

Via email

Date: October 30, 2025

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To: Christina Beusch, Deputy Attorney General

CC: Ed Pesick, Chair, Administrative Law Section, W.S.B.A.

Subj.: WSR 25-20-108; Model public records rule WAC 44-14-030(2), records indexes

On behalf of the Administrative Law Section of the Washington State Bar Association, we submit these comments and proposed revisions of WAC 44-14-030(2) and of the related Comment, WAC 44-14-03003, focusing on the verbiage applicable to state agencies with regard to the records indexes required by section RCW 42.56.070(5) of the Public Records Act (PRA).

The changes we propose will improve practice before administrative agencies for legal professionals and for the public. The indexed documents make clear what are the key records that agencies rely on, both in hearings and in other agency decisions and actions. Our proposed changes cover key elements that the PRA requires of state agency index system rules but which are omitted in the current model rule. Our revised model rule comment will encourage state agencies to adopt best practices in drafting their index system rules and in creating and maintaining their records indexes. State agencies' indexes that are built on this improved model rule and comment will make it easier for both lawyers and the public to identify and access those key state agency documents.

This document consists of the following sections:

- Introduction
- Main points summary
- WAC 44-14-030(2) model index rule
  - Discussion
  - Revised rule
- WAC 44-14-03003 model rule comment
  - Discussion
  - Revised rule comment
- Appendix
  - RCW 42.56.070 excerpts
  - Example agency index rules
  - WAC vs PRA checklist for AG model rule
  - Evaluation of Current Model Index Rule Comment

## INTRODUCTION

The state agency indexes required by RCW 42.56.070(5) of the PRA benefit the public and the state agencies themselves.

The State Auditor’s May 2016 report “Performance Audit Administrative Appeals” made “recommendations to certain state agencies that we think will help appeals participants navigate more easily through the appeals process,” which included “develop a process for indexing significant decisions” and post decision indexes on agency websites.<sup>1</sup>

But as far as we could tell, this PRA required resource was largely overlooked by state agencies and by attorneys, let alone the general public. We surveyed the rules of about 250 state agencies, boards and commissions and found that very many have no records index rule at all, and of those that do, only a handful come close to meeting all the requirements of the statute. In our opinion only seven index rules substantially complied with the PRA requirements at that time.

In the fall of 2018 we began to address this situation with articles in the newsletter of the Administrative Law Section.<sup>2</sup> Our first article began as follows:

Are you new to practicing before a particular state regulatory agency? Would you like ready access to agency documents that describe key precedents and agency policies? Even if you are not new to practice at a given state agency, would you like to double check your knowledge of precedents and policies against the agency’s listing of them? Indexes required by the Public Records Act (PRA) are a potential resource for you – especially the ones that are posted online.

This view of the usefulness of agency significant decisions indexes was echoed by a panelist for a 1/12/22 CLE – “Pathways to a Career as an ALJ.” In the context of recommending ways in which aspiring ALJs could get to know the work of a possible agency employer, the panelist recommended consulting the agency’s significant decisions index (if it has one).

Having the PRA-required index rule and maintaining publicly available indexes allows state agencies to rely on the indexed documents as precedents and as enforceable statutory interpretations. RCW 42.56.070(6) in the PRA limits the uses agencies may make of public records of any type that are not included in indexes available to the public. The Administrative Procedure Act has similar restrictions in RCW 34.05.220.

In 2021 we began participating in state agency rulemakings to encourage compliance with RCW 42.56.070(5). In those proceedings some agencies enacted an index rule that contains all or substantially all of the components required by the PRA. See WAC 196-09-152 (Board of Registration of Professional Engineers and Land Surveyors), WAC 139-02-050(2) (Criminal Justice Training Commission), WAC 246-08-450 and WAC 246-08-480 (Department of Health).

