

Public Records: Tackling the Tough Questions Including Use of Smart Phones and Other Thorny Issues



MRSC Local Government Webinar Series

November 13, 2012

Co-Presented By:

Joe Levan, MRSC Legal Consultant

Scott Sackett, Washington State Archives
Electronic Records Management Consultant

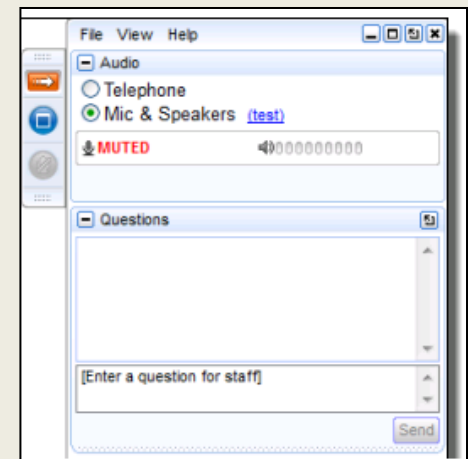


Webinar Technical Notes



During the Webinar:

- Technical Difficulties: Call MRSC at (206) 625-1300 or (800) 933-6772
- To expand or collapse your toolbar, click on the arrow
- To submit a question or comment:
Maximize the “Questions” portion, type your message, and click the “Send” button



After the Webinar:

- A link to this webinar will be emailed to attendees



JOE LEVAN

Legal Consultant

jlevan@mrsc.org

(206) 625-1300

(800) 933-6772

MRSC provides legal and policy assistance to cities, towns, counties, and other local governments throughout the state

Call on Joe and the other MRSC consultants with questions related to municipal law and for assistance with sample policies and other research

www.mrsc.org



*Municipal Research &
Services Center of
Washington*



Washington State Archives, a division of the Office of the Secretary of State, preserves and provides access to state and local agency records with enduring historical value

The Archives' Records Management program provides guidance, advice and support to state and local government agencies in the retention and management of public records

www.sos.wa.gov/archives/recordsmanagement

SCOTT SACKETT

**Electronic Records
Management Consultant**

Scott.sackett@sos.wa.gov

(509) 413-3296



Washington
Secretary of State
SAM REED



WHAT IS A PUBLIC RECORD UNDER CHAPTER 40.14 RCW?

For **retention** purposes (RCW 40.14.010):

- “...Made by or received by any agency of the state of Washington in connection with the transaction of public business...” (this applies to local governments as well as state agencies)
- “regardless of physical form or characteristics, and including such copies thereof...”

WHAT IS A PUBLIC RECORD UNDER CHAPTER 42.56 RCW?

For **Public Records Act (PRA)** purposes:

- Cities, counties, special purpose districts, and other local government entities are “local agencies” under the PRA
- Under the PRA, a “public record” is defined broadly to include any:
 - Writing
 - Containing information relating to the conduct of government
 - That is prepared, owned, used, or retained by that government regardless of physical form or characteristics

RCW
[42.56.010](#)(1)

RCW
[42.56.010](#)(3)

WHAT RECORDS NEED TO BE **RETAINED**? (WHAT IF THEY AREN'T?)

- Per RCW [40.14.070](#), public records can only be destroyed in accordance with [records retention schedules](#) approved by the Local Records Committee
- If a record is destroyed prior to meeting its retention requirement, consequences can include:
 - Audit findings
 - Negative publicity
 - Lost lawsuits
 - Penal provisions under chapter [40.16](#) RCW (injury to and misappropriation of a public record)

KEEP YOURSELF OUT OF THE HEADLINES

INTENTIONAL DESTRUCTION OF A PUBLIC RECORD IS A FELONY UNDER CHAPTER 40.16 RCW

According to an [October 2012 article](#) in *The Columbian* newspaper:

