

Employee Records Request

Navigating the lanes of travel for employee and employee's records.



But first a word from our Attorneys...

This material is for informational purposes only and is not intended as legal advice, nor as a substitute for the legal advice of an attorney. You should contact your own legal counsel if you have a question regarding your legal rights or any other legal issue.



Introduction

There are many reasons we release records. At the center of many of these requests is an employee. Sometimes it's the employee making the request, but more commonly the records sought concern or are about the employee. Knowing which lane you are in and what law governs the release, is paramount in getting to the right destination.



Outline

- + Employee Initiated Requests
- + Personnel File Review
- + Union Information Requests
- + Subpoenas
- + Statute Requires Disclosure



What lane are you in?

Employee Initiated Requests

Employees acting in their own interest.



Employee Requests

(current or former)

Requester Identity

- + They stand in the same shoes as any other requester.
- + Exemptions apply based on their personal status.
- + Motives in making the request are not a factor BUT you may need to engage with others in the agency to work through this to assure the requested records are provided.

Process

- + Treat all requesters the same - they are entitled to the same process.
- + Can not treat them differently because you know may be a colleague.
- + Exemptions apply based on their status as a requester, not on their knowledge as an employee.

Other considerations

- + They are likely familiar with the agency's records.
- + They may be able to provide greater assistance than other requesters in focusing the request.
- + Will also likely know when you have missed a record.

Personnel File Review

Employee asking to inspect their own
file.



Employee Inspection of Personnel File



Every employer shall, at least annually, upon the request of an employee, permit that employee to inspect any or all of his or her own personnel file(s).

RCW 49.12.240

Personnel File Review

Considerations

- + How was the request worded: to obtain a copy or inspection?
- + Do you need to clarify?
- + PRA and L&I Statute provide for a right to inspect.
- + How do you assure the requester is the employee?
- + What is a personnel file? *Martin v. Gonzaga University*, 200 Wn. App. 332, 402 P.3d 294 (2017)

Divergence of the Statutes

- + PRA requires a reasonable estimate of time. L&I statute requires access within a reasonable period of time; they are separate processes.
- + L&I statute allows for review, removal of material, or submission of employee rebuttal.
- + Special rules for possible criminal offense investigations or records compiled for an impending lawsuit.

RCW 49.12.250 & 260

Union Information Request

Unions represent agency employees and have unique power to obtain records and information from the agency.



Union information request



Collective bargaining requires a good faith in an effort to reach agreement. A necessary corollary to the expectation is to provide relevant and necessary information required by the other party to carry out their rights and obligations in the collective bargaining process.

NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-53 (1956)

City of Bellevue v. Int'l. Ass'n of Fire Fighters, Local 1604, 119 Wn.2d 373, 383 (1992).

Expectation does not attach until the union is recognized as the exclusive bargaining representative.

Whatcom County, Decision 7884-A (PECB, 2002)

Union information request

Who may submit

- + Union President
- + Negotiator
- + Shop Steward
- + Union's Attorney
- + Others with the Union

Form of the Request

- + Request language possibilities:
 - + Union request for information
 - + Request for records to prepare for bargaining (or a grievance)
- + May indicate that it is both a Union Request and under the PRA - now what?

Information pertaining to employees in the pertinent bargaining unit has been held to be "presumptively relevant." A union requesting information regarding employees outside the bargaining unit must show (1) the relevancy of the requested information to the union's bargaining responsibilities; and (2) that the union adequately informed the employer of the basis for its request.

Don't expect consistency...

