

Kittitas County Prosecuting Attorney

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*Our Mission:
Seeking Justice, Serving Victims and
Holding Offenders Accountable*



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Nick Brown
Attorney General
via email to: agorulemaking@atg.wa.gov

Dear Attorney General Brown,

I write today to present a concern regarding your office's proposed Public Records Act Model Rules, WSR 25-20-108. Specifically, I am most concerned with the proposed amendment to WAC 44-14-040 (6), which relates to the provision of third-party notice and the prevention of harm. For the reasons outlined below, I object to the insertion of this language into the model rule: "Before sending a notice, an agency should have a reasonable belief that the records are arguably exempt from disclosure."

As a preliminary matter, this provision requires agency records officers to make a determination regarding the potential for exemption of records without sufficient information. One of the main reasons for third-party notice is to allow the third party, often an employee or crime victim, to decide if there is risk involved in the release that will make them feel the need to pursue an injunction. In providing notice, the agency leaves that determination to the third party because they will often have more information about the situation— is the requestor a vindictive ex, their rapist, or a suspect they are investigating? The history between the subject of records and the requester can make records exempt from disclosure, and it is likely unknown to the public records officer reviewing a request.

A neighboring agency recently received a request for all photos of a particular vehicle/license plate for a specific timeframe from their Flock camera automated license plate reader system. The release of these records would allow the requester to use government systems to learn where a member of the public has travelled around the area. Perhaps the person whose information is sought has no concern with disclosure, but maybe they went to a medical clinic for a personal procedure, or maybe they are being stalked. The new rule would prevent us from notifying the person being tracked and offering them an opportunity to seek protection of their privacy rights in court.

Kittitas County also has contracts with private enterprises which require provision of notice when certain data is requested. These provisions are often put in place because a public records officer is not in an appropriate position to determine whether a record sought impacts a business' trade secrets. The implementation of this rule would interfere with those contracts.

The requirement that an agency must believe a record is exempt prior to providing notification puts the cart before the horse. If the agency believes the record is exempt, then they can rely on that exemption to protect the subject of the records. Third party notice is most useful in those cases where the agency cannot make that exemption determination without further information. In providing notice to the records' subject, the agency tells them the records will be released unless the third party successfully gets a court to order nondisclosure. A brief delay to allow the third party to evaluate their risk and act to protect their rights balances the rights of all involved citizens— requesters and record subjects.

The third-party notice process was not created by the legislature to shield government officials or agencies, rather its purpose is to protect individual Washingtonians' right to privacy from invasion by others. Moreover, records subject to third-party notice are not withheld without judicial review. There are many reasons why a Washingtonian's information may end up in a government record, often under circumstances they wish to keep private. The proposed rules forsake the rights of those individuals in favor of records requesters.

For these reasons, I urge you to decline the proposed amendment to WAC 44-14-040 (6)

Attorney