PRESENTED BY

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PRACTICAL PUBLIC RECORD RESPONSES

This presentation will:

- Walk through several mock public records requests

- Highlight relevant law and possible pitfalls

- Emphasize a process for responding to record requests

IMPORTANT PRA REMINDERS

- PRA cannot violate the Constitution

  – First Amendment right to privacy may preclude disclosure of some records (no compelling state interest in disclosing police officer names, for example)

  – PRA does not create a constitutionally protected liberty interest (subject to due process protections) – it merely creates a procedure.

PROCESS

1. Define the Request

2. Understand the Law of the Request

3. Identify Exemptions

4. Provide Notice Where Applicable

5. Respond

SCENARIO 1: LEASES
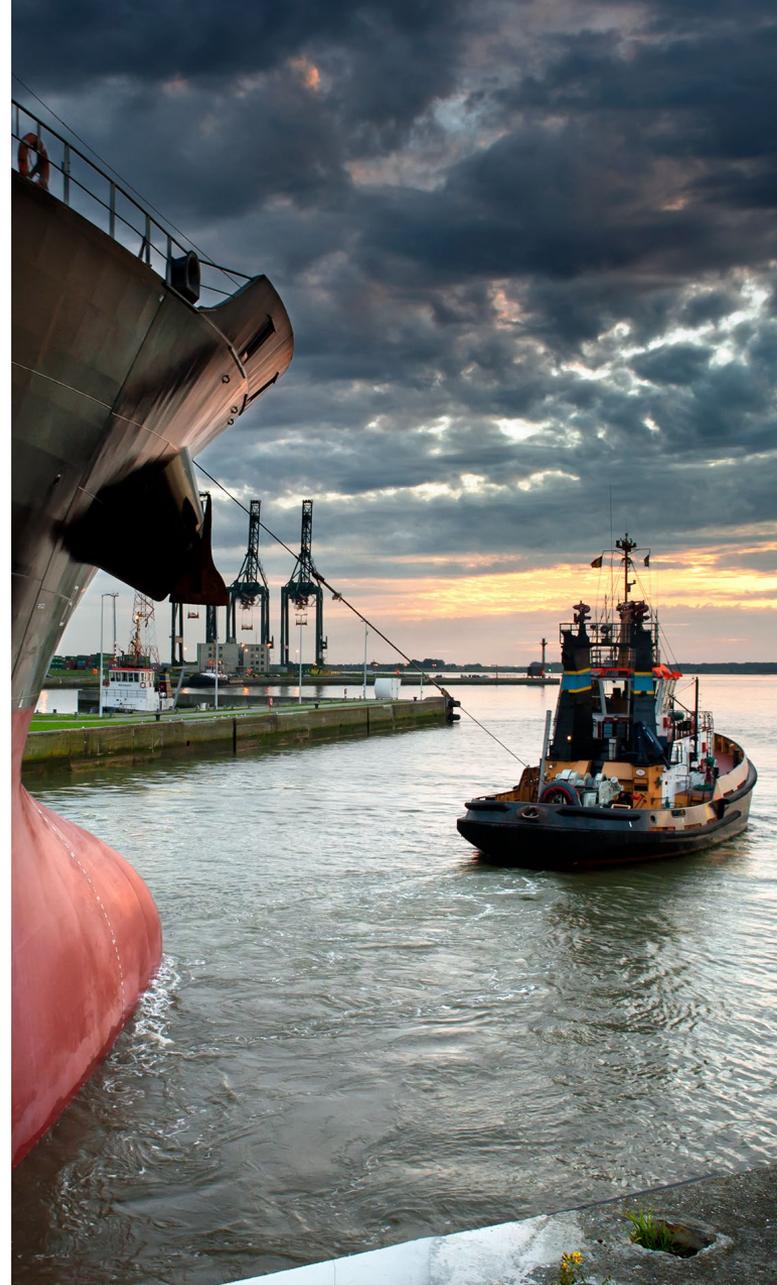
REQUEST

All lease documents for a particular tenant over the last 10 years.

QUESTION

Is 10 years of data showing carefully negotiated rate and lease terms exempt?