Home Address and Other Personal Contact Information	
Employee's home address and other information exempt from release.	Employer required to provide specified information to the Union.
RCW 42.56.250(1)(d)	RCW 41.56.037 RCW 41.80.083 RCW 28B.52.027

Deliberative Process	
Pre-decisional opinions or recommendations exempt if injurious to process.	The employer considered the contents in decision making so should have been disclosed.
RCW 42.56.280	<i>WSP Troopers Assn. and State of Wash.</i> PD-4710 (1994)

But Then Again

No Duty to Create a Record

Smith v. Okanogan County, 100 Wn. App. 7, 994 P.2d 857 (2000)
City of Anacortes, Decision 7768 (PECB, 2002)

Collective Bargaining v. The Public Records Act

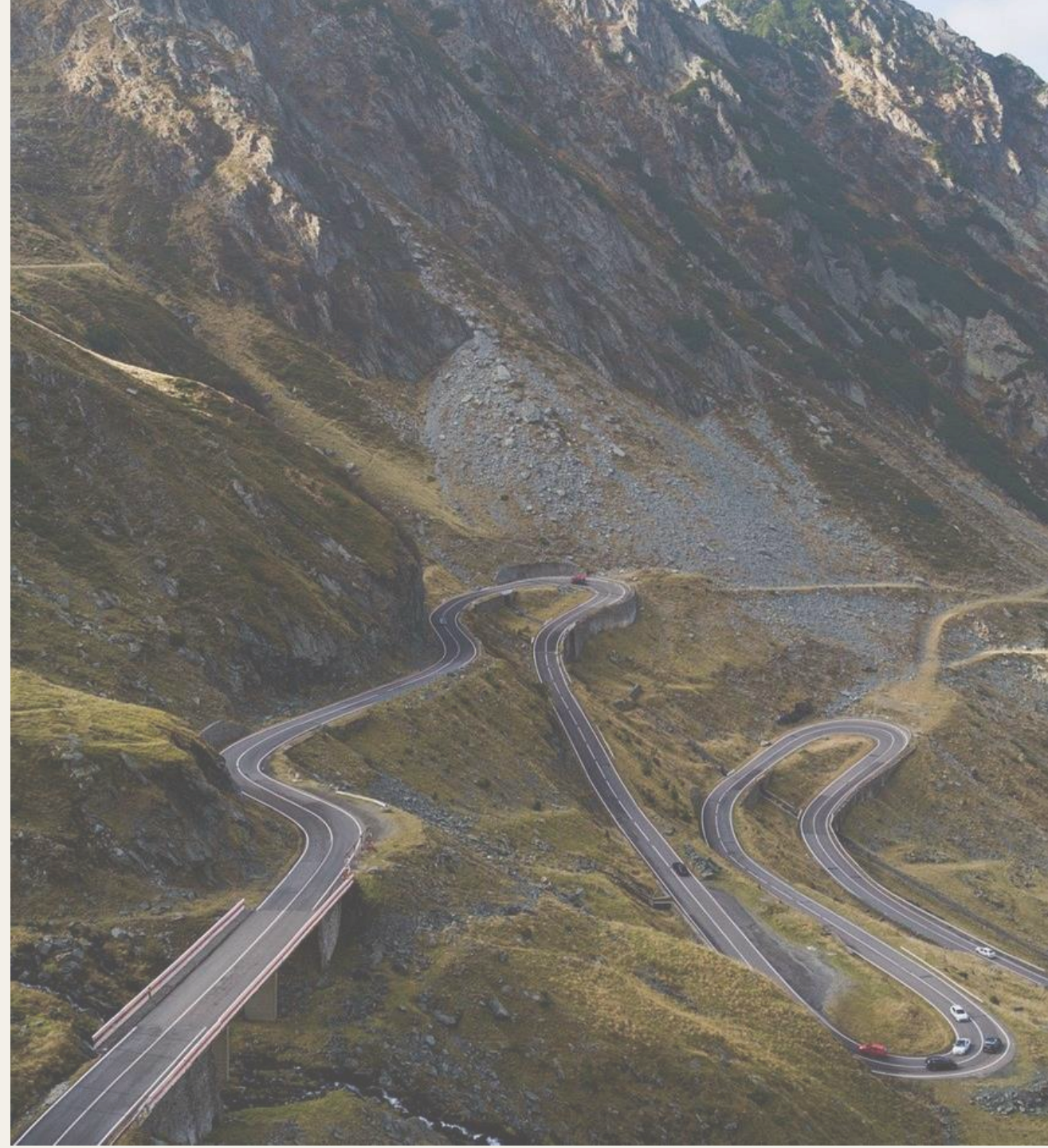
The provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose. Except as provided ... if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of this chapter shall control. RCW 41.56.905.



