

# Average Joe's

## Guide to Washington State Public Records

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## I. Background

The Public Records Act is codified in the Revised Code of Washington at 42.56.001, *et. seq.*

In 1972, the citizens of the State of Washington approved a broad freedom of information initiative. This law is now commonly referred to as the Public Records Act. More than forty years old, the law has stood the test of time and the idea that “[t]he people insist on remaining informed so that they may maintain control over the instruments that they have created,” remains strong today. RCW 42.56.030.

The idea behind public records is founded in the style of our government, a democratic republic. A democratic republic is where ultimate authority and power is derived from the citizens, and the government itself is run through elected officials. This is essentially what the Public Records Act tells us.

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. RCW 42.56.030.

This same sentiment is also echoed on a national level. Since both state and federal government work in the same fashion, this should not be a surprise.

The idea that public records are essential a democratic republic is unique to the United States, as it cannot be traced back through England, like much of the American legal system.

American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government” among other reasons. *Nixon v. Warner Communications, Inc.*, 435 US 589, 598 (1978).

Citizens have an interest in their government, especially when it is a democratic republic. Public records can be used as a check against government abuse, to verify if government is working efficiently and effectively, and more recently to verify what information the government has about himself in order to protect his privacy.

Public records are not a recent phenomenon. As illustrated in section II(B)(i-iii) *infra*, the State of Washington has long recognized an interest in public records going back to the founding of the State.

The Public Records Act is just one of several laws and rules that affect open government in Washington State.<sup>1</sup>

In reality the Public Records Act is one of several laws that govern what information the public can find out about the workings of the government. More complex government inquiries may need to use more than just the Public Records Act to find out the necessary information. However, each additional law or rule has its own standards for what records are 'public' and even what amount of money can be charged for the records.

- The Legislative Records Act governs public records with the Washington State Legislature. Thus, the Public Records Act does not apply to the Washington State Legislature. The Legislative Records Act is generally more restrictive than the Public Records Act, and uses different standards to determine which documents are public. RCW 40.14.100, *et. seq.*
- Washington State Court Rule GR 31.1 governs administrative court records. GR 31.1.
- Freedom of Information Act, commonly referred to by its acronym 'FOIA', it is a federal law governing access to public records in federal agencies. 5 U.S.C. § 552, *et. seq.*

## II. What are Public Records?

### Statutory Requirements:

State law creates a scope for what for the requested records must fall into. A public record is: 1. A writing (which is very broadly defined); 2. Containing information relating government conduct or proprietary function; 3. That is owned or used or retained by the government. RCW 42.56.010(3).

In other words, generally the Public Records Act requires disclosure of public records by governmental entities upon request unless exempted. *O'Connor v. DSHS*, 25 P. 3d 426, 431 (Wash. 2001).

The statutory scope of the records is important for both the requestor and the government agency. The scope gives both parties an idea of what documents are eligible for dissemination. Then after the request is made and received, the government agency can look through the identified records to see if any statutory exemptions exist. If exemptions do indeed exist, then the records are not disseminated. If no exemption exists, then the records can be disseminated to the appropriate requestors.

### Examples of potential public records from court cases in Washington State are:<sup>2</sup>

1. Articles of Incorporation for a corporation that are filed with the Washington Secretary of State. *Knapp, Burrell & Co. v. Strand*, 4 Wash. 686 (1892).

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<sup>1</sup> The Open Public Meetings Act (OPMA) is a companion law to the Public Records Act. These laws are sometimes called 'sunshine laws.' The Open Public Meetings Act generally ensures public access to meetings where there is a quorum (of decision makers) and action is taken. RCW 42.30.010 *et. seq.* The workings of the OPMA and how it can interact with the Public Records Act is outside of the scope of this discussion.

<sup>2</sup> Only cases listed that are decided after 1972 involve the Public Records Act in disclosure. Early court cases in Washington State were considered public records if the statute gave individuals a right to view them.

