

WAPRO Conference – Spring 2024

Legal Update

This case law review includes decisions issued from October 12, 2023 through May 7, 2024. Several unpublished appellate decisions are summarized for this presentation. While they may not be cited as precedent they are nonetheless instructive.

DISCLAIMER

This presentation is educational only and is not legal advice or a legal opinion. The PRA changes over time. Later court decisions or changes in statutes can impact these decisions and an agency's obligations.

TALK WITH YOUR AGENCY'S LEGAL ADVISOR



Court Decisions

9th Cir. Court of Appeals
U.S. Dist. Court, W.D. Wash.
Wash. State Supreme Court
Wash. State Court of Appeals

Hood v. Prescott

Unpublished (April 30, 2024)

Trial Court

Requestor made a records request for audit records (similar to request made/litigated by other agencies). The PRO sought clarification. Requestor did not answer PRO's questions but stated he "narrowed" his request to certain items. City produced records. Requester then sued. Trial court granted City's motion for summary judgment. Meanwhile, requestor receives records from State Auditor's Office (SAO) he argues should have been produced by City. Records from the SOA are produced to the court in a motion for reconsideration, which is denied.

Hood v. Prescott

Unpublished (April 30, 2024)

Court of Appeals

COA began by looking at the scope of the request and acknowledged that both parties' interpretations of the request are plausible. Whether the City's interpretation was reasonable is a question of fact for the trial court. Thus, evidence shows genuine issue of material fact. An issue of material fact also exists regarding the adequacy of the search. The City attorney provided a declaration regarding the search, but there was no evidence provided by a person who actually conducted a search. There was no evidence regarding search terms used, locations searched, or type of search performed.

Navarro v. Auburn Police Department

Unpublished (April 29, 2024)

Trial Court

Requester is a suspect in an attempted robbery. Requester makes records requests for the investigation records in June 2020 and January 2021. The City denies both requests claiming the categorical active investigation exemption, RCW 42.56.240(1). Requester files suit and trial court dismisses complaint on summary judgment. Requester receives the investigative file in response to a 3rd records request. Final entry in file is from October 2019 regarding victim being unable to identify the suspect and therefore lacking evidence to forward for criminal charges. Requester moves to vacate prior summary judgment dismissal order arguing City's investigation was not active at time of requests and the Detective perjured himself.

Navarro v. Auburn Police Department

Unpublished (April 29, 2024)

Court of Appeals

Trial court denied the motion to vacate. COA affirmed. The City's evidence and detective testimony was credible and investigations can be kept open until statute of limitations. Trial court did not abuse discretion. When the records requests were made the investigation was open and active.

Hood v. Centralia College

Unpublished (April 23, 2024)

Trial Court

During the discovery phase of the 2020 *Hood v. Centralia College* litigation, Hood requested documents that the trial and appellate court deemed not responsive to his earlier 2019 PRA request. Other documents filed in the litigation made it clear Hood wanted other documents. The College was found to have not violated the PRA regarding the 2019 request. Hood filed suit in March 2023 asserting his requests in the course of the litigation constituted new PRA requests.

Hood v. Centralia College

Unpublished (April 23, 2024)

Court of Appeals

Hood's litigation requests were not public records requests. Requesters must give the agency fair notice that they are requesting records under the PRA. None of the request's characteristics favor the requests being public records requests. Two of the requested records' characteristics favor fair notice as a request. Fair notice distinguishes PRA requests from those arising from some other legal authority. If a request for records appears to be under an authority other than the PRA, this factor is usually dispositive; it is not a PRA request. A request in "in the shadow" of other legal authority must clearly distinguish itself as a public records request.



INTERMISSION

Cousins v. State, Dept. of Corrections

___ Wn.3d ___, ___ P.3d ___ (2024)

Facts: The Request – Take 1

Cousins makes a records request on July 21, 2016, seeking “any and all records regarding Renee A. Field” – her sister, who died in DOC custody. Multiple times during productions of installments, Cousins stated that records were missing and identified specific records. DOC responded that request was still open and DOC was gathering records. When payment was not received for an installment, DOC closed the request for nonpayment. Cousins asked about the installment and resent payment. DOC produced the installment and stated: “PRU 43037 is now closed. However, if you should have any questions related to this request, you may contact me ...” Five days later Cousins and DOC continue correspondence regarding records but DOC did not answer all of Cousins’ questions. DOC re-sent the January 2019 closing letter several times.

