No. 100260-2

WASHINGTON SUPREME COURT

CHRISTY DIEMOND,

Petitioner,

v.

KING COUNTY,

Respondent.

MEMORANDUM OF AMICUS CURIAE

WASHINGTON COALITION FOR OPEN GOVERNMENT

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Coalition for Open Government ("WCOG"), a Washington nonprofit corporation, is an independent, nonpartisan organization dedicated to promoting and defending the public's right to know in matters of public interest and in the conduct of the public's business. WCOG's mission is to help foster open government processes, supervised by an informed and engaged citizenry, which is the cornerstone of democracy. WCOG represents a cross-section of the Washington public, press, and government.

II. STATEMENT OF THE CASE

WCOG relies on the facts set forth in the parties' briefs.

III. ARGUMENT

WCOG takes no position on the legal issues that do not relate to the interpretation of the Public Records Act, Chap. 42.56.RCW ("PRA"). WCOG is concerned with the correct interpretation of the PRA.

If review is granted, and if Diemond prevails on the procedural issues, then this case presents an opportunity for this Court to clarify that an entire county is one "agency" under the PRA, and counties (and other agencies) do ***not*** have the legal authority to Balkanize themselves into separate "agencies" for purposes of comply with the PRA. That issue warrants review by this Court under RAP 13.4(b)(1) and (4).

The PRA broadly defines "agency" as follows:

> (1) "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

RCW 42.56.010. Under this definition, which omits only the state as a whole, "every county" is a "local agency" and therefore an "agency" for purposes of the PRA.

In response to petitioner Diemond's allegation that King County violated the PRA by failing to produce responsive

records, from either the Sheriff or the Prosecuting Attorney or both, the respondent argues that King County is actually more than one "agency" for purposes of the PRA:

> King County Code (KCC) section 2.12.005 defines the Executive Branch and the Sheriff's Office as separate agencies for the purposes of responding to public records requests. King County Code 2.12.005.A, 2.12.230.B; CP 970-75. A request to one agency does not constitute a request to any other agency. *Id*.

Answer to Petition for Review at 3. **The County is wrong. King County is one agency under the PRA.** The County has no authority to Balkanize itself into separate agencies for purposes of complying with the PRA. The ordinances relied on by the County impermissibly conflict with the PRA and are invalid under *Kilduff v. San Juan County*, 194 Wn.2d 859, 453 P.3d 719 (2019).

A. KCC 2.12.005(A) and KCC 2.12.230(B) are invalid under *Kilduff v. San Juan County*, 194 Wn.2d 859, 453 P.3d 719 (2019).

The County has adopted ordinances that purport to define King County as nine (9) separate agencies under the PRA. KCC

2.12.005(A). These ordinances further purport to require requestors to make separate PRA requests to each separate agency through a separate PRA office. KCC 2.12.230(B). Finally, these ordinances purport to eliminate any obligation by King County as a whole to respond to PRA requests:

> A separate request must be made to each agency from which access to public records is requested or assistance in making such a request is sought.

KCC 2.12.230(B). All of these ordinances are based on the County's erroneous assumption that it has the legal authority to interpret the term "agency" in RCW 42.56.010(1) to elevate the bureaucratic interests of the County over the policy of the PRA.

In *Kilduff v. San Juan County*, 194 Wn.2d 859, 453 P.3d 719 (2019), the county adopted an ordinance that purported to require a PRA requestor to request review by the county prosecutor before filing a lawsuit under the PRA. San Juan County argued that RCW 42.56.100 authorized agencies to adopt "administrative remedies" into the PRA. 194 Wn.2d 870-872. This Court rejected this argument **9 to 0**, holding that the county

ordinance was invalid because it conflicted with RCW 42.56.520. The Court reiterated the point, made in numerous PRA cases, that agencies may not interpret the PRA in ways that undermine the PRA:

> In sum, San Juan County's reading of RCW 42.56.520, .040, and .100 undermines the purpose of the PRA. Far from authorizing agencies to create an internal barrier to judicial review, these three provisions are meant to further the interests of the people to receive "full access to information concerning the conduct of government on every level," not the interests of "the agencies that serve them." RCW 42.17A.001(11); RCW 42.56.030. To be clear, the PRA's "mandate of liberal construction requires the court to view with caution any interpretation of the statute that would frustrate its purpose." *Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 86 Wn. App. 688, 693, 937 P.2d 1176 (1997).
>
> SJCC 2.108.130's administrative exhaustion requirement is not authorized by any provision of the PRA, undermines the PRA's purposes, and is contrary to the PRA model rules. We therefore hold that the ordinance is invalid.

194 Wn.2d at 873-74.

Similarly, the King County ordinances are an invalid attempt to create "internal barriers" to PRA compliance within

the County itself. RCW 42.56.100 does ***not*** give the County the authority to adopt PRA ordinances that conflict with the PRA. The County ordinances that purport to break King County up into ***nine*** separate agencies are based on an erroneous, narrow interpretation of RCW 42.56.010.[1] These ordinances undermine the purpose of the PRA by making it more difficult and time-consuming to obtain public records, and more likely that responsive records will not be produced.