In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern. RCW 42.56.030.

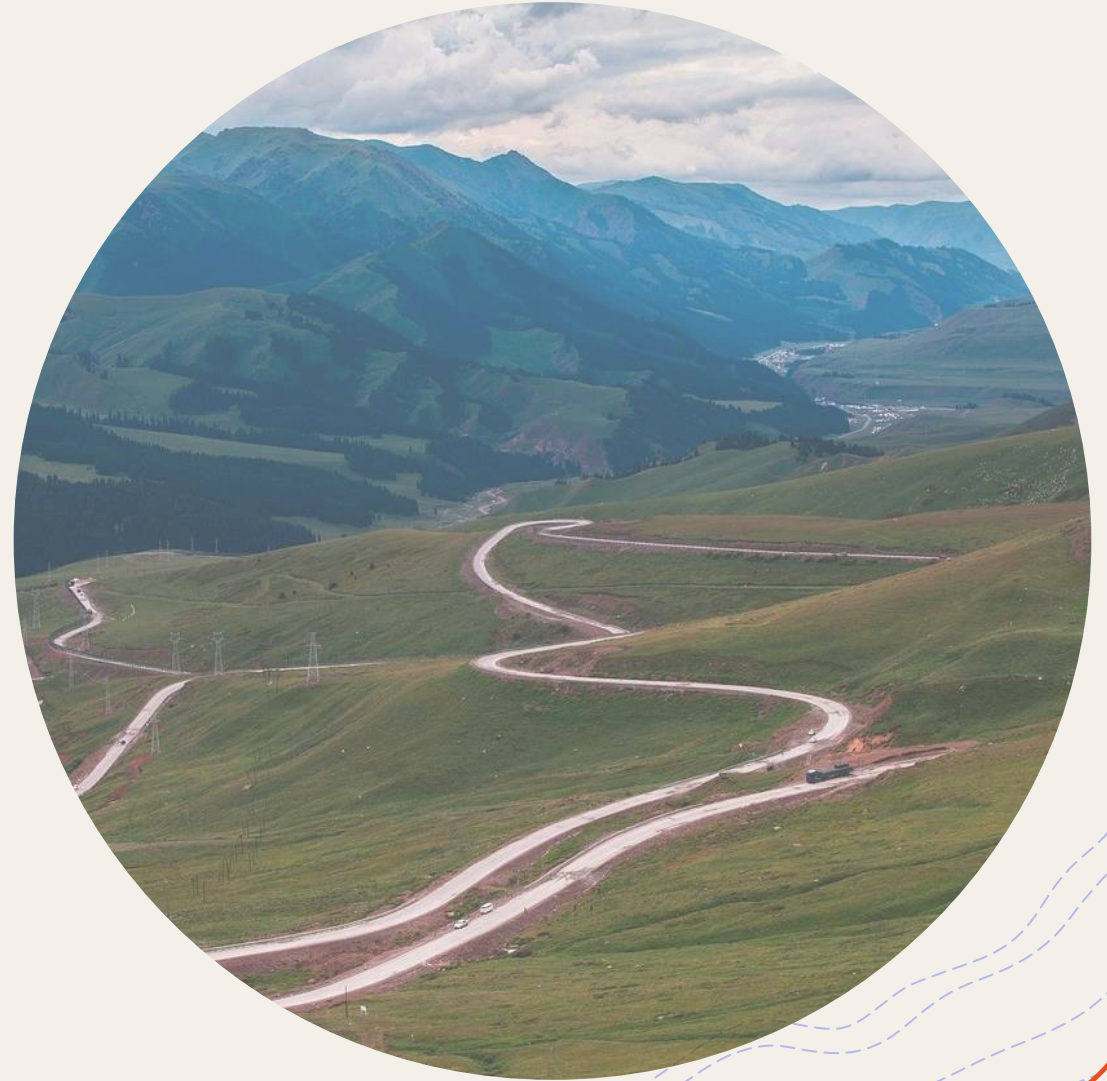
Guiding Principle

The expectation is that parties will work together to attempt to resolve any difficulties associated with an information request. Even where the PERC concludes that a union is not entitled to requested information, an employer may be found guilty of a technical violation if it simply "stiff-arms" the union and refuses to respond to the request.



Subpoenas

Lawsuit requests for records.





Subpoena

(sə-'pē-nə)

Definition:

+ A writ commanding a person designated in it to appear in court under a penalty for failure.

Meriam-Websters Online Dictionary

