

PUBLIC RECORDS LITIGATION

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AWC RMSA MEMBER PRA TRAINING SERIES
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Overview

- Enforcement and Causes of action under the PRA
 - Agency Administrative Review
 - Injunctions under RCW 42.56.540
 - Prisoner/Sexually Violent Predator Injunctions under RCW 42.56.565
 - Complaint for PRA violations under RCW 42.56.550
- Process overview
 - Steps in litigation (filing, motions, discovery, trial, etc.)
 - Common defenses
 - Crafting agency affidavits
- Penalty assessment and attorneys' fees
 - Overview of mitigating/aggravating penalty factors (Yousoufian factors)
 - Discussion of penalties awarded in PRA cases
- Case Examples
- Risk management strategies for PRA litigation
- Additional resources



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TYPES OF PUBLIC RECORDS LEGAL CHALLENGES

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Good Faith Liability?

- No agency or public official/employee liability if records released in good faith
- May not apply if another statute imposes confidentiality requirements on particular records
- Does not apply to the failure to disclose records that *should* have been disclosed, even if done in good faith (though may be a mitigating penalty factor)



RCW 42.56.060

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Agency Administrative Review

- Agencies may establish internal procedures to review decisions to deny requests or to review concerns by requestors (RCW 42.56.520)

HOWEVER...

- Requestors are not *required* to go through such administrative processes prior to instituting litigation (*Kilduff v. San Juan County*, __ Wn.2d __, 453 P.3d 719 (2019))
- Administrative review can save both requestors and agencies time, money, and headache
 - Simple mistake, such as a typo that was missed on an exemption log
 - Reasonable explanation as to why an agency took longer to respond to a request



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Judicial Enforcement

- Public Records Act enforced by courts
- Court can order a variety of remedies, such as:
 - Civil penalties up to \$100 per day
 - Award of attorneys' fees/cost to prevailing requestors
 - Disclosure of all or part of the withheld record, or **non-disclosure** of part or all of the record
- Outside of the PRA, there can be criminal liability for willful destruction or alteration of a public record
- One year statute of limitations for PRA lawsuits
 - From the date an agency claims an exemption, or
 - When agency last produces records on an installment basis
 - Begins upon agency's final, definitive response



RCW 42.56.550; Ch. 40.14 RCW



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Injunctions – RCW 42.56.540

- Third-party who is named in a record or is the subject of a record may seek an injunction to prevent release of the record
- Agency may also seek an injunction to determine whether a record should be released
- The requestor must be named as a party
- Suit can be filed in the county in which record is maintained or the party seeking the injunction resides
- Party seeking the injunction has the burden to prove:
 - A PRA exemption applies, and
 - Disclosure “would clearly not be in the public interest and would substantially and irreparably damage any person, or ... vital governmental functions.”

Morgan v. City of Federal Way



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Prisoner Injunctions* – RCW 42.56.565

- May be requested by any agency, person named in the record, or person to whom the requests specifically pertains
- Court must find:
 - Request was made to harass or intimidate the agency/its employees
 - Fulfilling the request would likely threaten security of correctional facilities
 - Fulfilling the request would likely threaten the safety/security of staff/inmates (or their families) or any other person, or
 - Fulfilling the request may assist criminal activity
- Relevant factors include: other requests by requestor, type of records sought, purpose of the request, whether disclosure would harm persons/vital government interest, whether request seeks significant/burdensome # of records, security, deterrence of criminal activity
- Injunction may be granted upon a showing by a preponderance of the evidence
- May also enjoin future requests by the same person or entity owned/controlled by them



*also applies PRRs sought by sexually violent predators in a civil commitment facility. See RCW 71.09.120



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Review in Superior Court

- Cause of action under the PRA include:
 - Denial of opportunity to inspect or copy a public record (or portion thereof)
 - Failure to provide a reasonable estimate of time/estimate unreasonable
 - Failure to provide a reasonable estimate of charges/estimate unreasonable
- Suit filed in the county where the records are maintained
- Burden of proof is on the agency to show denial is consistent with statute exempting/prohibiting disclosure or that estimates provided are reasonable
- De novo review ("from the new"), meaning court reviews the matter on its own without regard to the agency's decision



RCW 42.56.550



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PROCEDURAL STEPS

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Litigation Steps

- Initial filing and service of Complaint and Summons
- Answer
- Discovery (requests for production, interrogatories, requests for admission, depositions)
- Substantive Motions, typically:
 - Motion to Show Cause
 - Motion for Summary Judgment
 - Motion for In Camera Review
- Trial
- Appeals