CONSIDERATIONS

- What information might you want to protect?

- What information might the tenant want to protect?

PROCESS

PROCESS

1. Define the Request

What's a "lease document?"

Email Negotiations?

LOI?

Amendments?

Email Modifications?

PROCESS

1. Define the Request

2. Understand the Law of Request

   – Here, the request does not cite a statute or other law, and this merges with the next step

PROCESS

1. Define the Request
2. Understand the Law of Request
3. **Identify Exemptions**

EXEMPTION
RCW 42.56.280 "DELIBERATIVE PROCESS"

Drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this chapter, except that a specific record is not exempt when publicly cited by an agency in connection with any agency action.

DELIBERATIVE PROCESS, CONT.

Exempt only if:

- pre-decision opinions or recommendations expressed as part of the deliberative process;

- disclosure would be harmful to the deliberative or consultative function of the process, and;

- disclosure would interfere with the flow of recommendations, observations, and opinions, and;

- the records reflect policy recommendations and opinions, not simply the raw factual data underlying a decision.

DELIBERATIVE PROCESS, CONT.

- Lease negotiations may be deliberative process, but an executed lease is not.

- It does not matter that public disclosure might adversely impact the Port's ability to get the best deal in future negotiations, or that it may be disadvantaged in future lease negotiations if the other party knew what terms or provisions the Port may be willing to deviate from in its standard lease.

West v. Port of Olympia, 146 Wn. App. 108, 192 P.3d 926, 2008 Wash. App. LEXIS 1700 (Wash. Ct. App. 2008).

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WHAT DO YOU NEED TO KNOW?

NOTE: we never decide how to apply public record exemptions without reference to caselaw.

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EXEMPTION?
RCW 42.56.270 FINANCIAL, COMMERCIAL, AND PROPRIETARY INFORMATION

Valuable formulae, designs, drawings, computer source code or object code, and **research data** obtained by any agency **within five years of the request** for disclosure when disclosure would produce **private gain and public loss.**

WHAT DO YOU NEED TO KNOW?

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"**Research Data**," is a "body of facts and information collected for a
specific purpose and derived from close, careful study, or from scholarly
or scientific investigation or inquiry."

Servais v. Port of Bellingham, 127 Wn.2d 820, 832, 904 P.2d 1124 (1995).

FROM THE STATUTE

- Obtained within 5 years of the request
  - Maximum application to half the data

- Private gain and public loss
  - Who will benefit from disclosure and what will it cost the public?

FROM THE CASELAW

- Body of facts and information - ✓

- Collected for a specific purpose - ✓

- Either (a) Derived from close, careful study - ?

- or (b) from scholarly or scientific investigation or inquiry - X

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PROCESS

1. Define the Request
2. Understand the Law of Request
3. Identify Exemptions

4. Notice

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PROCESS

4. Notice

- No statutory notice requirement

- Consider advance sharing of the proposed disclosure with the tenant on a deadline to file for a restraining order.

