Overstreet, Greg (ATG)

From: Molenda, Joseph C (LNI)
Sent: Wednesday, December 14, 2005 4:52 PM
To: ATG WWW Public Records Requests
Cc: Overstreet, Greg (ATG)
Subject: Public Records Model Rules Comments

Attached are my comments on the draft Public Records Model Rules. They are in table format. Note that these comments are my own and do not represent the agency I work for as a whole. Please contact me with any questions. Thank you for this opportunity for input.

Model Rules
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Joe

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Comments:
WAC Chapter 44-14 - Proposed Public Records Model Rules

Rule Number	Rule Title/Subject	Comments/suggestions
44-14-00001	Statutory authority and purpose.	
44-14-00002	Format of model rules.	
44-14-00003	Model rules and comments are nonbinding.	
44-14-00004	Recodification of the act.	
44-14-00005	Training is critical.	
44-14-00006	Additional resources.	The mention of the WSBA Deskbook is appreciated.
44-14-010	Authority and purpose.	Spacing adjustment needed in the word "and" in the rule title. Though the stipulation of "identifiable" records is included later, it could also be added here ("nonexempt '*identifiable* public records'").
44-14-01001	Scope and coverage of Public Records Act.	One would hope the pertinent Public Disclosure Act definitions for key terms is included in the recodified chapter 42.56 RCW. The distinction of a court from an agency, as well as the four-factor test for PRA jurisdiction is appreciated.
44-14-01002	Requirement that agencies adopt reasonable regulations for public records requests.	In the last paragraph, the addition of the phrase "or disruptive" to the clause "to prevent a requestor from being disrespectful [or disruptive] to agency staff" seems appropriate.
44-14-01003	Construction and application of act.	The first paragraph may not be necessary, as it seems to reproduce large sections of statute. The first sentence of the second paragraph, with cites to the act statutes, may be sufficient to start this comment.
44-14-020	Agency description – Contact information – Public records officer.	Useful template.
44-14-02001	Agency must publish its procedures.	
44-14-02002	Public records officers.	
44-14-030	Availability of public records. (1) Hours for inspection of records.	Good template rule with advice on oral requests to confirm with requestor in writing.

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	(2) Records Index. (3) Organization of records (4) Making a request for public records.	
44-14-03001	"Public record" defined. (1) Writing. (2) Relating to the conduct of government. (3) "Prepared, owned, and used or retained."	(1) Cite of RCW 42.17.020(48) is incorrect, should be 42.17.020(42). Cite of RCW 42.17.020(41) is incorrect, should be 42.17.020(42). (2) Cite of RCW 42.17.020(41) is incorrect, should be 42.17.020(36). (3) Cite of RCW 42.17.020(41) is incorrect, should be 42.17.020(36). Good suggestions on not sending records to a third party to avoid disclosure and bcc'ing work-related items on home PCs to the work PC servers.
44-14-03002	Times for inspection and copying of records.	
44-14-03003	Index of records.	The third paragraph states a state agency must index only <u>two</u> "categories" of records, separating the first two types from the last three listed in RCW 42.17.260(5). This is confusing and should be reworded for clarity, as the statute specifies **five** types that state agencies must index, without categorizing them. Good suggestion regarding electronic records indexing and retrieval.
44-14-03004	Organization of records.	The admonition not to let original records leave an agency office is appreciated, as is the electronic access alternative.
44-14-03005	Retention of records.	The connection between records retention and records request management is appreciated.
44-14-03006	Form of requests.	Question the applicability of RCW 42.17.260(1) to this comment. Good advice on verbal requests and request forms. Defining "indemnify" (in the last sentence) may assist the public in interpreting this comment.
44-14-040	Processing of public records requests –	(2) Isn't clarifying a request by telephone, though expedient, fraught

