

# INFRASTRUCTURE AND PUBLIC RECORDS REQUESTS



# LOCAL GOVERNMENT PUBLIC RECORDS ACT 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.

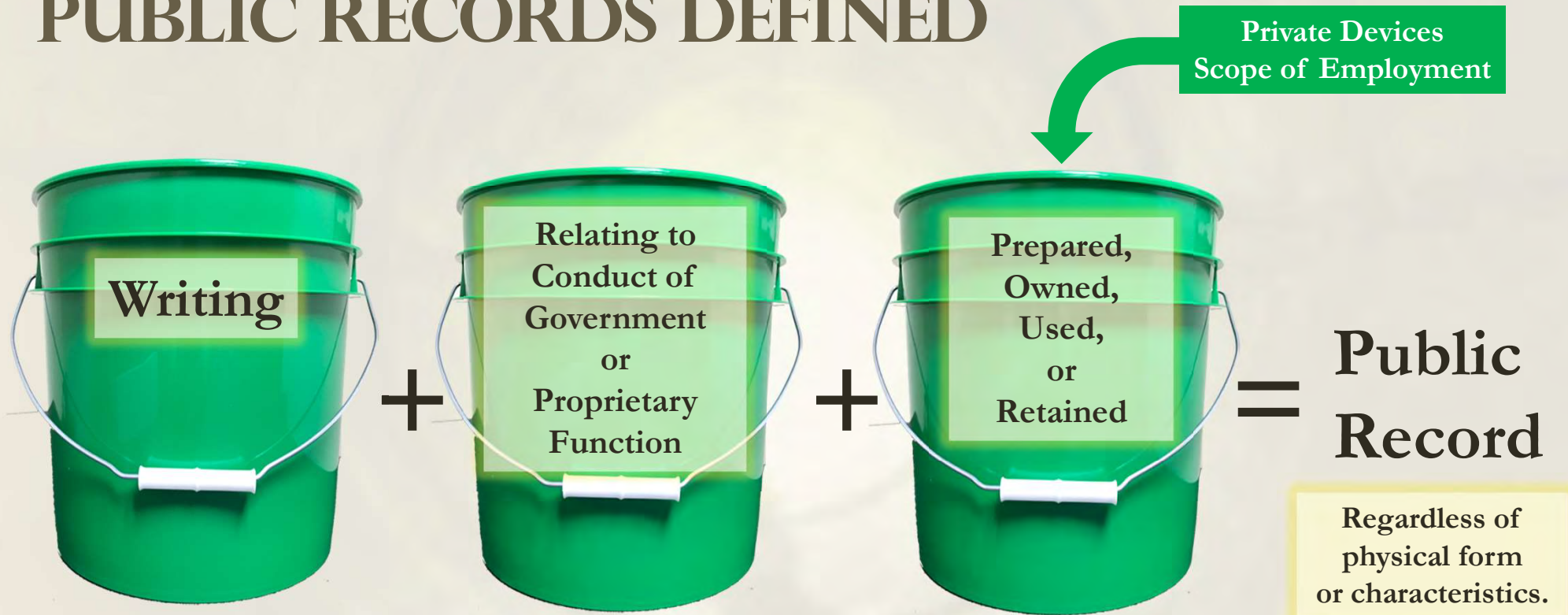
# PUBLIC RECORDS ACT (RCW 42.56)