The definition of agency in RCW 42.56.010 is broadly drafted to encompass all the different types of government

[1] The County has suggested that the definition of "agency" cannot be interpreted to require coordination among county agencies run by separately elected officials. *Answer to WCOG's Amicus Brief* (10/26/20) at 8-9. First, there is absolutely no reason why the PRA—a state law enacted by the voters—could not modify the obligations or relationships of local agencies and officials, which are themselves created by state law. Second, the County only has ***six*** different elected officials or bodies (executive, council, sheriff, assessor, prosecutor, and director of elections), but KCC 2.12.005(A) purports to divide King County into ***nine*** separate agencies.

agencies, specifically including "county" and any department or division of a county:

> (1) "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

RCW 42.56.010. Interpreting this section liberally in favor of disclosure, as required by *Kilduff* and RCW 42.56.030, the "County" as a whole is an "agency" that must comply with the PRA. Under *Kilduff* the County has no authority to adopt a narrow interpretation of RCW 42.56.010(1) under which the whole County is not an "agency." KCC 2.12.005(A) and KCC 2.12.230(B) are invalid.[2]

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[2] The county ordinances are also contrary to the AGO model rules as originally adopted in 2006. Prior to the 2018 revisions the AGO model rules clearly stated that entire counties were agencies under the PRA. WAC 44-14-01001 (2006) ("[T]he act defines the county as a whole as an "agency" subject to the act."); **Appendix**. WAC 44-14-01001 was revised in 2018 in an attempt to make sense of *Koenig v. Pierce County*, 151 Wn. App.

B. *Koenig v. Pierce County*, 151 Wn. App. 221, 211 P.3d 423 (2009) directly conflicts with both *Kilduff*, *supra*, and the *Yousoufian V* penalty factors.

The County also relies on *Koenig v. Pierce County*, 151 Wn. App. 221, 211 P.3d 423 (2009), for the proposition that the Prosecutor is a separate agency from the other parts of King County. *Resp. Br.* at 15. In that case the Pierce County prosecutor refused to produce a witness statement based on the prosecutor's erroneous assertion that the requestor could obtain the same record from the sheriff. The requestor had explicitly asked the prosecutor and sheriff to coordinate their responses to ensure that all records were provided. But the prosecuting attorneys representing the prosecutor and sheriff refused to do so. 151 Wn. App. 227-228.

221, 211 P.3d 423 (2009). *See* section III(B)(below). The new rule suggests that a PRA request can be made to an entire county, and that, despite the language of *Koenig v. Pierce County*, counties with multiple PRA officers have an obligation to coordinate their responses to a PRA request. *Id.*

Only after being sued and submitting discovery to the requestor did Pierce County finally realize that the sheriff had ***not*** provided the missing witness statement, and that other responsive records were in another file that the county had failed to locate. 151 Wn. App. at 229. The Court of Appeals should have recognized that Pierce County, as a whole, was intentionally violating its duty to comply with the PRA. Instead, the court proceeded from its own erroneous assumption that the sheriff and prosecutor were separate "agencies" under the PRA, and then faulted the requestor for trying to impose new duties on those allegedly-separate agencies. 151 Wn. App. at 232-33.

By incorrectly assuming that the prosecutor and sheriff were separate agencies under the PRA, *Koenig v. Pierce County* encouraged other agencies to break themselves up into separate agencies to which separate PRA requests must be made and which have no duty to work together to provide the "fullest assistance" required by RCW 42.56.100. Nor did the *Koenig* court suggest any limits on the ability of agencies to break

themselves up into numerous separate agencies with separate PRA officers. The court's erroneous analysis of "agency" in *Koenig v. Pierce County* suggests that King County could further Balkanize both the Sheriff and Prosecutor into several separate "divisions" in order to further frustrate PRA requestors.[3]

In fact, Pierce County has already done so. Pursuant to PCC 2.04.020(A) Pierce County purports to have established more than thirty (30) separate "agencies" within the County, each with its own separate PRA officer. That ordinance further provides that a requestor must request records from the particular department's PRA officer. *Id*.

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[3] The definition of agency in RCW 42.56.010(1) includes "divisions." The King County Sheriff is organized into four "divisions:" Office of the Sheriff, Criminal Investigation, Patrol Operations, and Technical Services. *See* https://www.kingcounty.gov/depts/sheriff/about-us/organization.aspx (last visited September 3, 2020). The King County Prosecutor is organized into four "divisions:" Civil, Criminal, Child and Family Support and Juvenile. https://www.kingcounty.gov/depts/prosecutor.aspx (last visited September 3, 2020).

But as explained above, Pierce County had no such authority. The *Koenig* court failed to adopt the correct liberal interpretation of RCW 42.56.010(1), required by *Kilduff* and RCW 42.56.030, under which an entire county is one agency under the PRA.[4]

The requestor in *Koenig v. Pierce County* also cited *Yousoufian v. King County Executive*, 114 Wash. App. 836, 846, 60 P.3d 667 (2003) (*Yousoufian I*), *rev'd on other grounds*, 152 Wn.2d 421, 98 P.3d 463 (2005) (*Yousoufian* II), noting that the trial court's unchallenged findings of fact faulted the county for, *inter alia*, "poor communication between County departments." 151 Wn. App. at 232; *see Yousoufian I*, 114 Wn. App. at 846. The *Koenig v. Pierce County* opinion erroneously dismissed *Yousoufian I*'s analysis of the county's PRA violations as merely the trial court's description of the PRA violation. 151 Wn. App.

[4] The *Koenig* court made the same error in narrowly construing RCW 42.56.580 to not require the appointment of a public records officer for the entire county. *Koenig v. Pierce County*, 151 Wn. App. 221, 233, 211 P.3d 423 (2009).

at 232. But the actual opinion of the Court of Appeals in *Yousoufian I* unambiguously agreed with the trial court, and blamed the county for failing to properly coordinate the PRA responses of various county departments:

> More disturbing is the response of the finance department to Yousoufian's records request. Yousoufian's attorney requested financial records from finance after the deputy prosecutor representing Sims' office indicated that a separate records request should be sent there. The same prosecuting attorney responded to Yousoufian's request with a letter indicating that finance had no records responsive to Yousoufian's request…
>
> In the final analysis, it seems clear that the County's violation of the PDA was due to poor training, failed communication, and bureaucratic ineptitude rather than a desire to hide some dark secret contained within its files. We therefore agree with the trial court's characterization of the County's conduct as grossly negligent, but not intentional, withholding of public records…

Yousoufian I, 114 Wn. App. at 846.