RCW 42.56.550



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Common Defenses

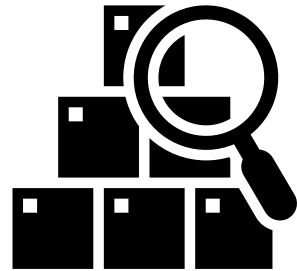
- Lack of standing
- Statute of limitations expired
- Failure to properly serve
- Search was adequate
- Records do not exist/were properly destroyed
- Records are not "public records"
- Records not maintained/cannot be provided in requested format
- Agency acted in good faith
- Records exempt/properly identified on exemption log



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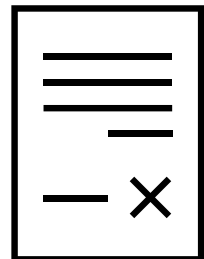
Discovery

- Rules of discovery apply in PRA cases the same as in any other civil action
- Agency may send or receive discovery requests
- Either party may inquire into any information relevant to the suit
- May seek a protective order to limit what must be produced or how the disclosed material can be used
- Recent court decision held that seeking information during discovery as to a requestor's motivation and/or bad faith when making PRRs is not appropriate



Motions

- Motion to Show Cause
 - Filed by the requestor/plaintiff
 - Requires the agency to “show cause” as to why it refused to provide requested records or show why the estimates of time/charges were reasonable
 - Burden is on the agency
- Motion for Summary Judgment
 - Can be filed by either party
 - Moving party bears the burden to prove the absence of any genuine issue of material fact and that the party is entitled to judgment as a matter of law
 - Purely speculative claims about the existence and discoverability of records will not overcome an agency affidavit which is accorded a presumption of good faith
- Motion for In Camera Review
 - Can be requested by either party
 - Give the Court an opportunity to review exempt/confidential records without redaction and determine whether agency properly applied exemptions

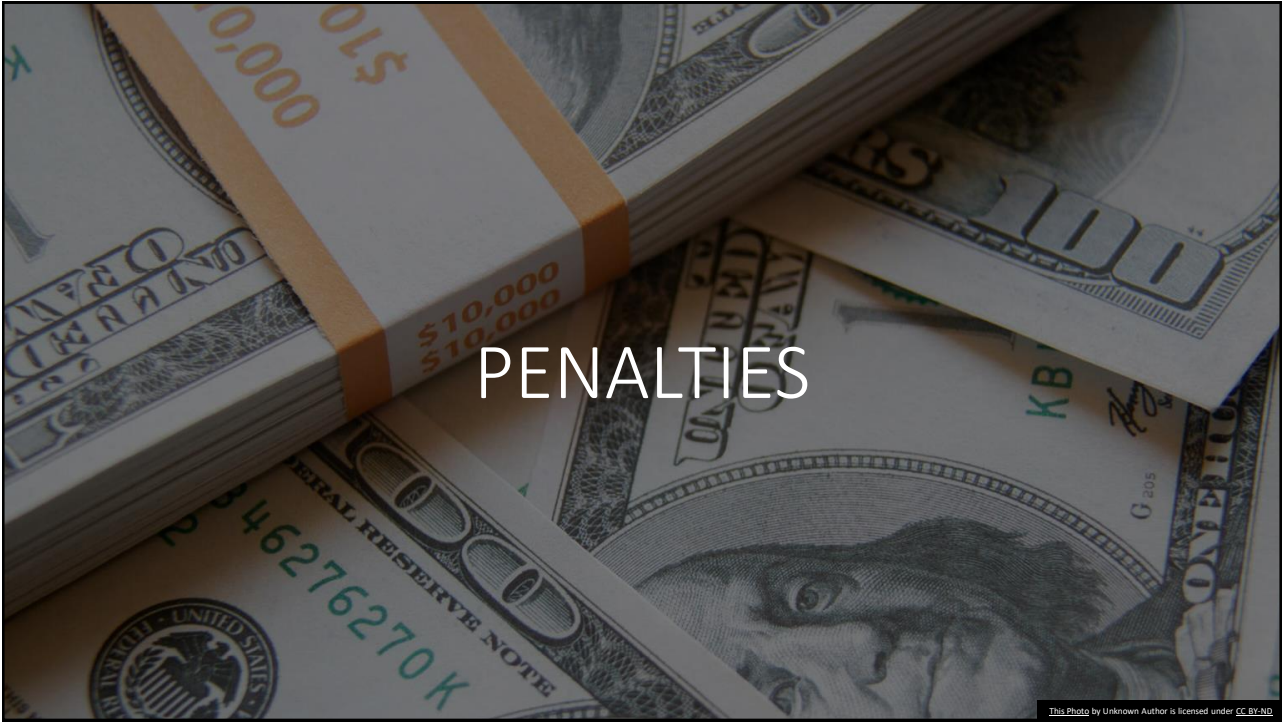


Agency Affidavits/Declarations

- Agency affidavits are accorded a presumption of good faith
- Agency may rely on reasonable detailed, nonconclusory affidavits submitted in good faith.
- Affidavits should include:
 - Facts surrounding PRR
 - Search terms used
 - Type of search performed
 - Details regarding the places searched, including personnel consulted
 - Exhibits supporting the facts should be attached
 - Explanation regarding why certain records were not found/do not exist, if applicable



