



# Office of Privacy & Data Protection

Privacy and the Washington State Public Records Act  
Hacktober Presentation - October 27, 2020  
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# Hacktober Presentation

- State Chief Privacy Officer Katy Ruckle will talk about privacy and the state public records act. There is a difficult balance between individual privacy and open records. Please join Katy for discussion on considerations when handling public records that may contain private information.

# Overview for Today

- Preliminaries/Basics
- Context of privacy in PRA
  - History
  - Exemptions
- Trends
- Public policy considerations

# Preliminaries

- Washington State Public Records Act is codified at Chapter 42.56 Revised Code of Washington
- “The PRA mandates broad public disclosure of public records”
- The PRA's primary purpose is to foster governmental transparency and accountability by making public records available to Washington's citizens. *See City of Lakewood v. Koenig*

# What is a record?

- See RCW 40.14.010 – Definition of public record
- Includes any paper, correspondence, completed form, bound record book, photograph, film, sound recording, map drawing, machine-readable material, compact disc meeting current industry ISO specifications, or **other document, regardless of physical form or characteristics**, and including such copies thereof, that have been made by or received by any agency of the state of Washington in connection with the transaction of public business, and legislative records as described in RCW [40.14.100](#).
- See RCW 42.56.010 (3) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function **p**repared, **o**wned, **u**sed, or **r**etained by any state or local agency regardless of physical form or characteristics.

# What is privacy in the context of public records?

- There is no general “privacy” exemption in the PRA
- Privacy is created and preserved by way of several specific exemptions to the Public Records Act
- Exemptions are laws that allow for redaction or withholding of parts of the public record (42.56.070)

# Interpretations of Exemptions

- The text of the PRA directs that it be "liberally construed and its exemptions narrowly construed ... to assure that the public interest will be fully protected." RCW 42.56.030.
- [Courts] start from the presumption that an agency has "an affirmative duty to disclose public records." *Spokane Police Guild v. WA State Liquor Control Bd (1989)*

# Where are exemptions?

- Identified specifically in the PRA
- Sunshine Committee – Schedule of Review
- Other statutes
  - The "other statute" exemption "applies only to those exemptions explicitly identified in other statutes; its language does not allow a court 'to imply exemptions but only allows specific exemptions to stand'."  
*Brouillet v. Cowles Publishing Co.* (1990)



## Could there be a general privacy exemption?

- Not likely – See *In Re Rosier* (1986)
- In *Rosier*, the [Washington State Supreme Court] interpreted a portion of the PRA to imply a general personal privacy exemption.
- The legislature responded swiftly by explicitly overruling *Rosier* and amending what is now RCW 42.56.070 to include the "other statute" exemption.

## RCW 42.56.050 – Privacy test

- **Invasion of privacy, when.**
- A person's "right to privacy," "right of privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person:
  - (1) Would be **highly offensive** to a reasonable person, and
  - (2) is **not of legitimate concern** to the public.
- The provisions of this chapter dealing with the right to privacy in certain public records **do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions** from the public's right to inspect, examine, or copy public records.

## Legislative intent (1987)

- "The legislature intends to restore the law relating to the release of public records largely to that which existed prior to the Washington Supreme Court decision in *"In Re Rosier"*
- The intent of this legislation is to make clear that:
  - (1) Absent statutory provisions to the contrary, agencies possessing records should in responding to requests for disclosure not make any distinctions in releasing or not releasing records based upon the identity of the person or agency which requested the records, and
  - (2) agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records.
- Further, to avoid unnecessary confusion, "privacy" as used in RCW [42.17.255](#) is intended to have the same meaning as the definition given that word by the Supreme Court in *Hearst v. Hoppe* (1978)

## Privacy test:

Highly offensive and Not of legitimate public concern

- No definition of this so the guide we have is facts from case law.
- This test is one of the most litigated provisions of the PRA
- Records that have met both prongs of the test:
  - Records about unsubstantiated claims of sexual misconduct by teachers (*Bellevue John Does*)
  - Suicide note in medical examiner records (*Comaroto v Pierce County Medical Examiner's Office*)

## Privacy test: Highly offensive and Not of legitimate public concern

- Records that have not met this test:
  - Surveillance video of a mass shooting – **First responder activity legitimate public concern**
  - Unsubstantiated allegations of improper accounting procedures by public employee – **not highly offensive**
  - Dates of birth of public employees – **not highly offensive**
  - State retirement records of disabled firefighters – Court said illnesses of firefighters were **not “highly offensive to reasonable people”**
  - Description of sexual assault of a child - **legitimate public concern in administration of criminal justice system**