After *Koenig v. Pierce County* was issued this Court issued its final opinion in *Yousoufian v. Office of Ron Sims*, 168

Wn.2d 444, 229 P.3d 735 (2010) (*Yousoufian V*).[5] Summarizing the trial court's unchallenged findings of fact the Court noted that various public officials, prosecuting attorneys and departments of King County gave Yousoufian inaccurate and conflicting responses, and that the County as a whole failed to produce responsive records. 168 Wn.2d at 451-455. Based on these findings the Court blamed and penalized King County **as a whole** for its violations of the PRA:

> It is fair to say that the unchallenged findings of fact demonstrate that over a period of several years the county repeatedly failed to meet its responsibilities under the PRA with regard to Yousoufian's request. Specifically, the county told Yousoufian that it had produced all the requested documents, when in fact it had not. The county also told Yousoufian that archives were being searched and records compiled, when that was not correct. In

[5] *Yousoufian v. Office of Ron Sims*, 137 Wp. App. 69, 151 P.3d 243 (2007) (*Yousoufian III*) was issued in February 2007, and affirmed in part and reversed in part on January 15, 2009 in 165 Wn.2d 439, 200 P.3d 232 (*Yousoufian IV*). But the *Yousoufian IV* opinion was withdrawn by the Supreme Court on June 12, 2009, before the opinion in *Koenig v. Pierce County* was issued. *See Yousoufian V*, 168 Wn.2d at 450 n.2. *Yousoufian V* was issued in March 2010, after the Court of Appeals issued its opinion in *Koenig v. Pierce County*.

> addition, the county told Yousoufian that information was located elsewhere, when in fact that was not the case. After years of delay and misrepresentation on the part of the county, Yousoufian found it necessary to file suit against the county in order to obtain all of the requested documents. Nevertheless, it would still take another year for the county to completely and accurately respond to Yousoufian's request.

Yousoufian V, 168 Wn.2d at 456. Based on these violations of the PRA the Court imposed a penalty of $371,340 on King County, one of the largest PRA awards ever made. *Id.* at 470.

In its prior response to WCOG the County noted that the County's failings in *Yousoufian V* were limited to various departments within the executive branch of the County government. *Answer to WCOG's Amicus Brief* (10/26/20) at 8-9. But under *Koenig's* improperly narrow analysis of the definition of "agency" in RCW 42.56.010(1), each King County "office, department, division, bureau, board, commission, or agency thereof" is also defined as an agency "without establishing any obligatory relationship between them." *Koenig*, 151 Wn. App. at 232.

This Court's analysis of the duties of King County as a whole cannot be reconciled with the erroneous opinion in *Koenig v. Pierce County* that county departments are separate agencies with no duty to coordinate their responses to PRA requests. *Koenig v. Pierce County* was wrong when it was issued, and is simply bad law after *Yousoufian V*.

C. *Koenig v. Pierce County*, 151 Wn. App. 221, 211 P.3d 423 (2009) is erroneous for several other reasons.

In addition to directly conflicting with this Court's opinions in *Kilduff* and *Yousoufian V*, there are several other reasons why *Koenig v. Pierce County* was and is erroneous, and should not be followed.

First, In 2009, when *Koenig v. Pierce County* was decided, the Attorney General's recently-adopted model rules agreed with the requestor (Koenig) that Pierce County was one agency under the PRA:

> Some agencies, most notably counties, are a collection of separate quasi-autonomous departments which are governed by different elected officials (such as a county assessor and prosecuting attorney). However, the act defines the

> county as a whole as an "agency" subject to the act. RCW 42.17.020(2). An agency should coordinate responses to records requests across departmental lines. RCW 42.17.253(1) (agency's public records officer must "oversee the agency's compliance" with act).

WAC 44-14-01001 (2006); WSR 06-04-079 (January 31, 2006); **Appendix**.

> Sometimes more than one agency holds the same record. When more than one agency holds a record, and a requestor makes a request to the first agency, the first agency cannot respond to the request by telling the requestor to obtain the record from the second agency. Instead, an agency must provide access to a record it holds regardless of its availability from another agency.

WAC 44-14-04004(4)(a) (2006); WSR 06-04-079 (January 31, 2006); **Appendix**. As interpreted in the AGO model rules, Pierce County's conduct in *Koenig v. Pierce County*, like King County's conduct in this case, was a violation of the PRA.

The requestor brought these model rules to the attention of the Court of Appeals. 151 Wn. App. 233. But the Court of Appeals dismissed these rules as "nonbinding" without any attempt to explain why the rules were substantively wrong or

why the Court of Appeals would reject the AGO's liberal interpretation of the PRA. *Id*. Although the AGO model rules are nonbinding, such rules are still considered when interpreting the PRA. *Kilduff*, 194 Wn.2d at 873. If the Court of Appeals had given due consideration to the AGO's correct interpretation of "agency" and the requirement of liberal interpretation, the court would have rejected the erroneous assumption that the prosecutor and sheriff were separate agencies.[6]

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[6] The AGO model rules were revised in 2018. These revisions included changes to WAC 44-14-01001 and WAC 44-14-04004 that attempted to make sense of *Koenig v. Pierce County*. The revised rules cited the case, but did not entirely agree with the Court of Appeals opinion. Revised WAC 44-14-01001 indicates that a PRA request can be made to an entire county, and that, despite the language of *Koenig v. Pierce County*, counties with multiple PRA officers have an obligation to coordinate their responses to a PRA request:

> Some agencies, most notably counties, are a collection of separate quasi-autonomous departments which are governed by different elected officials (such as a county assessor and prosecuting attorney). The act includes a county "office" as an agency. RCW 42.56.010(1). However, the act ((~~defines~~)) also includes the county as a whole as an "agency" subject to the act. ((~~RCW 42.17.020(2). An agency should coordinate~~

