To: Attorney General Nick Brown

Via agorulemaking@atg.wa.gov

FR: Representative Gerry Pollet, JD. Gerry.pollet@leg.wa.gov

RE: Comments on Model Rules for Public Disclosure (Public Records Act) RDS-6700.2

Date: November 16, 2025

I want to commend you and the staff of the Office of the Attorney General for your proposed update to the Model Rules for the Public Records Act, and encourage their adoption as proposed with several additions explained in these comments.

I was the House prime sponsor of the legislation ("Open Government Trainings Act", 2014) which ensures that all elected officials and public records officers are trained to meet their obligations under the Act, which are central to accountability of public officials to the public, essential to building trust in government, and essential to preserving democracy (the Act also applies to training under the Open Meetings Act). I have also been the sponsor of many other pieces of legislation to preserve and expand the right of the public to know what our government is doing – and what special interests may be asking our government officials to do.

I have taught Open Government law and policy and been a presenter at many continuing legal education programs and trainings to assist citizens to use the Public Records Act and FOIA.

And I have had to litigate to obtain records from local and state agencies.

Based on my decades of effort to preserve and expand openness, I thank you for the Proposed Model Rules and urge their adoption with some additions discussed below.

I have no doubt that the Proposed Model Rules will improve agency (both state and local) efficiency as well as transparency. Most importantly, the Proposed Rules will improve the functioning of our democracy and trust in government.

All too often agencies' inefficiencies in managing records and inability to identify relevant records are the source of lengthy delays in disclosure under the PRA (and, sadly, often the cause of penalties). That inefficiency has serious consequences for agencies meeting their regulatory obligations (i.e., under the Administrative Procedures Act) in processing regulatory applications, reviewing complex proposals for action, in land use decisions, etc. Below, I provide examples of the benefits to agency management and efficiency from the AGO Proposal and offer an additional proposal for indexes to be available.

As a long-time member of the Joint Legislative Audit and Review Committee (JLARC) (and current Chair), I urge that this effort utilize the data generated by the annual report to the Legislature compiled by the Legislative Auditor's JLARC staff on the time to respond to records requests and costs of maintaining records and responding to requests for disclosure.

That report documents that the length of time to disclose records has increasing despite the incredible expansion of search and records management tools available to agencies (i.e., use of AI in addition to key word searches). As The Washington Coalition for Open Government summarized, the self-reported data from agencies document that "average days to final

disposition" for state agencies increased 50%[1] and overall wait times for records disclosure increased by approximately 60% in the past five years. See Washington Coalition for Open Government data chart based on the most recent Joint Legislative Audit and Review Committee PRA survey data.

The PRA has always required "prompt" disclosure of records, per RCW 42.56.080:

> (2) Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them **promptly available** to any person including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure.

Emphases added.

And RCW 42.56.020 is even entitled in the Revised Code of Washington as "Prompt responses required:

> **RCW 42.56.520 Prompt responses required.**
>
> (1) Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives. Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond in one of the ways provided in this subsection (1):

Thus, it is disheartening that some public commenters on the Proposed Rule update object to the inclusion of the references to "prompt" and "promptly." It is vital that the Proposed Rules provide improved guidance to agencies on meeting their fundamental duties to respond and provide records promptly. Not referring to the fundamental statutory obligation would be to encourage agencies to stick their heads in the sand and not attempt to adopt best practices to meet their obligations.

Additionally, as WCOG commented, WAC 44-14-020 should require "the most timely possible action on requests."

The self-reported costs by agencies to the JLARC Survey[2] reveals that agencies are typically spending in the range of .1 to .4% (one tenth of one percent to four tenths of one percent) of

---

[1] https://public.tableau.com/app/profile/jlarc/viz/2023PublicRecordsReportingResponseTime/ResponseTime?:render=false Sorted by state agencies and applying "metric 3 average days to final disposition." Most PRA requests for local governments are from criminal defense attorneys. These are most typically responded to within five days. Since most requests are simple and closed in the five day initial response, the trend to increasingly lengthy waiting time periods is of great concern for records relating to major pending decisions, elections, regulatory actions with comment periods, etc.

[2] The self-reporting of costs without verification by JLARC has been criticized as likely encouraging some agencies / governmental bodies to inflate their costs of responding to records requests to advance their legislative agendas to reduce their obligations under the PRA. For example, legal costs to have attorneys reviewing all records requests and each record prior to disclosure, even when a trained officer has not identified a potential exemption applicable to the record, have been acknowledged as being reported by some agencies.

their entire agency annual budgets on managing and responding to records requests! Yet, public administration and open government research often advise that agencies look to "one percent for openness" as a minimum standard.

