

Law Enforcement Exemptions

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First Some Basics

Investigative Exemption

RCW 42.56.240(1)

Specific intelligence information and specific investigative records

- Compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession,
- Nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy

Specific Investigative Information

Records related to a specific investigation

Exemption is often based on investigation status

Specific Intelligence Information

Disclosure would reveal law enforcement techniques, capabilities, limitations, and the extent of law enforcement knowledge which would jeopardize investigations, prosecutions and/or assist individuals in criminal activity.

Often based on risk of disclosure

Open Criminal Investigations

The contents of open investigations that are actively being pursued are categorically exempt. *Newman v. King County*, 133 Wn.2d 565, 945 P.2d 712 (1997).

No exemption log required

Closed Investigations

Investigation closes as soon as it is referred to the prosecuting agency. *Cowles Pub'g. Co. v. Spokane Police Dep't.*, 139 Wn.2d 472, 987 P.2d 620 (1999)

Record by record review and exemption log required

Re-Opened Criminal Investigations

Categorical exemption does not apply to a case referred to prosecutor but then referred back to law enforcement for additional investigation. *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 314 P.3d 1093 (2013)

Must review contents record by record and provide an exemption log. *Id.*

Make Sure It's Open

Mistaken claim that investigation is open may be insufficient to trigger the statute of limitations. *White v. City of Lakewood*, 194 Wn. App. 778, 374 P.3d 286 (2016)

Open Internal Investigations

Categorical exemption does not apply to open internal law enforcement investigations. *Sargent v. Seattle Police Dep't.*

Even if they could lead to criminal charges. *Id.*

Must review contents record by record and provide exemption log.

OTHER EXEMPTIONS MAY APPLY

Categorical exemption doesn't apply, but other law enforcement exemptions may. *City of Fife v. Hicks*, 186 Wn. App. 122, 345 P.3d 1, (2015)

- Complainant/victim/witness nondisclosure

Sustained Internal Investigations

Subject's identity not exempt and must be disclosed

Substance of investigation generally not exempt

Some content may be exempt

- C/V/W, medical information, etc.

Unsustained Internal Investigations

Identity of subject is exempt only if the nature of the allegations is highly offensive. *West v. Port of Olympia*, 183 Wn. App. 306, 333 P.3d 488 (2014).

- Sexual misconduct and child abuse allegations are highly offensive;
- Accusations of possible criminal conduct are not. *Id.*

Caveats

Internal investigations of medical misconduct by prison medical staff were not conducted for purposes of “law enforcement.” *Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wn.2d 628, 115 P.3d 316 (2005)

Different rules apply to LE internal EEO investigations (RCW 42.56.250(5) & (6))

Complainant/Victim/Witness Identities

“If at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern.”
Needn’t show threat. RCW 42.56.240(2)

Disclosure would endanger any person's life, physical safety, or property. RCW 42.56.240(2)

- Must be supported by specific evidence.
Sargent v. Seattle Police Dep't, 179 Wn.2d 376, 314 P.3d 1093 (2013)

Difficult Law Enforcement Exemptions

Juvenile Records

RCW 13.50

RCW 13.50 applies when the juvenile is the subject of the case:

- Records relating to commission of juvenile offenses. RCW 13.50.050
- Records not relating to commission of juvenile offenses. RCW 13.50.100(3) and/or RCW 13.50.100(4)(a) and(b)
- DSHS records, CPS records

Records with Juvenile Victims or Witnesses Not Involving Sexual Assault

Investigative Records of Cases Not Involving Sexual Assault with Adult Offender and Juvenile Victim or Witness

- Permission of child victim or the child's parents or legal guardian before releasing the names, addresses, or photographs of the living child victim or witness to the public.(RCW 7.69A.030(4))

Records with Juvenile Victims Involving Sexual Assault

Investigative Records of Cases Involving Sexual Assault with Adult Offender and Juvenile Victim

- Identity of child victims of sexual assault who are under age eighteen is exempt.
- Identifying information means child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator. RCW 10.97.130, RCW 42.56.240(5)

Health-Care vs. Medical Information

- **Health-Care Provider Records**
 - Washington Health Care Information Act (HCIA), Chapt. 70.02 RCW; RCW 42.56.360(2) (HCIA applies to public inspection and copying of health care information of patients when held by public agencies)
 - Exempt except to authorized individuals

