

PUBLIC RECORDS ACT

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The Public Records Act – Ch. 42.56 RCW

Adopted in 1972 under Initiative 276

- Policy of open government
- “The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.”

Liberal interpretation

- “This chapter shall be liberally construed and its exemptions narrowly construed.”

(RCW 42.56.030)

Agencies Must Make Public Records Available

An agency must make available for public inspection and copying all public records, unless covered by a specific exemption. (RCW 42.56.070)

Records Policies

Required by RCW 42.56.040, .070

Prominently display and make policy available

Index of records

- Not required if “unduly burdensome” to maintain
- But, need a “formal order” explaining this

Include list of non-PRA exemptions that may apply

Records retention policy

What is a “Public Record”?

Broadly defined at RCW 42.56.010

Three elements:

- 1) “any writing . . . regardless of physical form or characteristics”
- 2) “containing information relating to the conduct of government or the performance of any governmental or proprietary function”
- 3) “prepared, owned, used, or retained by any state or local agency”

Questions about whether something is a “public record” are usually about (2) or (3), not (1).

Enforcement and Penalties

Court can order statutory penalties be awarded to the requester (per day, per record)

- And, even per page – *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270 (Mar. 24, 2016)

Court will order payment of requester's attorney's fees & costs

Court can also order disclosure of all or part of withheld record, or non-disclosure of part or all of record

Remember:

- The PRA liberally construed; exemptions narrowly construed
- The burden will fall on the agency to justify its conduct

Responding to Records Requests

Initial response – within 5 business days (RCW 42.56.520)

- Provide records, provide reasonable estimate of time, or deny – *Hikel v. City of Lynnwood*, 197 Wn. App. 366 (2016)
- Requesting clarification

Installments

Exemption logs

- Brief explanation of how exemptions apply to the record
- Don't simply cite the statute

Do not charge for inspection of records



Keep in Mind . . .

Do not distinguish among requesters, except in rare instances where necessary (e.g., request by employee to view file)

Purpose of request not generally not relevant

- But, is the requester asking for a list of persons?

No particular form of request is required

“Overbroad” requests – agency cannot deny a request solely because it is overbroad (RCW 42.56.080)

The Act covers requests for *records*, not information

- But, consider whether to provide information anyway

Provide the “fullest assistance” to requesters



Requests for Employee Records

Who is the requesting party?

- Employee or former employee?
- Union?
- Third party?

Remember that the Public Records Act isn't the only source of duty to disclose employment records

Employees and former employees have the right to review

information in their personnel file and to challenge that information

- RCW 49.12.240-.260; WAC 357-22-020

Former employees retain the right of rebuttal or correction for up to two years

- RCW 49.12.250

Requests by Union

Employer has general obligation to provide information needed by the bargaining representative for the proper performance of its duties

Information about employees in the bargaining unit is presumptively relevant and must be provided

Doesn't require a pending grievance

“The contents of an employee’s personnel file unquestionably constitute relevant information as ‘intrinsic to the core of the employer-employee relationship’.”

Serv. Co. of New Mexico, 360 NLRB No. 45 (Mar. 27, 2014) (citing cases)

Requests by Others

Evaluate PRA and “other statute” exemptions

- Some are mandatory (release prohibited by law)
- Some can be waived

Notice to affected individuals

- RCW 42.56.540; WAC 44-14-04003(11)
- Optional, but must comply with contract or other law requiring notice

No liability for loss or damage based upon release of a public record if acted in good faith in attempting to comply with the Public Records Act

- RCW 42.56.060

Privacy Under the Public Records Act

There is no general “privacy” exemption in the PRA

- See WAC 44-14-6002(2)

But, violation of the right to privacy is an essential element of certain exemptions

- E.g., personal information maintained in employee file

Always consider redaction

Privacy Under the Public Records Act

What is a person's right to privacy under the PRA?

Generally, applies only to the intimate details of one's personal and private life

RCW 42.56.050:

- 1) Highly offensive to a reasonable person and
- 2) Not of legitimate concern to the public

It is not enough that the disclosure may cause embarrassment to the individual or to others

Employment Information Exemption – RCW 42.56.250

Lists several pieces of exempt employee information, such as:

- Test questions, scoring keys, and other examination data
- Applications, resumes, and related materials
- Addresses, telephone numbers, e-mail addresses, SSNs, driver's license numbers, emergency contact and dependent information

Is not dependent on violating the employee's right to privacy

Application Materials – RCW 42.56.250(2)

“All applications for public employment, including the names of applicants, resumes, and other related materials submitted with respect to an applicant”

Does it still apply after the person is hired?