Second, the Court of Appeals erroneously relied on its own incorrect assessment of the policy of the PRA, which was, in turn, based on the court's underlying incorrect assumption that Pierce County was not a single agency under the PRA in the first place:

> If we were to hold that the prosecutor's office has a duty to inquire with other Pierce County departments concerning a record request directed

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> ~~responses to records requests across departmental lines. RCW 42.17.253(1)~~)) *Id*. (local agency includes every county and local office). Therefore, some counties may have one public records officer for the entire county; others may have public records officers for each county official or department. The act does not require a public agency that has a records request directed to it to coordinate its response with other public agencies; however, for example, if a request is directed to an entire county, then coordination in some manner among county offices or departments may be necessary.[3] Regardless, public records officers must be publicly identified. RCW 42.56.580 (2) and (3) (agency's public records officer must "oversee the agency's compliance" with act)…

WAC 44-14-01001 (2018); WSR 18-06-051, § 44-14-01001, filed 3/2/18, effective 4/2/18; *see also* WAC 44-14-01001 (2018); WSR 18-06-051, § 44-14-04004, filed 3/2/18, effective 4/2/18; **Appendix**.

> only to the prosecutor's office, the effect would be that no department within the state or municipal government could deny a request for public records without having first canvassed all the other departments within that unit of government.

151 Wn. App. at 233. This Court has noted that courts and judges are no more qualified than agencies when interpreting the PRA. *See Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 259-260, 884 P.2d 592 (1994). The Court of Appeals in *Koenig v. Pierce County* should have interpreted "agency" broadly, as required by RCW 42.56.030, instead of relying on its own assumptions and opinions about how the PRA should to work.

Finally, *Koenig v. Pierce County* took a bit of dicta from a footnote in *Limstrom v. Ladenburg*, 136 Wn.2d 595, 604 n.3, 963 P.2d 869 (1998) out of context to support its erroneous assumption that Pierce County was not a single agency under the PRA:

> The Public Records Act "does not require ... an agency to go outside its own records and resources to try to identify or locate the record requested." *Limstrom*, 136 Wash.2d at 604 n. 3, 963 P.2d 869.

151 Wn. App. at 233. By cherry-picking this footnote from *Limstrom* the Court of Appeals erroneously assumed that the "agency" in *Limstrom* was the prosecuting attorney and that other parts of the same county would be "outside" that agency.

But *Limstrom* does not support the court's erroneous assumption that an entire county is not a single agency under the PRA. *Limstrom* only involved a request for records of the prosecuting attorney, and its holding that the prosecutor's records were work product had nothing to do with the question of whether an entire county is an "agency." The cited footnote did not even address the legal issue in *Limstrom* but merely noted that Limstrom's requests were unclear. *Limstrom*, 136 Wn.2d at 604 n.3. The portion of the *Limstrom* footnote cited in *Koenig v. Pierce County* is vague, gratuitous dicta that did not support the proposition for which it was cited in *Koenig*.[7]

[7] Subsequent cases have cited the *Limstrom* footnote for the more narrow proposition that a county is not required to obtain records from parts of a county that are not agencies under the PRA. *See Cortland v. Lewis County*, 2020 Wash. App. LEXIS 253; 2020

In sum, the Court of Appeals opinion in *Koenig v. Pierce County* was incorrect when it was issued, and is no longer good law in light of *Kilduff* and *Yousoufian V*.

This issue warrants review by this Court under RAP 13.4(b)(1) because *Koenig v. Pierce County* conflicts with this Court's more recent decision in *Kilduff v. San Juan County*. The correct interpretation of "agency" is also an issue of substantial public interest, for purposes of RAP 13.4(b)(4) because two of the largest counties in the state have illegally Balkanized themselves into multiple sub-agencies making it much more difficult to request records from those agencies. It is possible, if not likely, that other counties, cities or other agencies have also attempted to Balkanize themselves into multiple agencies for purposes of PRA compliance. This illegal, anti-transparency behavior needs to be stopped immediately.

WL 556398 (county not required to obtain records from a judicial branch agency); *Cortland v. Lewis County*, 2020 Wash. App. LEXIS 447, 2020 WL 902555 (same).

IV. CONCLUSION

For all these reasons the Court should reject the County's argument that the Prosecutor and Sheriff are separate agencies, overrule *Koenig v. Pierce County*, and hold that KCC 2.12.005(A) and KCC 2.12.230(B) are invalid.

V. APPENDICES

Appendix Portion of WSR 18-06-051 (3/2/18)

This memorandum contains 3193 words, excluding the parts of the memorandum exempted from the word count by RAP 18.17.

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RESPECTFULLY SUBMITTED this 29th day of November, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 29th day of November, 2021, true and correct copies of this amicus memorandum and the *Motion for Leave to File Memorandum of Amicus Curiae* were served on the parties as follows:

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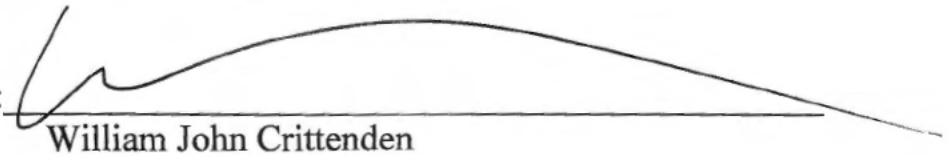
By: 

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DATE: March 02, 2018
TIME: 12:05 PM

WSR 18-06-051

RULE-MAKING ORDER
PERMANENT RULE ONLY

CR-103P (December 2017)
(Implements RCW 34.05.360)

Agency: Office of the Attorney General

Effective date of rule:

Permanent Rules

☒ 31 days after filing.

