

# PUBLIC RECORDS AND INFRASTRUCTURE PROJECTS



**IACC**  
INFRASTRUCTURE ASSISTANCE  
COORDINATING COUNCIL





# LOCAL GOVERNMENT PRA CONSULTATION PROGRAM



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**Technical Assistance – Training – Risk Mitigation – Best Practices**



# 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 the PRA and an agency's obligations.
- Opinions and thoughts shared today are not necessarily the views of the AGO or the Attorney General.



# THE REQUEST

I would like a copy of all records in the planning, design and construction of the Brightwater treatment facility and effluent tunnels from Woodinville to Point Wells and the Puget Sound outfall piping.

# PUBLIC RECORDS ACT (RCW 42.56)

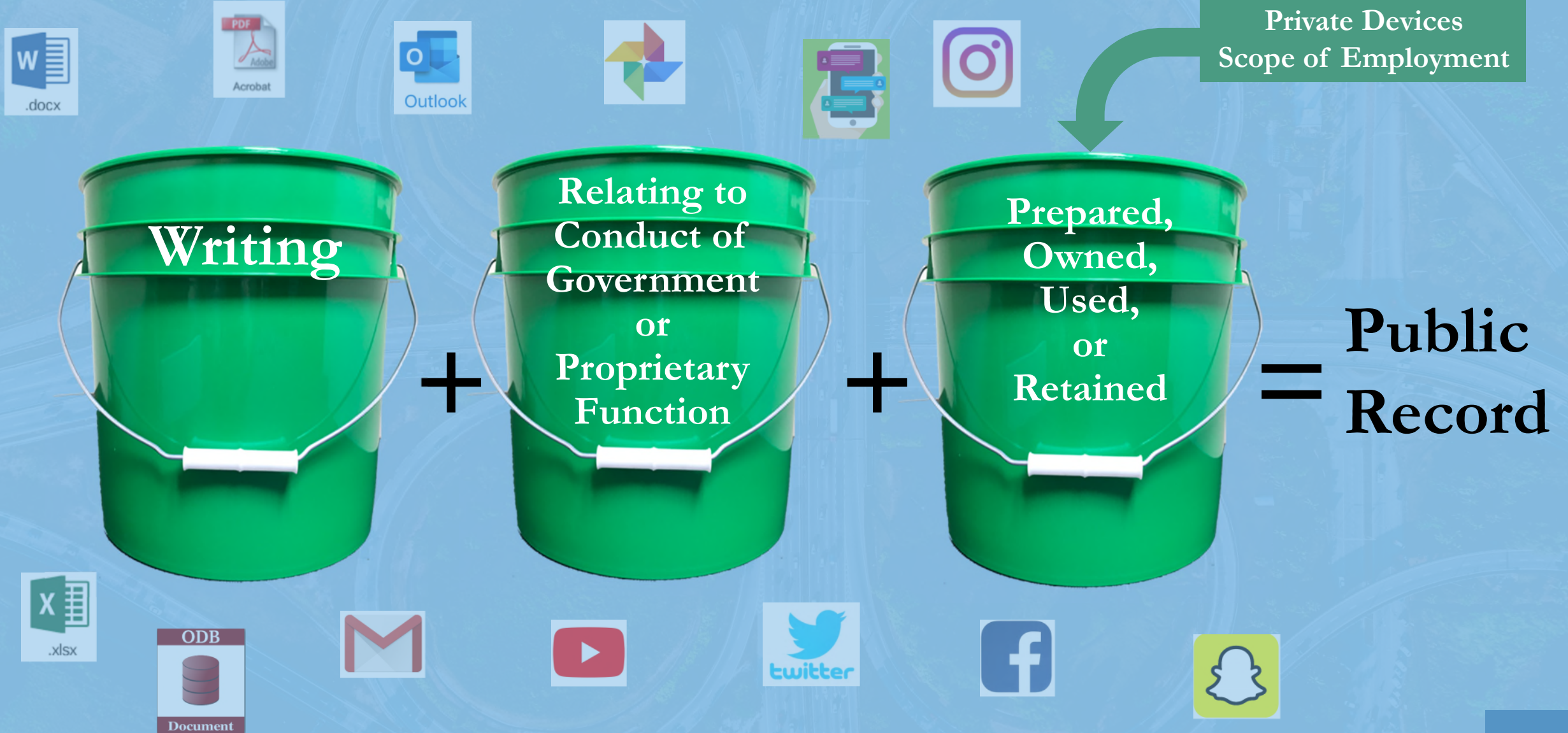
Consistent with the PRA's 'strongly worded mandate for broad disclosure of public records,' we construe the statute's disclosure requirements liberally and its exemptions narrowly.

