City of Tukwila

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Administrative Services Department – Marty Wine, Deputy City Administrator

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RE: Proposed Amendments to the Public Records Act (PRA) Model Rules (WAC 44-14)

Dear Attorney General Brown,

Please accept this letter as the City of Tukwila formal comment letter in response to the proposed amendments to the Public Records Act (PRA) Model Rules found in the Washington Administrative Code (WAC) 44-14 (CR-102).

The primary purpose of the PRA is "to foster governmental transparency and accountability by making public records available to Washington citizens." *Doe ex re. Roe v. Washington State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016) (citing *City of Lakewood v. Koenig*, 182 Wn.2d 87, 93, 343 P.3d 335 (2014)). The PRA is a "strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). But, **the PRA must also be interpreted in a way that carefully balances public transparency against a public agency's ability to complete its other vital functions**.[1]

Under the PRA and the PRA Model Rules, as currently written, public agencies must respond to all PRA request in a timely manner, conduct adequate searches of public records, then review responsive records for applicability of over six hundred (600) potential exemptions[2], redact/ withhold the records as necessary, prepare an exemption log, and then finally provide the records and log to requesters. In response to the increasingly complex demands of the PRA, the City of Tukwila, as other agencies, has increased dedicated staffing levels towards PRA functions, despite funding constraints.

The main objection to many of the proposed edits is because the PRA already provides a remedy to requesters who do not receive their records in a timely manner. The concerns brought up by the media do not point to the overarching issue of non-compliance by certain jurisdictions. Rather than modify the model rules, the best course of action is for a requester to file a lawsuit against a public agency, alleging a violation of the PRA, if the agency fails to respond in a timely manner. The adoption of rules requiring expedited processing is not only inconsistent with established law and burdensome on public agencies, but also wholly

[1] *See e.g.,* RCW 42.56.100 ("Agencies shall adopt and enforce reasonable rules and regulations… to prevent excessive interference with other essential functions of the agency…."); RCW 42.56.070 ("A local agency need not maintain… and index [of certain public records], if to do so would be unduly burdensome….");.

unnecessary because current remedies exist. The scope of the proposed edits would be better addressed through legislative rulemaking due to the potential for widespread impacts to both the public and to public agencies that are already struggling to meet the demands of the PRA with limited resources.

With this information in mind, the City has ongoing concerns with some of the PRA Model Rules:

1. **Revision to WAC 44-14-020(3) – Requiring Most Timely Possible Action**

   Proposed Revision: Adding the phrase "the most timely possible action on requests".

   Comment: The PRA already guarantees the public the right to prompt access to public records by stating "public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them *promptly available*" [RCW 42.56.080(2) emphasis added]. The Public Records Act (PRA) already sets clear and measurable procedural benchmarks which provide objective timeframes that provide both agencies and requesters with a predictable framework for compliance and enforcement. The WAC should serve to clarify statutory intent, not expand or reinterpret it beyond what the State Legislature has enacted.

   Introducing "the most timely possible action" undermines the already established clarity found in the PRA and attempts to expand beyond what the Legislature has established. This language suggests a more stringent expectation going beyond the statutory requirement without defining what "most timely possible action" means. Such a vague standard could result in inconsistent enforcement and unnecessary litigation over compliance, ultimately resulting in greater taxpayer burden.

   Washington State Courts have consistently emphasized compliance with the PRA must be measured by objective and reasonable standards rather than undefined/ambiguous language. Per *Yousoufian v Office of Ron Sims, 168 Wn.2d 444 (2010*), the Washington State Supreme Court held that agencies are expected to act reasonably and diligently in responding to public records requests, but that penalties and compliance determinations must be made on demonstrable facts rather than what might have been "possible". Additionally, *Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702 (2011)* underscored the importance of clear, objective standards that allow for meaningful judicial review.

   The current proposed language does not support the need for clear and enforceable standards to shore up the standards established through the PRA.

2. **Revision to WAC 44-14-040(1) – Triaging Simple and Complex Requests**

   Proposed Revision: Requiring public agencies to "triag[e] requests into simple and complex tracks to ensure that processing times are proportionate to the difficulty of each request."

   Comment: 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 and creating inconsistency in how requests may be handled from one agency to another. 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 require 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.

Additionally, 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 not 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."). The well-established practice of "first-in, first-out," allows agencies to handle requests in order of date of receipt and with the greatest efficiency. With the proposed requirement to prioritize requests based on their nature, requestors may become incentivized to split their request into several "simple" requests in hopes of receiving records more quickly or to jump a queue of existing requests.

Finally, this requirement places public agencies in the position of being forced to interpret the nature and intent of the request, which requesters are not required to disclose. No parameters are provided in the proposed revisions that would determine the difference between a "simple" or a "complex" request. By requiring staff to make this determination, an additional layer of liability is added for public agencies that would ultimately come at the cost of taxpayers should agencies be forced to defend their decision in court.

3. <u>Revision to WAC 44-14-040(1) - Single Record Within One Business Day</u>

<u>Proposed Revision</u>: Requiring public agencies to "endeavor to complete requests for a single record within one business day."

<u>Comment</u>: The PRA and its interpretive case law do not require public agencies to provide records within a specific timeframe. *See* RCW 42.56.520(1); RCW 42.56.080(2) ("Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person…."); *see also* AGO 1991 No. 6 ("We believe <u>the requirement of a prompt response means that agencies should act reasonably expeditiously in light of all the circumstances</u>. This flexible standard is consistent with the intent of the Legislature.").

