

PRA LEGAL UPDATE

WAPRO SPRING 2018



PRESENTED BY:

- **Nancy Krier – Assistant Attorney General For Open Government**
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MATERIAL TO BE COVERED:

- **CASE LAW UPDATES - DECISIONS**
- **PENDING APPELLATE CASES**
- **LEGISLATIVE UPDATES**
- **AGO UPDATES**
- **Q & A – TIME PERMITTING**

PUBLISHED CASES: 2017 -18

CAN BE CITED AND HAVE PRECEDENTIAL VALUE



WEST V. CITY OF PUYALLUP

2 WN. APP. 2D 586, 410 P.3D 1197 (FEB. 21, 2018)

- Facebook posts on an elected official's personal site are public records if they relate to the conduct of government and are prepared in within the scope of employment or official capacity.
- When records are held exclusively in an elected official's possession, determination will likely turn on whether the official was "furthering" the agency's interests in a substantial and direct manner
- In this case, requested records were not public records because they merely provided supporters with otherwise public information

WEST V. CITY OF PUYALLUP

2 WN. APP. 2D 586, 410 P.3D 1197 (FEB. 21, 2018)

- Determination will always be fact-specific
- Facebook posts deemed not to qualify as “public records” BASED ON THE SPECIFIC FACTS OF THIS CASE included:
- City council agenda
- Presentation made at council meeting
- Links to official City of Puyallup Facebook pages regarding wide variety of issues, many of which had been before council

SPRAGUE V. SPOKANE VALLEY FIRE DEPARTMENT

189 WN. 2D 858, 409 P.3D 160 (JAN. 25, 2018)

- Case primarily involves issues of First Amendment protections and non-public forums: see “Supreme Court: Fire District Email Policy Violated First Amendment” available at <http://mrsc.org/Home/Stay-Informed/MRSC-Insight/February-2018/Fire-District-Email-Policy-Violates-1st-Amendment.aspx>
- Holding that fire-captain was not acting in his official capacity when he sent emails to fellow fire-department employees using his government email account discussing religious issues suggests emails might not fit within the definition of “public record”
- To avoid potential disputes, agency email policy should inform employees:
 - (1) they have no expectation of privacy in agency emails and
 - (2) the agency may disclose “personal” emails sent over agency email system even if employee was not acting in the capacity of an “employee” when the email was sent or received

JOHN DOE G., ET AL V. DEPT OF CORRECTIONS, ZINK

190 Wn. 2d. 185, 410 P.3d 1156 (2018), reversing 197 Wn. App. 609, 391 P.3d 496 (2017)

- Zink requested all SSOSA evaluations from DOC since 1990 and the John Does filed suit to enjoin their release. The trial court found that SSOSA evaluations were exempt under RCW 70.02.250 and issued a permanent injunction. COA concurred that SSOSA evaluations contain protected health care information.
- The Supreme Court reversed: SSOSA evaluations are not exempt under the PRA. they are forensic examinations made for the purpose of aiding a court in sentencing a sex offender, and are not directly related to health care.

DOE P V. THURSTON COUNTY, ZINK

199 WN. APP. 280, 399 P.3D 1195 (JUNE 20, 2017)

- Four level I sex offenders filed a class action lawsuit against Thurston County and successfully enjoined the disclosure of unredacted level I sex offender records, including SSOSA and SSODA evaluations.
- The COA held that SSOSA and SSODA evaluations were exempt under the UHCIA exemption even though the information was held by county and not a health care provider. Offenders were “patients” & the evaluations were “health care information” under UHCIA.
- Still valid in light of John Doe G v. DOC?
- See also *Does v. Pierce County, Zink* (No. 48378-5-2) (appears to be same issues; case pending?).

DOES V. BENTON COUNTY, ZINK

200 WN. APP. 781, 403 P.3D 861 (OCT. 10, 2017)

- Level 1 SOs successfully enjoined the release of registration records. In a subsequent PRR for all e-mails concerning Zink's request for enjoined records, the County came across names of additional affected SOs and gave 3rd party notice and the court enjoined the County from releasing unredacted records.
- Then Doe v. WA State Patrol was decided, holding RCW 4.24.550 is not an "other statute" - "level I SO registration information is subject to disclosure." The court dissolved John Doe's injunction and unsealed the records identifying him, and ordered unredacted copies to be provided to Zink.
- An agency may need to notify third parties affected by the request, and the PRA authorizes them to take additional time to do this.
- A requestor is not entitled to penalties under the PRA unless some final agency action denies a public record.