"Prompt response" requires an agency to devote adequate resources to both managing and responding to requests. Agencies which do not put any priority on funding their records management, electronic indices and search capabilities or which do not have an adequate number of trained public records officers are not responding promptly.

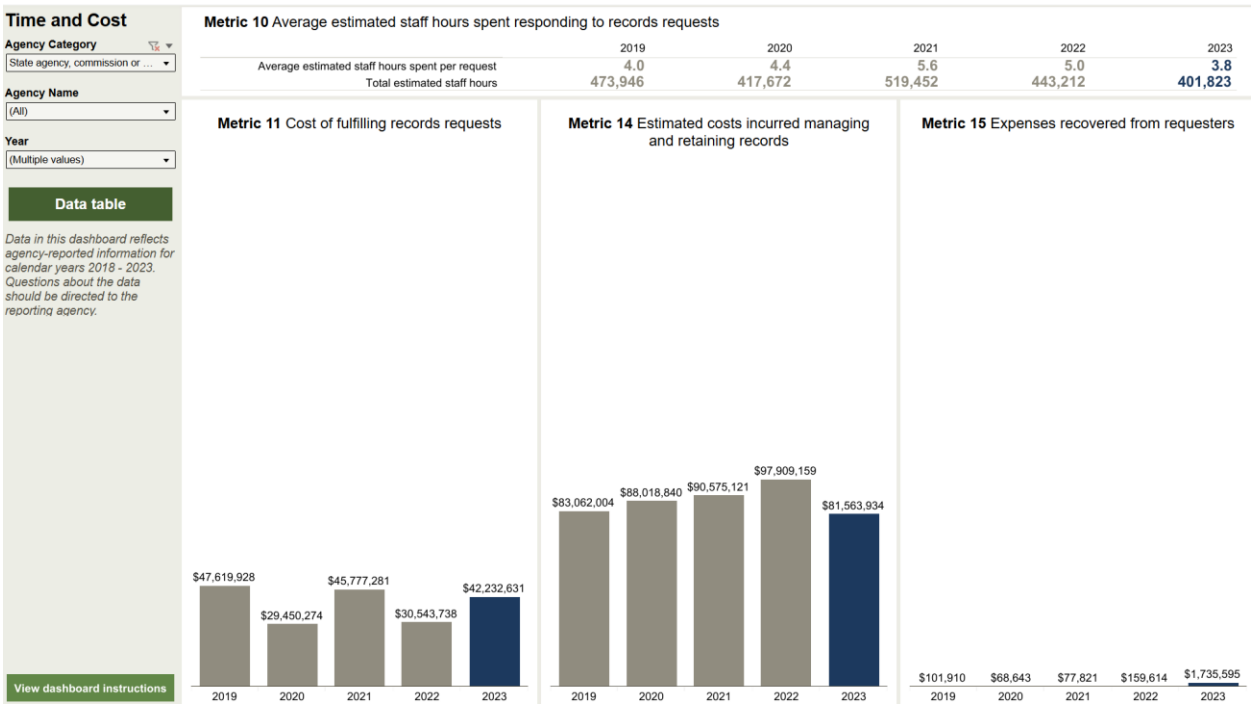
The JLARC data provides strong indications that some agencies are not ensuring that they have the basic resources to respond promptly to requests – despite the fact that such investment requires much less than one percent of total agency budgets and improves overall agency management and outcomes. The insignificant amount of funds devoted to records management and response to PRA requests – often spending between .1% and .4% of total agency budgets – is reflected in the growing backlog of pending PRA requests at the end of each year. This grew by 20% from 2022 to 2023 and by 50% over the past five years.

Request for Addition: I ask that the model rules include additional guidance that spending far less than one percent of an agencies' budget on records management and disclosure (not including legal costs or penalties for violations of the Act) *may* be considered by courts as bearing on whether the agency is conducting reasonable searches for records.

Washington's state agencies' total budgets for 2023 exceeded $30 billion. The total amount of self-reported costs for managing records by all state agencies was $81.5 million and $42.2 million for responding to records requests.[3] In sum, state agencies spent only .014% of their total budgets on records requests and just .4% on the total expenditure for records management and disclosure. Agencies expending less than .3% of their budget on managing their records - which is necessary for them to be efficient in their overall mission – are not likely to find sympathy in courts if they claim that it is unduly burdensome for them to manage their records in such a manner that they are searchable and disclosable in a reasonable amount of time.