Health-Care vs. Medical Information

- **Investigative Records Referring to Medical Information**
 - E.g., officer's notes referring to an individual's medical condition or medication.
 - Exempt only if disclosure would be highly offensive to a reasonable person and of no legitimate interest to the public. (RCW 42.56.240(1))

Mental Health-Care Records

- **HCIA, RCW 70.02.230(1) and RCW 42.56.360(2)**
- Fact of admission for mental health services and all information and records compiled, obtained, or maintained in the course of providing mental health services to either voluntary or involuntary recipients of services at public or private agencies are confidential

Forensic Exams

- **Not Health-Care:**
 - Special sex offender sentencing alternative (SSOSA) evaluations do not contain “health care information” because they are forensic examinations done for the purpose of aiding a court in sentencing a sex offender. SSOSA evaluations are made for the purpose of publishing the results to the court. *Doe G v. Dep't of Corr.*, ____ Wn.2d ____, 410 P.3d 1156 (Wash. 2018)

Forensic Exams

- Competency Exams: Access to a competency evaluation that has not been entered in a court file is limited to certain specified individuals with a need to access the information, but once filed, a competency evaluation becomes part of the court record. *State v. Chen*, 178 WN.2d 350, 309 P.3d 410 (2013).

Forensic Exams

Not created for purpose of providing health-care

Created to be filed with court

Other exemptions may apply (juvenile offender records)

May be sealed

Third-party notice

Seek legal advice

Jail Records

Booking photos and other jail records are generally exempt. RCW 70.48.100

Sex offender booking photos used for public notification are not exempt. RCW 4.24.550

If booking photo is used for another purpose, such as a photo montage, it is no longer an exempt jail record.

Jail Records

Jail records exemption applies to records sent to non-jail agency. Jail records in prosecuting attorney's file were exempt. *Zabala v. Okanogan Cty.*, 34961-6-III, 2018 WL 1599361, at *4 (Wash. Ct. App. Apr. 3, 2018)

Caveat: Subject of jail record has right to access. *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 314 P.3d 1093 (2013)

Driver's License and DOL Information

Not received from DOL – Redact driver's license numbers, driver's permit numbers, or state identification card numbers. RCW 42.56.230(5), RCW 9.35.005

Received directly from DOL– Redact all identifying information in addition to numbers listed above. RCW 46.12.635, 18 UCS § 2721, RCW 42.56.070. You may refer requestor to DOL.

Criminal History

Criminal History Information Received From WACIC/NCIC

Restricted to law enforcement use pursuant to federal law and may not be disseminated except to criminal justice agencies.

RCW 42.56.070, 28 USC § 534, 28 CFR 20.38,
and RCW 43.43.710.

In-Car Video

If litigation relevant to the video is pending:
Sound or video is exempt until final disposition of any litigation which arises from the incidents that were recorded. RCW 9.73.090(1)(c)

Body-Worn Video

- **Images presumed highly offensive may be redacted from BWV unless there is an overriding legitimate public interest. (RCW 42.56.240(14)):**
 - Any areas of a medical facility, counseling, or therapeutic program office where
 - A patient is registered to receive treatment, receiving treatment, waiting for treatment, or being transported in the course of treatment;
 - Health care information is shared with a patient;
 - Information that meets the definition of protected health information for purposes of HIPAA or 70.02 RCW;

Body-Worn Video

- Identity of or communications from a victim or witness of an incident involving domestic violence or sexual assault;
- Interior of a place of residence where a person has a reasonable expectation of privacy;
- Intimate images;
- A minor; or
- The body of a deceased person.

Body-Worn Video

- **Presumption that image is highly offensive may be rebutted by specific evidence in individual cases.**
 - Police accountability
 - Consider third-party notice to the subject of the image.

Body-Worn Video

- **May recover actual redaction costs unless requestor is:**
 - Person directly involved in incident recorded or his/her attorney
 - Person or his/her attorney who requests a body worn camera recording relevant to a criminal case involving that person;
 - Executive director from Washington State commission on African-American Affairs, Asian Pacific American Affairs, Hispanic affairs;
 - Attorney who represents a person regarding a potential or existing civil cause of action involving denial of civil rights under federal or state constitution or a violation of a U.S. D.O.J. settlement (Attorney must explain relevancy and request relief from redaction costs).

Decedent and Graphic Photos

- Graphic videos, photos and images that show victim's fear and distress from imminent death, or images of an identifiable decedent's body are exempt to non-family requestors under RCW 42.56.240(1)
 - Disclosure would invade privacy of surviving family members and would be highly offensive to a reasonable person and is not of legitimate concern to the public.