## Case law – cite cases

- Surveillance video of a mass shooting *Does v. King County* (2015)
- Unsubstantiated allegations of improper accounting procedures of public employee *West v. Port of Olympia* (2014)
- Dates of birth of public employees *WPEA et. al. v. EFF* (2019)
- State retirement records of disabled firefighters – Court said illnesses of disabled firefighters were not “highly offensive to reasonable people” examples the court cited were “back injury, asthma, emphysema, ulcers and arterial problems” (*Seattle Firefighters Union*) (1987)
- Description of sexual assault of a child *Koenig v. City of Des Moines* (2006)

# Is COVID-19 Employee Screening Data Exempt?

- Diagnosis from medical professional
- Per Equal Employment Opportunity Commission, “with limited exceptions, the ADA requires employers to *keep confidential any medical information they learn about any applicant or employee.*” [www.eeoc.gov](http://www.eeoc.gov)
- Keep information in confidential employee medical file

# Personal Information of Public Employees

RCW 42.56.230(3) Exempts “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**”

High threshold for privacy. Need to satisfy RCW 42.56.050:

- (1) highly offensive and (2) no legitimate concern to public

“Highly offensive” would include “unpleasant or disgraceful or humiliating illnesses.” (*Seattle Firefighters Union Local No. 27 v Hollister*)

Matter for agency determination on whether to use this statute for *highly sensitive* medical information of employees that does not fall under another exemption



# For employee information does it matter where private or personal information is kept?

- Very frequently yes. Usually it is the substance of the information that triggers an exemption, but this depends on the language of the exemption.
- If exemption requires information to be kept in a particular place then if the information is not stored in that place the exemption may not apply
- See *Mechling v. City of Monroe* (2009); *Does v. Spokane Falls Community College* (2019)\*

## *Does v. Spokane Falls Community College (2019)\**

- Records included four hundred pages of e-mail correspondence between and among employees of the community college. The community college maintains the e-mail in programs and servers, not in any employment file. Court ruled that the Jane Does failed to carry their burden in showing that Spokane Falls Community College maintained the subject records in any personnel file or that the records were similar in nature to records maintained for the benefit of an employee. Therefore, RCW **42.56.230(3)** did not shield the redacted information from disclosure.

\*Court reconsidered case and overruled this decision in light of HB 2020 [42.56.250] protecting victims and witness identities but only because of new law. Court affirmed decision re where records kept

# Privacy vs. Personal Information

- Courts and laws do make a distinction
  - 42.56.230(3) **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*;
  - **Personal information** defined in *Bellevue John Does* as “*information relating to or affecting a particular individual, information associated with private concerns, or information that is not public*”
  - 42.56.050 – **Privacy** test discussed earlier

# Rejection of Linkages Arguments

- Much discussion about what can be determined through other sources based on information in a public record (e.g. Big Data)
- Courts have rejected the premise that absent other clear exemptions information should be redacted or withheld because someone can link other information to determine otherwise confidential information
- *King County v. Sheehan* (2002) Names of law enforcement officers
- *Bainbrige Island Police Guild v. Puyallup* and *Koenig v. City of Des Moines* – Asked for records naming individual, but name was redacted from records
- *Doe v. WSP* – fact that victims could be identified in Level 1 sex offender records not does not make records exempt

## Rejection of Linkages Arguments “absurd results”

- No authority to look beyond the “four corners” of the records
- PRR that asks for records with named individual
- What if you have actual knowledge that the requester knows who the records are about even if they only ask by case number or manner of death
- Considerations
  - Injunctions/notice to affected parties 42.56.540
  - Ask requester to voluntarily accept redactions

## Linkage issue recognized recently by legislature...

- See [RCW 50A.25.140](#)
- **Disclosure when all details identifying an individual or employee are deleted—When authorized.**
- Nothing in this chapter shall prevent the disclosure of information or records deemed private and confidential under this chapter if all details identifying an individual or employer are deleted **so long as the information or records cannot be foreseeably combined with other publicly available information to reveal the identity of an individual or employer.**
- [[2019 c 13 § 83.](#)]

# Security and Cybersecurity considerations – See RCW 42.56.420

- (1) Exemptions for criminal terrorist acts or records shared by federal partners to address terrorist activities
- (2) (3) Vulnerability assessments for facilities like prisons, the SCC, or schools
- (4) Security risk assessments for system and infrastructure that identify vulnerabilities
- (5) System security and emergency preparedness plan required under [listed RCWs]
- (6) PII of contractors for CJIS purposes