*Washington State Supreme Court*

- Public records of government agencies are **presumed to be open to disclosure.**
- Non-exempt public records must be disclosed.
- Records or information in records can be withheld only if law allows. Exemptions are “narrowly construed.”
- **Location does not matter.** Public records can be located in/on agency files/accounts/servers or non-agency files/accounts/servers.
- Public records must be retained pursuant to records retention laws (RCW 40.14).



# Public Records Defined

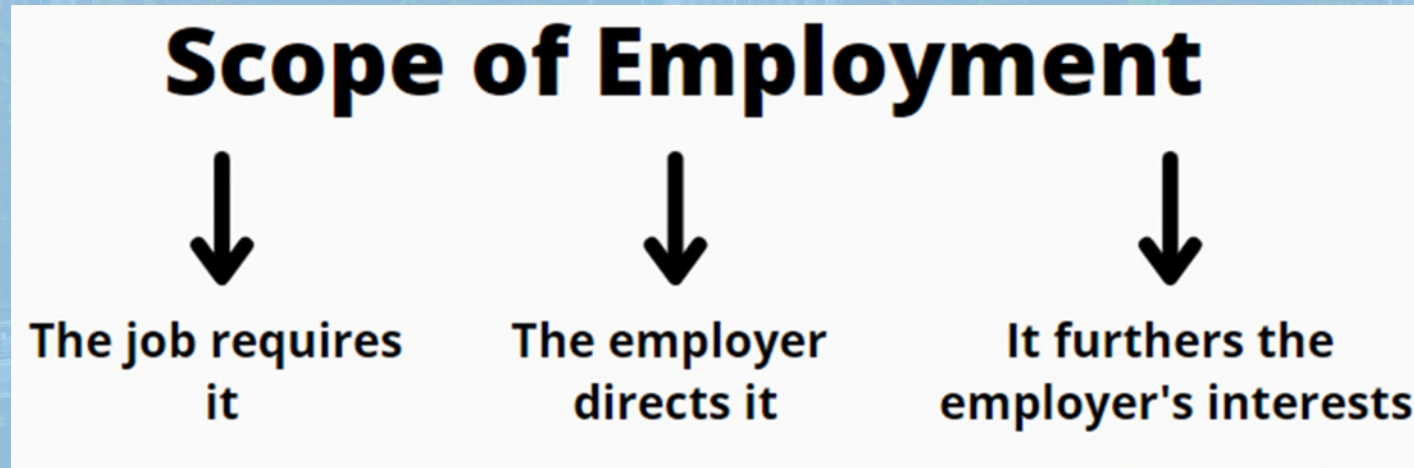


Regardless of physical form or characteristics.



# PERSONAL DEVICES & ACCOUNTS

Includes - personal cell phones, text messages, email accounts, and social media accounts.



The public employee must obtain, segregate and produce to the employer those public records that are responsive to a PRA request from the employee's personal accounts, files, and devices.

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Bottom Line

Records belong to the agency. They are not personal records.





# THE SEARCH IS ON...

An agency must conduct an adequate search for requested records.

*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 260 P.3d 119 (2011);  
*Fisher Broadcasting v. Seattle*, 180 Wn.2d 515, 326 p.3d 688 (2014); *Block v. City of Gold Bar*, 189 Wn. App. 262, 355 P.3d 266 (2015); *Kozol v. Department of Corrections*, 192 Wn. App. 1, 366 P.3d 933 (2016).

- The search must be reasonably calculated to uncover all relevant documents.  
*Id.* See also *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015).
- An agency is not required to go outside its own records in its search.  
*Limstrom v. Ladenburg*, 110 Wn. App. 133, 39 P.3d 351 (2002); *Bldg. Indus. Ass'n of Wash .v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196 (2009).
- Your records may be held by others.  
*Banks v. City of Tacoma*, Unreported, Decided June 2, 2021.



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# CONCERNED RATEPAYERS ASS'N V. PUD NO. 1 OF CLARK COUNTY

- Inquiry is whether the requested information bears a nexus with the agency's decision-making process.
- A nexus 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.
- Whether information has been "used," does not turn on whether the information is applied to an agency's final work product.
- 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.





