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Sea Changes to the Washington State Public Records Act

On July 23, 2017, Substitute House Bill 1594 (SHB 1594)[1] and Engrossed House Bill 1595 (EHB 1595)[2] shall become effective. These bills significantly change certain aspects of the Public Records Act, RCW 42.56, particularly with respect to imposing costs for the production of electronic records. To underline these new changes, each bulleted paragraph below will contain three sentences: (1) What the "old law" said; (2) what the new law will say; and (3) what this means for public agencies.

SHB 1594

- RCW 42.56.152 requires that public records officers undergo training on RCW 42.56 and records retention. SHB 1594 will amend RCW 42.56.152 to read that this training "must address particular issues related to the retention, production, and disclosure of electronic documents, including updating and improving technology information services." This means that PROs must not only obtain training related to the records retention schedules, but must also obtain training

[1] See SHB 1594: http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/House/1594-S.SL.pdf

[2] See EHB 1595: http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/House/1595.SL.pdf

related to *how* records must be retained and managed, and how the public may be provided better electronic access to records.[3]

- RCW 42.56.520 sets forth a variety of ways in which a public agency must respond to a public records request, within five business days of the request, which include (1) providing the records; (2) denying the request; (3) giving a reasonable estimate of when the records will be provided; and (4) providing a link to the internet site in which the records may be found. The new law adds a "fifth" way an agency may respond, although the "old law" previously included provisions allowing this: The agency may seek clarification of the request, and provide a reasonable estimate of when the records may be provided, if clarified; if the requestor does not clarify the request, the agency need not disclose the requested records, but must still respond to that portion of the request that is clear. This essentially means what the "old law" already meant: If a request is unclear, the agency may request clarification and need not respond if the requestor does not clarify the request; the law only clarifies that the agency must respond to those portions of the request that are clear.

- RCW 42.56.570 places requirements on the attorney general to support public agencies in complying with the Public Records Act. The new law goes further and requires the Washington State Archivist to provide training on records retention.[4] This new law means that the archivist could not deny a request for training on records retention if asked, and must generally offer training; it is our understanding that the archivist has been outstanding about providing such training, but this new law codifies that understanding.

The Real Sea Change

Prior to SHB 1594, there was no affirmative requirement that an agency maintain a log of public records requests; this was only a best practice. But this will change on July 23. Under SHB 1594, a new section shall be added to RCW 40.14, the Preservation and Destruction of Public Records Act. Under SHB 1594, every public agency—no matter its size—must now maintain a log of public records requests. These logs must contain the following information:

1. The identity of the requestor, if provided by the requestor;
2. the date the request was received;
3. the text of the original request;
4. a description of the records produced in response to the request;
5. a description of the records redacted or withheld and the reasons therefor; and
6. The date of the final disposition of the request.

[3] *See Also* the *Firehouse Lawyer* on Washington's Electronic Signature and Electronic Records Act, RCW 19.360.010, which relates to electronic access to public records: http://www.firehouselawyer.com/Newsletters/August2016.pdf

[4] SHB 1594 also imposes additional requirements on the AG to adopt a consultation program to improve records training and assistance with complying with RCW 42.56.

We are drafting a model policy on public records to reflect this impending change in the law.

SHB 1594 also adds a section to RCW 40.14 providing for a grant program to help public agencies get support on records retention.

Furthermore, a new section shall be added to RCW 40.14, stating that public agencies, whose personnel and legal costs associated with responding to public records requests equal or exceed $100,000 in a given year, **must** provide a plethora of information to the joint legislative audit and review committee. To generalize, this information includes but is not limited to information on records management and time spent responding to requests.[5] The requirements are too innumerable to enumerate here. *See* SHB 1594 at pages 7-9.

EHB 1595

This new bill contains substantial changes to the Public Records Act, pertaining to copying charges, and charges for locating and assembling public records, under very limited circumstances:

- RCW 42.56.070 formerly stated that a public agency shall adopt a statement of the actual per page cost of providing photocopies of public records. The new law states that an agency may do so, but if it does choose to establish a statement of the "actual costs" that it charges for providing photocopies or "electronically produced copies," (this is also new) that this must be done pursuant to notice and hearing; of course, EHB 1595 goes on to state that a public agency need not "calculate" the "actual costs" if the agency "has rules or regulations declaring the reasons doing so would be unduly burdensome." This means that an agency may now affirmatively establish written charges for producing records electronically (but see the next bullet) in addition to establishing costs for providing photocopied records, but if the agency wishes to do so, it must hold a public hearing with proper notice.

- The "old law" states that charges may be levied for copying public records; this "old law" shall remain the same. The new law codifies the Model Rules to the Public Records Act and reminds us that making a copy/scan of an electronic record is not creating a new record. This means that a public agency generally may not allege that a request that requires scanning or copying a public record into an electronic format is not a valid public records request.

- And now for a **sea change:** RCW 42.56.070 formerly contained no mention of calculating "actual costs" by considering the costs of electronic production of records. The new law indicates that an agency may consider the "actual costs" of "[T]ransmitting such records in an electronic format, including the cost of any transmission charge and use of any physical media device provided by the agency." This could mean that the agency may now

[5] Public agencies with costs less than $100,000 in any given year **may** provide such information.

affirmatively establish written charges for the "transmission" of electronic records, onto a physical device or otherwise.