Cousins v. State, Dept. of Corrections

___ Wn.3d ___, ___ P.3d ___ (2024)

Facts: The Request – Take 2

A new PRO reopened request in July 2020 to conduct additional searches. DOC began producing additional installments. Cousins filed a lawsuit in January 2021—DOC produced installments until June 2021, at which time DOC informed Cousins “this public records request.. is now closed.” Cousins’ counsel contacts DOC and states records are still missing. DOC produces Installment 17 in August 2021. DOC admitted that Installments 8-17 contain hundreds of pages of previously undisclosed responsive records.

Trial court granted DOC’s motion for summary judgment and determined the claims were barred by the statute of limitations. Court of Appeals affirmed dismissal.

Cousins v. State, Dept. of Corrections

___ Wn.3d ___, ___ P.3d ___ (2024)

Washington State Supreme Court

Supreme Court reverses. A closing letter must be objectively “sufficient to put [a nonattorney requester] on notice” that the one-year limitations period had started running because the agency does “not intend to disclose records or further address [the] request.” Use of the word “closed” is not determinative. To assess the sufficiency of a closing letter, courts and agencies should consult the Model Rules and the guidance provided in this opinion. After issuing a sufficient closing letter, an agency may choose to answer follow-up questions by simply reiterating that the statute of limitations has started running because the agency does not intend to further address the request.

Cousins v. State, Dept. of Corrections

___ Wn.3d ___, ___ P.3d ___ (2024)

Sufficiency of a closing letter – required content

A closing letter is sufficient if it provides at least the following information to the requester, in plain language targeted to a lay audience:

- (1) how the PRA request was fulfilled and why the agency is now closing the request,
- (2) that the PRA's one-year statute of limitations to seek judicial review has started to run because the agency does not intend to further address the request, and
- (3) that the requester may ask follow-up questions within a reasonable time frame, which may be specified by the agency.

The final, definitive response test is an objective inquiry, so the agency's subjective intent and the requester's subjective understanding are not relevant.

Cousins v. State, Dept. of Corrections

__ Wn.3d __, __ P.3d __ (2024)

The follow up questions

If the requester asks timely follow-up questions, the agency is not required to search for additional records, although it may choose to do so.

If the agency does not intend to further address the request, it must explicitly say so and reiterate that the statute of limitations has started to run.

Cousins v. State, Dept. of Corrections

___ Wn.3d ___, ___ P.3d ___ (2024)

Other Issues

The subsequent production of records may be relevant to liability or penalties but ordinarily will not restart the limitations period. Affirms *Belenski*. Clarifies *Dotson* did not adopt a bright-line rule that a closing letter will always trigger the statute of limitations. Providing later-discovered records does not restart the PRA's statute of limitations, unless equitable tolling applies.

June 2021 letter was final, definitive response to Cousins' request – lawsuit not barred by SOL. Court does “not claim to impose a retroactive standard of strict compliance.”

Hobbs does not apply here—lawsuit is not premature.



A moment to let it all sink in.
Any questions?

Sullivan 5 v. Univ. of Wash

9th Cir Ct of App., December 13, 2023

Poe 5 v. Univ. of Wash

U.S. Dist. Court, March 29, 2024

Animal rights groups sought the names of the members of UW's Institutional Animal Care and Use Committee; a federally mandated committee that ensures experiments that involve animals are carried out in an ethical manner. Prior case held that members did not have a right to associational privacy based on the 1st Amendment. In these two cases, members of the committee assert a right to “informational privacy,” which is a right rooted in the 14th Amendment Due process clause. Under this right, under certain circumstances, when government obtains private information about an individual, the government is required to keep that information confidential. It is very fact specific. It first requires a showing from the person seeking to keep the information confidential that sufficient negative consequences would result if the information was disclosed. In the lead case from the 9th Circuit, the court held that Social Security numbers could qualify as confidential based on the risk identity theft.