# CEDAR GROVE COMPOSTING V. CITY OF MARYSVILLE

- Q: Whether records prepared and held by a private third-party contractor who provided professional services to the City of Marysville are Public Records?
- A: Under these facts, yes. Marysville knew what Strategies was doing, paid them for those activities, was generally aware that there were documents in Strategies' possession created during those activities, and discussed the contents of some of those documents with Strategies.” Contrary to the City's assertion at oral argument that it was “utterly oblivious” to the existence of these documents, the record before us shows that nine months before Cedar Grove filed suit, Marysville knew about them and knew further that Cedar Grove might attempt to obtain these records with a PRA request.





# RECORDS SEARCH RESPONSIBILITIES

## Plan searches:

- Understand your agency. Who holds what records. What are the records storage locations and systems.
- “Easy” vs Complex searches.

## Document ALL your search efforts including:

- Search terms used.
- Locations searched.
- Description of records produced & how.
- Description of records not produced.

Just because you looked once does not mean you are done; follow up and follow the breadcrumbs.





# PREPARING FOR PROPRIETARY & CONFIDENTIAL INFORMATION

Agencies should be very clear how they will handle any proprietary or confidential information provided by the contractor.

Recommended language for contracts and solicitations include the following :

- The bidder/contractor will initially identify (mark) any claimed proprietary or confidential records. See WAC 480-07-160(4) & (5).
- The agency will timely notify the bidder/contractor of any request for claimed proprietary or confidential records.
- The agency will provide the bidder/contractor a reasonable amount of time to obtain a court order enjoining production under RCW 42.56.540.
- Disclose the claimed proprietary records if the contractor does not obtain a court order prior to the agency deadline.
- The contractor may and likely will need to go to court to argue for withholding of a record or records.



## WAC 480-07-160

# CONFIDENTIAL AND OTHER RESTRICTED INFORMATION

(4) Exempt Information, (5) Confidential Information, & (6) Highly Confidential Information

(a) *Designating information as exempt from disclosure.* Any provider claiming that information provided to the commission is exempt from disclosure/confidential/ highly confidential must make that claim in writing at the time the provider submits the document containing the information. The provider must also state the basis for the claim ... at the time the provider submits information claimed to be exempt.

(b) *Provision of documents with information designated as confidential.* Any provider ... must submit both a redacted and an unredacted version to the commission.

(c) *Marking and submission.* The provider must follow specific submission requirements including identifying text and submission on yellow paper.

(d) *Requests for information designated as confidential.* The Agency will comply with PRA, including 3<sup>rd</sup> Party Notice or Discovery Rules.



# CONTRACTS FOR BUILDING AND MAINTAINING INFRASTRUCTURE

- The contract is a public record.
- What's in a name? Contract, Solicitation, Grant, etc.
- Agencies cannot contract away statutory obligations under the PRA.
- Agency cannot promise confidentiality of a public record if the law does not permit withholding of the record or information.



# EXEMPTIONS – A FOUNDATION

- Records are presumed open.
- An exemption must exist in law (state or federal; PRA or other laws). So where do I find them?
- Exemptions are narrowly construed.
- The individual asserting the exemption bears the burden of proof.
- An agency must, in writing, cite the exemption for the requester and provide a brief explanation. Typically, agencies provide an “Exemption Log.”
- No “silent withholding.”
- The majority of exemptions are discretionary.



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# PRELIMINARY DRAFTS, NOTES RECOMMENDATIONS, RCW 42.56.280

- Records may be withheld if they pertain to the agency's deliberative process and show the exchange of opinions within an agency before it reaches a decision or takes an action.
- MIGHT be considered by an agency during the bid process, when an agency does not have a stand-alone exemption providing for non-disclosure of records during that process, and particularly for its bid evaluations. **TALK WITH YOUR ATTORNEY.**
- The materials covered by the exemption reflect policy recommendations and opinions and not raw factual data on which a decision is based.
- Does not apply to a record when publicly cited by an agency in connection with any agency action.
- Only protects records during a limited window of time while the action is “pending,” and the withheld records are no longer exempt after the agency takes final action.



