Seattle City Attorney
Ann Davison

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Via email only to agorulemaking@atg.wa.gov

Office of the Attorney General
1125 Washington St. SE
P.O. Box 40100
Olympia, WA 98504

Re: Formal Comment on Attorney General Nick Brown's Proposed Changes to the Model Public Records Act Rules, CR-102

Dear Attorney General Brown:

The Seattle City Attorney's Office (CAO) agrees that updates to the Model Rules are warranted. However, the Attorney General's Office should rework or omit several of the proposed amendments. Some appear to mandate records response or retention practices that go beyond the statutory language of the Public Records Act (PRA) and the precedential case law interpreting the PRA. Because courts use the Model Rules to inform their opinions as to agency compliance with the PRA[1], the Model Rules should strive to accurately reflect the actual requirements of the law. Where the Attorney General's Office sees fit to recommend an agency practice that would comply with the PRA, it should be clear that such guidance is a recommendation and does not reflect the only way in which an agency compliance can be achieved.

To address our specific concerns, we have listed the section containing the proposed amendment followed by the issues we believe the proposal creates. For ease of reference:

- WAC 44-14-030(2) – Issue 1: The amended language adds a requirement that a local agency which is opting out of the index requirement in RCW 42.56.070(3) identify the specific type of record it is finding to be unduly burdensome to index or for which it has found that creating an index would interfere with agency operations.
    - The requirement to identify the specific type of record is not found in RCW 42.56.070(4) and therefore this amendment goes beyond the statutory requirement.

[1] See: Cantu v. Yakima Sch. Dist. No. 7, 23 Wn. App. 2d 57, 91, 514 P.3d 661, 680 (2022), and Cousins v. State, 3 Wn.3d 19, 49, 546 P.3d 415, 432 (2024)

  - Creating and maintaining an index of every new kind of record generated by a local agency that has already issued a formal order finding that the indexing requirement is overly burdensome or interferes with agency operations would itself be burdensome and interfere with agency operations.

- WAC 44-14-030(2) – Issue 2: The proposed amendment has language that indicates that the location of the formal order described in RCW 42.56.070(3) be described in an agency's required rules on responding to requests made under the PRA. While advisable – this is not a requirement in the PRA and so should not be framed in prescriptive language but rather as a recommendation.

- WAC 44-14-030(3) – Issue 1: The language establishing that an agency will maintain its records in a such a way that is accessible to staff responsible for searching and producing records, suggests that all records be directly available to public records officers. This requirement is not found in the language of the PRA.
  - This proposal is overly prescriptive in the way that it suggests direct access to all records by staff responsible for searching and producing records, is the only means by which an agency can be in compliance with the PRA.
  - Such a requirement may help facilitate compliance – but it is not found in the statutory language and does not reflect the complexity of the vast variety of records agencies prepare, own, use, or retain. There are also security and regulatory limitations on direct access to certain forms of public records.
  - It would be consistent with the act to say that agencies will maintain their records in a reasonably organized manner that is accessible for searching and producing records in response to a public records request, thereby remaining neutral on which staff need to be permitted direct access.

- WAC 44-14-030(3) – Issue 2: The amended language that creates an obligation for an agency to take reasonable actions "preventing unauthorized destruction or removal of original records by employees, elected officials, and others", while laudable, is not a standard found within the language of the PRA. Chapter 40.16 RCW contains personal criminal penalties for willful and unlawful destruction of records. If the legislature had wanted to make agencies directly responsible for taking these precautions, it could have done so. Including this in the Model Rules suggests that such a standard has a legal foundation, where there is no statutory basis that supports this standard.

- WAC 44-14-030(3) – Issue 3: The proposed addition of language mandating that if an agency employee creates or receives 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, creates prescriptive standard that is not found in the language of the PRA. Adopting such a policy is one means to ensure compliance with records retention and disclosure requirements, but it is not the only means of doing so. To the extent that a recommendation from the Attorney General's Office is issued on this topic, it should be in the form of describing the problem to be addressed – and then if so desired, an example of one kind of policy that can be used to try and address it.

- WAC 44-14-040(1) – Issue: The proposed amendment to this section appears to create an obligation that a public records officer or designee triage requests into simple and complex tracks "when appropriate", without reference to any provision within the PRA itself that creates such an obligation. This is a useful approach to managing requests and we welcome specific language approving of this practice – but that is different than a directive that public records officers "will" do this paired with an unhelpfully vague qualifier "when appropriate". There are many possible ways of coordinating a response to multiple requests of differing complexity that would allow an agency to meet its PRA obligations, and a one size fits all approach here is unnecessarily and inappropriately limiting. We believe a better approach would be to encourage agencies to fulfill the greatest number of requests possible, with one potential solution being to triage requests by complexity in a transparent manner.

- WAC 44-14-040(3) – Issue: The proposed amended language instructs agencies to consider whether the requestor has identified a reason that time is of the essence for the production of records and if it is practicable to produce the records in the time frame provided by the requestor, however there is no means by which an agency can evaluate the accuracy of a requestor's proffered reason for expedience. All requestors want the records they request as quickly as possible, and if prompted all would likely provide a reason they need a record by a particular date. Practically, if agencies are instructed to take these requestor provided timelines at face value with no means to investigate or evaluate the veracity of the claim or relative importance of the stated need for the records, there is no added value in an agency taking requested timeline into account at all – as all requestors will simply request immediate responses.

- WAC 44-14-040(6) – Issue: The proposed amendment to this provision states that an agency should have a reasonable belief that the records are arguably exempt from disclosure prior to providing third party notice of a

request and intended response. There is no language in the PRA requiring that analysis. In fact, RCW 42.56.250(2) explicitly requires notice to be provided to employees when records are requested that exist solely within their personnel, payroll, supervisor, or training file, even though many such records would not reasonably be considered to be exempt from disclosure. To the extent that this amendment is trying to account for scenarios where a third party was previously provided notice and chose not to seek an injunction to bar the release of a record, it should be re-written to specifically address that scenario.

- WAC 44-14-040(8)(b)—Issue: The portion of the proposed language that instructs agencies to take into account how recently a prior request for the same records was closed and the number of records remaining to be processed, when evaluating a reasonable estimate of time to produce the records, is either duplicative of the existing reasonable estimate standard or to the extent that it goes beyond that standard creates an obligation that is not found in the PRA or relevant case law. This might be better moved to the section in the Model Rules discussing reasonable estimates of time, and if placed there it should be clear that this recommendation is illustrating a factual situation that may already be considered by a court when evaluating whether an agency has provided a reasonable estimate.

Agency records are more voluminous and complex than ever before. The Model Rules should help address evolving challenges and benefit both agencies and requesters. With this in mind, the CAO hopes the Attorney General's Office will seriously consider the foregoing comments and suggested changes. They are intended to meet your office's objectives without creating unworkable standards for smaller agencies, or conflicts with existing case law or the PRA.

Very truly yours,

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