WPEA V. WS STATE CENTER FOR CHILDHOOD DEAFNESS & HEARING LOSS ET AL.

1 WN. APP 2D 225, 404 P.3D 111 (2017), REV. GRANTED MARCH 5, 2018

- Disclosing full names of public employees associated with their birth date subject those employees to risk of identity theft and harms. There is a constitutionally protected privacy interest in this information under Art. I Sec. 7.
- There is no “categorical” exemption to prevent disclosure of public records on personal devices.
- Supreme Court oral argument set June 12, 2018
- See also slide cataloging various union lawsuits
- Caution – Unpublished, non-binding Federal District Court opinion in UW lawsuit has applied this case broadly

RECENT SEIU CASES

- *SEIU 775NW v. State DSHS*, 198 Wn. App. 745, 396 P.3d 369 (April 25, 2017) (rev. denied) (provisions in collective bargaining statute do not create PRA exemption)
- *SEIU Local 925 v. Freedom Foundation*, 197 Wn. App. 203, 289 P.3d 641 (2016) (disclosure did not violate constitutional privacy rights; request was not for commercial purposes)
- *SEIU 775NW v. State, DSHS*, 193 Wn. App. 377, 377 P.3d 214 (2016), (rev. denied) (request for contact information of home care providers by political advocacy group (Freedom Foundation) was not a request for commercial information)
- Also pending in division 1: *SEIU Local 925 v. Freedom Foundation, University of Washington* (Cause No. 76630-9-1) (Court of Appeals Division 1) (Issue: Are emails between employees and union discussing union issues “public records”)(hearing April 2018).

RUFIN V. CITY OF SEATTLE

199 WN. APP. 348, 398 P.3D 1237 (JUNE 26, 2017)

- On appeal, Court of Appeals (Division 1) held:
- CR 68 applies to PRA lawsuits.
- Under CR 68, Party “A” makes an “offer of judgment” to Party “B”, Party B rejects that offer, and Party B ultimately fails to obtain a better result, Party A will not be liable for “costs” incurred after the date of the offer.
- When a statute or contract identifies “costs” to include attorney fees, CR 68 can prevent the party who rejected the offer from obtaining fees.
- Note, attorney fees incurred prior to the offer will be included in the calculation of a final award for the purposes of calculating whether Party B obtained a better result, so an offer of judgment should address attorney fees.

WEST V. THE EVERGREEN STATE COLLEGE BOARD OF TRUSTEES

-- WN. APP. --, 414 P.3D 614 (FEB. 28, 2018)

- West sued TESC for withheld records containing names, student numbers, ID photos and disciplinary records claiming FERPA not an “other statute” entitled to exemption.
- The “other statute” exemption applies when the plain language of the statute explicitly exempts a given category of records or information.
- FERPA contains nondisclosure language and therefore qualifies as an “other statute.” FERPA prohibits educational institutions that receive federal funding from disclosing education records or personally identifiable information from those records without first receiving the students' written consent. 20 U.S.C. § 1232g(b), (d); 34 C.F.R. Part 99.

DEPT OF CORRECTIONS V. MCKEE

199 WN. APP. 635, 399 P.3D 1187 (JULY 11, 2017)

- Inmate submitted 336 PRA requests since 2006.
- Department of Corrections sought preliminary injunction under RCW 42.56.565 (inmate injunction statute), arguing requests were burdensome and made for financial gain.
- Trial court: Inmate injunction statute did not apply as a matter of law when a requester is harassing an agency for financial gain.
- Court of Appeals (Division 3): Trial court reversed. Inmate injunction statute can apply when requests are made to harass agencies themselves, in addition to their employees. Case remanded for a determination on whether McKee's conduct qualified as harassment.

ZABALA V. OKANOGAN COUNTY

– WN. APP. 2D –, 414 P.3D 585 (DIV. III APRIL 3, 2018)

- Zabala requested all jail phone recordings used in criminal prosecutions in Okanogan County and all documents related to those recordings and challenged the County's claims of exemption under RCW 9.73.095(3) and RCW 70.48.100.
- On appeal, the court held that RCW 70.48.100 exempts disclosure of recorded conversations from jail facilities, and extends to these records despite being forwarded to another government agency.
- The exemption extends to all recordings and related documents even when in possession of the prosecuting attorney.
- RCW 9.73 inapplicable to local jails.

KITTITAS COUNTY V. SKY ALLPHIN, ET AL.