Two agencies decided to not adopt an index rule at that time but stated that they would consider addressing the issue in a future proceeding. Three agencies enacted rules that, in our opinion, are wholly

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<sup>1</sup> <https://portal.sao.wa.gov/ReportSearch/Home/ViewReportFile?arn=1016691&isFinding=false&sp=false>

<sup>2</sup> See our articles in the fall 2018, winter 2019, Spring 2020 and Fall 2025 newsletters at <https://www.wsba.org/legal-community/sections/administrative-law-section> .

or substantially non-PRA-compliant. One agency repealed a partially compliant rule and did not replace it.<sup>3</sup>

A more robust and accurate model rule and comment should result in more agencies coming into compliance with the law, especially if the Attorney General's Office emphasizes these improvements in communications to state agencies after the conclusion of its current model rules revisions.

## MAIN POINTS SUMMARY

- There should be a separate model rule and related comments for PRA-required state agency records indexes.
- The model rule needs more detail in order to be a template that state agencies can use to create the index rules that the PRA requires of them.
- The related comment should have more implementation and best practices advice.
- The current model rule comment incorrectly advises that state agencies may use their record retention schedules as the PRA-required records indexes. This advice should be replaced by a statement that records retention schedules are not the PRA-required indexes.

## WAC 44-14-030(2) MODEL INDEX RULE

### Discussion

In addition to maintaining pre-July 1, 1990, indexes for any type of record that state agencies might have had, RCW 42.56.070(5) requires state agency indexes for the following types of post-June 30, 1990, records (as defined in the Administrative Procedure Act) –

- Final orders in adjudicatory cases “that contain an analysis or decision of substantial importance to the agency in carrying out its duties” [often called “significant decisions”];
- Declaratory orders “that contain an analysis or decision of substantial importance to the agency in carrying out its duties;”
- Interpretive statements;
- Policy statements.<sup>4</sup>

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<sup>3</sup> That agency stated that “case law only requires that an index if created must be provided to a requestor.” Our research has not found such case law and, so far, the agency has not responded to our request that it identify the case law it has in mind.

<sup>4</sup> In addition to the PRA's general requirement in RCW 42.56.070(1) that agencies make “all public records” available to the public, RCW 34.05.220 (2) in the Administrative Procedure Act requires that several types of documents be available to the public: “To the extent not prohibited by federal law or regulation, nor prohibited for reasons of confidentiality by state law, each agency shall keep on file for public inspection all final orders, decisions, and opinions in adjudicative proceedings, interpretive statements, policy statements, and any digest or index to those orders, decisions, opinions, or statements prepared by or for the agency.”

The indexes must allow an inquirer to identify and locate specific documents, such as a decision in case XYZ, a policy statement on topic A, or an interpretive statement on issue B.

The agency's rule that establishes and implements the required indexing system must set forth at a minimum –

- requirements for the form and content of the index,
- the index's location and availability to the public, and
- the schedule for revising or updating the index.

In the Appendix see two examples of good agency index rules. In our comments in state agency rulemakings we recommend using the basic formats of rules such as these. Using that format, we recently developed a rule template with comments (explanations, best practices ideas, etc.) that we include in some of our rulemaking comments.

The current model state agency index rule is:

Records index. (If agency keeps an index.) An index of public records is available for use by members of the public, including (describe contents). The index may be accessed online at (website address). (If there are multiple indices, describe each and its availability.)

In rulemakings in which we have participated, some proposed index rules reflect a very literal application of this model rule, for example:

Public records indexing system. The department has implemented a system of indexing for the identification and location of records identified in RCW 42.56.070. The general index of public records will be maintained at [url].

The AG's proposed revision of the model index rule would result in this template for state agency index rules (the Attorney General's proposed additions are underlined):

Records index. (If a state agency has records for which it is required to keep an index.) An index of public records is available for use by members of the public, including (describe contents of records maintained by the agency that are required to have an index pursuant to RCW 42.56.070(5).) The index may be accessed online at (website address), and the index is revised or updated (describe schedule).

(If there are multiple indices, describe each, its availability, and schedule for being revised or updated.)