SCENARIO 2: SECURITY EMPLOYEE RECORDS
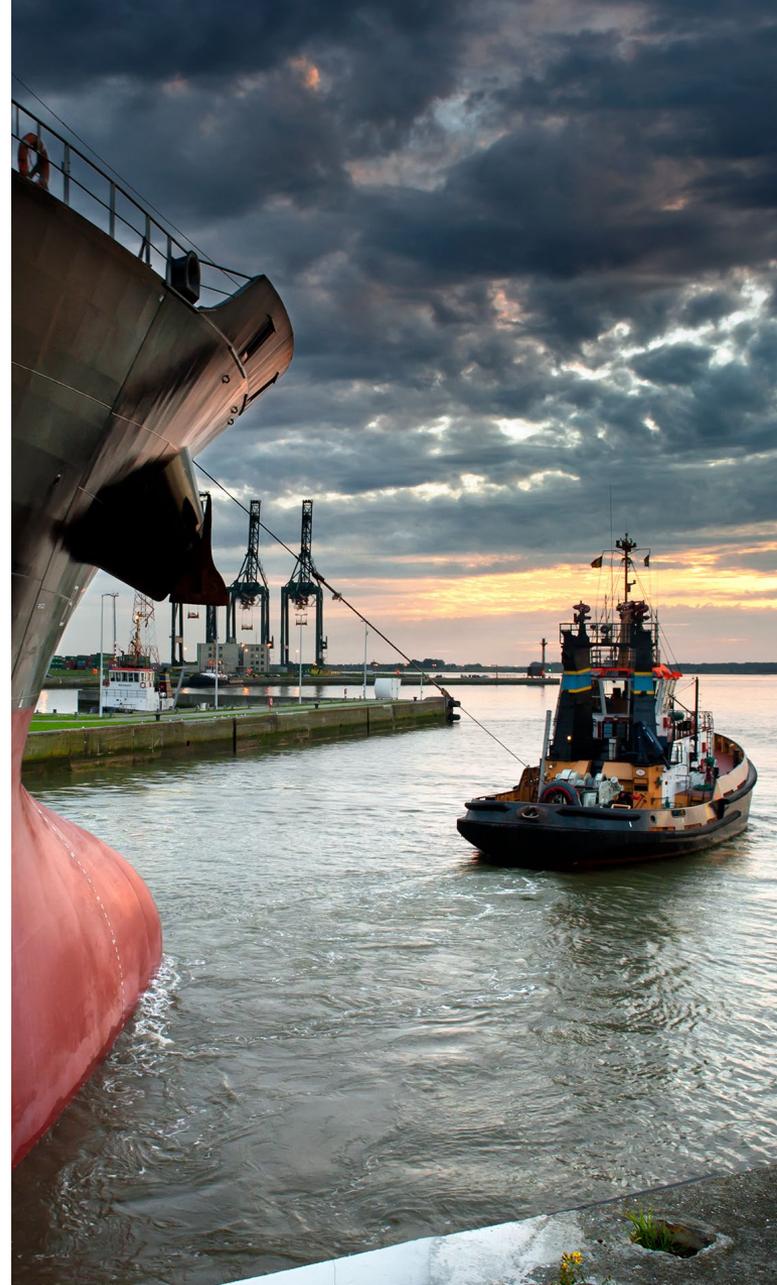
REQUEST

Regarding a former security guard employee, any criminal history, disciplinary records, complaints, investigations of misconduct, reason for separation from employment, and any other records needed to comply with RCW 43.101.095 and RCW 43.101.135.

PROCESS

1. Define the Request

"Any criminal history, disciplinary records, complaints, investigations of misconduct, reason for separation from employment, and any other records" …

OR ONLY

Those things to the extent they are "… needed to comply with RCW 43.101.095 and RCW 43.101.135."

PROCESS

1. Define the Request

2. Understand the Law of Request

LAW OF REQUEST
RCW 43.101.095. PEACE AND CORRECTIONS OFFICER CERTIFICATION – BACKGROUND INVESTIGATION

- All applicants to be "Washington peace officers and corrections officers" must submit to background check

- Must include criminal history, disciplinary records from any previous "law enforcement or correctional employer," complaints, investigations of misconduct, reason for separation from employment

LAW OF REQUEST
RCW 43.101.135. SEPARATION OF PEACE OR CORRECTIONS OFFICER

Upon separation of a peace officer or corrections officer hired after July 1, 2023, from employing agency, the agency shall maintain records for 10 years, including "all misconduct and equal employment opportunity complaints, progressive discipline imposed including written reprimands, supervisor coaching, suspensions, involuntary transfers, investigatory files, and other disciplinary appeals and litigation records."

WHAT DO YOU NEED TO KNOW?

Do you employ "Washington peace officers?"

- "Peace Officer" = a public agency employee responsible for "the detection and apprehension of persons committing infractions or violating the traffic or criminal laws." RCW 10.93.020 and 43.101.095.

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IF YES:

Response must include "all misconduct and equal employment opportunity complaints, progressive discipline imposed including written reprimands, supervisor coaching, suspensions, involuntary transfers, investigatory files, and other disciplinary appeals and litigation records."