+ A subpoena is a legal, written order to compel an individual to give testimony on a particular subject at a specific time and place, or to provide documents or other tangible individual to give testimony on a particular subject at a specific time objects. Subpoenas can compel an individual to testify for a deposition, trial, Congressional inquiry, or other hearings.

Cornell Law School, Legal Information Institute

Subpoena's role in a lawsuit

A lawsuit is filed alleging that something has happened that the legal system can resolve; filed based in good faith and not to harass or other improper purpose.

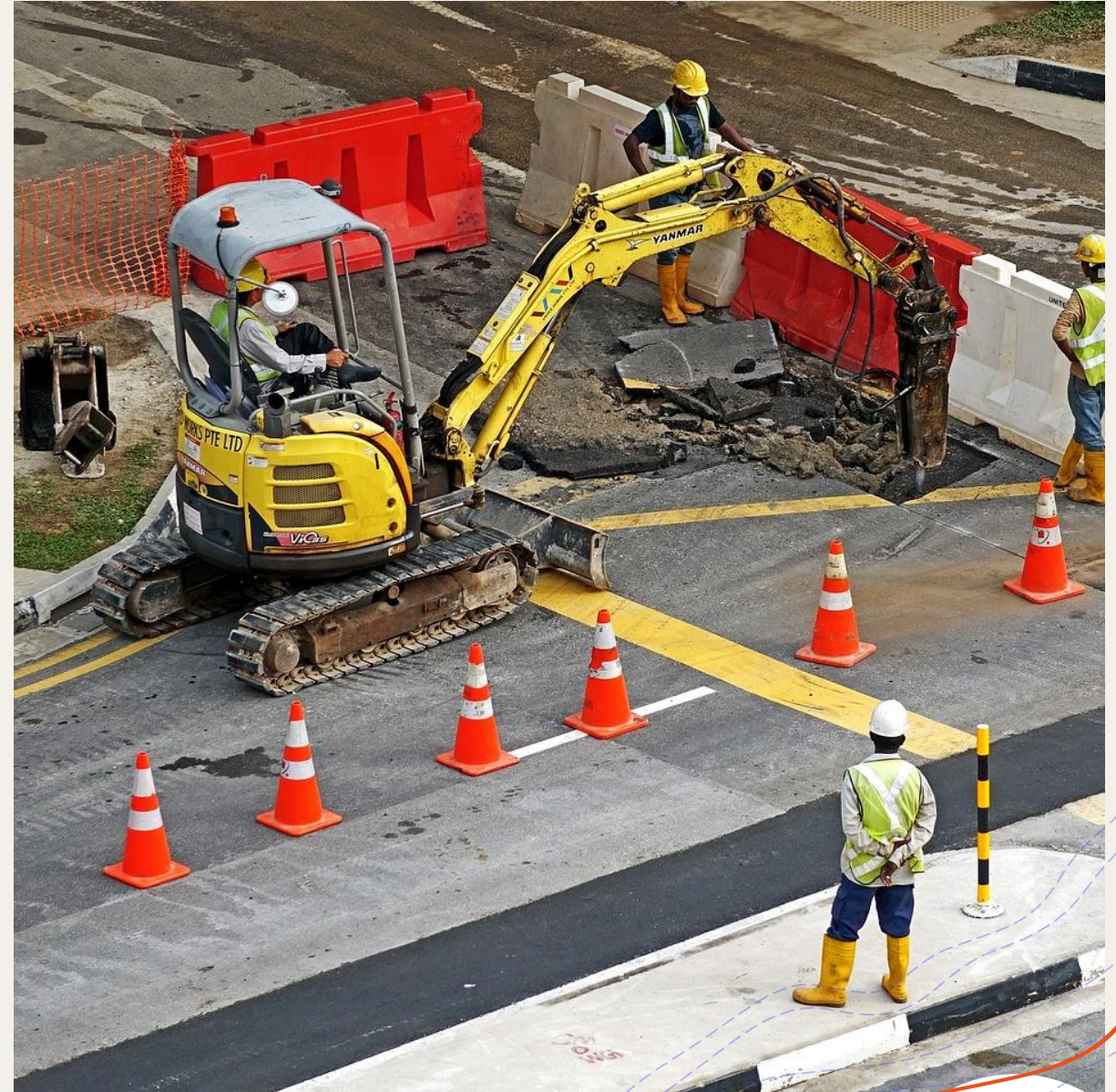
After the suit is filed the parties engage in "discovery" where the parties exchange information and gather evidence.