The addition of the verbiage about the update schedule would be helpful, as that is one of the PRA-required components of an index rule. But we would expect at least some agencies to propose an index rule like this, still missing some required rule components:

The department has implemented a system of indexing for the identification and location of records identified in RCW 42.56.070. The general index of public records will be maintained at [url]. The index will be updated annually.

In the Appendix see our “WAC vs PRA checklist for AG model rule.” This is a form we use in rulemakings to evaluate an agency’s current and/or proposed records index rule. As you can see, our evaluation of the proposed revised first paragraph of WAC 44-14-030 (which concerns state agency indexes) should be more explicit about the type(s) of records covered by the rule, should add a description of the agency’s “system of indexing” and should add a description of the “form and content” of the indexes.

### Draft revised model rule

Model rule WAC 44-14-030 is titled “Availability of public records” and covers four distinct subjects: Hours for inspection of records, Records index, Organization of records, Making a request for public records. The “Records index” portion covers state and local agencies. The proposed revised rule significantly expands the local agencies portion.

The model rules for state agencies and for local agencies should be in a separate model rule section – preferably in two sections, one for state agencies and one for local agencies. That way, when someone pulls up “Chapter 44-14 WAC” on the WAC website they will easily find the model records index rules for state agencies and for local agencies.

Because our indexes rule template covers the required components for all the types of records listed in RCW 42.56.070(5), includes comments and footnotes, and has generous spacing, it is several pages long. So, we do not advocate that it be fully reproduced in the model rule. We have condensed its basic provisions in a fill-in-the-blanks format, and our proposed model rule comment provides key information for filling in those blanks.

Our proposed state agency indexes rule is as follows:

Records index – state agencies.

This rule implements RCW 42.56.070(5) and (6) and RCW 34.05.220(2) and (3). The (agency) has implemented an indexing system for the identification and location of the following records:  
(Include the sections below for the types of records applicable to the agency)

- (a) Records issued before July 1, 1990, for which the agency has maintained an index. (If none, state this.) (If the agency has such indexes -) The form and content of the index is (describe).
- (b) Index of final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW 34.05.010 and that contain an analysis or decision of substantial importance to the agency in

carrying out its duties. The process and criteria for identifying orders “of substantial performance are (describe). The form and content of the index is (describe). The schedule for revising or updating the index is (describe).

- (c) Declaratory orders entered after June 30, 1990, that are issued pursuant to RCW 34.05.240 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties. The process and criteria for identifying orders “of substantial performance are (describe). The form and content of the index is (describe). The schedule for revising or updating the index is (describe).
- (d) Interpretive statements as defined in RCW 34.05.010 that were entered after June 30, 1990. The form and content of the index is (describe). The schedule for revising or updating the index is (describe).
- (e) Policy statements as defined in RCW 34.05.010 that were entered after June 30, 1990. The form and content of the index is (describe). The schedule for revising or updating the index is (describe).
- (f) The index(es) are available to the public on the agency’s website: (url). They are available for public inspection and copying weekdays, excluding legal holidays or other days the agency is closed, between (times) at (location).
- (g) Pursuant to RCW 42.56.070(6) and RCW 34.05.220(3) documents published in an index may be relied on, used or cited as precedent by the agency against a party and invoked by the agency for any other purpose.

## WAC 44-14-03003 MODEL RULE COMMENT

### Discussion

The AG’s proposed model rules changes do not include WAC 44-14-03003. They should.

In the Appendix see our “Evaluation of Current Model Index Rule Comment.” Most of our comments are “OK” or “Good.” Our concerns are with the lack of information and best practices advice for all of the rule components required by the PRA and with the erroneous advice to use an agency’s record retention schedule as its PRA-required records index.

#### - More detail about index rule components

The current text ignores the RCW 42.56.070(5)’s provision that the final orders and declaratory orders that are required to be indexed are those that “contain an analysis or decision of substantial importance to the agency in carrying out its duties.” The text should include this point, should advise that agency rules include the criteria and process for identifying such orders, and should suggest such criteria.

The current text does not address the required rule component “form and content.” This should be added, including recommendations for identifiers in the index, i.e., terms that can be used to locate documents of interest, such as topics and party names.