- A former county auditor in Washington state was accused of shredding public records
- He was charged initially with two felony counts of injury to public records
- He admitted to asking his staff to shred documents, which included vouchers related to unauthorized personal expenses
- He ended up pleading guilty to attempted injury of public records, and he was sentenced to serve 168 hours of community service and ordered to pay the county \$62,000 in restitution

PENALTIES UNDER THE PRA

- Requesters can sue the agency
- Statutory penalties – if the agency is found to have improperly denied the requester’s right to inspect or copy public records, courts have interpreted RCW [42.56.550](#)(4) to mandate a per day penalty
- Depending upon the circumstances and the extent to which the agency acted in good faith, the penalty ranges from \$0 per day up to \$100 per day for each day the requester was denied the right to inspect or copy the public record at issue
- Costs and reasonable attorney fees may also be awarded against an agency if a requester can show that an agency denied the requester’s right to:
 - Inspect or copy a record, or
 - Receive a response to a PRA request in a reasonable time

NO DUTY TO CREATE RECORDS BUT ONCE RECORD EXISTS, DUTY TO RETAIN MAY APPLY

- Neither the **records retention** requirements nor the **PRA** require an agency to create records
- If, for example, a **PRA request** is made for a record that no longer exists because it was properly destroyed in accordance with the appropriate records retention schedule, the response from the agency would be that there are no records responsive to the PRA request – see, e.g., [*Bldg. Indus. Ass'n of Wash. v. McCarthy*](#), 152 Wn. App. 720 (2009)
- However, once a PRA request is made and while it is pending, records responsive to the request cannot be deleted, even if they could have been deleted otherwise under the applicable retention schedule – see, e.g., [*O'Neill v. City of Shoreline*](#), 170 Wn.2d 138, 149 (2010); see also RCW [42.56.100](#)

ELECTRONIC RECORDS & THE PRA

- An electronic record (just like any other record) will be a public record if it contains information related to the conduct of government and it has been prepared, owned, used, or retained by the agency

RCW
[42.56.010](#)

See also:

- WAC [44-14-050](#) (processing of PRA requests – electronic records)
WAC [434-662-150](#) (email management)
WAC [44-14-05001](#) (access to electronic records)
WAC [44-14-05002](#) (reasonably locatable and translatable electronic records)
WAC [44-14-05003](#) (parties should confer on technical issues)

METADATA & THE PRA

- Metadata is data about data
- Hidden statistical information about a document generated by a software program
- Generally not visible when a document is printed or converted to an image file
- Describes the history, tracking, or management of an electronic document
- Generally describes how, when, and by whom the record was collected, created, accessed, or modified and how it is formatted (e.g., size, location, storage requirements, and media information)

Examples of email

metadata (among 1,200 or more properties):

- dates the email was sent, received, replied to, or forwarded
- blind carbon copy information
- sender address book information

O'Neill v. City of Shoreline, 170 Wn.2d 138, 147-48 (2010)

KEY CONCEPT – CONTENT

Content

- In connection with the transaction of public business under chapter [40.14](#) RCW
- Relating to the conduct of government under chapter [42.56](#) RCW
- But Note: If the content of the record relates solely to personal matters and not agency business, it is not a public record – see, e.g., [Tiberino v. Spokane County Prosecutor](#), 103 Wn. App. 680 (2000); [Yacobellis v. Bellingham](#), 55 Wn. App. 706 (1989)

KEY CONCEPT – FUNCTION/USE

Function/Use

- Under the PRA, chapter [42.56](#) RCW, to constitute a record, the record must relate to the conduct of government and be either prepared, owned, used, **or** retained by the agency
- Whether the record was **used** by the agency is not always clear
- A record is “used” by an agency if the record contains information that the agency either employs for, applies to, or makes instrumental to a governmental end or purpose – see, [Concerned Ratepayers v. PUD No. 1](#), 138 Wn.2d 950, 960 (1999)