- RCW 42.56.120 formerly stated that "[N]o fee shall be charged for the inspection of public records or locating public documents and making them available for copying, except as provided in RCW 42.56.240(14)." The new law would add a further (and very limited) exception to this rule of no charges for locating public records: An agency may impose a "customized service charge...if the agency estimates that the request would require the use of information technology expertise to prepare data compilations, *or* provide customized electronic access services when such compilations and customized access services are not used by the agency for other agency purposes." This could certainly be construed to mean that if a public records officer is required to create something akin to a detailed Excel spreadsheet, this could be deemed to be the "use of information technology expertise to prepare data compilations," and therefore the agency could levy a "customized service charge"—but this may stretch the exception too far, some open-government advocates may argue.

This new exception requires some additional consideration, beyond our three-sentence formula. First, a "customized service charge" may not exceed the "actual cost" of providing the specialized services. Second, to impose this charge, the agency must notify the requestor of the customized service charge to be applied to the request, including (1) an explanation of why the customized service charge applies; (2) a description of the specific expertise used in providing the specialized services, and (3) a reasonable estimate of how the charge is determined. The notice must also give the requestor the opportunity to amend his or her request to avoid the customized service charge.

- And now for an additional **sea change:** RCW 42.56.120—the "old law"—now reads that an agency may adopt "reasonable charges"—not to exceed $.15 per page—for the copying of public records. The new law enumerates various different types of copying charges that may be utilized when the agency does not calculate[6] the "actual costs" of copying public records—when to do so would be unduly burdensome; the new law reads that "[T]o the extent the agency has not determined the actual costs of copying public records," the agency may charge the following:

(1) Fifteen cents per page for photocopies of public records, printed copies of electronic public records when requested by the person requesting records, or for the use of agency equipment to photocopy public records;

[6] Understand that "calculating" the "actual costs" of copying public records implies an unwritten determination of the actual costs, and is not the same as adopting a written statement of the actual costs, pursuant to public notice and hearing under the new law. See the first bullet of this section.

(2) **Ten cents per page for public records scanned into an electronic format or for the use of agency equipment to scan the records;**

(**3) Five cents per each *four* electronic files or attachments uploaded to email, cloud-based data storage service, or other means of electronic delivery; and**

(4) Ten cents *per gigabyte* for the transmission of public records in an electronic format or for the use of agency equipment to send the records electronically.

What this means (and this is only the third sentence, grammatically speaking) is that an agency may now charge a copying/production cost for more than simply a photocopy of an original public record.

Other Stuff in EHB 1595 not related to copying charges

The Public Records Act has not contained any provisions related to "bot requests," which shall be defined by the new law as "a request for public records that an agency reasonably believes was automatically generated by a computer program or script." The new law would permit a public agency to deny a bot request that is "one of many" requests made by a requestor within a 24 hour period, if the agency determines that responding to such bot requests would cause excessive interference. What this means is that a public agency may not deny an isolated bot request; there must be multiple bot requests made within a 24 hour period.

With respect to broad public records requests: Washington courts have found for years that a public records request must be for an identifiable record, but RCW 42.56 never affirmatively stated that. The new law underlines that a request must be for an identifiable record, and further specifies that a request for every record prepared, owned or retained by the agency is not a valid request for a public record; but a request for every record pertaining to a specific category of government conduct, such as personnel evaluations of fire chiefs, would not be such a type of request. This means that a public records requestor cannot simply ask for all records the agency has; but that does not mean that a request can be denied for being "overly broad" when the request is for "identifiable public records," as is stated elsewhere in the Public Records Act.

We are drafting a model policy on public records to reflect this impending change in the law.

SAFETY BILL

Safety Bill feels this month is a good time to discuss again the "two in, two out" rule contained in WAC 296-305.

WAC 296-305-5002 contains the "two in, two out" rule embodied in the 2013 NFPA 1500, section 8.5. Indeed, 8.5 is basically identical to WAC 296-305-5002 (3).

However, WAC 296-305-5002 (4) does have this narrow exception to the "two in, two out" rule:

> "Initial attack operations shall be organized to ensure that if, on arrival at the emergency scene, responders find a known rescue situation where immediate action could prevent the loss of life or serious injury, such action shall only be permitted when no less than three personnel (2-in/1-out) are present and equipped to provide emergency assistance or rescue of the team entering the hot zone. No exception shall be allowed when there is no possibility to save lives or no "known" viable victims."

This exception is also implied in the 2013 NFPA 1500, at 8.5. We think the exception is pretty clear. If a three-person crew (which is a pretty common staffing number on fire engines in Washington, where four-person engine companies are still not very common) comes upon a working structural fire, and they know a person is imminent danger of losing their life inside the structure, they may enter as long as the third responder can comply with the rapid intervention requirements and there is constant communication with the crew inside the structure.

Like all exceptions to such regulations, this exception must be narrowly construed. For example, we do not think it is enough if bystanders suspect or believe there might be persons inside the building, but it should be sufficient if they describe definitely seeing or hearing people calling for help. Entry is also prohibited if it is probably futile, or in other words if the possibility the persons are still living are slim. We would suggest that your local safety program should elaborate somewhat on what your crews should do in that "two in, one out" situation beyond just what the WAC states to provide safety guidance. That is what section 5002 (4) means when it says the "operations shall be organized to ensure...." Don't get "organized" at the last minute....put it in your policies instead.