☐ Other (specify) _____ **(If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)**

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

☐ Yes ☒ No If Yes, explain:

Purpose: The Office of the Attorney General is amending several advisory Public Records Act (PRA) Model Rules (Model Rules) in chapter 44-14 WAC, and is repealing one advisory Model Rule (WAC 44-14-07003). The purpose is to update the Model Rules to reflect developments in statutes, case law and technology since the rules were last revised in 2007.

Citation of rules affected by this order:

New:

Repealed: WAC 44-14-07003

Amended: WAC 44-14-00001, WAC 44-14-00002, WAC 44-14-00003, WAC 44-14-00004, WAC 44-14-00005, WAC 44-14-00006, WAC 44-14-010, WAC 44-14-01001, WAC 44-14-01002, WAC 44-14-01003, WAC 44-14-020, WAC 44-14-02001, WAC 44-14-02002, WAC 44-14-030, WAC 44-14-03001, WAC 44-14-03002, WAC 44-14-03003, WAC 44-14-03004, WAC 44-14-03005, WAC 44-14-03006, WAC 44-14-040, WAC 44-14-04001, WAC 44-14-04002, WAC 44-14-04003, WAC 44-14-04004, WAC 44-14-04005, WAC 44-14-04006, WAC 44-14-050, WAC 44-14-05001, WAC 44-14-05002, WAC 44-14-05003, WAC 44-14-05004, WAC 44-14-05005, WAC 44-14-06001, WAC 44-14-06002, WAC 44-14-070, WAC 44-14-07001, WAC 44-14-07004, WAC 44-14-07005, WAC 44-14-07006, WAC 44-14-080, WAC 44-14-08001, WAC 44-14-08002, WAC 44-14-08004

Suspended:

Statutory authority for adoption: RCW 42.56.570

Other authority:

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as WSR 17-17-157 on August 23, 2017 (date).

Describe any changes other than editing from proposed to adopted version:

In adopting these final advisory Model Rules, the Office has made several minor insubstantial changes from the proposed rules to clarify the language, correct citations or formatting, and to provide additional references to statutes and Model Rules.

In addition, the Office made two substantial changes based on public comments.

The first change is the removal of proposed language with respect to an agency initiating and assigning a priority/category to a records request, as was proposed in WAC 44-14-040 and WAC 44-14-04003 (and in internal references to that proposed language in other rules). This change was based on public comment received. The commenters either requested the proposed language not proceed, or had concerns if the proposed language did proceed. While the Office recognizes public agencies may process requests in various ways in order to enable them to handle simple as well as complex requests, and some local agencies have adopted a categorization approach that works for them, it was not determined to be feasible at this time to provide possible standard language in Model Rules. Therefore, that proposed language is not included in the final rules.

The second change is the removal of most of the judicial review discussion in WAC 44-14-08004. This removal is also based on public comment received, which described in part that the Model Rules do not govern court proceedings, and that many court cases describe various elements of judicial review. In addition, the Office's online *Open Government*

Appendix

Resource Manual links to the PRA judicial review statutes at RCW 42.56.550 and RCW 42.56.540, and provides links to many of those court decisions. Therefore, like the amendments that reduce the scope of the Model Rules' discussion of exemptions (see amendments to WAC 44-14-06002), the discussion of judicial review is similarly significantly reduced in the final rules.

More information on comments received on the proposed amendments and the reasons for the changes in the adopted final rules is available in the Concise Explanatory Statement, which will be made available on the Office's website on the rulemaking web page at http://www.atg.wa.gov/rulemaking-activity.

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name:
Address:
Phone:
Fax:
TTY:
Email:
Web site:
Other:

Note: If any category is left blank, it will be calculated as zero. No descriptive text.

Count by whole WAC sections only, from the WAC number through the history note. A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	0	Amended	0	Repealed	0
Federal rules or standards:	New	0	Amended	0	Repealed	0
Recently enacted state statutes:	New	0	Amended	44	Repealed	1

The number of sections adopted at the request of a nongovernmental entity:

	New	0	Amended	0	Repealed	0

The number of sections adopted on the agency's own initiative:

	New	0	Amended	44	Repealed	1

The number of sections adopted in order to clarify, streamline, or reform agency procedures:

	New	0	Amended	0	Repealed	0

The number of sections adopted using:

Negotiated rule making:	New	0	Amended	0	Repealed	0
Pilot rule making:	New	0	Amended	0	Repealed	0
Other alternative rule making:	New	0	Amended	0	Repealed	0

Date Adopted: March 2, 2018	**Signature:** Bob Ferguson
Name: Bob Ferguson	
Title: Attorney General	

Appendix

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-010 Authority and purpose. (1) RCW ((~~42.17.260(1)/~~)) 42.56.070(1) requires each agency to make available for inspection and copying nonexempt "public records" in accordance with published rules. The act defines "public record" at RCW 42.56.010(3) to include any "writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained" by the agency. RCW 42.56.010(3) excludes from the definition of "public record" the records of volunteers that are not otherwise required to be retained by the agency and which are held by volunteers who do not serve in an administrative capacity; have not been appointed by the agency to an agency board, commission or internship; and do not have a supervisory role or delegated authority. RCW ((~~42.17.260(2)/~~)) 42.56.070(2) requires each agency to set forth "for informational purposes" every law, in addition to the Public Records Act, that exempts or prohibits the disclosure of public records held by that agency.

(2) The purpose of these rules is to establish the procedures (name of agency) will follow in order to provide full access to public records. These rules provide information to persons wishing to request access to public records of the (name of agency) and establish processes for both requestors and (name of agency) staff that are designed to best assist members of the public in obtaining such access.

(3) The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. The act and these rules will be interpreted in favor of disclosure. In carrying out its responsibilities under the act, the (name of agency) will be guided by the provisions of the act describing its purposes and interpretation.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-01001 Scope of coverage of Public Records Act. The act applies to an "agency." RCW ((~~42.17.260(1)/~~)) 42.56.070(1). "'Agency' includes all state agencies and all local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." RCW ((~~42.17.020(2)~~)) 42.56.010(1).