RCW 43.101.135.

IF NO:

Response must include "any criminal history, disciplinary records, complaints, investigations of misconduct, reason for separation from employment."

Agency does not have any records required to comply with RCW 43.101.095 and RCW 43.101.135.

PROCESS

1. Define the Request
2. Understand the Law of Request
3. Identify Exemptions

EXEMPTION
PERSONAL INFORMATION IN EMPLOYEE FILES THAT WOULD VIOLATE RIGHT TO PRIVACY (RCW 42.56.230)

From the Statutes:

Highly offensive to a reasonable person, and not of legitimate concern to the public

(RCW 42.56.050)

RIGHT TO PRIVACY, CONT.

From the Caselaw:

Sexual relations; family quarrels; unpleasant or disgraceful or humiliating illnesses; or intimate, personal letters.
NOT: ID badge photos

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 136, 580 P.2d 246 (1978).

EXEMPTION

PERSONNEL RECORDS (RCW 42.56.250)

Income data, taxpayer information, banking numbers, and social security numbers; and

Name, birthdate, job title, addresses, telephone numbers, wireless telephone numbers, email addresses, driver's license numbers, identicard numbers, payroll deductions including the amount and identification of the deduction, and emergency contact information; and

EXEMPTION
PERSONNEL RECORDS (RCW 42.56.250)

Names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal email addresses, social security numbers, and emergency contact information of dependents.

PROCESS

1. Define the Request
2. Understand the Law of Request
3. Identify Exemptions
4. Notice

NOTICE

NOTICE REQUIREMENTS: RCW 42.56.250 (personnel records)

To the employee, any union representing them, and the requestor:

(a) The date of the request;

(b) The nature of the requested record relating to the employee;

(c) That the agency will release any information in the record which is not exempt from the disclosure requirements of this chapter at least ten days from the date the notice is made; and

(d) That the employee may seek to enjoin release of the records under RCW 42.56.540.

