[1] It would not be surprising for compliance with the model rules to become the regular consideration and benchmark for review of agencies' actions. At the same time, the model rules cannot impermissibly speak for the legislature. Nor can the rules account for the variation between agency resources, recordkeeping, and functions. The more particular and specific you make the model rules, the more risk is created for agencies.

Proposed revisions to WAC 44-14-030(2):

The City of Auburn does not support this amendment. This proposed amendment defeats its purpose. It requires that, if an agency has records for which it is required to keep an index, the index itself must describe the schedule by which the index was or will be revised or updated, the contents of the index, and where the index is available. It also requires that, if an agency wishes to opt out of the index requirement because it is unduly burdensome and would interfere with agency operations, the request to opt out must identify each record and the reason why providing an index would be unduly burdensome and interfere with agency operations. The time necessary to identify individual records and list the specific reason that it is difficult to index each record may take the same amount of time, if not longer, than it would take to fully index it. In an attempt to save agencies time, the requirements to request to opt out may be unduly burdensome and interfere with agency operations, which could render the amendment meaningless.

Proposed revisions to WAC 44-14-040(1):

<u>The City of Auburn does not support this amendment.</u> The AGO's proposed additions to WAC 44-14-040(1), which suggests triaging requests, shortening time frames for response, and prioritization of "simple" requests, fails to account for the reality of responding to public records requests. The determination of whether a request is "simple" or "complex" is not always obvious on the face of the request, may be perceived differently between a requestor and an agency, and invites subjective classification of requests. Requests for a "small number of records" may still be complex depending on where those records are located, what exemptions

[1] "In sum, we hold that a sufficient closing letter will ordinarily trigger the PRA's one-year statute of limitations pursuant to *Belenski*'s final, definitive response test. In accordance with the attorney general's Advisory Model Rules, agencies must refrain from closing a request until the request has been fulfilled pursuant to applicable regulations. See WAC 44-14-04006(1)." *Id.* at 49.

may apply, the nature of the records, whether third party notices[2] are required or warranted, etc. What a requestor may view as simple may, for an agency, require an involved response with extended review. A request that appears simple, may become complex as it is being researched and records are located.

The proposed additions fail to account for the complexity and particular circumstances of an agency, the existing requests they have, and add an additional layer of subjective complexity to an already complex response process. In reality, many agencies already have a "fast track" system where they respond within 5 days.[3] It is arguably built into the permissible responses provided for in RCW 42.56.520. The suggested additions would be unworkable for many agencies, and incorporation of the proposed additions into the model rules would invite courts to hold agencies to what, for many agencies, would be an unobtainable standard.

Critics of an agency's "first in, first out" approach fail to recognize that this approach serves a purpose—to avoid distinguishing between requestors.[4] Additionally, if agencies only respond or always prioritize "simple" requests, more complex requests that are also of significant public importance will be delayed weeks or months. It is understandable that requestors want information quickly. But, the proposed amendment assumes the requests are simple, easy, and have greater importance than those of other requesters. The need to provide fullest assistance extends to all requesters, not with priority given to "simple" requesters.

Proposed revisions to WAC 44-14-040(3):

The City of Auburn does not support this amendment. The proposed amendment to WAC 44-14-040(3) requires that an agency consider whether time is of the essence. The term "time is of the essence" invites a subjective determination as to the importance of a request and could be considered a deadline for completion of a request, that, if not met, might lend a requestor to initiate litigation. It could require a requester to state the reason for their request[5] and whether or not time is of the essence may not be obvious on the face of the request. Further, it is highly unlikely that the City would be in a position to determine if the deadline is manufactured, self-imposed, or because of the delay of the requestor. This addition would permit distinguishing between requesters and determining priority based on a requesters' circumstances.

[2] A discussion of the proposal to eliminate third-party notices is below.

[3] According to the 2024 Joint Legislative Audit and Review Committee (JLARC) Public Records Report as presented at the WAPRO Fall Conference, responding agencies reported completion of 57% of requests within five days.

[4] "Agencies shall not distinguish among persons requesting records …." RCW 42.56.080(2).

[5] Persons requesting records "shall not be required to provide information as to the purpose of the request …." RCW 42.56.080(2).