Court ((~~files and~~)) records, judges' files, and the records of judicial branch agencies are not subject to the act.[1] Access to these records is governed by court rules and common law. The model rules, therefore, do not address access to court or judicial branch records.

An entity which is not an "agency" can still be subject to the act when it is the functional equivalent of an agency. Courts have applied a four-factor, case-by-case test. The factors are:

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(1) Whether the entity performs a government function;
(2) The level of government funding;
(3) The extent of government involvement or regulation; and
(4) Whether the entity was created by the government((~~. Op. Att'y Gen. 2 (2002)~~)).[2]

Some agencies, most notably counties, are a collection of separate quasi-autonomous departments which are governed by different elected officials (such as a county assessor and prosecuting attorney). The act includes a county "office" as an agency. RCW 42.56.010(1). However, the act ((~~defines~~)) also includes the county as a whole as an "agency" subject to the act. ((~~RCW 42.17.020(2). An agency should coordinate responses to records requests across departmental lines. RCW 42.17.253(1)~~)) *Id.* (local agency includes every county and local office). Therefore, some counties may have one public records officer for the entire county; others may have public records officers for each county official or department. The act does not require a public agency that has a records request directed to it to coordinate its response with other public agencies; however, for example, if a request is directed to an entire county, then coordination in some manner among county offices or departments may be necessary.[3] Regardless, public records officers must be publicly identified. RCW 42.56.580 (2) and (3) (agency's public records officer must "oversee the agency's compliance" with act).

Notes:
[1] *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986); *West v. Washington State Assoc. of District and Municipal Court Judges*, 190 Wn. App. 931, 361 P.3d 210 (2015). See the courts' General Rule 31 and 31.1 regarding access to court records.
[2] *((See also)) Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 149, 162, 974 P.2d 886((~~, review denied, 138 Wn.2d 1015, 989 P.2d 1143~~)) (1999); *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 387 P.3d 690 (2017). See also Op. Att'y Gen. 2 (2002) and Op. Att'y Gen. 5 (1991).
[3] *Koenig v. Pierce County*, 151 Wn. App. 221, 211 P.3d 423 (2009).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-01002 Requirement that agencies adopt reasonable regulations for public records requests. The act provides that state agencies are to publish a rule in the Washington Administrative Code (WAC) and local agencies are to make publicly available at the central office guidance for the public that includes where the public may obtain information and make submittals and requests. RCW 42.56.040.

The act provides: "Agencies shall adopt and enforce reasonable rules and regulations... to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency.... Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW ((~~42.17.290/~~)) 42.56.100. Therefore, an agency must adopt "reasonable" regulations providing for the "fullest assistance" to requestors and the "most timely possible action on requests."[1]

At the same time, an agency's regulations must "protect public records from damage or disorganization" and "prevent excessive interference" with other essential agency functions. Another provision of the act states that providing public records should not "unreasonably disrupt the operations of the agency." RCW ((~~42.17.270/~~)) 42.56.080.

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((~~and~~)), provide a brief explanation of the circumstances, and provide the nonexempt records with a written explanation of any redacted or withheld records.

(14) **Maintaining a log.** Effective July 23, 2017, the agency must maintain a log of public records requests to include the identity of the requestor if provided by the requestor, the date the request was received, the text of the original request, a description of the records redacted or withheld and the reasons therefor, and the date of the final disposition of the request. RCW 40.14.026(4).

Notes:

[1]See also Op. Att'y Gen. 2 (1998).

[2]See *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004, n.12 (2014) (Court of Appeals encouraged requestors to communicate with agencies about issues related to their records requests).

[3]See *Smith v. Okanogan County*, 100 Wn. App. 7, 13, 994 P.2d 857 (2000) ("When an agency fails to respond as provided in RCW 42.17.320 (42.56.520), it violates the act and the individual requesting the public record is entitled to a statutory penalty."); *West v. State Dep't of Natural Res.*, 163 Wn. App. 235, 243, 258 P.3d 78 (2011) (failure to respond within five business days); *Rufin v. City of Seattle*, 199 Wn. App. 348, 398 P.3d 1237 (2017) (failure to respond within five business days entitles plaintiff to seek attorneys' fees but not penalties).

((~~[3]While an agency can fulfill requests out of order, an agency is not allowed to ignore a large request while it is exclusively fulfilling smaller requests. The agency should strike a balance between fulfilling small and large requests.~~

[4]*Smith*, 100 Wn. App. at 14.

[5]*Fisher Broadcasting v. City of Seattle*, 180 Wn.2d 515, 326 P.3d 688 (2014).

[6]*Ockerman v. King County Dep't of Dev. & Envtl. Servs.*, 102 Wn. App. 212, 214, 6 P.3d 1215 (2000) (agency is not required to provide a written explanation of its reasonable estimate of time when it does not provide records within five days of the request).

[7]*Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 334 P.3d 94 (2014) (the act recognizes that agencies may need more time than initially anticipated to locate records).

[8]An exception is some state-agency employee personnel records. RCW ((~~42.17.295~~)) 42.56.110.

((~~[6]*Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909 (2002) ("an applicant need not exhaust his or her own ingenuity to 'ferret out' records through some combination of 'intuition and diligent research'").~~

~~7~~)) [9]*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011); *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012).

[10]*O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010); *Nissen v. Pierce County*, 182 Wn.2d 363, 357 P.3d 45 (2015); *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016).

[11]*Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010); *Neighborhood Alliance*, 172 Wn.2d at 728.

[12]*Neighborhood Alliance*, 172 Wn.2d at 722.

[13]*Andrews v. Wash. State Patrol*, 183 Wn. App. 644 at 653; *Hikel v. Lynnwood*, 197 Wn. App. 366, 389 P.3d 677 (2016).