A subpoena is a discovery tool. The two we will focus on are:

- + Subpoena Duces Tecum
- + Deposition Subpoena

When may your agency receive a subpoena?

- 1) Your agency is involved in a lawsuit.
- 2) Your agency is the records holder.



How subpoenas work

Subpoena Duces Tecum

Subpoena for the production of evidence

- + It is a court order requiring the person subpoenaed to produce books, documents or other records under his or her control at a specified time/place in a court hearing or a deposition.
- + Oftentimes, compliance can be achieved by mailing, or sending records via e-mail, or providing the records at a specified date without an in-person appearance if arranged in advance

Deposition Subpoena

- + It is a court order requiring a person who is not a party to a lawsuit to provide copies of business records and/or appear at a deposition to answer questions asked by one party in a lawsuit.

Tips for responding to a subpoena

- + Do not put on your PRO hat, this is not a Public Records Request under Ch. 42.56 RCW.
- + Do not ignore the subpoena.
- + Talk with your legal counsel, particularly if your agency is involved in the suit.
- + Talk with your legal counsel and others that are on a need to know basis. Don't broadcast everything about the subpoena.
- + Don't destroy records – sound familiar – destruction may be “spoliation” which could significantly adversely impact the agency's position.
- + You may be able to object to some or all of the content, work with your legal counsel. Possible objections may include:
 - + Does not allow sufficient time to comply.
 - + Seeks irrelevant evidence.
 - + Requires disclosure of privileged or other protected information.
 - + Subjects the recipient to undue burden or expense.
- + Production of records may be by categories identified in the subpoena, as they are maintained in the ordinary course of business, or both.

Statute Requires Disclosure

Certain records must be made
available to state or federal officials.



A sampling of access statutes

Employee Names

Every employer shall keep a record of the names of all employees employed by him or her, and shall on request permit the director [of L&I] to inspect such record. RCW 49.12.050.

Audits

The State Auditor exercises constitutional authority to assure public agencies spend money appropriately and in the public interest. Also investigates allegations of waste, fraud or abuse of public funds. See RCW 43.09.050, 165.

Financial Reports

All local governments must submit an annual financial report within 150 days of the end of the local government's fiscal year. RCW 43.09.230.

Worker Injury Reporting

Employers must submit annual OSHA reports. Employers must report specified worker injuries within 8 hours for certain significant incidents and 24 hours for other identified incidents. WAC 296-27-02105; WAC 296-27-031.



“I may not have gone where I
intended to go, but I think I have
ended up where I intended to
be.”
– Douglas Adams –

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