# RCW 42.56.420(1) - criminal terrorist acts

- The following information relating to security is exempt from disclosure under this chapter:
- (1) Those portions of records assembled, prepared, or maintained to prevent, mitigate, or respond to criminal terrorist acts, which are acts that significantly disrupt the conduct of government or of the general civilian population of the state or the United States and that manifest an extreme indifference to human life, the public disclosure of which would have a substantial likelihood of threatening public safety, consisting of:
  - (a) Specific and unique vulnerability assessments or specific and unique response or deployment plans, including compiled underlying data collected in preparation of or essential to the assessments, or to the response or deployment plans; and
  - (b) Records not subject to public disclosure under federal law that are shared by federal or international agencies, and information prepared from national security briefings provided to state or local government officials related to domestic preparedness for acts of terrorism;



## RCW 42.56.420(2) &(3) assessments for facilities

- (2) Those portions of records containing specific and unique vulnerability assessments or specific and unique emergency and escape response plans at a city, county, or state adult or juvenile correctional facility, or secure facility for persons civilly confined under chapter [71.09](#) RCW, the public disclosure of which would have a substantial likelihood of threatening the security of a city, county, or state adult or juvenile correctional facility, secure facility for persons civilly confined under chapter [71.09](#) RCW, or any individual's safety;
- (3) Information compiled by school districts or schools in the development of their comprehensive safe school plans under RCW [28A.320.125](#), to the extent that they identify specific vulnerabilities of school districts and each individual school;

## RCW 42.56.420(4) - Security risk assessments

- (4) Information regarding the public and private infrastructure and security of computer and telecommunications networks, consisting of security passwords, security access codes and programs, access codes for secure software applications, security and service recovery plans, **security risk assessments, and security test results to the extent that they identify specific system vulnerabilities**, and other such information the release of which may increase risk to the confidentiality, integrity, or availability of security, information technology infrastructure, or assets;

## RCW 42.56.420(5) emergency preparedness plan (6) PII of contractors for CJIS purposes

- (5) The system security and emergency preparedness plan required under [listed RCWs] and
- (6) Personally identifiable information of employees, and other security information, of a private cloud service provider that has entered into a criminal justice information services agreement as contemplated by the United States department of justice criminal justice information services security policy, as authorized by 28 C.F.R. Part 20.

# What are the trends in public records laws?

- Exemptions based on broader public policy goals
  - Encouraging victims and witnesses of sexual harassment to come forward – (2019-20 session) HB 2020 - Exempting the disclosure of names in employment investigation records (RCW 42.56.250(6))
  - Protect dates of birth of public employees; other demographic information; require notice to employee's (2019-20 session) HB 1888 (RCW 42.56.250)
  - Enable state agency to receive federal data (Agriculture) (2019-20 session) HB 1385 (RCW 42.56.380)
  - Enable agencies to perform regulatory function – exempt medical information
    - **OIC Addressing nonpublic personal health information** (2017 session) HB1043/SB 5124 - (RCW 48.02.068)
    - **DRS Concerning the confidentiality of retirement system files and records relating to health information** (2019-20 session) SB 6499 (RCW 41.04.830)
  - Protect identity of gun owners who participated in bump-stock buyback (2019-20 session) SB 6025/HB 2182 (RCW 42.56.230(12))

# Public Policy Considerations

**'Snitch list': Trolls harass those who reported Covid-19 business violations in Washington state**

**People who reported COVID-19 violations get death threats after state releases their names**

**Washington residents report threats after naming businesses that could be violating coronavirus rules**

The conduct of a person using the information in a public record against a person who is the subject of the record would have to be assessed on specific facts and under general civil or criminal laws governing threats or harassment. Depending on the facts, it would be a private civil matter or criminal matter subject to local law enforcement. – spokesperson for AGO

# Public Policy Considerations

- Proclamation 20.64 and 20.64.1
- Contact tracing

**PROCLAMATION BY THE GOVERNOR  
AMENDING PROCLAMATION 20-05 AND 20-64**

**20-64.1**

**Public Records Act – Contact Tracing -- Personal Information**

- Agencies incentive to disclose because the risk of penalties is so high favors disclosure

“As a practical matter, the PRA's stiff monetary penalties, combined with the CPA's grant of immunity for "the release of relevant and necessary information," RCW 4.24.550(7), create an incentive for agencies to ignore the CPA's limits on the disclosure of level I offender information when responding to PRA requests.”

The legislature recognizes this problem: it was highlighted in the ...report. (“If an agency is asked to comply with the disclosure requirements of both [the PRA] and [the CPA], it is clear that the most prudent route for an agency to take is to liberally disclose records because there is a strict monetary penalty for non-disclosure under the PRA, and immunity [for] disclosure or non-disclosure ... under [the CPA]. [Thus,] [t]here is little incentive to adhere to the guidelines of RCW 4.24.550.” ~Justice Gordon McCloud, dissenting opinion in *Doe v. WSP (2016)*)

## So where are we?

- Balancing transparency and accountability with personal privacy rights







Thank you

[www.watech.wa.gov/privacy](http://www.watech.wa.gov/privacy)