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



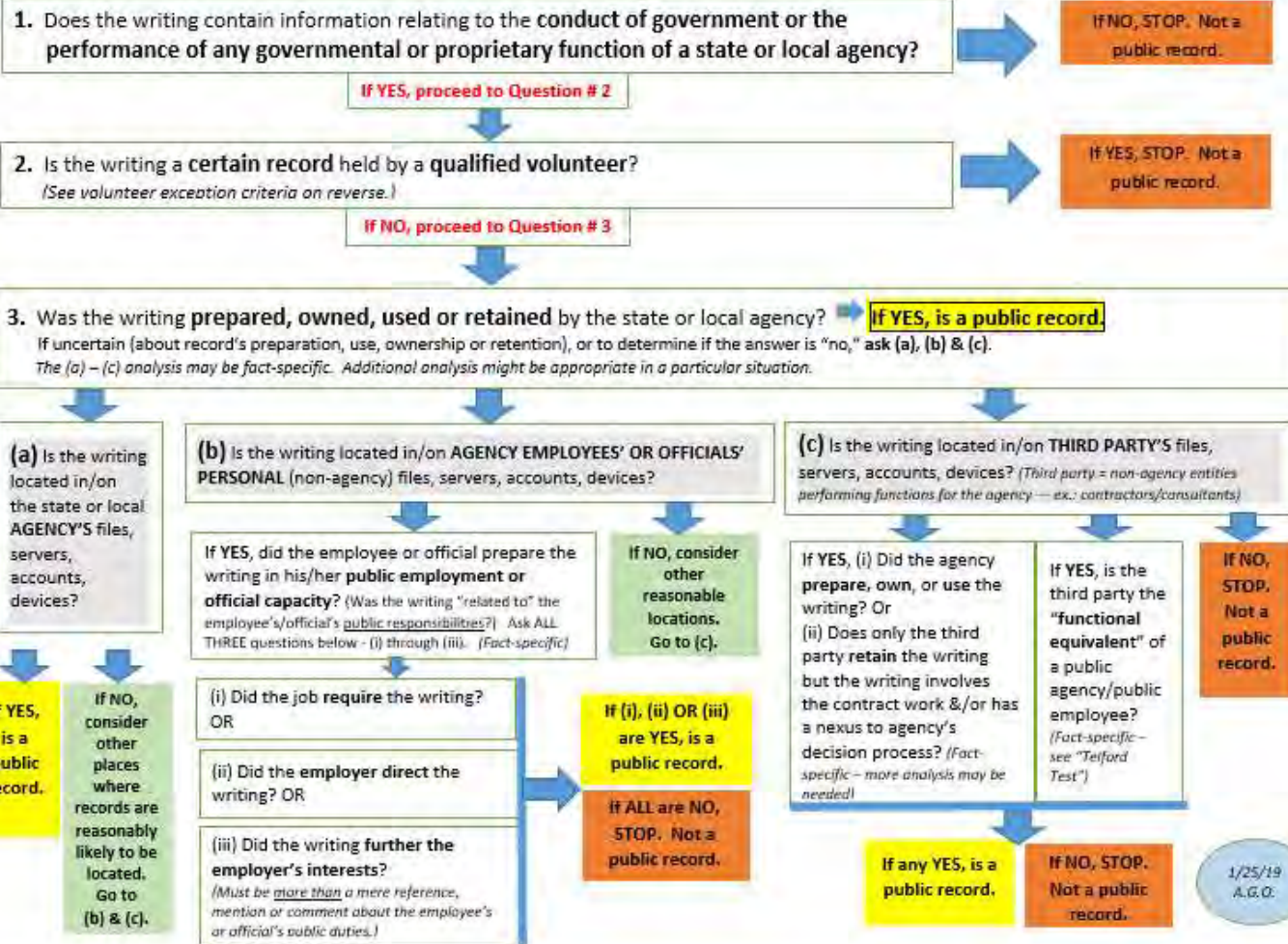
# CONCERNED RATEPAYERS ASS'N V. PUD NO. 1 OF CLARK COUNTY

- 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.



## 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.*



# RECORDS SEARCH RESPONSIBILITIES

*“The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents.”*

Plan searches:

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

Cast a wide net and document all of your search efforts including:

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

What if a contractor has agency records?





# CONTRACTS REGARDING 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.

# 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 (a common period is 10 business days).
- The agency will 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.

# Sample Vendor Proprietary Information Provision

Here is a sample provision that may come up in a Vendor Template:

7.6 Confidential Information. Each party may have access to information that is confidential to the other party ("Confidential Information"). For purposes of this Agreement, Confidential Information shall include any information that is clearly identified in writing at the time of disclosure as confidential as well as any information that, based on the circumstances under which it was disclosed, a reasonable person would believe to be confidential. Customer's Confidential Information shall include, but not be limited to, Customer Data. A party's Confidential Information shall not include information that (i) is or becomes a part of the public domain through no act or omission of the other party; (ii) was in the other party's lawful possession prior to the disclosure without any obligation of confidentiality and had not been obtained by the other party either directly or indirectly from the disclosing party; (iii) is lawfully disclosed to the other party by a third party without restriction on disclosure; (iv) is independently developed by the other party without use of or reference to the other party's Confidential Information, as established by written records. The parties agree to use commercially reasonable efforts not to make each other's Confidential Information available in any form to any third party. Notwithstanding the foregoing, Customer acknowledges and agrees that [REDACTED] may disclose Customer's Confidential Information to its Third Party Vendors solely to the extent necessary to provide products or services under this Agreement. This Section will not be construed to prohibit disclosure of Confidential Information to the extent that such disclosure is required by law or valid order of a court or other governmental authority; provided, however, that a party who has been subpoenaed or otherwise compelled by a valid law or court order to disclose Confidential Information (the "Responding Party") shall first have given sufficient and prompt written notice to the other party of the receipt of any subpoena or other request for such disclosure, so as to permit such party an opportunity to obtain a protective order or take other appropriate action. The Responding Party will cooperate in the other party's efforts to obtain a protective order or other reasonable assurance that confidential treatment will be afforded the Confidential Information. If the Responding Party is compelled as a matter of law to disclose the Confidential Information, it may disclose to the party compelling the disclosure only that part of the Confidential Information as is required by law to be disclosed.

# 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.

# 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.

# 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).*

- Financial, Commercial and Proprietary Information; RCW 42.56.270
- Uniform Trade Secrets Act; RCW 19.108
- Copyright; 17 U.S.C. §106

# 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)

# 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.

# THE INTERSECTION OF INFRASTRUCTURE RECORDS AND THE PRA

**Northwest Gas Association v. Washington Utilities  
and Transportation Commission**

141 Wn. App 98, 168 p.3d 443 (2007)

**Northwest Gas Association v. Washington Utilities and Transportation Commission**, 141 Wn. App 98, 168 p.3d 443 (2007).

“Thus, 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.”

Questions?