# STATE AGENCY BID RECORDS

- State agency procurement statutes for contracts governed by chapter 39.26 RCW (“Procurement of Goods and Services”) may be Confidential until the bid is announced *See* chapter 39.26 RCW, RCW 39.26.030
- **ONLY APPLIES TO STATE AGENCIES.**
- An exemption provision comparable to RCW 39.26.030 applicable to local government agency bid records has not been located at this time.



# CONTRACT MANAGEMENT AND COMPLIANCE MONITORING

- In 1979 the City Aberdeen awarded a contract for rehabilitation of the City's sewer system. Federal law required submission of certified copies of payroll records to assure compliance with prevailing wage. Records submitted to the city included employee names, job classifications, hourly wage, hours worked and total pay for the week. A labor union requested copies. The contractor sought to block release relying on what is currently RCW 42.56.240(1). The City contended some information was private concerning the employees.
- The City in this capacity was not investigative or enforcement. The information did not meet the PRA's "Privacy Standard" to withhold.

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, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.



# Northwest Gas Association v. Washington Utilities and Transpiration Commission

“the Pipelines have established a likelihood of proving at trial that the requested shapefile data falls under the statutory security exemption, which, we repeat, expressly includes “portions of records assembled, prepared, *or maintained to prevent, mitigate, or respond to criminal terrorist acts.*” RCW 42.56.420(1). The Legislature’s use of the conjunctive “or” clearly indicates their intent that “maintaining” records to mitigate or to respond to terrorist acts is sufficient to qualify that information for the security exemption, even if these records were not initially assembled or prepared for such security purposes.”



# PROTECTION OF INTELLECTUAL PROPERTY

Federal and state laws may protect “intellectual property.” “United States [federal] intellectual property law protects four main categories of intellectual property: patents, trademarks, copyright and trade secrets.”

*John Delaney, Comment, Safeguarding Washington’s Trade Secrets: Protecting Businesses from Public Records Requests, 92 Wash. L. Rev. 1905, 1911-1912 (2017).*

A third party seeking to enjoin release of intellectual property must demonstrate an applicable exemption AND 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.

*RCW 42.56.540; Lyft v. City of Seattle, 190 Wn.2d 769, 418 P.3d 102 (2018).*



# FINANCIAL, COMMERCIAL AND PROPRIETARY INFORMATION; RCW 42.56.270

- Exempts Valuable formulae, designs, drawings, computer source code or object code, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss.

- Purpose: to “prevent private gain derived from the exploitation of potentially valuable intellectual property created for the public benefit.”

*Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994).

- A party claiming confidentiality of records as research data, or “valuable formulae” must show disclosure would result in (1) unfair private gain and (2) “public loss.”

*Robbins, Geller, Rudman, & Dowd, LLP v. Office of the Attorney General*, 179 Wn. App. 711, 328 P.3d 905 (2014)



# UNIFORM TRADES SECRETS ACT, RCW 19.108

Under the UTSA, a “trade secret” consists of “information, including a formula, pattern, compilation, program, device, method, technique, or process that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Just being a Trade Secret is not enough, for an injunction moving party must also demonstrate 1) examination would clearly not be in the public interest and 2) would substantially and irreparably damage any person, OR would substantially and irreparably damage vital governmental functions. RCW 42.56.540



# COPYRIGHT ACT, 17 U.S.C. §106 *ET SEC*

Copyright is a type of intellectual property that gives the owner the exclusive right to copy, distribute, adapt, display, and perform the protected material. There are time limitations and “fair use” may allow for use. The bidder or contractor asserting the copyright protection is often the more appropriate party to provide that information to a court.

## *Fair Use in Action*

Kitsap County improperly asserted Copyright as an exemption. Use of copyrighted engineering drawings in preparation for comments and criticism in public hearings and appeals on proposed residential developments was reasonable “fair use.”

*Lindberg v. County of Kitsap*, 133 Wn.2d 729, 948 P.2d 805 (1997)



# COMPUTER AND TELECOMMUNICATIONS NETWORKS

The following information relating to security is exempt from disclosure :

Information regarding the public and private infrastructure and security of computer and telecommunications networks, consisting of security passwords, security access codes and programs, access codes for secure software applications, security and service recovery plans, security risk assessments, and security test results to the extent that they identify specific system vulnerabilities, and other such information the release of which may increase risk to the confidentiality, integrity, or availability of security, information technology infrastructure, or assets.