While the Attorney General's proposed revision to the model index rule adds verbiage about the revision and update schedule, the current comment text does not address this component. It should make the point that a "schedule" is a definite statement, such as "quarterly" or "annually," and not a vague term such as "periodically" or "as needed." The comment should also provide a "best practice" tip of continuous review and updating, rather than waiting for an arbitrary period to elapse.

- Records retention schedules are not the PRA-required record indexes

The current model rule comment includes this statement:

Agencies could also consider using their records retention schedules as their index, or direct requestors to the schedules as a way to describe the types of records an agency retains and for what periods of time.

The second half of the sentence is perhaps of some use to requestors, but the first part of the sentence is incorrect advice.

RCW 42.56.070(5) requires indexes that direct users to specific documents. Records retention schedules do not list specific documents. They list types of documents. Consulting them would not direct someone to a specific final order, declaratory order, policy statement or interpretive statement.

Some agencies have taken the Comment's advice, skipping any understanding of the PRA-s index rule requirements and resulting in records index rules or proposed rules such as:

The records retention schedule established by the division of state archives of the office of the secretary of state serves as an index for the identification and location of the department's records including those described in RCW 42.56.070(5).

Records index. An index of public records, consisting of the retention schedules applicable to those records, is available to members of the public at the agency's office.

Those examples are two of the thirteen such rules we found in 2019 when we reviewed all WAC chapters.

Since then we have submitted comments in state agency rulemakings with such proposed rules, and the agencies have not adopted those rules.

We have submitted comments in a pending rulemaking in which three agencies' record index rules are proposed to be records retention schedules.

The time and effort that state agencies have invested in these incorrect rulemaking procedures has been unproductive and delayed the provision of PRA-required indexes to the public.

The current model index rule comment needs to be revised to delete the incorrect advice and replace it with a definite statement that records retention schedules cannot be the PRA-required records indexes.

Revised Rule Comment

Below is our proposed revised model records index rule comment for state agencies. It retains useful verbiage from the current comment, adds verbiage to fill the gaps in the current comment and gives correct advice as to records retention schedules.

### **Index of records – state agencies**

State agencies are required by RCW [42.56.070\(5\)](#) to provide an index for certain categories of records, including policy and interpretive statements and final and declaratory orders of “substantial importance.” An agency is not required to index every record it creates. Since agencies maintain records in a wide variety of ways, agency indices will also vary. All agencies may issue declaratory orders and policy and interpretive statements. Only some agencies have authority to issue final orders in adjudicative proceedings.

An agency cannot use, rely on, or cite to as precedent a public record unless it was indexed or made available to the parties affected by it. RCW [42.56.070\(6\)](#), RCW [34.05.220\(3\)](#). An agency should post its index on its website.

The first category is “all records, if any, issued before July 1, 1990, for which the agency has maintained an index.” Agencies must search their records for such indexes and any that are located must be mentioned in the records index rule and made available to the public.

The other categories are for records issued after June 30, 1990. Agencies must search their records for such documents. If any are located, they must be covered in the records index rule and made available to the public. Even if an agency does not currently have any records in these categories, it should consider having a records index rule in place. Then, should the agency issue a covered record in the future, it can promptly include it in an index and thereby be able to immediately use, rely on, or cite it as precedent, avoiding the delay of going through the rulemaking process to enact the required index rule.

Index rules that cover final and/or declaratory orders “that contain an analysis for decision of substantial importance to the agency in carrying out its duties” should include the agency’s criteria and process for identifying such orders, for example: providing a legal analysis or interpretation not found in existing case law, or applying settled law to unusual facts. Such orders should be indexed at least by the case or document number; type of document; name of parties, if applicable (unless such names are exempt from public disclosure); brief description of subjects, topics and/or programs; and pertinent legal citations.

Interpretive statements should, at a minimum, be indexed by subject matter and topics, adoption order number, and date. Policy statements should, at a minimum, be indexed by program title (if applicable), subject matter and topics, adoption order number, and date.