2. Road books describing all of the roads in a county. *Town of Sumner v. Peebles*, 5 Wash. 471, 474 (1893).
3. Arrest records. *State v. Deatherage*, 35 Wash. 326, 330 (1904).
4. Individual's own medical records at a public hospital. *Oliver v. Harborview Med. Center*, 618 P. 2d 76 (Wash. 1980).
5. Liquor and Control Board investigative reports. *Spokane Police Guild v. Liquor Control Bd.*, 769 P. 2d 283 (Wash. 1989).
6. Documents specifying reasons for teacher certificate revocations. *Brouillet v. Cowles Punishing Co.*, 791 P. 2d 526 (Wash. 1990).
7. University grant proposals. *PAWS v. University of Washington*, 884 P. 2d 592, (Wash. 1994).
8. State gambling commission records showing the amount of the "community contribution" paid by an Indian tribe. *Confederated Tribes of Chehalis v. Johnson*, 958 P. 2d 260 (Wash. 1998).
9. List of full names and ranks of every police officer in King County. *King County v. Sheehan*, 57 P. 3d 307 (Wash. Ct. App. 2002).
10. Hospital investigations. *Cornu-Labat v. Hospital Dist. No. 2 of Grant County*, 298 P. 3d 741 (Wash. 2013).
11. Records from functional equivalent of public agencies (quasi-governmental entities that perform a government function) can be subject to the public records disclosure. *Woodland Park Zoo v. Fortgang*, No. 72412-4-I (Wash. Ct. App. Feb. 03, 2016); *Telford v. Thurston County Bd. Of Com'rs*, 974 P. 2d 886 (Wash. Ct. App. 1999).
12. Text messages. *Nissen v. Pierce County*, 357 P. 3d 45 (Wash. 2015).
13. Metadata can be public records. In this instance, metadata about emails was requested. *O'Neill v. City of Shoreline*, 240 P. 3d 1149 (Wash. 2010).
14. Records from personal devices when used by government employees in their official capacities. "[I]f government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined." *Nissen v. Pierce County*, 357 P. 3d 45, 49 (Wash. 2015) (quoting *O'Neill v. City of Shoreline*, 240 P. 3d 1149, 1155 (Wash. 2010)).

The definition of a public record is to be construed liberally and any exceptions to the law are to be construed narrowly. RCW 42.56.030.

Washington State courts repeatedly cite to this provision when interpreting the Public Records Act. See e.g. *Bainbridge Island Police Guild v. City of Puyallup*, 259 P. 3d 190, 194 (Wash. 2011).

### Agencies Not Required to Make Records

Generally public records are existing documents, files, databases, etc. Agencies are not required to create a records that do not exist at the time of the request.

## **III. Agencies Subject to the Public Records Act**

### The Public Records Act Applies to State and Local Agencies

Generally, the public records act applies to state and local agencies. RCW 42.52.010(1).

## Examples of potential public records from court cases in Washington State are:

1. A city's design and development department. *Overlake v. City of Bellevue*, 810 P. 2d 507 (Wash. Ct. App. 1991).
2. A county prosecutor's office. *Dawson v. Daly*, 845 P. 2d 995 (Wash. 1993).
3. A city's parks department. *Yacobellis v. City of Bellingham*, 780 P. 2d 272 (Wash. 1989).
4. A public hospital district. *Cornu-Labat v. Hospital Dist. No. 2 of Grant County*, 298 P. 3d 741 (Wash. 2013).

## Quasi-Governmental Agencies

As mentioned previously, the scope of the Public Records Act reaches beyond, typical governmental agencies, as listed above. Some agencies which are not traditional governmental agencies, may be subject to public disclosure under the Public Records Act.

An entity which is not an "agency" can still be subject to the act when it is the functional equivalent of an agency. Courts have applied a four-factor, case-by-case test. The factors are: (1) Whether the entity performs a government function; (2) The level of government funding; (3) The extent of government involvement or regulation; and (4) Whether the entity was created by the government." *Telford v. Thurston County Bd. of Com'rs*, 974 P. 2d 886, 893 (Wash. Ct. App. 1999). Washington courts use a balancing of the four factors on a case-by-case basis. *Id.* In other words, Washington courts do not strictly require that each factor is satisfied, but will look to the four factors overall and determine whether on the whole the agency in question is a functional equivalent of a government agency.

Two examples of where the Public Records Act applies to quasi-governmental agencies are the Washington State Association of Counties and the Washington State Association of County Officials. After going through the four-part analysis, stated in the previous paragraph, the Washington State Court of Appeals held both organizations to be quasi-governmental entities subject to the Public Records Act. See *Telford v. Thurston County Bd. of Com'rs*, 974 P. 2d 886 (Wash. Ct. App. 1999).

## Exceptions

There are a couple of notable exceptions to the general rule that the Public Records Act applies to state and local agencies. The Act does not apply to either the Washington Legislature or the Washington State courts.

## Legislative Records

The Legislative Records Act, RCW 40.14.100, *et. seq.*, actually pre-dates the Public Records Act. While, it appears on its face the Public Records Act would apply to the State Legislature, and the newer Public Records Act would usurp the older Legislative Records Act, the State Legislature effectively incorporated the Legislative Records Act into the Public Records Act. Thus, Legislative Records are now a type of type exception to the Public Records Act since the Legislative Records Act uses a different standard than the Public Records Act. There does not appear to ever be a legal challenge to the Legislative Records Act.