“As a policy matter, the purpose of the PRA is best served by communication between agencies and requestors, not by playing “gotcha” with litigation.” *Hobbs v. State*



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Penalties Generally

- Court can impose civil penalties up to \$100 per day per record to be awarded to the requestor
- Court may group records together for penalty assessments—or may calculate penalty on a per page basis
- Court may consider the size of the agency and often analyze the amount of the assessment per resident on a per capita basis
- No proof of damages is required
- Must consider any mitigating or aggravating factors that may reduce or increase a penalty
- Failure to provide 5-day letter not subject to penalties
- In addition to attorneys’ fees that may be awarded to prevailing requestor
- Penalty awards reviewed by appeals courts using an “abuse of discretion” standard



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Aggravating Factors (Increased Penalty)

- A delayed response by the agency, especially in circumstances making time of the essence.
- Lack of strict compliance by the agency with all procedural requirements and exceptions.
- Lack of proper training and supervision of the agency's personnel.
- Unreasonableness of any explanation for noncompliance by the agency.
- Negligent, reckless, wanton, bad faith, or intentional noncompliance by the agency.
- Agency dishonesty.
- Foreseeable public importance of the issue to which the request is related
- Any actual personal economic loss resulting from agency misconduct, where the loss was foreseeable to the agency.
- A penalty amount necessary to deter future misconduct considering the facts and the size of the agency.
- The inadequacy of an agency's search for records.



~ *Yousoufian v. Sims; Neighborhood Alliance v. Spokane County*



Mitigating Factors (Decreased Penalty)

- A lack of clarity in the public records request.
- The agency's prompt response or legitimate follow-up inquiry for clarification.
- The agency's good faith, honest, timely, and strict compliance with all procedural requirements and exceptions.
- Proper training and supervision of the agency's personnel.
- The reasonableness of any explanation for noncompliance by the agency.
- The helpfulness of the agency to the requester.
- The existence of agency systems to track and retrieve public records.



~ *Yousoufian v. Sims; Neighborhood Alliance v. Spokane County*



Examples of penalty awards

City of Marysville: \$143,740
Asotin County: \$49,385 **City of Mercer Island: \$90,000**
City of Tacoma: \$2,607,940!!!!
Town of Mesa: \$175,000
L&I: \$502,827
City of Bainbridge Island: \$500,000



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Risk Management Strategies



- Keep detailed records regarding:
 - PRR dates/deadlines and agency responses
 - Search efforts
- Provide clear, professional, and helpful communication with requestors
 - Remember your audience!
- Be honest. Don't try to hide mistakes.
- Stay current on training (training or lack thereof can be a mitigating or aggravating factor for penalties)
- Don't delay unnecessarily.
- When in doubt, contact agency legal counsel, MRSC, or Washington AG's Local Government PRA Consultation Program

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Reminder...

RMSA continues to offer pre-litigation assistance with new public records requests at no cost to members.

Contact RMSAClaims@awcnet.org for assistance or more information



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Additional Resources

MRSC Public Records Act Court Decisions with Summaries: [MRSC - Public Records Act Court Decisions](#)

Washington State Attorney General's video on the PRA: <http://www.atg.wa.gov/OpenGovernmentTraining.aspx#UyDPOfldWqs>

Washington State AG's Local Government PRA Consultation Program: <http://www.atg.wa.gov/prc-consulting-program>

MRSC publication: "Knowing the Territory: Basic Legal Guideline for Washington City, County and Special Purpose District Officials": <http://www.mrsc.org/publications/ktt13.pdf>

MRSC publication: "Public Records Act for Washington Cities, Counties and Special Purpose Districts": <http://www.mrsc.org/publications/prc13.pdf>

Washington Coalition for Open Government—Public Records Act information: <http://www.washingtoncog.org/searchpr.php>

JLARC: [Joint Legislative Audit & Review Committee Joint Legislative Audit & Review Committee \(wa.gov\)](#)



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Questions?

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