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PROSECUTING ATTORNEY

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Sent via email to agorulemaking@atg.wa.gov

RE: Proposed Amendments to the Model Public Records Act Rules, chapter 44-14 WAC

To Whom it May Concern:

We are writing to express feedback and our concerns regarding some of the proposed changes to the Public Records Act (“PRA”) Model Rules in chapter 44-14 WAC. We are civil deputy prosecuting attorneys and legal staff who respond to public records requests. Our agency endeavors to comply with the PRA, to promote transparency, and to serve the public. We believe strongly in the public's right to access records, and we work diligently to ensure that records are provided as expeditiously as possible.

The Model Rules are non-binding and are intended to set forth best practices for requestors and agencies. By law, local agencies are to consider the Model Rules. RCW 42.56.570. In practice, the Model Rules are often cited to in PRA litigation, and agencies are often held to the standards in the Model Rules as legal requirements. Further, the Model Rules inform both agencies and requestors as to reasonable expectations. As such, the effect of the proposed amendments on requestors and on local agencies should be carefully considered. We have detailed the areas of greatest concern for our agency below. We note that other agencies, in particular smaller agencies, may face additional challenges.

WAC 44-14-010: Proposed amendments adding the word “prompt” or “promptly” in three locations

We agree that under existing law, agencies are required to make records “promptly available” upon a request for identifiable records. *See, e.g.*, RCW 42.56.080.

We are concerned that the effect of adding three additional references to promptness may set unrealistic expectations for requestors; for example, suggesting that requestors should expect to receive records *more quickly* than they already are.

The state-wide JLARC data reporting shows that the number of requests for all agencies has been steadily increasing over time. The proposed amendments which add a new emphasis to the requirement for prompt responses from agencies could easily lead to an increase in frustration for requestors. Further, the addition of this amended language seems to imply that agencies aren't doing enough to respond quickly. That is simply not our experience. Based on the most recent year of JLARC reporting data (2023), we know that agencies are responding to approximately 55% of all requests within 5 days.

WAC 44-14-030(3): Proposed amendment requiring records to be maintained in a manner that is “accessible to staff responsible for searching and producing records”

This proposed amendment fails to recognize the diversity of records maintained by agencies, as well as the diversity of who may be assigned the task of searching for and producing records. For example, an agency

may receive a public records request for sensitive personnel-related records, including an employee medical file. The agency's Public Records Officer may not be an employee who would or should normally have access to those records. In order to respond to the request, the Public Records Officer may ask the employee who maintains medical files to search for records instead of accessing the full set of files themselves. This practice is perfectly appropriate under the PRA.

This proposed amendment, however, would suggest that the employee medical files need to be accessible to the Public Records Officer. This would potentially create other legal liability for the agency.

WAC 44-14-030(3): Proposed amendment requiring employees to transfer or copy public records created on personal devices/accounts to work devices/accounts as soon as practicable

We agree with the intent of this proposed amendment, and it is consistent with our agency's policies, but have concerns regarding the specific language used.

Many agencies do not provide their employees with work cell phones. Doing so is not a legal requirement, and it carries a significant cost. As a result, and in compliance with the PRA and with records retention requirements, employees may send transitory messages to each other on personal devices; for example, an employee may send a text message from their personal phone to another employee's personal phone indicating that they are running 5 minutes late. These messages have no retention requirement and can appropriately be deleted.

While the proposed language does include the phrase "that are being retained" it does not clearly convey to requestors that deletion of transitory messages is appropriate, and that those records do not need to be transferred to agency accounts for retention.

WAC 44-14-040(1): Proposed amendment that requests should be triaged into simple and complex requests, and that agencies endeavor to produce requests for a single record within five business days

The addition of "triaging requests into simple and complex tracks" (even with the current modifier of "when appropriate") is too prescriptive. The Model Rules should not set forth a specific process. The language would be more palatable if altered to say, "including, when appropriate, utilizing methods such as triaging requests into simple and complex tracks...."

However, we do not believe this addition is necessary at all. The Model Rules discuss timeliness at length in later sections (*see* WAC 44-14-04003 (3), paragraph 2 and 44-14-04003 (7)), both of which discuss this issue diligently, at length, and with more nuance.

Regarding the additional language specifying that agencies should response to simple requests within five business days, we are concerned about creating unreasonable expectations in requestors. We recognize that the proposed language says that agencies will "endeavor" to meet the timeline when it is "practicable to do so," but we can imagine many situations when meeting the timeline will not be feasible. For example, records which must be retrieved from archives, or which require extensive review for redactions, or where the requestor's request is not as simple as they believe it to be, all will require additional time for the agency's response. As noted above, agencies are responding to over 55% of requests within five days so

there are certainly situations where this can be accomplished, but given the many nuances involved we do not believe this language should be part of the Model Rules.

WAC 44-14-040(6): Proposed amendment requiring an agency to have a reasonable belief that records are arguably exempt from disclosure before providing third-party notice, and setting forth that disclosure should occur if an injunction is not obtained within 10 business days

This proposed amendment is problematic because it conflicts with other law. Agencies may be required by law to provide third-party notice before releasing records regardless of the agency's belief that an exemption applies. *See* RCW 42.56.250(2) (requiring notification for records held in certain employee files). This language fails to take this into account.¹

Likewise, the timeline proposed of releasing the records within 10 business days is inconsistent with other law and is harmful to persons who may appropriately wish to seek injunctive relief. RCW 42.56.250(2) requires disclosure to occur at least 10 days from the date the notice is made, creating an extremely narrow window of time under which agencies could comply with both that statute and the Model Rules. Furthermore, it is extremely difficult for an individual who did not have an attorney already hired to obtain an injunction within 10 business days, particularly if the appropriate court only hears certain case types on specific calendars. Agencies should be given more discretion to determine an appropriate period of time, recognizing that unnecessary delay should be avoided.

Finally, we note that the proposed amended language calls for 10 business days, while WAC 44-14-04003(12) refers to 10 calendar days. These should be consistent with each other.

WAC 44-14-040(8)(b): Proposed language requiring the agency to consider how recently the prior request was closed when evaluating the time needed to process the new request

We are struggling to imagine a situation where “how recently the prior request was closed” has a bearing on the estimated processing time if a new request was resubmitted. The time estimate would generally take into account factors such as whether the records the requester previously failed to claim or review are still available, or whether they will need to be gathered anew.

WAC 44-14-040(12): Section includes gendered language which was not removed

This section still includes gendered language that the requester fails to fulfill “his or her obligations.” We recommend that this be changed to “their obligations” or “the requestor’s obligations” to mirror the other amendments which shift away from gendered language.

WAC 44-14-04004(1): Section includes language that does not reflect the *Cousins* decision

There are no proposed amendments to this section. We note, however, that it does not appear to currently agree with guidance from *Cousins v. DOC*, and we suggest that it should be updated.

¹ We note that this language also appears in WAC 44-14-04003(12) and would recommend that in future rule-making the AGO consider revising this language to be in accordance with RCW 42.56.250(2).

Thank you for the opportunity to provide feedback.

Very truly yours,



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