KEY CONCEPT – FUNCTION/USE & NEXUS

Function/Use & Nexus

- Note: Even if a record relates in some way to the conduct of government, it may not be a public record if there is no nexus between the record and the agency's decision-making process – see, e.g., [*West v. Thurston County*](#), 168 Wn. App. 162 (2012) (attorney billing records not public records in a situation in which the invoices at issue were above the county's deductible and the county did not receive or use the invoices); see also [*MRSC Insight*](#) post entitled, “[Recent Court Guidance on What Constitutes a Public Record under the Public Records Act](#)”
- Nexus occurs when a record not only relates to the conduct or performance of the agency, but also when the record is a relevant factor in the agency's action – see, e.g., [*Concerned Ratepayers v. PUD No. 1*](#), 138 Wn.2d 950 (1999)

KEY RECORDS **RETENTION** CONCEPT

PRIMARY VS. SECONDARY COPIES

Primary Copy

- Generally, is the original record sent or received
- Serves as the official record
- Must be retained in accordance with current retention schedules

Secondary Copy

- Copies/duplicates of primary records which may be discarded when no longer needed for agency business

IS IT A PUBLIC RECORD?

Retention Considerations:

1. **Not a public record** = not connected to transaction of public business - **no retention required**

Examples:

- Personal email to friend/family
- Facebook post to personal page, not relating to agency business
- But ... records of such records may constitute public records (e.g., transaction log)

IS IT A PUBLIC RECORD UNDER THE PRA?

What is *not* a public record under the PRA?

Guidance is provided in [*Yacobellis v. Bellingham*](#), 55 Wn. App. 706 (1989):

- The court explained that personal notes, telephone messages, and daily appointment calendars are not public records
- Why? Because such records:
 - Are generally created solely for the individual's convenience or to refresh the writer's memory
 - Are maintained in a way indicating a private purpose
 - Are not circulated or intended for distribution within agency channels
 - Are not under agency control, and
 - May be discarded at the writer's sole discretion

RECORDS WITH MINIMAL RETENTION VALUE

Retention Considerations:

2. Is a record, but minimal retention value – can destroy as soon as no longer needed for agency business
 - a. Secondary copies (e.g., reference/convenience/access copies, cc's, etc.)
 - b. Transitory records:
 - Only document information of short-term value, AND
 - Not needed as evidence of a business transaction, AND
 - Not covered by a specific record series

TRANSITORY RECORDS

Retention Considerations:

Examples of transitory records:

- Community affairs notices (e.g. “Combined Fund Drive luncheon is this afternoon!”)
- Preliminary drafts, in many cases (see [Advice Sheet](#))
- Metadata created on personal devices when remotely accessing records on agency server

RECORDS WITH RETENTION VALUE

Retention Considerations:

3. Is a record, has retention value – **must be retained for specified minimum retention period**

Examples:

- Public Disclosure/Records Requests, GS2010-014 (retain for 2 years after request fulfilled, then destroy)
- Work Orders, GS50-06B-13 (retain for 3 years, then destroy)
- Communications – Governing/Executive/Advisory, GS50-01-12 (retain for 2 years after received/provided, then arrange for Archives appraisal/transfer)

PROCESS FOR RESPONDING TO PRA REQUESTS

1. Does an identifiable record exist that is responsive to the PRA request?
2. If yes, is there information in the record that is exempt or prohibited from disclosure?
3. If yes, the exempt information can be redacted and/or the information prohibited from disclosure cannot be disclosed.