The index rule’s provision for the schedule for revising or updating the index must be definite, such as such as “quarterly” or “annually,” and not a vague term such as “periodically” or “as needed.” Agencies should consider continuous updating. The sooner an agency includes an order or statement in its index, the sooner it may rely on the document as precedent or for other purposes. For orders: (a) Promptly upon the issuance of any final order or declaratory order, the agency will determine whether it is an order “of substantial importance.” If it is, the order will promptly be added to the appropriate index. (b) When an order is no longer one “of substantial importance” because, for example, a published decision entered by the court of appeals or the supreme court reverses the order or the agency determines that the order is no

longer precedential due to changes in statute, rule, or policy, the order will be removed from the index, unless it remains “of substantial importance” for other reasons. For statements: (a) Promptly on the issuance of any interpretive or policy statement (as defined above), the statement will be added to the appropriate index. (b) Statements will be removed from an index when they no longer represent the agency’s current position.

An agency may not use a record retention schedule as its required index. Those schedules list types of records, not the specific records that the required records indexes will enable the public to locate.

## APPENDIX

### RCW 42.56.070 excerpts

(5) Each state agency shall, by rule, establish and implement a system of indexing for the identification and location of the following records:

(a) All records issued before July 1, 1990, for which the agency has maintained an index;

(b) Final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW [34.05.010](#) and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(c) Declaratory orders entered after June 30, 1990, that are issued pursuant to RCW [34.05.240](#) and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(d) Interpretive statements as defined in RCW [34.05.010](#) that were entered after June 30, 1990; and

(e) Policy statements as defined in RCW [34.05.010](#) that were entered after June 30, 1990.

Rules establishing systems of indexing shall include, but not be limited to, requirements for the form and content of the index, its location and availability to the public, and the schedule for revising or updating the index. State agencies that have maintained indexes for records issued before July 1, 1990, shall continue to make such indexes available for public inspection and copying. Information in such indexes may be incorporated into indexes prepared pursuant to this subsection. State agencies may satisfy the requirements of this subsection by making available the public indexes prepared by other parties but actually used by the agency in its operations. State agencies shall make indexes available for public inspection and copying. State agencies may charge a fee to cover the actual costs of providing individual mailed copies of indexes.

(6) A public record may be relied on, used, or cited as precedent by an agency against a party other than an agency and it may be invoked by the agency for any other purpose only if:

(a) It has been indexed in an index available to the public; or

(b) Parties affected have timely notice (actual or constructive) of the terms thereof.

### Example agency index rules

#### Department of Health

[Comments: This is a good rule. It contains criteria for determining which orders are “significant decisions,” i.e., “contain an analysis or decisions of substantial importance to the agency in carrying out its duties.” Section 5 should state a definite schedule for reviews and updates, e.g., “quarterly” rather than “periodically.” The index is online at <https://doh.wa.gov/public-health-provider-resources/healthcare-professions-and-facilities/hearings/significant-decisions/significant-decisions-subject-matter-index> .]

#### WAC 246-08-480 Index of significant decisions.

(1) The department's index of significant decisions, prepared under RCW 42.56.070 (5)(b), contains orders that are issued in adjudicative proceedings as defined in RCW 34.05.010(1) and include an analysis or decision of substantial importance to the department in carrying out its duties. Together with the indices maintained under WAC 246-08-450, "significant decisions" shall serve as the index required by RCW 42.56.070.

(2) The department selects the orders to be included in "significant decisions" based on recommendations from staff and the public. Generally, a decision or order is considered "significant" only if it provides a legal analysis or interpretation not found in existing case law or applies settled law to unusual facts. The significant decision index shall include orders meeting the criteria in subsection (1) of this section, issued by the department and the disciplining authorities identified in RCW 18.130.040.

(3) The index shall, at a minimum, contain the case or document number; type of document; name of parties, if applicable, unless such names are exempt from public disclosure; brief description of subject, program; pertinent legal citation; and location of the document.