	general. (1) Providing "fullest assistance" (2) Acknowledging receipt of request. (3) Consequences of failure of respond. (4) Protecting rights of others. (5) Records exempt from disclosure. (6) Inspection of records. (7) Providing copies of records. (8) Large requests. (9) Completion of inspection. (10) Later discovered documents.	with the same legal risk as not confirming an oral request in writing? Shouldn't the oral clarification be confirmed in writing as well? (4) Good suggestion re contacting the person(s) impacted by release of requested records and advising them of the option to contact the requestor. (6) (a) Appreciate the guidelines for conducting a record inspection. (b) The 30-day limit should be communicated to the requestor when the agency notifies that the records are available for inspection or copying [see 44-14-04004(5)]. Shouldn't a subsequent request for similar or identical records be processed according to standard request processing priority procedures, instead of "last"? (10) Good advice on late-discovered records.
44-14-04001	Introduction.	Does the agency estimate of delivery time for a records request need to be justified in an explanation of why, and if so, to what extent of detail?
44-14-04002	Obligations of requestors. (1) Reasonable notice that request is for public records. (2) Identifiable record. (3) "Overbroad" requests.	(1) The admonition on "stealth" requests is appreciated. (2) Good advice on "information" vs. identifiable records and clarifying legal research requests. (3) The advice on clarifying "overbroad" requests is appreciated.
44-14-04003	Responsibilities of agencies in processing requests. (1) Similar treatment and purpose of the request. (2) Provide "fullest assistance" and "most timely possible action " (3) Communicate	(1) Good advice on prioritizing processing of large and small requests. (2) Good emphasis on "fullest assistance" and "most timely possible action." (3) This is one of the most important parts of the model rule comments, and cannot be emphasized enough. Advice on prioritization by the requestor is on point. (4) Thanks for mentioning the discretion

	with requestor. (4) No duty to create records. (5) Provide a reasonable estimate of the time to fully respond. (6) Seek clarification of a request or additional time. (7) Preserving requested records. (8) Searching for records. (9) Expiration of reasonable estimate. (10) Notice to affected third parties.	of the agency re: creation of records for a request. In most cases it can be impractical or unwarranted, but there are cases where it can help both customer and agency. "Controversy" is misspelled. (5) The comments are vague here. More guidance on explaining an agency's "reasonable estimate" of response time is needed, to prevent numbers of judicial challenges. (6) No mention was made whether seeking clarification can justify a request for extension of the estimated delivery date of a request. Comments on this would help. (8) The sentence, "The agency could notify the requestor of which departments are being surveyed for the documents so the requestor may suggest that to other departments," seems incomplete and unclear. Please clarify. (9) How should an agency document when a requestor gives permission to extend the estimated delivery date? (10) How is an agency supposed to know if third parties need to be contacted before it sees the requested records? How can the ten-or-more-day period be part of the "reasonable estimate" when the records haven't been located/retrieved before the estimate goes out?
44-14-04004 (misnumbered 05004) See also subsection misnumberings at right.	Responsibilities of agencies in providing records. (1) General. (2) Means of providing access. (3) Providing records in installments. (4) Failure to provide records. (5) When the agency does not have the	Note that this comment should be renumbered. (3) Good linkage of the installment option of request delivery with the "fullest assistance" concept. (4) Good definition of "denial" in various forms. (a) Appreciate the comments on supplementing responses to records requests and making another agency's records available for a request. (b)(i) Good advice on not redacting originals. (ii) The sentence "The brief explanation

