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TO: Washington Attorney General's Office
FROM: Association of Washington Cities
DATE: January 7, 2025
RE: Informal Comments on Public Records Act Model Rules rulemaking WSR 24-21-023

To the Attorney General's rulemaking team,

Thank you for the opportunity to submit these informal comments on the changes to the Public Records Act (PRA) Model Rules that were proposed by the Seattle Times and other news organizations. For this comment letter, we will refer to these proposals as the "proposed rules" or "proposal." We appreciate the chance to weigh in on these rules at this early stage to help the AGO develop its own draft CR-102 that will make its way through the rulemaking process.

Cities respect the vital role that news organizations and the PRA play in ensuring transparency in government, and we understand that the changing nature of records necessitates occasional updates to the rules. However, there are changes suggested in the news organizations' proposed rules that cities are concerned about, including some that may be in violation of statute, and we hope these issues can be addressed in the AGO's own CR-102.

An overall concern with the proposed changes is that they appear based on a misunderstanding of how the public records process works across the state and across jurisdictions, as well as a misunderstanding of the PRA itself in some cases. At some points, the proposed rules replace clear, statute-based deadlines with unclear, subjective timelines difficult to administer. At other points, they provide specific procedures that have no basis in (or are contrary to) statute and would be difficult for many jurisdictions to implement.

Case law interpreting the PRA is constantly evolving, and the Model Rules should remain broad enough, clear enough, and grounded in statute to remain as the up-to-date best practices they are meant to be. On that note, we would encourage the Attorney General to focus any updates in the Model Rules to better reflect recent changes in the law like third party notice requirements, including recent changes related records of domestic violence survivors who are public employees, records of public university students, and allowing third parties the opportunity to review records to determine if they want to seek an injunction.

These comments outline some of the areas where cities have concerns with the news organizations' proposed PRA Model Rules.

<u>Areas of Concern with the proposed rules</u>

1. **Requiring Public Records Officers (PROs) to "triage" simple/complex requests puts inappropriate pressure on PROs and may be contrary to the PRA.**

The proposed rules[1] would require agencies to triage requests, including placing requests on "simple" or "complex" tracks and "evaluating the nature of the request" in order to assign it priority to help a requestor meet a time-sensitive deadline. While cities understand the desire of requesters to have seemingly simple requests fulfilled quickly, that is not how public records requests are processed, and parts of the proposed language are contrary to the PRA itself.

Agencies set their own policies for processing public records requests, as required by the PRA. The PRA explicitly prohibits agencies from distinguishing between requestors, or from requiring requestors to provide information on the purpose of their request in most cases.[2] This is important, as agencies should not be allowed, or required by the Model Rules, to favor some types of requests or requestors over another, as would be the case if agencies were expected to prioritize some types of requests over others, as would be required under the proposed rules. In addition, the proposed rule would set a goal of responding to "simple" requests within a day – contrary to the statutory requirement of initially responding to requests within 5 business days[3] – which may cause confusion for public records officers looking to the Model Rules for guidance.

Requiring the prioritization of simple requests whenever they happen to come in could delay the processing of more complex, previously submitted requests. This could cause backlogs and inconvenience earlier requestors only because of the size of their request and that they had the misfortune of having their agency's public records officer pulled away at a later date to process someone else's request. The proposal also doesn't limit the number of "simple" requests that should be prioritized, so conceivably a "complex" request could get delayed indefinitely by a slew of "simple" requests that came in later.

In addition, "evaluating the nature" of a request would require public records officers to engage in a statutorily dubious inquiry into the purpose of a request (i.e. inquire if the request is time-sensitive and why). The PRA clearly directs public records officers to do otherwise and treat requests equally, mainly making inquiries only to determine if an exemption applies. "Time-sensitivity" of a request is not an area of inquiry sanctioned in the PRA and it would not be appropriate to expect public records officers to base processing priority decisions on such considerations as a best practice in the Model Rules.

The Attorney General should not include the proposed changes on "triage" or prioritization of public records requests included in its CR-102. The proposed changes potentially go against the statutory language of the PRA, would result in improperly favoring or disfavoring certain requests or requestors, and would put too much responsibility on agency PROs to make subjective prioritization decisions when they should focus on processing requests according to standard procedures.

2. **Different jurisdictions have different types of record keeping systems at different levels of technological sophistication.**

At several points in the proposed rules, the proposals seem to require standardization or centralization of records in a manner that does not reflect the reality of how many agencies maintain records.[4] Centralized storage of electronic records or physical records is not required by the PRA, and should not be included in the Model Rules as though it was.

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[1] *See* Proposed Changes to Model Rules for Implementing the Public Records Act, Oct. 2024, at 8-9.

[2] RCW 42.56.080(2)

[3] RCW 42.56.520(1)

[4] *See* Proposed Changes to Model Rules at 5 (requiring storage of public records on a "centralized electronic system"); at 10 and 14 (making electronic transmission of records the default delivery method).

Many agencies do not have a "centralized electronic system" for all electronic records, and many do not have a centralized filing system for non-electronic records. Cities often use several types of systems for different types of electronic records, and creating a central system would be either impossible or cost prohibitive in many cases. Different types of electronic records use different types of retention systems. Some examples include Microsoft Sharepoint for files and documents, Barracuda for emails, GovQA, specific accounting and payroll software, unique CAD and GIS systems, etc. Centralizing all these different types of records into a single system would also take many of these records out of their native format, and thus potentially useful public information – like metadata associated with original records – would be lost. In addition, many centralized systems are also cost prohibitive, and many smaller cities and agencies would not be able to afford such systems.