(4) Any person may nominate a final adjudicative order, other adjudicative order or declaratory order to be evaluated for indexing by completing an Order Index Nomination Request Form. The form can be obtained from and returned to the Adjudicative Service Unit, P.O. Box 47879, Olympia, WA 98504-7879, along with a copy of the nominated order. The department shall make a final decision as to whether to index the nominated order, and that decision is not appealable.

(5) The department shall periodically update and review the index to verify that the indexed documents continue to meet the criteria in subsection (1) of this section. The department may, at any time, delete a document from an index.

(6) The index is a public record and is available for public inspection and copying in accordance with chapter 246-02 WAC. The index of significant adjudicative orders is located in the Adjudicative Service Unit, 310 Israel Road, Tumwater, WA 98501.

## Board of Registration of Professional Engineers and Land Surveyors

[Comments: This is a good overall indexes rule. It would be better to include the process and criteria for determining which orders “contain an analysis or decisions of substantial importance to the agency in carrying out its duties.” The indexes are online at <https://brpels.wa.gov/sites/default/files/2025-07/Disciplinary%20Index%20072025.xlsx> .]

WAC 196-09-152 Records index.

- (1) Purpose. This rule implements RCW 42.56.070 (5) and (6) and 34.05.220 (2) and (3).
- (2) The board has implemented an indexing system for the identification and location of the following records:
  - (a) All records issued before July 1, 1990, for which the board has maintained an index which include final orders and board orders, indexed by type of order, date issued, profession, case number, and respondent name;
  - (b) Final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW 34.05.010(1) indexed by type of order, date issued, profession, case number, topic, and respondent name;
  - (c) Policy statements as defined in RCW 34.05.010(15), interpretive statements as defined in RCW 34.05.010(8), and declaratory orders that were entered after June 30, 1990, and indexed by title, topic, and dates issued;
  - (d) Minutes of board meetings shall be indexed chronologically.
- (3) Indexes are available online at [brpels.wa.gov](https://brpels.wa.gov) and are available for public inspection and copying weekdays, excluding legal holidays or other days the agency is closed, between 8:30 a.m. and 4:30 p.m. at the board's office, 605 11th Ave SE, Suite 201, Olympia, Washington.
- (4) The indexes are updated quarterly. In addition to the indexing system, the board also maintains and continually updates its website at [brpels.wa.gov](https://brpels.wa.gov), which includes board laws and rules; board forms; board meeting agendas and materials; and other agency documents.

WAC vs PRA checklist for AG model rule

<p align="center"><b>WAC 44-14-030 Availability of public records With AGO-proposed revisions, October 2025</b></p>	<p align="center"><b>WAC vs. PRA REQUIREMENTS</b></p>	
<p>1<sup>st</sup> paragraph relating to state agencies (2<sup>nd</sup> and 3<sup>rd</sup> paragraphs relate to local agencies); underlined verbiage are the AG’s proposed additions to the model rule. Line breaks added for ease of reading.</p> <p><b>(2) Records index.</b> (If a state agency has records for which it is required to keep an index.)</p> <p>An index of public records is available for use by members of the public, including (describe contents of records maintained by the agency that are required to have an index pursuant to <u>RCW 42.56.070(5)</u>).</p> <p>The index may be accessed online at (website address), <u>and</u> the index is revised or updated (describe schedule).</p> <p>(If there are multiple indices, describe each, its availability, <u>and schedule for being revised or updated.</u>)</p> <p><i><u>(2) Records index. (If a state agency has records for which it is required to keep((s)) an index.) An index of public records is available for use by members of the public, including (describe contents of records maintained by the agency that are required to have an index pursuant to RCW 42.56.070(5)). The index may be accessed online at (website address), and the index is revised or updated (describe schedule). (If there are multiple indices, describe each ((and)), its availability, and schedule for being revised or updated.)</u></i></p>	<p><b>Does the rule cover indexes of –</b></p> <p>1. <i>Indexes of pre-July 1, 1990 records.</i></p>	<p align="center"><b>By ref to statute</b></p>
	<p>2. <i>Final orders in adjudicative proceedings “that contain an analysis or decisions of substantial importance to the agency in carrying out its duties”?</i></p>	<p align="center"><b>By ref to statute</b></p>
	<p>3. <i>Declaratory orders “that contain an analysis or decisions of substantial importance to the agency in carrying out its duties”?</i></p>	<p align="center"><b>By ref to statute</b></p>
	<p>4. <i>Interpretive statements?</i></p>	<p align="center"><b>By ref to statute</b></p>
	<p>5. <i>Policy statements?</i></p>	<p align="center"><b>By ref to statute</b></p>
	<p>6. <b>Does the rule describe “a system of indexing for the identification and location” of the covered orders and statements?</b></p>	<p align="center"><b>No</b></p>
	<p><b>Does the rule include –</b></p> <p>7. <b>Requirements for the form and content of the indexes?</b></p>	<p align="center"><b>No</b></p>
	<p>8. <b>The indexes’ location and availability?</b></p>	<p align="center"><b>Yes</b></p>
	<p>9. <b>The schedule for revising or updating the indexes?</b></p>	<p align="center"><b>Yes</b></p>
<p><b>Comments</b></p> <p>1-5: The fill-in-the-blank parenthetical “describe the contents . . .” would be completed with the applicable documents type(s) stated in nos. 1-5. Rather than “describe contents of records maintained by the agency that are required to have an index pursuant to RCW 42.56.070(5),” the model rule’s fill-in-the-blank</p>		