Screenshot of Tableau data run from JLARC report January 2025 for state agencies' costs:

[3] The total costs for responding to requests by all reporting local governmental and state agencies in 2023 was $136.8 million and the cost of records management was $213.6 million (rounded). The ***average staff time spent responding to a request was just 2.6 hours***. 2023 Public Records Reporting: Time and Cost by JLARC at: https://public.tableau.com/app/profile/jlarc/viz/2023PublicRecordsReportingTimeandCost/TimeandCost?:render=false



Comment on WAC 44-14-030: The indexing provisions implementing RCW 42.56.070 and the addition of the following language in WAC 44-14-030 are very important to ensure that local and state agencies improve the efficiency of records management and do not destroy records which are important to sound decision-making, avoiding arbitrary and capricious actions as well as in meeting public records disclosure (and discovery obligations in event of litigation):

> (3) Organization of records. The (name of agency) will maintain its records in a reasonably organized manner and accessible to staff responsible for searching and producing records. The (name of agency) will take reasonable actions to protect records from damage and disorganization, including preventing unauthorized destruction or removal of original records by employees, elected officials, and others. A requestor shall not take (name of agency) records from (name of agency) offices without the permission of the public records officer or designee. If (name of agency) employees create or receive public records on personal devices or in personal accounts, such employees shall transfer or copy the records that are being retained to work devices or work accounts as soon as practicable.

The guidance which will be provided if these provisions are adopted will dramatically improve the efficiency of our state and local agencies.

As an elected official, I know how much time my fellow elected officials spend searching personal devices and accounts for official business records. In numerous discussions and training sessions, I have never had an official share that they were provided guidance to transfer or copy their official work records to an official account that could be readily searched using key word and similar tools for relevant records. Just as importantly, I have interacted with numerous agency officials whose work products were not readily available for their agency because of this lack of guidance.

Adding the proposed language should greatly improve agency efficiency by encouraging provision of the tools to staff and elected officials to easily transfer records from personal devices and accounts to the official agency, searchable record system.

Thus, I support the comment of the Washington Coalition for Open Government on searchability and transfer of records to agency records systems with the addition of the added underlined language:

> We agree with the proposal to spell out in WAC 44-14-030(3) that agencies must keep records organized in a way that they can be readily accessed by public records officers and other staff with PRA responsibilities. We support the proposed changes that would ensure that records created or received on personal devices are transferred to or duplicated in agency systems as soon as practicable, and are not stored solely on personal devices. Furthermore, rules should warn agencies and staff that withholding or inadequately protecting public records on personal cellphones or other devices can result in disciplinary action and destruction of records may be a crime.
>
> We also agree that WAC 44-14-030(3) should be updated to reflect that modern threats to preservation of public records stem mostly from misuse of new technology by government employees and elected officials. WashCOG has learned of too many instances in which employees or elected officials have failed to retain email, text, chat and other messages, usually on personal electronic devices or on ephemeral communication platforms such as Microsoft Teams. Our report documents several high-profile cases and includes recommendations to limit this practice. It notes, "This practice imposes a burden on agencies and ultimately taxpayers, by making it more difficult and costly to retrieve records in response to a PRA request." Model Rules should end the use of auto-deletion of public records, configuring those platforms used for government business, such as Microsoft Teams, to comply with state records retention schedules. Preservation management should be overseen by records management staff.

Additional language requested to be added to WAC 44-14-030:

> The use of electronic records and databases with search tools makes if unlikely that a local agency (other than the smallest agencies for which the legislature provided an exception to posting open meeting notices online) will continue to find it "unduly burdensome" per RCW 42.56.070(3) and (4) to maintain and provide access to an online index identifying:
>
> "(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the agency;
>
> (c) Administrative staff manuals and instructions to staff that affect a member of the public;
>
> (d) Planning policies and goals, and interim and final planning decisions;

(e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and

(f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities of the agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights of the state, the public, a subdivision of state government, or of any private party."

RCW 42.56.070(3).

Any agency will benefit from having such an electronic index of its significant guiding records, and there is no reason for such an index not to be available to the public. Not having such an index would appear to be a red flag in regard to the management of the agency and a likely invitation to have penalties imposed for not being organized to conduct reasonable searches for its most basic records.

My next area of comment is one that is vital for our Public Records Act to preserve and enhance democracy and ensure that public officials are accountable.

All too often, the public and journalists encounter delays in disclosure of requested records bearing on major public controversies, records which may bear on voters' decisions for an election, or records vital for informed comment on a formal agency proposal for which the agency has a strict deadline for public comment, or records relating to pending legislation being considered on a tight timeline by a local government or the Legislature.

Delayed disclosure of requested records bearing on a candidate's actions or lobbying of an official months after an election undermines democracy and prevents accountability.

Delaying disclosure of records that are essential for review of a proposal subject to a strict timeline for public comment by the delaying agency destroys trust in governmental decisions.

This is not a hypothetical concern. It is a frequent occurrence.