[14]The agency holding the record can also file a RCW ((~~42.17.330~~)) 42.56.540 injunctive action to establish that it is not required to release the record or portion of it. An agency can also file an action under the Uniform Declaratory Judgments Act at chapter 7.24 RCW. *Benton County v. Zink*, 191 Wn. App. 194, 361 P.2d 283 (2015).

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-04004 Responsibilities of agency in providing records. (1) **General.** An agency may simply provide the records or make them available within the five-business day period of the initial response. When it does so, an agency should also provide the requestor a written cover letter or email briefly describing the records provided and informing the requestor that the request has been closed. This assists the agency in later proving that it provided the specified records on a certain date and told the requestor that the request had been closed. However, a cover letter or email might not be practical in some circumstances, such as when the agency provides a small number of records or fulfills routine requests.

An agency can, of course, provide the records sooner than five business days. Providing the "fullest assistance" to a requestor would mean providing a readily available record as soon as possible. For example, an agency might routinely prepare a premeeting packet of documents three days in advance of a city council meeting. The packet is readily available so the agency should provide it to a requestor on the same day of the request so he or she can have it for the council meeting.

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(2) **Means of providing access.** An agency must make nonexempt public records "available" for inspection or provide a copy. RCW ((~~42.17.270~~)) 42.56.080. An agency is only required to make records "available" and has no duty to explain the meaning of public records.[1] Making records available is often called "access."

Access to a public record can be provided by allowing inspection of the record, providing a copy, or posting the record on the agency's web site and assisting the requestor in finding it (if necessary). An agency must mail a copy of records if requested and if the requestor pays the actual cost of postage and the mailing container.[2] The requestor can specify which method of access (or combination, such as inspection and then copying) he or she prefers. Different processes apply to requests for inspection versus copying (such as copy charges) so an agency should clarify with a requestor whether he or she seeks to inspect or copy a public record.

An agency can provide access to a public record by posting it on its public internet web site. Once an agency provides a requestor an internet address and link on the agency's web site to the specific records requested, the agency has provided the records, and at no cost to the requestor. RCW 42.56.520. If requested, an agency should provide reasonable assistance to a requestor in finding a public record posted on its web site. If the requestor does not have internet access, the agency may provide access to the record by allowing the requestor to view the record on a specific computer terminal at the agency open to the public. An agency ((~~is not required to do so. Despite the availability of the record on the agency's web site, a requestor can still make a public records request and inspect the record or obtain a copy of it by paying the appropriate per-page copying charge~~)) shall not impose copying charges for access to or downloading records that the agency routinely posts on its web site prior to receipt of a request unless the requestor has specifically requested that the agency provide copies of such records through other means. RCW 42.56.120 (2)(e).

(3) **Providing records in installments.** The act ((~~now~~)) provides that an agency must provide records "if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure." RCW ((~~42.17.270~~)) 42.56.080. An installment can include links to records on the agency's internet web site. The purpose of this installments provision is to allow requestors to obtain records in installments as they are assembled and to allow agencies to provide records in logical batches. The provision is also designed to allow an agency to only assemble the first installment and then see if the requestor claims or reviews it before assembling the next installments. An agency can assess charges per installment for copies made for the requestor, unless it is using the up to two-dollar flat fee charge. RCW 42.56.120(4).

Not all requests should be provided in installments. For example, a request for a small number of documents which are located at nearly the same time should be provided all at once. Installments are useful for large requests when, for example, an agency can provide the first box of records as an installment. An agency has wide discretion to determine when providing records in installments is "applicable." However, an agency cannot use installments to delay access by, for example, calling a small number of documents an "installment" and sending out separate notifications for each one. The agency must provide the

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"fullest assistance" and the "most timely possible action on requests" when processing requests. RCW ((~~42.17.290~~)) 42.56.100.

(4) **Failure to provide records.** A "denial" of a request can occur when an agency:

((~~Does not have the record;~~))

Fails to respond to a request;

Claims an exemption of the entire record or a portion of it; ((~~or~~))

Without justification, fails to provide the record after the reasonable estimate of time to respond expires((~~:~~

~~(a) **When the agency does not have the record**~~)); or

Determines the request is an improper "bot" request. An agency is only required to provide access to public records it has or has used.[3] An agency is not required to create a public record in response to a request.

An agency must only provide access to public records in existence at the time of the request. An agency is not obligated to supplement responses. Therefore, if a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive to the request and need not be provided. A requestor must make a new request to obtain subsequently created public records.

Sometimes more than one agency holds the same record. When more than one agency holds a record, and a requestor makes a request to the first agency (agency A), ((~~the first~~)) agency A cannot respond to the request by telling the requestor to obtain the record from the second agency (agency B). Instead, an agency must provide access to a record it holds regardless of its availability from another agency.[4]

However, an agency is not required to go outside its own public records to respond to a request.[5] If agency A never prepared, owned, used or retained a record, but the record is available at agency B, the requestor must make the request to agency B, not agency A.

An agency is not required to provide access to records that were not requested. An agency does not "deny" a request when it does not provide records that are outside the scope of the request because they were never asked for.

((~~(b)~~)) (5) **Claiming exemptions.**

((~~(i)~~)) (a) **Redactions.** If a portion of a record is exempt from disclosure, but the remainder is not, an agency generally is required to redact (black out) the exempt portion and then provide the remainder. RCW ((~~42.17.310(2)~~)) 42.56.210(1). There are a few exceptions. ((~~(5)~~)) [6] Withholding an entire record where only a portion of it is exempt violates the act.((~~(6)~~)) [7] Some records are almost entirely exempt but small portions remain nonexempt. For example, information revealing the identity of a crime victim is exempt from disclosure if certain conditions are met. RCW ((~~42.17.310 (1)(e)~~)) 42.56.240(2). If a requestor requested a police report in a case in which charges have been filed, and the conditions of RCW 42.56.240(2) are met, the agency must redact the victim's identifying information but provide the rest of the report.

