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**SENT VIA EMAIL ONLY**

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Re: Formal Comment on Proposed Amendments to the Model PRA Rules

Dear Attorney General Brown,

My law firm represents the City of Lake Stevens ("City"). Please accept this letter as the City's formal written comment in response to the Attorney General's Office proposed amendments to the Model Public Records Act Rules ("Model Rules").

Several of the proposed amendments to the Model Rules should not be adopted because they: (1) are inconsistent with the Public Records Act ("PRA"), (2) place an undue burden on public agencies, and/or (3) strongly prejudice the individuals who submit non-time sensitive, complex PRA requests. Specifically, the following proposed amendments should not be adopted.

**1. WAC 44-14-030(2)–Requiring Local Public Agencies to Specify the Type of Records for Which No Indices are Maintained.**

Proposed Amendment: Requiring a local public agency that opts out of the index requirement to specify the type of records that they do not maintain.

Comment: The City opposes this proposed amendment because it imposes a requirement on public agencies that is not mandated by the PRA. RCW 42.56.070(4) permits public agencies to opt out of this requirement if it is "unduly burdensome" to maintain an index of certain public records, issues and publishes a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with agency operations, and makes available for public inspection and copying all indexes maintained for agency use. RCW 42.56.070 does *not* require public agencies to identify and then specify the type of records for which they do not maintain an index.

Furthermore, the proposed amendment also places an unnecessary burden on public agencies that opt out of the PRA's index requirement. If adopted, the proposed amendment would recommend that local agencies, which opt out of the index requirement, review all of their

public records and then specify which ones the agency is not indexing. This process will surely be lengthy and consume precious PRA staff resources, as the sheer amount of public records in the modern era has exploded since the inception of the PRA in 1973. Staff resources should instead be dedicated to responding to and fulfilling PRA requests.

Finally, this proposed amendment works in the opposite direction of RCW 42.56.070(4). The clear purpose of RCW 42.56.070(4) is to alleviate public agencies from the undue burden of reviewing and cataloging their public records. Yet, if adopted, this proposed amendment would recommend public agencies, who wish to relieve themselves from the burden of indexing records, to instead conduct a time-consuming audit of every type of record for which it does not maintain an index—contrary to the time-saving spirit of RCW 42.56.070(4).

## 2. WAC 44-14-040(1)—Triaging Simple and Complex Requests

Proposed Amendment: Requiring a public agency, “when appropriate,” to “triag[e] requests into simple and complex tracks to ensure that processing times are proportionate to the difficulty of each request.”

Comment: As previously asserted in its informal comment to the rules petition that precipitated this proposed amendment, the PRA and its interpretive case law do not require public agencies to triage requests. “[N]othing in the PRA requires an agency to prioritize certain requested records over others.” *West v. Dep’t of Fish & Wildlife*, 2022 WL 369984, 20 Wn. App. 2d 1074 (2022); *see also Williams v. Dep’t of Corr.*, 2022 WL 3754896, 23 Wn. App. 2d 1016 (2022).

Furthermore, triaging requests into “simple” and “complex” tracks may not actually result in quicker production of public records. The proposed revision fails to clearly define/describe “simple” and “complex” requests, therefore leaving public agencies to assign their own (potentially arbitrary) meaning to those terms. In addition, a request that may appear “simple,” based on the plain language of a request, may actually require significant time to fulfill. The time required to fulfill a PRA request depends on the time required to search and review records—not the plain language of a request. For example, a request for a single police report may actually produce several documents that requires significant redaction time because the report may include juvenile offenders or allegations of sexual assault. Therefore, categorizing requests as either “simple” or “complex” may result in relatively arbitrary distinctions and a slower production time.

Finally, requiring public agencies to essentially prioritize simple over complex requests strongly prejudices requesters who submit “complex” requests by “pushing” them down the priority queue. The PRA guarantees a general public right to prompt access to records and does grant priority access to requesters who submit “simple” requests. RCW 42.56.030; *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn. 2d 896, 910, 346 P.3d 737, 743 (2015) (“The PRA protects the public’s right to be informed of agency decisions.”).

3. WAC 44-14-040(3)—Consideration of When Time is of the Essence

Proposed Amendment: Requiring a public agency to “consider if the requester has identified a reason that time is of the essence for the production of the records and if it is practicable to produce the records in the time frame provided by the requestor.”

Comment: The City opposes this amendment for five separate reasons. First, this amendment is not supported by the plain language of the PRA or its interpretive case law. As previously explained, “nothing in the PRA requires an agency to prioritize certain requested records over others.” *West v. Dep’t of Fish & Wildlife*, 2022 WL 369984, 20 Wn. App. 2d 1074 (2022); *see also Williams v. Dep’t of Corr.*, 2022 WL 3754896, 23 Wn. App. 2d 1016 (2022).