Sullivan 5 v. Univ. of Wash

9th Cir Ct of App., December 13, 2023

Poe 5 v. Univ. of Wash

U.S. Dist. Court, March 29, 2024

The members of the Committee demonstrated a long history of animal rights groups targeting the members of similar committees, and their families, with harassment. And while a name is not normally considered “private,” under these circumstances the court held it qualified. Next the court balances the potential harm with the public need for the information. Generally, the PRA serves to foster government accountability. But here, because the Committee meetings were open to the public, the added public benefits from disclosing the names of the Committee members was marginal and did not outweigh the risk of harm.

Sullivan: the 9th Circuit vacated an injunction based on information privacy because the names of the two lead plaintiffs had already been disclosed.

Poe: After the Sullivan decision, other members of the Committee whose names had not been disclosed filed for a new injunction and in Poe the trial court re-issued the injunction for the remaining members. This will go back up to the 9th Circuit.

Cutler-Flinn v. Wash. State Dept. of Corrections

Unpublished (April 23, 2024)

Trial Court

Inmate Requestor made three requests, including one request for two policies available on DOC's website. First Request: Inmate Requestor did not have access to the internet and requested copies. DOC said it would only produce the record after Inmate requestor paid copy costs. Inmate sued, claiming DOC violated RCW 42.56.120(2)(e) by charging copy costs for documents available for free on its website. Trial court ruled in DOC's favor on Summary judgment. Second and Third Request. After an attorney made an appearance for Inmate requestor, DOC sent motion to show cause on second and third request to the attorney, but not the Inmate Requestor. Both failed to respond to motion so trial court dismissed the two claims. Inmate Requestor filed a motion to vacate or reconsider, which was denied.

Cutler-Flinn v. Wash. State Dept. of Corrections

Unpublished (April 23, 2024)

Court of Appeals

COA affirms on appeal. *First Request:* RCW 42.56.120(2)(e) prohibition on copying charges for access to or downloading of records that the agency routinely posts on its public internet website prior to receipt of a request unless the requestor has specifically requested that the agency provide copies of such records through other means.” Here, the inmate did not have access to a computer or the internet so he was asking for copies “through other means.” Therefore, DOC did not violate the PRA by requiring Requestor Inmate to pay for copies before DOC provided the records.

Second and Third Request: Based on the actions of the attorney who purported to represent the Inmate Requestor, DOC reasonably concluded that the attorney did in fact represent the Inmate Requestor. DOC was only required to serve the attorney, and by failing to respond to the show cause motion, the Inmate Requestor waived his right to challenge the dismissal of the claims.

Contreras v. City of Tacoma

US Dist. Court, W.D. Wash. (March 15, 2024)

Facts

Contreras was detained by Tacoma PD Officers in July 2020. He was released at the scene after which he expressed concern to supervisors about his treatment. On April 24, 2021, he requested records regarding the incident. May 10, 2021, TPD responded it had no records. A request to South Sound 911 produced a CAD log. Later TPD produced three installments; 1) Internal Affairs records on March 16, 2022 provided “as a courtesy,” 2) CAD printouts on May 17, 2022 as part of its Rule 26 disclosures, and 3) Field Information Reports(FIR) discovered on February 21, 2023 but not produced until November 14, 2023. Contreras files suit alleging various claims including PRA violations of an inadequate search.

Contreraz v. City of Tacoma

US Dist. Court, W.D. Wash. (March 15, 2024)

Holding

On motion for summary judgment in a PRA case, the agency “bears the burden, beyond material doubt, of showing its search was adequate. While South Sound 911 holds the CAD log, TPD can search the CAD log and in this case input information into the log. TPD violated the PRA when it failed to provide the CAD log. FIR’s are the officer’s descriptions of the events from July 2020. While they may have been stored in South Sound 911 systems, TPD officers prepared them; they are public records wherever they may be stored citing *Nissen*. The searches were inadequate by failing to search South Sound 911 given that TPD uses and prepares records stored there. TPD did not follow obvious leads for responsive records. TPD did not violate the PRA in not producing the IA records. These records were prepared outside of the date range specified in the request. The overall conduct triggered many *Yousoufian* aggravating factors, total penalty of \$45,780 plus reasonable attorneys’ fees and costs.