-- Wn. App. 2d --, 413 P.3d 22 (March 14, 2018) (published in part)

- Not to be confused with case of the same name decided by Division III in 2017, and currently pending before the Supreme Court
- Agency has the authority to invoke “show cause” procedure based on implicit authority in the Civil Rule 7
- When agency files a motion to show-cause motion, court should use procedures in RCW 42.56.550 that only expressly apply to requestor-initiated show cause motion

KITTITAS COUNTY V. SKY ALLPHIN, ET AL.

-- Wn. App. 2d --, 413 P.3d 22 (March 14, 2018) (published in part)

- Unpublished rulings of interest:
- Appellate court will defer to trial court's credibility determination even when no fact hearing was held when trial court has observed actions of the parties throughout litigation proceedings
- Burden-shifting rules in RCW 42.56.550 only shift the burden to an agency to show withholding was proper and any delay was reasonable
- The requestor, as plaintiff, has the burden of proving records requested existed and qualified as public records

UNPUBLISHED CASES: 2017 -18

MAY BE CITED, BUT ARE NOT PRECEDENTIAL – GR 14.1(a)



WEST V. BACON

UNPUBLISHED DIV. II (DEC. 19, 2017)

- PRA lawsuit was properly dismissed because it was filed before port engaged in final action denying a record (Hobbs v. State).
- Port's multiple extensions of self-imposed time periods to respond were not unreasonable; request was broad in scope and potentially involved a large number of documents including many that needed review for privilege.
- Port awarded attorneys' fees based on appellate court's finding that appeal was frivolous (West-only ruling?)
- Supreme Court denied review AND awarded the Port attorney fees

EGGLESTON V. ASOTIN COUNTY

UNPUBLISHED DIVISION III (DEC. 17, 2017)

- Eggleston sued the county for withheld records re Ten Mile Creek Bridge Project.
- The requested 2002 e-mail was not prepared by the County and not “owned, used or retained by the County – therefore not a public record.
- The preliminary draft exemption is to protect “the give-and-take of deliberations...necessary to formulate agency policy.” Only those portions of documents actually reflecting policy recommendations and opinions may be withheld.
- The April and July plans did not clearly express any opinions or recommendations regarding the Project's final plan, so were not exempt from disclosure under the preliminary draft exception.

KENNEDY V. SKAGIT COUNTY HOSPITAL DIST. NO. 1

UNPUBLISHED DIVISION II (JAN. 22, 2018)

- In this PRA case, requester moved for waiver of the court's civil fees pursuant to General Rule 34.
- Court found requester was indigent and GR 34 is applicable to civil cases.

STRICKLAND V. PIERCE COUNTY

UNPUBLISHED DIVISION II (JAN. 29, 2018)

- PRA lawsuit regarding claim that county improperly withheld records was properly dismissed where requester failed to comply with one-year statute of limitations in filing action.
- The fact that a few responsive records turned up later did not change the result. There was no evidence of deception or bad faith to support an equitable tolling of the statute of limitations.
- Requester's argument for application of a discovery rule is unsupported.

WILLIAMS V. DEP'T OF CORRECTIONS

UNPUBLISHED DIVISION II (FEB. 21, 2018)

- Inmate PRA case.
- Court of Appeals: Agency made a reasonable estimate of time, did not unduly delay production of records, and provided a sufficient brief explanation.
- However, the agency improperly redacted some portions of records with respect to the security provisions in 42.56.240. Remanded to determine if penalties should be awarded.

PENDING APPELLATE CASES

EXAMPLES OF CASES NOT YET DECIDED



KITTITAS COUNTY V. SKY ALLPHIN, ET AL.

CAUSE NUMBER 93562-9

- Pending before Washington State Supreme Court. Oral argument was March 16, 2017.
- Published Court of Appeals (Division 3) decision: County properly withheld records under common interest/joint defense doctrine with respect to materials covered by attorney client privilege and attorney work product.
- Supreme Court: “Petition for review is granted only as to the issue of whether emails exchanged between County prosecuting attorneys and Department of Ecology employees relating to the Chem-Safe NOVA litigation are exempt from public records production as attorney work product under the ‘common interest doctrine.’” Decision pending.

LYFT INC. V. CITY OF SEATTLE

CAUSE NUMBER 94026-6

- Pending before the Washington State Supreme Court. Oral argument was held November 17, 2017.
- Transportation network companies (TNC) (Uber, Lyft) sought prevention of the release of certain records related to their business models. King County Superior Court entered injunction precluding disclosure of zip code data related to rides, finding it was a protected trade secret. Requester had sought the information from the city; records provided as part of the city's ride-sharing regulatory program.
- Direct review sought in State Supreme Court. Issues raised include whether injunction properly granted, and what is the proper injunction standard (PRA, Uniform Trade Secrets Act, common law) to enjoin disclosure of this information.