## Court Records Held by the Court

The Washington State courts were included in the Public Records Act until they exempted themselves in 1986. Other exemptions to the Public Records Act are made statutorily by the Washington State Legislature. The judicial exemption was made unilaterally by the Washington State Supreme Court in *Nast v. Michels*. “Because the common law provides a right of access to court case files and because of the language of the public records section of the PDA, we hold the PDA does not provide access to court case files.” *Nast v. Michels*, 107 Wn.2d 300, 304 (1986).<sup>3</sup> Later opinions on the subject have criticized the Court exempting itself from the Public Records Act, but theorized overturning the decision would do more harm than good.<sup>4</sup>

When court records are held by the Court GR 31.1 governs what records are made public and what records are not.

## Court Records Held Outside the Court

Court records can and do be held outside of the court. One example of where court records are held outside of the courthouse can be the emails of the judiciary. See Memorandum of Understanding between the Yakima County Courts and the Yakima County Board of Commissioners, Mar. 29, 2016 (stating “Some of the Court’s records are maintained exclusively by the Court. Other Court records reside on Executive IT servers.”).

It is unclear whether court records held outside of the courts are subject to the Public Records Act or not.

The Court did rule in *Yakima County v. Yakima Herald-Republic* that “documents, when transferred to nonjudicial county entities, are governed by the PRA unless they are subject to an additional protective order.” *Yakima County v. Yakima Herald-Republic*, 246 P. 3d 768, 784 (Wash. 2011).

## **IV. How to Request Public Records?**

The law does not specify any form or template for requestors to use.

Simply, most public records requests can be fulfilled with a simple email (see Section VIII. Appendix below). An email is advantageous for a couple of reasons. It is a quick, easy, and generally readily accessible way to make a request. Furthermore, if there is a dispute on the public records request, email provides a digital paper trail of communications.

Although some state and local agencies have made their own forms for requestors to use. It is a best practice to use the form generated by the agency. If for some reason, an individual is worried about the lack of a paper trail by filling out an agency form, then an individual can consider memorializing the public records request in an email to the Public Records Officer in addition to filling out the form.

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<sup>3</sup> The term ‘PDA’ stands for Public Disclosure Act. The Washington State Public Records Act was previously named the Public Disclosure Act.

<sup>4</sup> “*Nast v. Michels*, 107 Wash.2d 300, 730 P.2d 54 (1986), was wrongly decided. However, only the legislature should overturn the longstanding construction of a statute. It has not done so. Accordingly, *Nast* does control and requires affirmance.” *City of Federal Way v. Koenig*, 217 P. 3d 1172, 1175 (Wash. 2009) (Korsmo, J., concurring).

It is important for requestors, especially first time requestors, to remember the Public Records Act requires agencies to provide for the “fullest assistance to” requestors and the “most timely possible action” on requests. RCW 42.56.100; *Resident Action Council v. Seattle Housing Authority*, 300 P. 3d 376 (Wash. 2013).

## **V. Agency Responsibility**

### **Agency must respond to public records in five days.**

That means the Agency must do one of the following in five-days time: 1. Produce the requested records by making them available for inspection at agency offices or by mailing or emailing copies to the requester; 2. Provide an Internet address and link on the agency’s website to the requested records; 3. acknowledge receipt of the request and give a reasonable estimate of the time needed; or, 4. deny all or part of the request in writing.” RCW 42.56.520.

### **Agency must make a reasonable search**

“[T]he search must be reasonably calculated to uncover all relevant documents.” *Block v. City of Gold Bar*, 355 P. 3d 266, 269 (Wash. Ct. App. 2015) (quoting *Neighborhood Alliance of Spokane County v. Spokane County*, 261 P. 3d 119, 128 (Wash. 2011)).

It is the agency’s burden to establish that it made a reasonable search. “To establish that its search was adequate in a motion for summary judgment, the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. This evidence should describe the search and “establish that all places likely to contain responsive materials were searched.” *Block v. City of Gold Bar*, 355 P. 3d 266, 269 (Wash. Ct. App. 2015) (internal quotation marks omitted).