Proposed revisions to WAC 44-14-040(6):

The City of Auburn does not support this amendment. The proposed revisions to WAC 44-14-040(6) would impose standards that are greater than those required by law at the expense of the rights and privacy that may be afforded to members of the public. It would prohibit the use of third-party notices where an exemption does not appear to apply, which would be directly contrary to the intent and the availability of relief from the court contained in RCW 42.56.540. Although a small number of requests would likely be processed more quickly by eliminating the use of third-party notices or restricting their use, that is arguably contrary to RCW 42.56.540 and detrimental to those individuals to whom the records relate. Also, courts would be inundated with requests for shortened-time review and hearings to resolve whether the release of private and/or personal information is proper.

Any suggestion that third party notices are unnecessary and useless disregards that third party notices are a useful tool to allow individuals to try to protect their information. To suggest that agencies simply send third party notices as a delay tactic with no actual concern ignores the reality that many agencies have records of a highly personal and private nature regarding specific individuals and release of such records can have significant detrimental impacts on individuals who had no choice but to be included in an agency's records. It also fails to account for the fact that agencies do not bring the lawsuit that may cause delay and, such delay in litigation, is not attributable to an agency, regardless of the ultimate outcome.

In addition, the "substantially and irreparably harm" test the proposal suggests is not rooted in law nor sufficiently outlined to allow determination of what would meet that standard.

Proposed revisions to WAC 44-14-040(8):

The City of Auburn does not support this amendment. The proposed changes to WAC 44-14-040(8) fail to consider that agreements cannot always be reached and that agencies must have a mechanism to close requests and achieve finality. It is not uncommon for requesters to be unresponsive after a request has been submitted. Requiring continued contact with a requester despite a lack of response, lack of records review, and lack of payment, etc. would cause additional delays to an already prolonged response process and worsen backlogs for request responses. The suggested revisions alleviate requesters from taking responsibility and accountability for addressing their own request. The amendment also suggests that, if the requestor fails to claim or review the assembled records within 30 days, they can submit a new request that receives priority (i.e., moves to the "front of the line") and disregards the time needed to possibly reassemble the records to complete the request.

Proposed revisions to WAC 44-14-040(10):

The City of Auburn does not support this amendment. This amendment requires that the agency make records "promptly available" which, essentially, allows a requestor to decide the

schedule of installments.[6] This disregards the time and staff necessary to complete a request and the fact that current requests must be set aside to complete an installment. This is not reasonable or practical. It is inappropriate commentary on how agencies should allocate limited resources without knowledge of the scope or extent of an agency's resources.

Proposed revisions to WAC 44-14-040(12):

The City of Auburn is in favor of this amendment. This proposed amendment helps streamline the process of closing a request in an efficient and manageable manner. It succinctly communicates necessary information to a requestor to allow them to act, if desired. In clarifying that this practice is acceptable, this amendment allows agencies to finalize a request while also giving the requestor information and sufficient opportunity to act.

Concluding Comments:

Many of the proposals would impose or require subjective determinations that invite discrimination between requesters, would deter or punish requesters with more complex requests, and could encourage requestors to take advantage of the system by making a series of small requests to get priority. This does not equitably serve the public by fulfilling all requests as timely and reasonably as possible.

Many of the additional actions proposed would actually have the effect of extending the time for response, require longer timelines for work on a request, and would add to the inefficiency of an already widely overwhelmed public records system. Leaving requests open with indefinite end dates, adding more or additional information that isn't legally required, and requiring agreements with or more communications with unresponsive requesters would add to inefficiency, not reduce it.

For example, removal of third-party notices and prioritization of "simple" requests would presumably have a benefit, but it would be to the detriment of those individuals at issue in the records requested and those individuals seeking complex information, for what could be an equally important reason.

In conclusion, the model rules are non-binding best practices, but the impact of their adoption for agencies, especially in light of *Cousins*, is significant and should not be underestimated. Nor should the model rules speak where the legislature already has. The model rules cannot address the variety of circumstances agencies find themselves in, the divergence in resources, or the vast differences in records and technology across agencies. To the extent the model rules can account for that variety and complexity in agency, and be realistic about the process, the greater benefit they will have to public agencies. Ultimately the hope is public agencies can use the rules as guidance to improve practices and provide the best service to all requesters, not

[6] Citing RCW 42.56.100, the comment states, "This recognizes that an agency is not always capable of fulfilling a request as quickly as the requestor would like." WAC 44-14-04003(3).

facilitate quicker responses for a limited number of requesters at the expense of the agency and those they serve who may be included in their records.