Graphic Photos

Videos, photos and images that show graphic injuries of a non-decedent are exempt under RCW 42.56.240(1) because disclosure would invade the privacy of injured person and would be highly offensive to a reasonable person and is not of legitimate concern to the public.

Biometrics

- Biometric identifiers are exempt under RCW 40.26.020(5):
 - Retina or iris scan
 - Fingerprint
 - Voiceprint
 - DNA
 - Scan of hand or face geometry

Security Information

Vulnerability assessments and emergency or escape response plans at correctional facilities or secure treatment facilities for civilly committed sexually violent predators (RCW 42.56.420(1))

Related to Intelligence Information (RCW 42.56.240(1))

Prison surveillance camera system, *Fischer v. Washington State Dep't of Corr.*, 160 Wn. App. 722, 254 P.3d 824 (2011)

Guide to the evaluation of reliability of prison confidential informant information reports. *Haines-Marchel v. State, Dep't of Corr.*, 183 Wn. App. 655, 334 P.3d 99 (2014)

Security Information

- **Information that will jeopardize agency computer or communications security (RCW 42.56.420(4))**
 - Passwords, access codes, certain cell-phone numbers
 - Information that will expose system vulnerabilities

Security Information

- **Information assembled, prepared, or maintained to prevent, mitigate, or respond to criminal terrorist acts. (RCW 42.56.420(1)).**
 - Emergency response plans (e.g., stadium evacuation plan)

Tactics

- **Intelligence Information (RCW 42.56.240(1))**
 - Tactical information not generally known by public in operational plans and training documents
 - “If/then” scenarios; e.g., hand signals, formations, and other responses to particular situations
 - Specific weaponry or capabilities beyond standard issue

Officer should supply specific explanation why essential to effective law enforcement

Attorney-Client Privilege

Criminal Cases:

Attorney-client privilege doesn't apply between the lawyer prosecuting a case and the law enforcement officer.

Attorney-Client Privilege

Seeking Advice/Civil Cases:

Law enforcement agency member seeking legal advice from the agency's attorney; e.g., the police department PDO seeking advice on a PRA matter from the City Attorney's Office lawyer.

In-house attorneys for law enforcement agencies may not have an attorney-client relationship with the agency – Check with agency lawyer.

Know who your agency's lawyers are. Seek their input on whether communication was seeking or providing legal advice.

RCW 42.56.070(1); RCW 5.60.060(2)(a); RCW 42.56.290

Attorney Work Product

Existing, Anticipated, or Past Litigation Required

1. Opinion Work Product: Reflects legal opinions/impressions of attorney - Exempt;
2. Gathered Work Product: Information collected/assembled in litigation or anticipation of litigation - Exempt unless requestor can show “substantial need” and “unable without undue hardship to obtain the substantial equivalent of the materials by other means.” CR 26(b)(4).

Police records gathered by prosecutor may be AWP in prosecutor’s file but not in police agency file. *Thomas v. Pierce Cty. Prosecuting Attorney's Office*, 190 Wn. App. 1036 (2015) (unpublished).

RCW 42.56.290 – Seek Legal Advice

Confidential Informants

- Information revealing the identity of a confidential informant is privileged pursuant to RCW 5.60.060(5), an other statute under RCW 42.56.070(1).
- Nondisclosure of information that reveals the identity of a confidential informer is also essential to effective law enforcement therefore exempt pursuant to RCW 42.56.240(1).

Confidential Informants

Cannot deny or confirm whether an individual is a confidential informant without an order from a criminal court finding that disclosure of the information is relevant and helpful to defense, or essential to a fair determination of cause, in a particular criminal case. See, *State v. Harris*, 91 Wn.2d 145, 588 P.2d (1978).

Undercover Officers

- Information revealing the identity of an undercover officer is essential to effective law enforcement therefore exempt pursuant to RCW 42.56.240(1).
- Officer must actually be operating undercover in connection with records not merely have the potential to go undercover “someday.” *King Cty. v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002)

Records Received from Other Law Enforcement Agencies

Records received from other agencies are your agency's records for purposes of the PRA and you can't rely on the other agency's assertion that it is exempt.

Your agency must engage in an independent analysis of any exemption. *Adams v. Washington State Dep't of Corr.*, 189 Wn. App. 925, 361 P.3d 749 (2015)

- Consider third-party notice.

QUESTIONS?