Similarly, agencies often do not have centralized physical storage of records, nor are they required to under the PRA. Records are most often housed in the location that makes the most sense for the day-to-day use of those records by the agency, not necessarily for ease in responding to records requests. The PRA requires that records be retained and available to the public within certain set timeframes, it does not demand that agencies completely restructure their record keeping systems to optimize records requests over other agency functions. The Model Rules should continue to reflect this.

Cities understand that these provisions in the proposed rules were inspired by a high-profile incident of public records being deleted when they were created and stored on private devices or accounts. It is our belief that a unique high-profile incident by itself does not warrant changing the Model Rules. Cities generally agree that it is often easier if an agency is able to completely separate public work-related and private accounts and devices. However, some agencies, like small cities, may not have the budget or staff trained in centralized systems to implement these ideas if they are made best practices.

The Model Rules should remain flexible enough that they can serve as best practices for all agencies of all sizes. The Attorney General should not include requirements to centralize record keeping systems in the CR-102.

3. **Third party notice is required by statute and should not be discarded or de-emphasized in the PRA Model Rules.**

The proposed rules include provisions[5] that would replace the third-party notice procedure with a system that would substitute an individual third party's right to seek an injunction against disclosure of their information with an agency's determination of whether or not a specific exemption applies. The proposal would also do this without notifying the third party of their right to seek an injunction. This proposal is contrary to the statutory language of the PRA and should not be included in the Attorney General's CR-102.

The PRA itself requires agencies to protect a person's "right to privacy,"[6] where disclosure of records would be highly offensive to a reasonable person and is not of legitimate public concern. RCW 42.56.540 specifically sets out the right to seek an injunction against a public record request, and the agency's option to give third party notice:

[5] Proposed Changes to Model Rules at 11-12.

[6] RCW 42.56.050

"The examination of any specific public record may be enjoined if, upon motion and affidavit by… a person who is named in the record or to whom the record specifically pertains, the superior court… finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person... *An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested.*" [emphasis added]

Additionally, the third party notice process also protects records requesters as a result of injunction hearings – an option that may be lost if the process is disfavored in the Model Rules. RCW 42.56.210(2) specifies that "[i]nspection or copying of any specific records exempt under the provisions of [the PRA] may be permitted if the superior court…, after a hearing with notice thereof to every person in interest and the agency, that the exemption of such records is clearly unnecessary to protect any individual's right of privacy."

As best practices, the PRA Model Rules should not imply that third party notice is disfavored when agencies and individuals have a statutory right to seek an injunction and important individual rights to privacy may be at stake.

4. **Once agencies have provided records, they should be able to rely on contact information provided by requesters to inform them about their request.**

The proposal includes language[7] that requires agencies to pursue giving requestors "actual notice" that their records request has been fulfilled before closing a request as abandoned. Another proposed provision[8] would require agencies to hold records for inspection for "an agreed period" (rather than the standard 30 days) and require agencies to make multiple attempts at contacting requestors that their records are available if they fail to claim them during the inspection period.

These requirements are burdensome and time-consuming to agency staff, will result in inconsistent administration of public records requests, may interfere with timely responses to other requests, and indefinitely delay disposal of old records according to agency retention schedules.

When a requestor reaches out to an agency in a public records request, the agency should be able to reasonably rely on the requestor's provided contact information when responding to a request without making multiple attempts to contact a requestor after their inspection period has ended. It is the requestor's responsibility to pay attention to agency communications when they have a request pending. Agencies should not have to go through extraordinary efforts to make multiple attempts to contact requestors after the inspection period has elapsed. Similarly, ensuring "actual notice" after the agency has already reached out to a requestor using their provided contact information is burdensome and will delay the closing of abandoned requests. Waiting for actual notice can also delay the disposal of records that have met their retention requirements, but are on hold because of a still open (but effectively abandoned) request.

Requiring agencies to make extra efforts will take valuable staff time away from responding to other records requests, further slowing processing times. The proposed language also replaces the standard 30-day inspection period with an undefined "agreed period." Agency staff, especially those processing large numbers of requests, do not have the capacity to customize the deadlines for inspection periods for each requestor. Doing so would make the public records

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[7] *See* Proposed Changes to Model Rules at 15.

[8] Id at 13

process inconsistent and burdensome to administer and open up agencies to needless liability for failing to meet myriad customized deadlines. Maintaining the standard 30-day period keeps all requestors on equal footing and is fair to both requestors and agencies alike.

Cities do not recommend that the Attorney General adopt the proposed requirements to make multiple attempts at contacting requestors or requiring attempts at giving actual notice to requestors before closing abandoned requests. Likewise, cities do not recommend replacing the standard 30-day period for record inspection with an “agreed period.”

Conclusion

While we understand the desire to have records requests fulfilled as quickly as possible, the proposed changes to the Model Rules do not reflect a clear understanding of the PRA or of how agencies store and process public records requests. In some cases, the proposed rules appear to contradict the actual language of the PRA. The Model Rules should offer guidance to public records staff by showcasing broadly applicable best practices, not sow confusion. “Public records” covers an immense range of records, and the PRA covers a wide range of state and local governments – with widely disparate levels of staffing, budget, and access to technology available to them. The PRA Model Rules should reflect these wide ranges and offer best practices that are applicable to the greatest number of entities subject to the PRA.

We hope the Attorney General considers these concerns as the CR-102 is developed. AWC appreciates the chance to weigh in on these proposals, and we look forward to continuing to work with the Attorney General’s Office as this rulemaking continues. Thank you again for the opportunity to weigh in on these important rules.

Regards,

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Association of Washington Cities