NOTE: If the record is requested in electronic format, the general rule is that it is to be provided in electronic format

- Keep in mind that WAC [434-662-040](#) requires that electronic records be retained in electronic format

SCENARIO *1:*



You begin your day
by checking your
agency email on
your personal smart
phone

SCENARIO 1: ACCESSING AGENCY EMAIL VIA SMART PHONE – RETENTION CONSIDERATIONS

- **Content** and **function** determine retention
- Smart phone provides a means of remote access to agency email server
- Retain emails sent/received by agency email server as primary copy
- Flash memory/metadata created on your device is a transitory record
- Have policy: if it relates to agency business, use agency-controlled email account

SCENARIO 1: ACCESSING AGENCY EMAIL VIA SMART PHONE – PRA CONSIDERATIONS

- If you download an attachment from an email to view via your personal smart phone, it seems that the record likely will remain in temporary cache and be a secondary copy
- Arguably, it would not be reasonable nor technically feasible to make such temporary cache available in response to a PRA request – see, e.g., [Mechling v. City of Monroe](#), 152 Wn. App. 830 (2009), rev. den., 169 Wn.2d 1007 (2010); citing: WAC [44-14-050](#); WAC [44-14-05001](#)
- If you don't create unique agency records on your smart phone, the reasonable conclusion is that everything on the phone related to agency business would be a secondary copy

Sample Email Policy

Monroe: Email for Public Officials, Policy & Guidelines

- Non-city email addresses may be disclosed in the course of responding to public records requests or discovery requests in legal proceedings – see <http://www.mrsc.org/policyprocedures/m67email.pdf>

WHAT ABOUT TEXT MESSAGES?

- Text messages can be problematic both from a records retention and PRA perspective
- If you text, you are creating a unique record
- Issues arise regarding who has custody and control of the record, and how to access such records because they are held by a third party
- It may be, for example, that the third party provider will only retain texts for a limited amount of time (e.g., 5-10 days)
- If allowing texting, strongly recommend use of capture tools to retain all texts
- If texting used to conduct agency business, recommend that it be limited to those for whom it is truly necessary (e.g., for specified law enforcement and emergency management functions)

SCENARIO 2:



You check your
agency voice mail
on your smart
phone

SCENARIO 2: ACCESSING AGENCY VOICE MAIL VIA SMART PHONE – **RETENTION** CONSIDERATIONS

- Third party provider – presents challenges
- Again, **content** and **function** determine retention
- Is message **transitory** in nature (e.g., “call me at 2 PM”)?
- If message has retention value, **capture** record or, if not possible, **memorialize** it

SCENARIO 2: ACCESSING AGENCY VOICE MAIL VIA SMART PHONE – **RETENTION** CONSIDERATIONS (CONT.)

- If possible, **capture** voice mail within agency systems, e.g., as an email with audio file attached – retain what is captured as primary copy
- Not possible? **Memorialize** the business transacted, e.g., with an email to sender of the voice mail summarizing and confirming its content
- Again, agency policies/procedures regarding appropriate use and retention are recommended

SCENARIO 2: ACCESSING AGENCY VOICE MAIL VIA SMART PHONE – PRA CONSIDERATIONS

- Recommend having an integrated voice mail and email system so all voice messages also are created as files that become part of email system
- That way, the email with the voice message attachment is retained as the primary copy and the message on the voice mail system is a secondary copy that can be deleted
- Remember: Sound retention practices make it easier to respond to PRA requests

Sample Policy

Maple Valley: Telephone and Cellular Phone Usage Policy –

<http://www.mrsc.org/policyprocedures/m355cellphonepol.pdf>

SCENARIO *3:*



You access your
agency desktop or
email via your
personal laptop

SCENARIO 3: ACCESSING AGENCY DESKTOP/EMAIL USING YOUR PERSONAL LAPTOP

RETENTION CONSIDERATIONS

- Whether accessing via Virtual Private Network (VPN) or remotely accessing email server, laptop serves as an access window to agency server/network
- Records on agency server/network are primary copy – retain based on **content** and **function**
- Flash memory/metadata created on your laptop is a transitory record

WHAT IF I'M USING A PERSONAL EMAIL ACCOUNT?