should identify the types of records covered by RCW 42.56.070(5) for which the agency has an index: indexes of pre-July 1, 1990 records; final orders in adjudicative proceedings that contain an analysis or decisions of substantial importance to the agency in carrying out its duties; declaratory orders “that contain an analysis or decisions of substantial importance to the agency in carrying out its duties; interpretive statements, policy statements.

6. No “system . . .” is described in this model rule.

A “system of indexing” will, in effect, include #7 “form and content” and #9 “schedule for revising,” but a separate “system of indexing” description in the rule can cover topics such as the medium (e.g., digital), the person(s) responsible for setting up and managing the system/index (e.g., public records officer), and whether the index will include just one of the types of documents or more than one (e.g., a single index might include both final and declaratory orders or both interpretive and policy statements).

For orders, part of the system to be described in the rule is the process for identifying orders that “are of substantial importance to the agency in carrying out its duties.” There will be an internal agency process, but non-agency personnel might also be involved. For example, the Department of Licensing’s rule WAC [308-101-260](#) (Significant decisions in driver license cases) provides: (3) Any person may nominate a final adjudicative order to be evaluated for indexing by completing an Order Index Nomination Request form. The form can be obtained from the department’s website at [www.dol.wa.gov](http://www.dol.wa.gov) and returned to: Administrative Law Office, P.O. Box 9031, Olympia, WA 98507-9031, along with a copy of the nominated order. (4) The director or director’s designee shall make a final decision as to whether to select the nominated order as a significant decision based on the criteria in subsection (2) of this section, and that decision is not appealable.

7. The “form and content” portion of the PRA-required rule describes how someone can search the index for records of interest.

For statements this should include at least by topic, adoption order number, date ranges of order issuance, and by major agency program (if applicable).

For orders, this should include at least by topics (e.g., statute, rule, agency policy, legal issue, factual situation that are part of the order’s “substantial importance”), case name, parties, order number, and date ranges of order issuance.

The rule also needs to include the criteria for identifying orders that “are of substantial importance to the agency in carrying out its duties,” such as the following: it illustrates the application of law and/or agency rules and/or policies to common factual situations; it clarifies an unsettled interpretation of statute or modifies or clarifies an earlier interpretation; it provides a legal analysis or interpretation not found in existing court case law; it applies settled law to an unusual factual situation; it reflects the further development of, or continued adherence to, a legal principle previously recognized by the agency, it has previously been cited by the agency in a final order as precedent or is likely to be so cited in the future.

8. The indexes’ location and availability – online is the best practice, but rule should also describe how persons can see or get a copy of the index by other means, such as visiting an agency office.