Instead, the PRA requires public agencies to provide an initial response within five days, RCW 42.56.520(1), and provide a complete response within a reasonably prompt timeframe based on the totality of the circumstances. *Conklin v. Univ. of Washington Sch. of Med.*, 25 Wn. App. 2d 1010, *rev'w denied*, 528 P.3d 362 (Wash. 2023) ("In determining whether an agency acted promptly in producing responsive records, we

examine whether the agency's response was thorough and diligent. Whether the agency responded with reasonable thoroughness and diligence is a fact-specific inquiry."). Requiring public agencies to provide certain public records within one business day is therefore inconsistent with the PRA and places unrealistic expectations on public agencies, especially smaller jurisdictions with little to no staff, who may not have the capacity to provide quick responses.

Finally, the proposed revision fails to recognize that the time required for public agency staff to search, identify, review, and provide a single record to a requester can be extremely time-consuming. Not all single records are easy to locate, review for exemption, and produce. For example, the City can likely produce certain types of records within a short period of time, such as permits, resolutions, and ordinances. But other type of single records can take hours to ultimately produce due to the complexity and/or length of the record.

Agencies are already required to promptly acknowledge receipt of requests within 5 business days and respond to and fulfill requests as promptly as feasible, making this proposed revision unnecessary.

4. Revision to WAC 44-14-040(3) – Consideration of When Time is of the Essence

Proposed Revision: Requiring public agencies 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 Requester"

Comment: The City opposes this revision for five separate reasons. First, this revision is contrary to the plain language of the PRA and its interpretive case law. RCW 42.56.080(2) plainly states that public agencies "shall not distinguish among persons requesting records, and such persons shall not be required to produce information as to the purpose for the request" except in limited circumstances. (Emphasis added). And, 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 revision is unworkable because it fails to explain how staff should process requests, which are claimed to be time sensitive. In 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 greater not a particular 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, who must face a lengthy wait while others, who may have delayed submitted their request, are served before.

Fourth, this proposed revision incentivizes PRA requesters to submit last minute PRA requests. 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 near before submitting a request. This behavior prejudice requesters who submit requests well in advance of their need for records and unfairly put 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 on 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 file 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).

5. <u>Revision to WAC 44-14-040(6) – Requiring Substantial and Irreparable Damage for Third Party Notice</u>

<u>Proposed Revision:</u> Requiring that a record contain information "that may substantially and irreparably damage a person if disclosed" before a public agency may issue third-party notice.

<u>Comment</u>: This proposed revision is also inconsistent with the PRA and interpretive case law. The PRA authorizes public agencies to notify affected person of a public request records. *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 damage" 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 PRA 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.

Moreover, the proposed revision also unfairly requires public agency staff to make judgments whether release of information would "substantially and irreparably damage a person" based solely on the limited information contained in the record at-issue. Most

often, these records do not provide full context for the information. Thus, whether release of information will actually "substantially and irreparably damage a person" depends heavily on information that public agency lacks and is currently prohibited from obtaining from requesters.

Finally, limiting public agencies to sending third party notice only when release of information would "substantially and irreparably damage a person" exposes public agencies to potential liability by requiring release of records that might be exempt, but at the time staff adjudged would not "substantially and irreparably damage a person." RCW 42.56.060 acts as an immunity shield to public agencies that send third party notice.

6. **Revision to WAC 44-14-040(6)—Requiring Applicability of an Exemption for Third Party Notice**

Proposed Revision: Requiring public agencies to determine an exemption may apply to a record before it issues third-party notice.

Comment: This proposed revision 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).

The proposed revisions above should be rejected because they are inconsistent with established law. In general, the PRA asks very little of public records requesters. Requesters must submit a request for identifiable records, respond to clarification(s), wait a reasonable period of time for the requested records, and then pay for and claim records in a timely fashion. Yet, the proposed revisions above seek to shift many of those burdens to the public agency by imposing new rules, such as expediting "time-sensitive requests." The purpose the PRA Model Rules "is to provide information to records requesters and state and local agencies about 'best practices' for complying with the Public Records Act, chapter 42.56 RCW." WAC 44-14-00001. **Its purpose is not to establish new rules that impose hardships and/or response standards that exceed those established in the PRA and its interpretive case law.**

Finally, the proposed revisions above should not be adopted because the PRA already provides a remedy to requesters who do not receive their records in a timely manner. The PRA allows a requester to file a lawsuit against a public agency, alleging a violation of the PRA, if the agency fails to respond in a timely manner. RCW 42.56.550; *Cantu v. Yakima Sch. Dist. No. 7*, 23 Wn. App. 2d 57, 88, 514 P.3d 661, 678 (2022). Thus, adopting rules requiring expedited processing is not only inconsistent with established law and burdensome on public agencies, but also wholly unnecessary because current remedies exist.

Consequently, while ultimately designed to improve the processing speed for PRA requests, proposed revisions referenced above should be rejected because they: (1) are inconsistent with the Public Records Act ("PRA"), (2) place an undue burden on public agencies and have potential legal implications, (3) are administratively unworkable, and/or (4) strongly prejudice the

individuals who submit non-time sensitive, complex PRA requests. The impacts of the proposed changes to the Model Public Records Rules are cost-prohibitive and resource intensive for the City to implement and therefore unnecessarily burdensome. We anticipate other public agencies will be similarly negatively impacted should these changes be adopted.

We appreciate the opportunity to provide comments and are available should there be any questions.

Regards,

Signed by:
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Andy Youn-Barnett
City Clerk & Records Governance Manager

Signed by:
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CC: Thomas McLeod, Mayor
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