Retention Considerations:

- Should be avoided when conducting agency business – this should be reflected in agency policy
- If you must **send** from a non-agency account, copy to agency email address at same time and retain that as primary copy
- If you **receive** a business-related email on a personal account, forward to agency email address and retain that as primary copy
- If business needs to be conducted remotely, agency should have email that permits remote access and is accessible by agency

SCENARIO 3: ACCESSING AGENCY DESKTOP/EMAIL USING YOUR PERSONAL LAPTOP PRA CONSIDERATIONS

- Seems reasonable to regard a VPN system as a method to gain access – a viewer
- Likely inadvisable to download documents to your personal laptop while using a VPN or remotely accessing your agency email
- If the document is the primary copy, reasonable approach would be to transfer it to the agency server and delete it from your personal laptop so the primary copy is on the agency server
- Don't keep any primary copies of agency records on your personal electronic devices

SCENARIO

4:



Use of Social Media
by you personally
and/or on behalf
of your agency

SCENARIO 4: SOCIAL MEDIA– RETENTION CONSIDERATIONS

- E.g., Facebook, Twitter, Flickr, LinkedIn, etc.
- [Advice sheet](#) available regarding key questions
- [Best practices and guidelines](#) from Office of the Governor
- Retention requirements based on **content** and **function**
- Records with retention value need to be captured and retained by agency
 - Most often entails third-party social media capture tools, e.g., TweetTake, SocialSafe, ArchiveFacebook, PageFreezer, etc.
 - Cannot rely on social media provider to retain – might be there in 10 years or might be gone tomorrow

SCENARIO 4: SOCIAL MEDIA– RETENTION CONSIDERATIONS

- Agency should have social media policy delineating terms of use, authorization/training required

Examples:

- [City of Seattle](#)
- [City of Bonney Lake](#)
- [City of Cheney](#)
- Even if use not authorized, agency may be held accountable for elected officials/employees acting in official capacity on social media – advise capture and retention by agency

SCENARIO 4: SOCIAL MEDIA– PRA CONSIDERATIONS

If the agency has its own Facebook page:

- Assume posts are public records
- Need to manage posts
- Consider retention
- Consider metadata
 - Maintained by a third party (e.g., Facebook)
 - Arguably, such metadata is not reasonably accessible
 - Use third party tools to capture records

SCENARIO 4: SOCIAL MEDIA– PRA CONSIDERATIONS (CONT.)

If an agency official or employee has his/her own Facebook page:

- Don't mix agency business with your personal life
- In other words, don't use your personal Facebook page to conduct agency business
- The agency should have clear and enforceable policies regarding such activities
- If you are an incumbent who is a candidate, make sure your election activities don't mix with agency business

Additional Sample Policy

King County Social Media Guidelines

- Communication through agency-related social media is considered a public record –
<http://www.mrsc.org/policyprocedures/k5socmedguide.pdf>

MOVING TO THE CLOUD?

RETENTION CONSIDERATIONS

- Legal custody of the records
- Privacy, security; hijacking of information
- Data transmission/flow (where is the server, exactly?)
- Disaster preparedness and recovery
- If/when the business relationship ends, how will they ensure that your records can be exported in a usable, compatible format?
- These issues should be addressed in any contract/agreement with the provider

THE DIGITAL ARCHIVES:

MOVING YOUR E-RECORDS INTO THE FUTURE

- Electronic records that are designated as Archival in retention schedules can be appraised and/or transferred to the Archives for permanent preservation and access
- [Digital Archives](#) currently holds >110 million records, over 36 million of which are searchable
- Current holdings include County Auditors' recorded documents; Superior Court Clerk case files; scanned minutes, ordinances, and resolutions; emails with archival value; digital audio recordings of council/commission meetings, and more

QUESTIONS?

CONTACT INFORMATION



JOE LEVAN
MRSC Legal Consultant
jlevan@mrsc.org
(206) 625-1300
(800) 933-6772
www.mrsc.org



SCOTT SACKETT
Washington State Archives –
Records Management
recordsmanagement@sos.wa.gov
scott.sackett@sos.wa.gov
(360) 586-4901
(509) 413-3296
www.sos.wa.gov/archives/recordsmanagement