9. The schedule for revising or updating the indexes needs to be specific and definite, not vague such “as needed.” For example: No less frequently than every [time period], the agency will review the indexes to ensure that they are current and complete.

The best practice is continuous updating. The sooner an agency includes an order or statement in its index, the sooner it may rely on the document as precedent.<sup>5</sup> For example –

For orders: (a) Promptly upon the issuance of any final order or declaratory order, the agency will determine whether it is an order “of substantial importance.” If it is, the order will promptly be added to the appropriate index. (b) When an order is no longer one “of substantial importance” because, for example, a published decision entered by the court of appeals or the supreme court reverses the order or the agency determines that the order is no longer precedential due to changes in statute, rule, or policy, the order will be removed from the index, unless it remains “of substantial importance” for other reasons.

For statements: (a) Promptly on the issuance of any interpretive or policy statement (as defined above), the statement will be added to the appropriate index. (b) Statements will be removed from an index when they no longer represent the agency’s current position.

Evaluation of Current Model Index Rule Comment

<b>WAC 44-14-03003 (Comment) re Index of records.</b>	<b>Comments</b>
State and local agencies are required by RCW 42.56.070 to provide an index for certain categories of records. An agency is not required to index every record it creates.	OK
Since agencies maintain records in a wide variety of ways, agency indices will also vary.	OK
An agency cannot use, rely on, or cite to as precedent a public record unless it was indexed or made available to the parties affected by it. RCW 42.56.070(6).	Good
An agency should post its index on its website.	Good
The index requirements differ for state and local agencies.	Correct so far as it goes.
A state agency must index only two categories of records: (1) All records, if any, issued before July 1, 1990 for which the agency has maintained an index; and (2) Final orders, declaratory orders, interpretive statements, and statements of policy issued after June 30, 1990. RCW 42.56.070(5).	Subsection (2) omits the statute’s qualifier for orders: “contain an analysis or decision of substantial importance to the agency in carrying out its duties.”
A state agency must adopt a rule governing its index.	Good.

<sup>5</sup> RCW 42.56.070(6) limits the uses agencies may make of public records of any type that are not included in indexes available to the public. The Administrative Procedure Act has similar restrictions: RCW 34.05.220.

<p>A local agency may opt out of the indexing requirement if it issues a formal order specifying the reasons why doing so would "unduly burden or interfere with agency operations." RCW 42.56.070 (4)(a). To lawfully opt out of the index requirement, a local agency must actually issue an order or adopt an ordinance specifying the reasons it cannot maintain an index.</p>	<p>[No comment]</p>
<p>The index requirements of the act were enacted in 1972 when agencies had far fewer records, the vast majority of records were paper, and an index was easier to maintain. However, technology allows agencies to map out, archive, and then electronically search for electronic documents. Agency resources vary greatly so not every agency can afford to utilize this technology. However, agencies should explore the feasibility of electronic indexing and retrieval to assist both the agency and requestor in locating public records.</p>	<p>Obsolete – do not all agencies use electronic records now?</p>
<p><b>Agencies could also consider using their records retention schedules as their index, . . .</b></p>	<p>Incorrect. These schedules should not be “considered;” they cannot be the PRA required indexes: they do not identify individual documents (just “types of records”) and do not have the “form and content” and other elements required by the law (discussed above). Should be replaced by a definitive statement that these schedules cannot be the PRA-required indexes.</p>
<p>. . . or direct requestors to the schedules as a way to describe the types of records an agency retains and for what periods of time. See chapter <a href="#">40.14 RCW</a><sup>6</sup> and WAC <a href="#">44-14-03005</a>.<sup>7</sup></p>	<p>OK – as long as the first part of the sentence is deleted. But not really very pertinent to PRA-required indexes.</p>
	<p>Provides no tips or best practices advice for the “form and content” of the indexes or for the update/revision schedule.</p>

<sup>6</sup> PRESERVATION AND DESTRUCTION OF PUBLIC RECORDS

<sup>7</sup> AGO model rule comment: WAC 44-14-03005 Retention of records.