Neal v. City of Bainbridge Island

US Dist. Court, W.D. Wash. (January 26, 2024)

Facts

On December 16, 2020, requester filed a public records request seeking “the video and audio zoom recordings for all Island Center Subarea Planning Process meetings. Prior to making the request, the City had informed the requester that it only maintained audio which it posted on its website; while the meetings occurred via Zoom, only audio was downloaded, video was deleted. The trash file in Zoom was reviewed for records. The city produced one video from the day of the request and a later open house recording.

Neal v. City of Bainbridge Island

US Dist. Court, W.D. Wash. (January 26, 2024)

Holding

The PRA does not require that an agency produce a record that does not exist at the time of the request. Declarations establish that the Recordings and Trash folders of the City's Zoom account were the only locations the videos could reasonably be found and that the videos were not in either of those locations on the day of Plaintiff's request. As such, Defendant satisfied its burden of showing the videos did not exist. Defendant satisfied its burden of showing it searched all places the videos were reasonably likely to be found. Plaintiff questions why the City did not search other locations, seemingly relying on an email from a councilmember to Plaintiff expressing a "hope[] that if there is a backup of the recording," it could be retrieved does nothing to help establish that the files were *reasonably likely* to be found in a backup, or even that "backup" locations actually existed.

Spokoinv v. Univ. of Wash. Medical Center

US Dist. Court, W.D. Wash. (January 5, 2024)

Facts

Requester worked at the UWMC as an RN. After resigning from employment she filed suit alleging numerous claims including a PRA violation related to two requests. Requester asserts UWMC intentionally delayed records production for two years. The requester claimed that for a June 17, 2020 request records were available by October 30, 2020 and for an April 1, 2021 request, requester asserts records were available on April 7, 2021. UWMC produced records in batches starting March 5, 2021, through August 17, 2023.

Spokoinv v. Univ. of Wash. Medical Center

US Dist. Court, W.D. Wash. (January 5, 2024)

Holding

The requester “erroneously equates “available records” with those “ready for production.” Looking to *Conklin v. UWMC* the court concluded that based on global circumstances (COVID 19), the UWMC backlog of other requests ahead of hers, and the 1.5 million pages of records requiring review as relevant factors in the determination the UWMC was diligently working on the request. UWMC acted reasonably with respect these particular requests and the requester presented no evidence from which a reasonable factfinder could conclude that it did not.

San Juan County v. Wash. Coalition for Open Gov.

Unpublished (November 13, 2024)

Trial Court

Requester sought all invoices, contracts, correspondence, notes, bids, proposals, records relating to conflicts of interest, meeting minutes, and any other records relating to [San Juan] County's use of outside counsel in the ongoing litigation of *Kilduff v. San Juan County*. A month later the county provided heavily redacted invoices; hours and dollar amount billed was not redacted. Requester challenged redactions claiming over-redaction. The County filed a cross motion for Summary Judgement asserting the documents were relevant to an ongoing controversy and therefore exempt. Following in camera review the court found the descriptions of the work performed could be redacted in its entirety; line by line redaction was not necessary.

San Juan County v. Wash. Coalition for Open Gov.

Unpublished (November 13, 2024)

Court of Appeals

COA affirms the lower court. RCW 42.56.290 is a categorical exemption applicable to material that would not be discoverable under the civil rules. This includes work product and attorney-client privileged material in ongoing litigation. The invoices documented the actions the attorneys took, the hours spent, and the amount charged for the ongoing Kilduff case. As a result, they constitute work product. The unredacted records detail exactly the activities counsel took in the litigation and are privileged materials. RCW 42.56.904 includes “other laws.” This brings RCW 42.56.290’s protection of WP and ACP within the scope of RCW 42.56.904. The County did not treat WCOG differently from other Requesters. The “redaction codes” applied to the records, provided with code sheet, was a sufficiently detailed brief explanation.



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