The PRA doesn't mandate that agencies respond to requests only in the order in which they were received or that a journalist or active citizen cannot submit a request to be able to comment on a pending deadline just because they have a prior request that the agency is slowly responding to in installments. Yet, agencies frequently make these very claims. I recently had such a response.

Agencies may not discriminate based on who the requester is. They may, and should, adopt guidelines (as some have done, such as in Kirkland) to create objective tiers for responding to requests based on complexity. The Model Rules should also provide guidance that agencies may create objective subject areas for which they will prioritize searches and disclosure.

Indeed, agencies which state they will not process a second request from the same person who has a pending request are discriminating against requesters. The intent of the Act is clear by ensuring that requesters are not required to identify themselves.

The Model Rules should encourage agencies to respond to requests in the "promptest manner possible" when the request is for records which relate to:

- Enabling the public to comment on a proposal for which the agency itself has a deadline for accepting comments.
    - **If the agency cannot disclose records prior to the end of the comment period, the Model Rules should encourage the agency to consider extending the comment period until the agency has provided the requested records, and provide the public with the rationale for its decision on the proposal / public comment website**;
- Elections, ballot measures and conduct or actions of public officials who will be appearing on an upcoming ballot.
    - The Model Rules should, at minimum, advise records officers and agencies that delayed disclosure or improper withholding of records relevant to a ballot measure or other election may be a factor in significantly increasing penalties. See Yousoufian v. Office of Ron Sims.
- Time sensitive matters of significant public concern being reported on by news journalists with publishing deadlines.

I join in support of the Washington Coalition for Open Government's comment:

● As proposed, WAC 44-14-040(1) should specify that public records officers can triage requests into simple and complex tracks. This would more fully satisfy the existing provision in this section that records should be provided "in the most efficient manner possible." Objectors have complained that it is not always possible early in the PRA process to determine if a request is complex or simple.

The proposed language merely says that this sorting may occur "when appropriate." That is not a burden; it opens the possibility that more requestors could be served more efficiently. We believe the statute allows records officers to prioritize simple requests ahead of large and complex requests. The Model Rules should make that clear. WAC 44-14-04003 already states that, "A relatively simple request need not wait for a long period of time while a much larger or more complex request is being fulfilled. Agencies are encouraged to be flexible and process as many requests as possible even if they are out of order."

● The language proposed for insertion into WAC 44-14-040(1) encouraging release of a single, identifiable record within five days is simple common sense. Again, note that the proposed wording says this should be done "where it is practicable to do so." No harm done. More transparency enabled.

● We support the language proposed for insertion into WAC 44-14-040(3) instructing records custodians to consider whether the requester has provided evidence that "time is of the essence" in fulfilling the request, and "if it is practicable to produce the records in the time frame provided by the requestor." (Emphasis added.)

● We support the language proposed for insertion into WAC 44-14-040(6) raising the standard for third-party notice to cases "which may substantially and irreparably damage any person or vital government function," which complies with the standard for enjoining release of a record. See RCW 42.56.540. Requiring agencies to "have a reasonable belief that" records are "arguably exempt from disclosure" is simple common sense. The practice of third-party notification has too often become a tactic for governments that

don't want to release information to delay or contravene their responsibilities for responding to requests.

In regard to WAC 44-14-040(12), I strongly support adding guidance that agencies must provide multiple notifications and a reasonable timeline before they close a request for failing to open and download an installment, non-payment, or not appearing to pick up records. I have encountered situations where an agency said it had closed a request due to failure to open an installment or pay when the requester was on a short vacation or ill (and email reply noted that).

I join WCOG's comment:

- Agencies should notify requesters that they are taking action that triggers the statute of limitations and when the one-year statute of limitations begins to run after a request is closed.
- Any notice of failure to pay for or pick up records requires an opportunity to cure the default and continue the production of the installments without demanding the requester make a new request and start over.

My final **proposed addition is for the Model Rules to include a reminder to agencies that they are required by law to complete the annual PRA reporting to the Legislature** if they incur costs exceeding $100,000 annually in relevant public records costs. As stated in the Executive Summary of the JLARC report:

> **Statute requires agencies to report data about public records activities**
>
> RCW 40.14.026 requires state, local, and other government agencies that are subject to the Public Records Act to report information about their public records activities.
>
> - Agencies that spent over $100,000 or more on public records requests in the prior fiscal year must submit data for 15 statutory performance metrics.
> - Agencies that spent less can report data voluntarily.

The report provides vital information for accountability and improving performance under the PRA. Report data for agencies indicate which agencies have adopted practices which improve openness and provide an important warning light for needed improvement.

Adoption of the Proposed Model Rules with the additions suggested will improve management efficiency and accountability of agencies – improving trust in government and faith in democracy.

Contact: Gerry.Pollet@leg.wa.gov