### **Agency must prove redacted or withheld records are exempt**

Sometimes government agencies may redact or withhold documents from public records requests. This is perfectly reasonable, as the law permits government agencies to redact or withhold documents, as long as the government justifies it under the law. “The burden of proof is on the agency to establish that any refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part.” *Rental Housing Ass’n v. City of Des Moines*, 199 P. 3d 393, 398 (Wash. 2009) (citing RCW 42.56.550(1)). “Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.” *Rental Housing Ass’n v. City of Des Moines*, 199 P. 3d 393, 398 (Wash. 2009).

Even when documents are personal in nature, they must be acknowledged.

Where an employee withholds personal records from the employer, he or she must submit an affidavit with facts sufficient to show the information is not a “public record” under the PRA. So long as the affidavits give the requester and the trial court a sufficient factual basis to determine that withheld material is indeed nonresponsive, the agency has performed an adequate search under the PRA. *Nissen v. Pierce County*, 357 P. 3d 45, 58 (Wash. 2015).

This burden makes sense when you think about it. The agency has all the information. The agency knows what the records contain and is the only person/entity in position to make a determination if an exemption applies.

[I]t is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. *Vaughn v. Rosen*, 484 F. 2d 820, 823 (D.C. Cir. 1973).

To make the playing field more even between the agency and the requestor, the agency needs to provide certain information about the requested records, and in the case of redaction or withholding documents the government needs to explain why – to level the playing field.

### Agency Must Produce Records

The agency must also produce all non-exempt records. RCW 42.56.070.O; *Connor v. DSHS*, 25 P. 3d 426, 431 (Wash. 2001). The records do not have to be produced all at once, especially with larger requests. They can be produced in installments. RCW 42.56.550(6). However, there is nothing requiring the agency to provide records in parts/installments. *Ockerman v. DDES*, 6 P. 3d 1214, 1218 (Wash. Ct. App. 2000).

## VI. Requestor Responsibility

The intent of the Public Records Act to provide non-exempt records to requestors. With that being said, requestors need to help the agency help them. There are a few things requestors need to do.

The requestor needs to provide notice that it is a Public Records Act request. *Wright v. State*, 309 P. 3d 662, 665 (Wash. Ct. App. 2013); *Hangartner v. City of Seattle*, 90 P. 3d 26, 30 (Wash. 2004).

The request must contain existing "identifiable public records." RCW 42.56.080.

## VII. General Considerations

### When in Doubt: It is Better to Request

A good rule of thumb can be, when in doubt concerning if the records sought fall within the scope of the Public Records Act, it is better to request than to not.

### Over Disclosure

There is no penalty for over-disclosure if an agency is acting in good faith. The Public Records Act affirmatively states: "[n]o public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter." RCW 42.56.060.

This section compliments

## VIII. Appendix

### Resources

- a. Attorney General's Open Government Resource Manual
  - i. <http://www.atg.wa.gov/open-government-resource-manual>
- b. Attorney General Open Government Ombudsman
  - i. "The Attorney General has appointed an Assistant Attorney General for Open Government who can assist citizens and agencies with Public Records Act and Open Public Meetings Act compliance."
    1. Some examples include:
      - a. A citizen emails a question to the office to ask whether an agency's response (or lack of a response) violates the Public Records Act. If the office has enough information in the email (a copy of the request and the agency's response), it might provide a short analysis of the law and apply it to the facts presented by the citizen.
      - b. A citizen or agency asks the office if an agency meeting must be open to the public. The office would analyze the issue and provide an informal opinion by phone, email, or sometimes by letter.
    - ii. <http://www.atg.wa.gov/open-government-ombuds-function>
- c. Washington Coalition for Open Government
  - i. WCOG is an independent, nonpartisan, nonprofit organization that works through the courts and the Legislature to defend and strengthen Washington's open government laws.
  - ii. <http://washingtoncog.org/>
- d. Muck Rock
  - i. Muck Rock provides a repository of hundreds of thousands of pages of original government materials, information on how to file requests, and tools to make the requesting process easier.
  - ii. <https://www.muckrock.com/>

### Example Public Records Request Template<sup>5</sup>

(Today's Date)

To Whom It May Concern:

Pursuant to Washington Public Records Act, RCW 42.56.001 et. seq., I writing this email to place a public records request with \_\_\_\_\_ (governmental agency). I request the following records in digital form:

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<sup>5</sup> This public records template is available as a reference only. It is not sanctioned or endorsed by any group. Nor is this meant to be an official form of any sort. It is merely a template I created and use for public records requests in Washington State.

(Write a list of identifiable records that can be produced by the agency.)

I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not. If there are charges associated with my request, please inform me of the total charges in advance of fulfilling my request, via email.

Sincerely,

\_\_\_\_\_ (Your name)