RCW 42.56.420(4)



# RAIL FIXED GUIDWAY PUBLIC TRANSPORTATION SYSTEMS

The following information relating to security is exempt from disclosure:

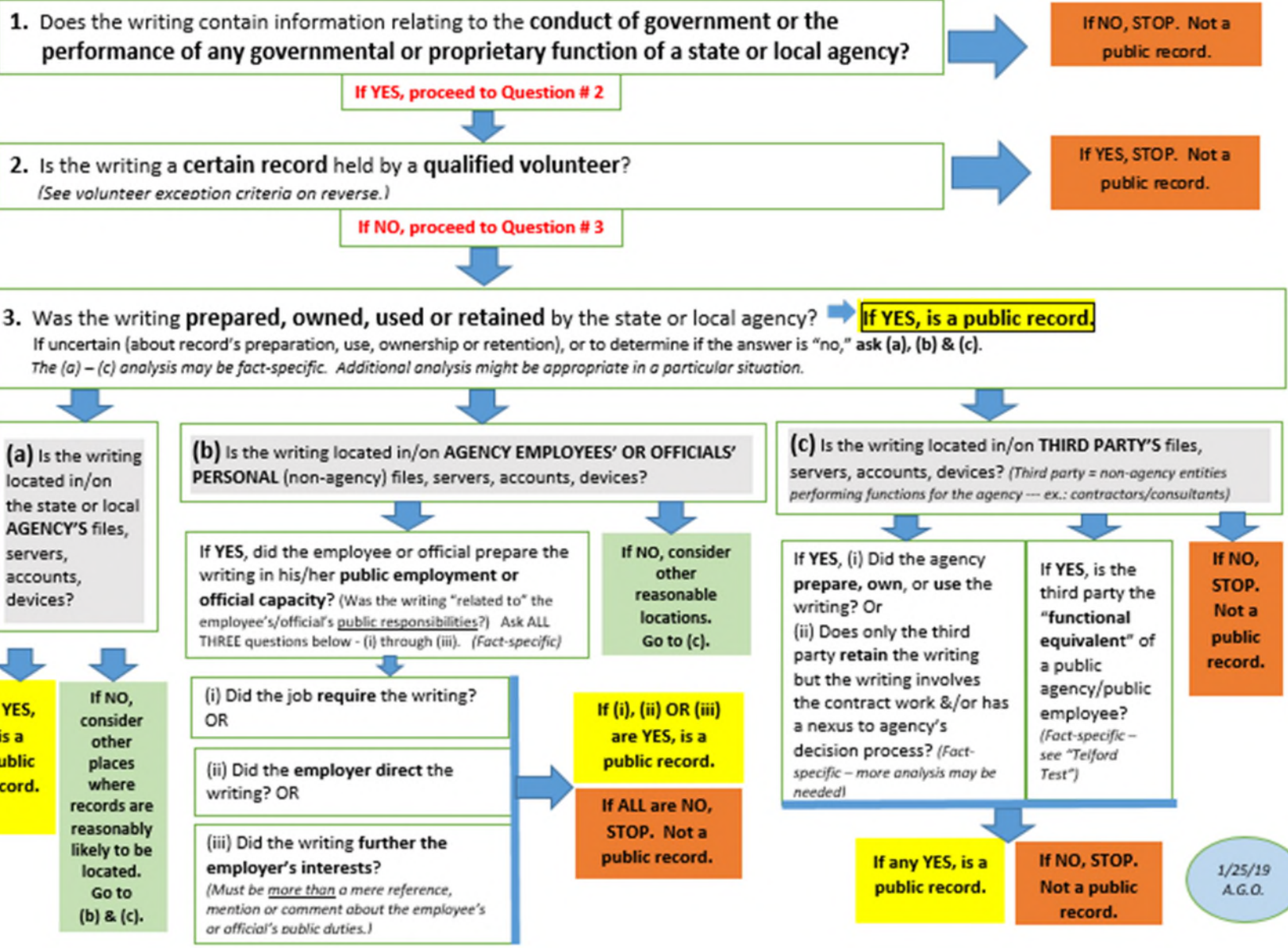
The system security and emergency preparedness plan required under RCW 35.21.228, 35A.21.300, 36.01.210, 36.57.120, 36.57A.170, and 81.112.180.  
[Safety program plan and security and emergency preparedness plan.]

RCW 42.56.420(5)



## 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.*



1/25/19  
A.G.O.



# Questions?