LEGISLATIVE UPDATE



EXAMPLES OF 2018 LEGISLATION

- SEE BILL LIST HANDOUT
- At least 20 bills affecting various agency records enacted in 2018 regular session.
- No special sessions (so far).
- Examples include:
 - 1513 - Youth voter registration sign up information
 - 2097 -Disclosure of religious affiliation of individuals
 - 2611 - Privilege for peer support group counselors

EXAMPLES OF 2018 LEGISLATION

- Examples include:
 - 2700 - Handling of child forensic interview & child interview digital recordings
 - 5996 - Disclosure and discussion of sexual harassment & sexual assault in the workplace
 - 6027 - Discovery of privileged health care information & communications in noneconomic damages claims
 - 6032 - Supplemental appropriations - Secs. 925(14) & 603(25) - Task force on legislative records
 - 6408 - Body worn cameras
 - Legislature's bill page website: <http://app.leg.wa.gov/billinfo/>

UPCOMING 2019 SESSION – PREVIEW

- Several open government proposed initiatives filed with Secretary of State
- Requires certain # of signatures to proceed
- Some are “Initiatives to the People”: 1584, 1592, 1608, 1628, 1629
- Some are “Initiatives to the Legislature”: 972, 973, 974, 977
- Primarily address records/activities of Legislature
- Secretary of State’s website (2018 Initiatives and Referenda page):
<https://www.sos.wa.gov/elections/initiatives/referenda.aspx?y=2018>

ATTORNEY GENERAL'S OFFICE



PENDING FORMAL OPINION (AGO) REQUESTS

- Pat Kohler, Director, Department of Licensing (September 6, 2017):
 - “Are concealed pistol licenses disclosable?”
(Question concerns RCW 42.56.240(4) and RCW 9.41.129.)
- Shawn Sant, Franklin County Prosecuting Attorney (& 17 other county prosecutors) (September 6, 2017):
 - “Should 1980 AGO No. 1 be withdrawn/revised in light of changes in technology and practice, the legislative intent of RCW 42.56.070(9), and the recent decision in *SEIU Healthcare 775 NW v. Department of Social and Health Services*, 193 Wash.App. 377, 377 P.3d 214, *review denied*, 186 Wash.2d 1016, 380 P.3d 502 (2016)?”
 - “Is it proper to redact names of individuals from a list or data compilation which is requested under the Public Records Act and for a commercial purpose?”
(Questions concern property tax assessment records.)

MODEL RULES

- AGO MODEL RULES
- See handout.
- AGO advisory PRA Model Rules (WAC 44-14)
- RCW 42.56.570: AGO is to publish advisory model rules, and may revise them “from time to time”.
- Model rules had not been revised since 2007; were updated March 2018, eff. April 2.
- Amendments address PRA court decisions, legislative changes, use of personal devices, providing records electronically, other updates.
- More information on ago rule making web page at: <http://www.Atg.Wa.Gov/rulemaking-activity>, and
- AGO MODEL RULES WEB PAGE AT [HTTP://WWW.ATG.WA.GOV/MODEL-RULES-PUBLIC-DISCLOSURE](http://WWW.ATG.WA.GOV/MODEL-RULES-PUBLIC-DISCLOSURE)

AGO LOCAL GOVERNMENT PUBLIC RECORDS CONSULTATION PROGRAM

- AGO Local Government Records Consultation Program (1594) (RCW 42.56.570(5)) New Program
 - To develop “best practices” for local governments in complying with the PRA including:
 - responding to records requests,
 - seeking additional public and private resources for developing and updating technology information services, and
 - mitigating liability and costs of compliance.
 - Up and running with AAG Morgan Damerow-Consultant (Breakout session for details)

AGO OPEN GOVERNMENT TRAINING WEB PAGE

- Recent postings:
- Updated PRA Training Video (fall 2017) (Lesson 2)
- List of/links to formal Attorney General Opinions on PRA (Lesson 2)
- 2018 Records Bills List (Lesson 2)
- Link to updated Model Rules web page (right side of page)
- Link to new Local Government Records Consultation Program web page (right side of page)
- Link to updated online records retention training by Secretary of State – State Archives (Lesson 4)
- <http://www.atg.wa.gov/opengovernmenttraining.aspx>

THANK YOU!

QUESTIONS?

