the News Media would crack down on closing requests that requesters do not intend to abandon. The current rule, WAC 44-14-040(10), says this: "*If, within thirty days, the requestor fails to inspect the entire set of records or one or more of the installments, the public records officer or designee may stop searching for the remaining records and close the request*." This is problematic because the PRA does not set a 30-day deadline (or any deadline) to inspect records. Nor does the PRA authorize agencies to "close" requests when requesters are slow to pick up or download installments. RCW 42.56.120(4) says:

> If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided. If an installment

> of a records request is not claimed or reviewed, the agency is not obligated to fulfill the balance of the request.

This statute dates to an era when installments were "claimed" in retail-store fashion: upon hearing that records are assembled and ready for pickup, a requester would show up at an agency office and pay a fee to get the records. The wording contemplates a simultaneous exchange of payment and a PRA installment (charging "for each part . . . as it is provided"). The last sentence of RCW 42.56.120(4) simply suspends the agency's obligation to fulfill a request if an available portion is not claimed. It does not identify any deadline to claim records and does not say anything about permanent closure. The News Media believes that, construing the statute liberally in favor of disclosure as required by RCW 42.56.030, it merely means that PRA obligations are suspended for as long as a request is neglected.

Because of the model rule, agencies routinely tell requesters they must pay for records within 30 days or be forced to start over with a new request. This is inefficient and, in some cases, it is unfair. The News Media proposed a more collaborative approach, eliminating the 30-day deadline (which is not in the PRA) and allowing requesters to revive requests that they did not intend to abandon. Although the News Media believes that would be consistent with the PRA, it is not worth jeopardizing the rulemaking petition overall and can be dropped if necessary for consensus.

Thank you again for considering this response to informal rulemaking comments. Please let me know if further clarification would be helpful.

Sincerely,

Katherine George
Attorney for the Seattle Times