PROCESS

1. Define the Request
2. Understand the Law of Request
3. Identify Exemptions
4. Notice

5. Respond

SCENARIO 3: EMAILS AND INTERNET LOGS
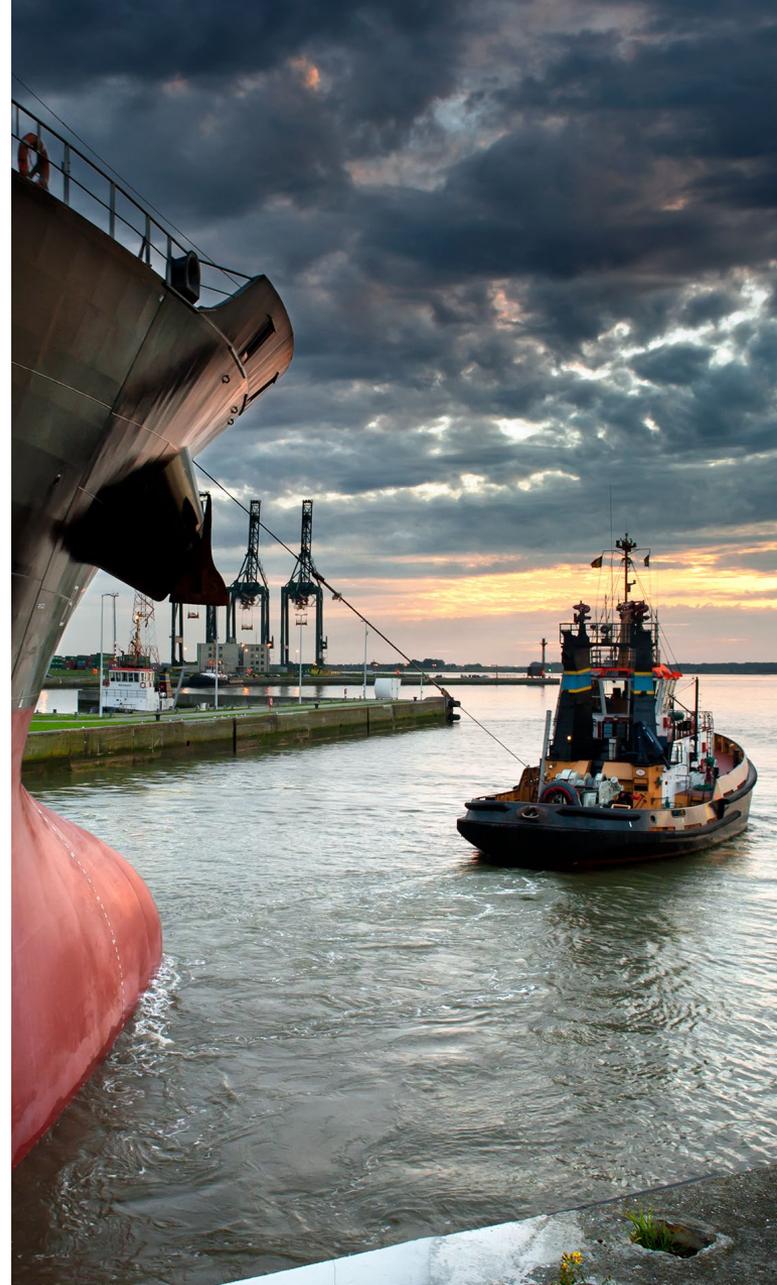
REQUEST

All emails related to a potential new tenant, along with internet access logs (IAL's) for all Port employees involved in the acquisition and lease drafting for the new tenant.

PROCESS

1. Define the Request

If you clarify the request to determine the requestor wants meta data from the emails, must you provide it?

PROCESS

1.   Define the Request
2. **Understand the Law of Request**

Metadata associated with public records is subject to disclosure under the PRA.

If the email is public record, so is the metadata.

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

QUESTION: WHAT DO YOU NEED TO KNOW?

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- When a request is made to the Port for an email that is a public record, you may not destroy or delete the electronic version of the email (including metadata).

- The *Records Management Guidelines* issued by the Secretary of State allows for printing of emails and then deleting the electronic version. BUT – do not do this if there is a pending request that *could* include metadata.

- Metadata must be specifically requested – a mere request for the email is not likely sufficient

CONSIDERATIONS

- Does the data exist?

- What if the Port has printed the email (prior to the request) and then deleted the electronic version?

- Is there a conflict between the PRA and another statute? If so, PRA trumps.

QUESTION

Must you provide the IAL's? What if your system does not back-up the IAL's and only keeps them for the immediately preceeding 12-month period?

FROM THE CASELAW

Internet access logs are subject to disclosure under PRA because they contained information relating to the conduct of Government.

If no back-up is created, then the electronic records of IAL's do not have to be produced, as the request does not involve identifiable public records.

Belinski v. Jefferson County, 187 Wn.App. 724 (2015)

WHAT DO YOU NEED TO KNOW?

WHAT DO YOU NEED TO KNOW?

- Is there an identifiable public record? Is the document identified with reasonable clarity?

- Does the request provide notice that is made under the PRA?

- Is there a statute of limitations issue?

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PROCESS

1. Define the Request

2. Understand the Law of Request

3. Identify Exemptions

   – RCW 42.56

PROCESS

1. Define the Request
2. Understand the Law of Request
3. Identify Exemptions
4. Notice
- Any statutory requirements?

- Privacy considerations?

- Other party arguments for protection?

PROCESS

1. Define the Request
2. Understand the Law of Request
3. Identify Exemptions
4. Notice

5. Respond

CONSIDERATIONS

- Does the Port have any *existing* records?

- What does your document retention policy require you to keep? Have you followed it?

- Is there a statute of limitations issue?

  - RCW 42.56.550(6) provides a 1-year SOL for actions under the PRA (one year from the last production of any record under the request)

  - OR calculated from date exemption asserted

  - Doctrine of equitable tolling *may* apply

OTHER IMPORTANT ISSUES

- The Port must actually "possess" the document. Documents never in the Port's possession are not public records.

- Search for public records must be reasonably calculated to uncover all relevant documents

  – Be careful with search terms

  – Get requestor's agreement on terms?

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