Statistical information "not descriptive of any readily identifiable person or persons" is generally not subject to redaction or withholding. RCW ((~~42.17.310(2)~~)) 42.56.210(1). For example, if a statute exempted the identity of a person who had been assessed a particular kind of penalty, and an agency record showed the amount of penalties assessed against various persons, the agency must provide the record

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with the names of the persons redacted but with the penalty amounts remaining.

Originals should not be redacted. For paper records, an agency should redact materials by first copying the record and then either using a black marker on the copy or covering the exempt portions with copying tape, and then making a copy. Another approach is to scan the paper record and redact it electronically. It is often a good practice to keep the initial copies which were redacted in case there is a need to make additional copies for disclosure or to show what was redacted; in addition, an agency is required under its records retention schedules to keep responses to a public records request for a defined period of time. For electronic records such as databases, an agency can sometimes redact a field of exempt information by excluding it from the set of fields to be copied. For other electronic records, an agency may use software that permits it to electronically redact on the copy of the record. However, in some instances electronic redaction might not be feasible and a paper copy of the record with traditional redaction might be the only way to provide the redacted record. If a record is redacted electronically, by deleting a field of data or in any other way, the agency must identify the redaction and state the basis for the claimed exemption as required by RCW 42.56.210(3). ((~~See (b)(ii) of this subsection.~~ (~~(ii)~~))

(b) **Brief explanation of withholding.** When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld. RCW ((~~42.17.310(4)~~)) 42.56.210(3). The brief explanation should cite the statute the agency claims grants an exemption from disclosure. The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as "proprietary" or "privacy" are insufficient.

One way to properly provide a brief explanation of the withheld record or redaction is for the agency to provide a withholding ((~~index. It~~)) log, along with the statutory citation permitting withholding, and a description of how the exemption applies to the information withheld. The log identifies the type of record, its date and number of pages, and the author or recipient of the record (unless their identity is exempt).((~~7~~)) 8 The withholding ((~~index~~)) log need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption.

Another way to properly provide a brief explanation is to use another format, such as a letter providing the required exemption citations, description of records, and brief explanations. Another way to properly provide a brief explanation is to have a code for each statutory exemption, place that code on the redacted information, and attach a list of codes and the brief explanations with the agency's response.

((~~5~~)) (6) **Notifying requestor that records are available.** If the requestor sought to inspect the records, the agency should notify him or her that the entire request or an installment is available for inspection and ask the requestor to contact the agency to arrange for a mutually agreeable time for inspection.((~~8~~)) 9 The notification should recite that if the requestor fails to inspect or copy the records or make other arrangements within thirty days of the date of the

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notification that the agency will close the request and refile the records. An agency might consider on a case-by-case basis sending the notification by certified mail to document that the requestor received it.

If the requestor sought copies, the agency should notify him or her of the projected costs and whether a copying deposit is required before the copies will be made. Such notice by the agency with a summary of applicable estimated charges is required when the requestor asks for an estimate. RCW 42.56.120 (2)(f). The notification can be oral to provide the most timely possible response, although it is recommended that the agency document that conversation in its file or in a follow-up email or letter.

((~~(6)~~)) (7) **Documenting compliance.** An agency should have a process to identify which records were provided to a requestor and the date of production. An agency may wish to apply a "read receipt" rule to emails to requestors or ask the requestor to confirm if he/she received the email from the agency. In some cases, an agency may wish to number-stamp or number-label paper records provided to a requestor to document which records were provided. The agency could also keep a copy of the numbered records so either the agency or requestor can later determine which records were or were not provided; and, an agency is required to keep copies of its response to a request for the time period set out in its records retention schedule. However, the agency should balance the benefits of stamping or labeling the documents and making extra copies against the costs and burdens of doing so. For example, it may not be necessary to affix a number on the pages of records provided in response to a small request.

If memorializing which specific documents were offered for inspection is impractical, an agency might consider documenting which records were provided for inspection by making ((~~an index or~~)) a list of the files or records made available for inspection.

Notes:

[1] *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998)((~~, *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999)~~)).

[2] *Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997); RCW 42.56.120.

[3] *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004).

[4] *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978).

[5] *Limstrom v. Ladenburg (Limstrom II)*, 136 Wn.2d 595, 963 P.2d 896 (1998) n.3 ("On its face the Act does not require, and we do not interpret it to require, an agency to go outside its own records and resources to try to identify or locate the record requested."); *Koenig v. Pierce County*, 151 Wn. App. 221, 232-33, 211 P.3d 423 (2009) (agency has no duty to coordinate responses with other agencies, citing to and quoting *Limstrom II*).

[6] The two main exceptions to the redaction requirement are state "tax information" (RCW 82.32.330 (1)(c)) and law enforcement case files in active cases (((~~*Newman v. King County*, 133 Wn.2d 565, 574, 947 P.2d 712 (1997)~~)) *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 314 P.3d 1093 (2013). Neither of these two kinds of records must be redacted but rather may be withheld in their entirety.

((~~(6)~~)) [7] *Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 132, 737 P.2d 1302 (1987).

((~~(7)~~)) [8] *Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 271, n.18, 884 P.2d 592 (1994) ("*PAWS II*").

((~~(8)~~)) [9] For smaller requests, the agency might simply provide them with the initial response or earlier so no notification is necessary.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-04005 Inspection of records. (1) **Obligation of requestor to claim or review records.** After the agency notifies the requestor that the records or an installment of them ((~~are~~)) is ready for inspection or copying, the requestor must claim or review the records or the installment. RCW ((~~42.17.300~~)) 42.56.120. If the requestor cannot claim or review the records him or herself, a representative may do so within the thirty-day period.[1] Other arrangements can be mutually agreed to between the requestor and the agency.

WILLIAM JOHN CRITTENDEN

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