



Public Records Act and Public Agency Contracts

Washington Association of Public Records Officers

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A. Public Records Act (RCW 42.56)

- ▶ Records relating to the **conduct of government**
- ▶ Or its governmental **proprietary function**
 - ▶ **Prepared**
 - ▶ **Owned**
 - ▶ **Used or**
 - ▶ **Retained**
- ▶ By any **state or local agency**
- ▶ Must be disclosed unless exempt by law



B. Public Agency Contracting Records are “Public Records”

Two Ways to Bring Bidders’ or Contractors’ Records into PRA

1. The public agency “prepared, owned, used or retained” the record.

POUR



2. The contractor itself is the “functional equivalent” of a public agency or public employee.

“Used” - *Concerned Ratepayers*

- ▶ Whether information has been "used," however, should not turn on whether the information is applied to an agency's final work product.
- ▶ Rather, the critical inquiry is whether the requested information bears a **nexus with the agency's decision-making process**.
- ▶ A nexus between the information at issue and an agency's decision-making process exists where the information relates not only to the conduct or performance of the agency or its proprietary function, but is also a relevant factor in the agency's action.
- ▶ Thus, mere reference to a document that has no relevance to an agency's conduct or performance may not constitute "use," but **information that is reviewed, evaluated, or referred to and has an impact on an agency's decision-making process would be within the parameters of the Act.**



C. A Contractor Itself Might be a “Public Agency” for PRA Purposes: *Telford* Test

1. Whether the private entity performs a governmental function
2. The level of government funding
3. The extent of government involvement or regulation
4. Whether the entity was created by government

**Is the private contractor the
“functional equivalent”
of a public agency /or a public employee?
(*Cedar Grove Composting*)**

When is a "Writing" a "Public Record" under the Public Records Act?

A Guide for Illustrative Purposes Only. Not Legal Advice/Opinion. Consult RCW 42.56 (PRA) and PRA Case Law for Further Analysis. Some Citations on Reverse.

1. Does the writing contain information relating to the conduct of government or the performance of any governmental or proprietary function of a state or local agency?

If NO, STOP. Not a public record.

If YES, proceed to Question # 2

2. Is the writing a certain record held by a qualified volunteer?
(See volunteer exception criteria on reverse.)

If YES, STOP. Not a public record.

If NO, proceed to Question # 3

3. Was the writing prepared, owned, used or retained by the state or local agency? If YES, is a public record.
If uncertain (about record's preparation, use, ownership or retention), or to determine if the answer is "no," ask (a), (b) & (c). The (a) – (c) analysis may be fact-specific. Additional analysis might be appropriate in a particular situation.

(a) Is the writing located in/on the state or local AGENCY'S files, servers, accounts, devices?

If YES, is a public record.

If NO, consider other places where records are reasonably likely to be located. Go to (b) & (c).

(b) Is the writing located in/on AGENCY EMPLOYEES' OR OFFICIALS' PERSONAL (non-agency) files, servers, accounts, devices?

If YES, did the employee or official prepare the writing in his/her **public employment or official capacity?** (Was the writing "related to" the employee's/official's public responsibilities?) Ask ALL THREE questions below - (i) through (iii). *(Fact-specific)*

If NO, consider other reasonable locations. Go to (c).

(i) Did the job **require** the writing?
OR

(ii) Did the **employer direct** the writing?
OR

(iii) Did the writing **further the employer's interests?**
(Must be more than a mere reference, mention or comment about the employee's or official's public duties.)

If (i), (ii) OR (iii) are YES, is a public record.

If ALL are NO, STOP. Not a public record.

(c) Is the writing located in/on THIRD PARTY'S files, servers, accounts, devices? *(Third party = non-agency entities performing functions for the agency --- ex.: contractors/consultants)*

If YES, (i) Did the agency **prepare, own, or use** the writing? Or
(ii) Does only the third party **retain** the writing but the writing involves the contract work &/or has a nexus to agency's decision process? *(Fact-specific – more analysis may be needed)*

If YES, is the third party the **"functional equivalent"** of a public agency/public employee? *(Fact-specific – see "Telford Test")*

If NO, STOP. Not a public record.

If any YES, is a public record.

If NO, STOP. Not a public record.

1/25/19
A.G.O.

D. Bid and Contract Language Concerning Public Records

- ▶ Put bidder/contractor **ON NOTICE** about PRA (RCW 42.56), and obligations.
- ▶ Put contractor **ON NOTICE** about records retention (RCW 40.14), and obligations



E. Possible Exemptions Relevant to Bid or Contract Records

- ▶ State agencies - RCW 39.26.030 (contracts entered pursuant to that chapter) - Exempts bids “until the agency announces the apparent successful bidder.”
- ▶ Trade Secrets, Financial Information, Commercial Information, Proprietary Information (RCW 42.56.270, RCW 19.108, other statutes)
- ▶ Preliminary Drafts, Notes, Recommendations (RCW 42.56.280)
- ▶ Other statutes relevant to specific businesses.



F. Third Party Notices & Injunctions

- ▶ **RCW 42.56.540:** An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice.
- ▶ Notified persons can go to court to seek injunction.
- ▶ **GIVE BIDDER OR CONTRACTOR A **DEADLINE** TO OBTAIN INJUNCTION AND PROVIDE COPY TO AGENCY.**



- ▶ Parties: Third party, agency, requester
- ▶ Must have an **exemption in law** before a record or part of a record can be withheld in response to a PRA request.
- ▶ Party asserting record or information in record is exempt carries burden to establish that to a court.
- ▶ No promises of confidentiality that are not supported by law.

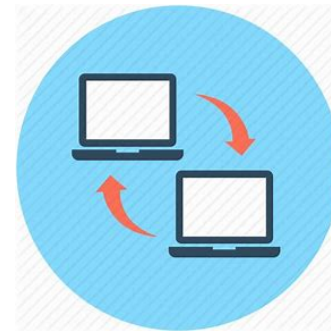


- ▶ Court must find:
 - ▶ Exemption applies to record(s)
 - ▶ **AND**
 - ▶ Disclosure would clearly not be in the public interest
 - ▶ and would substantially and irreparably damage any person,
 - ▶ or would substantially and irreparably damage vital governmental functions.



G. Confidential Information Provided to Contractors - Data Sharing Agreements

- ▶ If contractor given access to data or records exempted or protected from public disclosure by state or federal laws.
- ▶ Agreement should address contractor's obligations. Examples:
 - ▶ How data will be protected
 - ▶ Staff who have access to data
 - ▶ Return of data to agency
 - ▶ Data breach notification steps
 - ▶ Other provisions required by state or federal laws, or agency policies



H. Records Retention

- ▶ RCW 40.14
- ▶ Records retention schedules - Secretary of State - Washington State Archives
- ▶ Notice to contractor about obligations to retain records; provide them to agency
 - ▶ Also retention/production requirements if there is a PRA request or discovery hold



I. Samples

- ▶ See sample notices and contract language in materials.



Questions?

