CITY OF SEQUIM

152 W. Cedar Street, Sequim, WA 98382

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Washington Attorney General's Office
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RE: Comments on Public Records Act Model Rules Rule Making WSR 25-20-108

We appreciate the significant work already performed by the AGO in developing the proposed rules and note that they address many of the concerns raised in connection with the previous Model Rules draft. The PRA Model Rules are a valuable tool for agencies to consult for best practices for complying with the statutory and case law requirements of the PRA. The Legal Department of the City of Sequim respectfully submit these comments to call attention to areas of the Model Rules that the City believes will bring them into closer alignment with the PRA and the reported decisions interpreting it.

Although the AGO's Model Rules are non-binding best practices, the AGO should be mindful that the non-binding nature does not alleviate the impact of their adoption on agencies, particularly after the ruling in *Cousins v. State Department of Corrections*, 3 Wn.3d 19 (2024). The Washington State Supreme Court's holding in *Cousins* endorsed the use of the Model Rules to assess the appropriateness of an agency's actions under the law. Nonetheless, the Model Rules do not, and cannot, speak for the Legislature, nor can the rules account for the variation between agency resources, recordkeeping, and functions. The more specific one makes the Model Rules, the greater the risk of real or perceived agency noncompliance.

Our general concerns regarding the proposed changes are as follows:

1. Some of the changes seem to exceed or conflict with statutory authority, such as:
    - Decreasing time limitations to 1 day, whereas RCW 42.56.520 has identified five business days to respond to requests as "prompt"; and
    - The proposed changes seem to conflict with RCW 42.56.100 – "Agencies shall adopt ***and enforce*** reasonable rules and regulations . . . to provide full public access to public records, . . . ***and to prevent excessive interference with other essential functions of the agency***."
2. The Model Rules discount the practical realities that many small agencies struggle with on a daily basis. While the Model Rules often use "should" to mitigate these implications, the *Cousins* decision adds heightened scrutiny for staff in resource-strapped agencies. Moreover, the fact that agencies – *particularly those with limited resources* – increasingly need to hire dedicated public records staff runs counter to the legislative promise to "*prevent excessive interference with other essential functions of the agency".* Requestors increasingly consider any delay that does not align with their preferred timeline as unlawful; yet, that is not what the law requires.

3. The Model Rules, as currently drafted, allow petitioners to circumvent the legal process. Many supporters of the proposed rules indicate specific issues with an agency. *Their remedy is litigation;* the AGO should not subject all jurisdictions to punishment for the sins of a few.
4. Public employee information is already at risk because of cybercriminals, and that risk is already heightened because of Artificial Intelligence.

Our concerns with the proposed revisions to WAC 44-14-040(1):

<u>The City of Sequim does not support the addition of "simple" or "complex" as these determinations may be perceived differently by the requestor and the agency.</u>

- The proposed amendment to "complete requests . . . within one business day" increases the chance for error to meet this strict deadline. Under RCW 42.56.520(1), the PRA allows 5 days for initial response, fulfillment, or clarification – it should not be less than that.
    - Agencies can produce records that purport to be a request for a "single specific record" as a *courtesy to the requestor,* while making clear that the production (if not specifically requested via the PRA) is a courtesy copy only and that other information would need to be acquired through a record request.
- Simple requests can become very complex or vice versa; the scope is unknown until one begins gathering the responsive records.
- Requests should be handled in the order they are received, not prioritizing one requestor over another in accordance with RCW 42.56.080.
- To quote Julia Marshburn, Public Records Officer, Washington State Recreation and Conservation Office, Comment #30 on Page 28 of the Informal Comments on the Rulemaking Petition (which can be found on the AGO's website): "One can't tell the complexity of the request by looking at it; *research is required with every request*."

Our concerns with the proposed revisions to WAC 44-14-040(3):

<u>The City of Sequim does not support the addition of "time is of the essence".</u>

- The phrase "time is of the essence" is subjective. A public records officer will be unable to determine if the deadline is manufactured, self-imposed, or due to a delay of the requestor.
- To quote Jay Schulkin, Attorney, Porter Foster Rorick LLP, Comment #2 on Page 2 of the Informal Comments on the Rulemaking Petition (found on the AGO's website): "This would directly conflict with the requirement in RCW 42.56.080 that agencies not distinguish among requestors. It is not, and should not be, an agency's role to determine whose public records request is most important and should be prioritized . . ."

Our concerns with the proposed revisions to WAC 44-14-040(6):

The City of Sequim does not support proposed changes to the third-party notice.

- "Substantially and irreparably damage" is subjective and requires the agencies' records officer to determine what constitutes substantial and irreparable harm to an individual when the officer may know little to nothing about the third-party or the agency. Instead of parroting the language from RCW 42.56.540, the Model Rules should consider identifying suggested criteria to guide agencies in making this determination.
- This addition is contrary to RCW 42.56.250(2), which *requires* third-party notice for documents contained in an employee file.
- Third-party notice is a useful tool for individuals to protect their information.
- To suggest that agencies are using third-party notice as a stall tactic diminishes the reality that agencies have records that are highly personal and private.
- "Arguably" is vague and not definitive; we suggest changing it to something clearer and less subjective.
- Under RCW 42.56.520(2), additional time to respond to a public records request is allowed while notifying third persons. The proposed "10 business" days could be an issue for the third-party notice that has to be mailed to the recipient. We recommend 20 business days to allow the recipient to receive the notice and, if desired, to file a request for an injunction with the court.

In closing, if news outlets have an issue with a specific agency, litigation is their remedy – not punishing agencies across the State who have no desire to delay public records requests and work hard to meet the demands of requesters. Regarding the Model Rules, they should be written to provide greater clarity to agencies and requestors, not to increase ambiguity.

The City of Sequim efficiently closes nearly 70% of requests within the first five days, with a significant number completed within one business day. Delays typically occur when requestors either fail to communicate or change their request midway, rather than due to intentional delays by staff.

We hope that the AGO considers these comments in this rule-making process as an opportunity to assist agencies in administering this process.

Sincerely,

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