Second, the proposed amendment is unworkable because it fails to explain how staff should process requests, which are claimed to be time sensitive. In the absence of further guidance, this proposed revision would require public agency staff to either (a) accept a requester’s representations that its request is time sensitive (which, may or may not be true) or (b) conduct their own research to verify if a request is in fact time sensitive. For example, a requester may claim in its request that they need the records for an urgent safety matter, but a simple assertion by a requester that they need records soon may not be objectively reasonable. If public agency staff were required to verify if a request is in fact time sensitive, they would also likely be unable to do so in a meaningful fashion. Determining if a request is actually time sensitive requires access to facts, and significant staff time, which most (if not all) public agencies lack.

Third, requiring public agencies to prioritize time-sensitive requests prejudices requesters who submit “non-time-sensitive” requests by “pushing” them down the priority queue. The PRA guarantees a general public right to prompt access to records and does not place a greater or particularly individualized right to those who submit simple requests. RCW 42.56.030; *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn. 2d 896, 910, 346 P.3d 737, 743 (2015) (“The PRA protects the public’s right to be informed of agency decisions.”). This is especially unfair to individuals who request records well in advance of their time-sensitive need, but who may still face a lengthy wait while others, who may have delayed submitting their request, are potentially served before.

Fourth, this proposed amendment incentivizes PRA requesters to submit urgent PRA requests—regardless of whether there is existence of true urgency. If PRA requesters understood that they would be guaranteed to receive their requested records in an expedited fashion if their request was “time sensitive,” requesters may be inclined to either fabricate a false deadline or simply wait until a deadline approaches before submitting a request. This behavior prejudices requesters who submit requests well in advance of their need for records and unfairly puts the onus on public agency staff who quickly process urgent PRA requests that could have been submitted well before the actual need.

Finally, the PRA was not designed to provide immediate access to records in time-sensitive situations. The purpose of the PRA is to simply ensure that the public remain informed of the actions of public agencies by ensuring prompt access to records. *See* RCW 42.56.030; RCW 42.56.080(2). If a PRA request is actually time sensitive, requesters may seek alternative methods to obtain records that will provide them faster access to the records, such as

subpoenas and discovery, or even filing a PRA lawsuit if the delay in providing a response is unreasonably excessive. *Cantu v. Yakima Sch. Dist. No. 7*, 23 Wn. App. 2d 57, 88, 514 P.3d 661, 678 (2022).

#### 4. WAC 44-14-040(6)—Requiring Substantial and Irreparable Damage for Third-Party Notice

Proposed Amendment: Requiring that a record contain information “which may substantially and irreparably damage a person or vital government function” before a public agency may issue third-party notice.

Comment: This proposed amendment is also inconsistent with the PRA and interpretive case law. The PRA authorizes public agencies to notify affected persons of a public records request. See RCW 42.56.540; RCW 42.56.520(2). Then, any person named in a record (or to whom the record pertains) may seek injunctive relief to prevent release of said record. *Id.* No further requirement is necessary to seek relief. *Love Overwhelming v. City of Longview*, No. 58830-7-II, 556 P.3d 692 (2024) (“The plain language of RCW 42.56.540 requires no more than this; the statute demands no additional qualitative or quantitative characteristics—merely that the person be ‘named.’”). In fact, it is only after third-party notice is provided and injunctive relief is sought that a court must consider whether a person may be “substantially and irreparably damaged” from release of the record. RCW 42.56.540. *Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007) (plurality opinion) (“[T]o impose the injunction contemplated by RCW 42.56.540, the trial court must find that a specific exemption applies and that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest.”). The Model Rules should not be revised in a way that requires a public agency to determine whether a record contains information “that may substantially and irreparably damage a person” before issuing third-party notice because that inquiry is reserved for a superior court upon request for injunctive relief.

#### 5. WAC 44-14-040(6)—Requiring Reasonable Belief Records are Arguably Exempt from Disclosure for Third-Party Notice

Proposed Amendment: Requiring a public agency to “have a reasonable belief that the records are arguably exempt from disclosure” before a public agency may issue third-party notice.

Comment: This proposed amendment is inconsistent with the PRA and interpretive case law. RCW 42.56.540 and RCW 42.56.520(2) do not require public agencies to determine whether an exemption actually applies to a record before issuing third-party notice to a named person. See *Doe L. v Pierce County*, 2018 WL 4006594, 4 Wn. App. 2d 1082 (2018) (“RCW 42.56.540 and former RCW 42.56.520 specifically state that if a third person is named in a record, the County may notify the third person that the record is the subject of a PRA request.... [T]here is no requirement that the County first determine that an exemption will apply to the record. Indeed, to require an exemption to be identified first contravenes RCW 42.56.540’s mechanism for allowing the third person to then move to enjoin the examination of the record by showing that an exemption exists.”) (internal citations omitted).

Attorney General Brown

November 6, 2025

Page 5

Sincerely,

**OGDEN MURPHY WALLACE, P.L.L.C.**



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