- Court of appeals has said “yes” – *Belenski v. Jefferson County*, 187 Wn. App. 724 (2015)*

Watch for other exemptions that may apply

- Military records?
- Psychological evaluations; polygraph tests?

**Reversed in part on other grounds, Supreme Court No. 92161-0, 2016 WL 4574356 (Sept. 1, 2016).*

Personal Information Exemption – RCW 42.56.230

- “*Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy*”
- What is “personal information”?
 - Information relating to or affecting a particular individual, associated with private concerns, or that is not public or general. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199 (2008)
- Must violate the employee’s right to privacy (highly offensive and not of legitimate concern to the public)

Performance Evaluations

Performance evaluations may be protected

Discuss instances of misconduct?

- If yes, that information must be disclosed
- If not, disclosure of evaluation is presumed highly offensive

But, who is being evaluated?

- Legitimate concern of the public?
- Elected official?

Employee Disciplinary Records

No right to privacy in the mere fact of investigation (as distinguished from the factual allegations)

- *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896 (2015)

Depends on whether complaint substantiated or resulted in some sort of discipline

- Substantiated / discipline → disclose
- Unsubstantiated → personal info may be exempt if alleged misconduct highly offensive (e.g., sexual misconduct with a student)

Health Care Information

Public agencies generally not subject to HIPAA or Washington's Health Care Information Act (Ch. 70.02 RCW)

HIPAA's privacy rules generally do not protect a person's employment records, even if the information in those records is health-related

Private rights of action

- Cannot sue for privacy violation under HIPAA. *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1082 (9th Cir. 2007).
- HCIA allows private cause of action for noncompliance, but only against a "health care provider or facility." RCW 70.02.170.

Health Care Information Exemption

Public Records Act exemption incorporating Health Care Information Act. RCW 42.56.360(2).

But only as to “health care information of patients”

Employer-mandated evaluations likely don't qualify

- *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356 (2005)
- Release of drug test result not a violation of HCIA – purpose was not health care or medical treatment; required as condition of employment after work injury

Health Care Information Exemption

Does the record contain health care information of a patient?

- E.g., is it a record from a doctor to support a disability claim?
- Yes? → withhold, or redact if appropriate

If redaction of identity enough, must do that instead. *Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wn.2d 628, 645 (2005); see also RCW 42.56.210(1).

- No? → consider other exemptions, such as . . .

Health Care Information Exemption

Does the record contain information that would violate the employee's right to privacy if disclosed?

- Highly offensive to a reasonable person and
- Not of legitimate concern to the public

Seattle Firefighters Union Local No. 27 v. Hollister, 48 Wn. App. 129 (1987)

- PRA request for files of retired disabled firefighters and police officers held by the Department of Retirement Systems
- Information pertaining to back injury, asthma, emphysema, ulcers, and possible arterial problems
- *“None of these are unpleasant, disgraceful, or humiliating illnesses. They are not the kinds of illnesses that would be highly offensive to reasonable people.”*

SEIU I & II: Agency Lists

SEIU I

- *SEIU Healthcare 775NW v. DSHS*, 193 Wn. App. 377 (Apr. 2016).
- Freedom Foundation request: lists of home care providers
- Purpose: to notify of right to **not** join union and pay dues
- Not a “commercial” request, but agency must ask the question

SEIU II

- *SEIU 925 v. Freedom Foundation*, 197 Wn. App. 203 (Dec. 2016).
- Request: lists of **family member** childcare providers
- “Linkage” of family member provider names to identity of children does not prohibit release
- Constitutional privacy right not implicated

SEIU III: Union Meetings

SEIU III

- *SEIU 775 v. DSHS*, 198 Wn. App. 745, 396 P.3d 369 (Apr. 2017)
- CBA requires DSHS to set aside time during employee trainings for meetings with SEIU representatives
- Request for times/locations of SEIU rep. meetings
- Public Employees Collective Bargaining Act does not expressly prohibit release
- Legislative policy to protect public employees' free exercise of right to organize?

PECBA is not an "other statute" exemption to disclosure

Closing Observations

Employee files can present difficult judgment calls

Privacy test standards evolve

- What is “highly offensive to a reasonable person”?
- What is of legitimate concern to the public?

Court cases provide guidance (and reliance can lessen penalties if a violation), but are not necessarily determinative

Public records issues are fact-specific

Consider third-party notice

Risk analysis