	record. (6) [misnumbered (5)] Notifying requestor that records are available. (7) [misnumbered (6)] Documenting compliance.	should cite the statute the agency claims grant an exemption from disclosure, " should read "...grants an exemption,,," for correct verb agreement with the antecedent (statute). (6) Retaining copies of all requested documents would be impractical and cost prohibitive for most public agencies. Retention of selected request copies would be better advice. Use of electronic document imaging could facilitate this, where possible.
44-14-04005	Inspection (of?) records. (1) Obligation of requestor to claim or review records. (2) Time, place, and conditions for inspection.	(1) Good relation of abandoned requests to destruction of requested records. (2) More good advice on conducting records inspections.
44-14-04006	Closing request and documenting compliance. (1) Fulfilling request and closing letter. (2) Returning assembled records. (3) Retain copy of records provided.	(1) Good suggestions for content of final response (closing) letters. (2) Advice appreciated. (3) Again, retention of record copies provided should be done on a selective basis based on anticipated interest, importance, visibility, and/or possible litigation. In last sentence, "agencies" should be spelled "agency's."
44-14-04007	Later-discovered records.	This comment repeats advice already given in rule 44-14-040 (10).
44-14-050	Processing of public records requests – Electronic records. (1) General. (2) Providing electronic records. (3) Customized access to databases.	Guidance in requests for electronic records is especially needed and appreciated, given the dearth of state laws on the subject. (3) Clarification of agencies' obligation to write code to satisfy a request is helpful. The guidelines for determining whether to provide customized access are practical and should be useful, as is (d), .agency ability to limit such access. (f) Could be clearer as to format of publication, as programming and staff costs can vary from database to database and year to year.

Comments:
WAC Chapter 44-14 - Proposed Public Records Model Rules

44-14-05001	Access to electronic records.	Good guidance as to format of electronic record delivery to requestor.
44-14-05002	"Customized access" to electronic records. (1) No duty to create electronic records. (2) Complications of providing customized access to electronic records and databases.	(2) Paragraph 2: "Balancing these two principles,...but only if doing so would be relatively **easy** to accomplish." Try substituting the word "practical" for "easy," as ease is usually not the sole criterion for making a decision of this kind. These guidelines are helpful and appreciated.
44-14-060	Exemptions.	(1) If you truly want to include a list of the "other laws" exempting records and information from disclosure, it will be a fairly long list! (2) A cite of RCW 42.17.260(9) might be appropriate here.
44-14-06001	Agency must publish list of applicable exemptions.	Thanks for providing a link to the MRSC list of "other" exemptions.
44-14-066002	Summary of exemptions. (1) General. (2) "Privacy" exemption. (3) Attorney-client privilege. (4) Deliberative process exemption. (5) "Overbroad" exemption. (6) Commercial use exemption. (7) Trade secrets.	(1) Thanks for clarifying that "an exemption will not be inferred," and that a rule or policy cannot define an exemption's scope. Good distinction between "exempt" and "confidential," and thanks for the example. (2) Appreciate clarifying that "privacy" and its defining statute are not stand-alone exemptions. (3) Link to the attorney-client privilege guidance document is helpful. (4) Clarification was good and needed. (7) Good guidance on trade secrets, although additional guidance on how to estimate what reasonable time is to determine secrets in records and how to anticipate that in the original "reasonable estimate" of delivery to the requestor would help.
44-14-070	Costs of providing copies of public records. (1) Costs for paper copies. (2) Costs for	Clarification on RCW 42.17.260(7)(b) is needed in how to differentiate "staff salaries" from "staff time to copy and mail requested public records." Isn't "staff time" calculated on the basis of

	electronic records. (3) Costs of mailing. (4) Payment.	"staff salaries?" Is this calculated differently for a staff person who does public record requests only part-time as opposed to one who does it full-time?
44-14-07001	General rules for charging for copies. (1) No fees for costs of inspection. (2) Standard photocopy charges. (3) Charges for copies other than standard photocopies. (4) Copying charges apply to copies selected by requestor. (5) Use of outside vendor. (6) Sales tax. (7) Costs of mailing	(1) Thanks for clarifying the issue of "redaction fees." (2) A model copy charge cost analysis sheet would be helpful to clarify how calculations and reasoning are to be shown to satisfy legal requirements. (4) The notice to all requestors that inspections are free is new to me, even though I knew RCW 42.17.300 states no fee shall be charged for them. (5) This advice is both needed and useful, especially where staff labor is in short supply and request demand exceeds the ability to produce copies timely and cost-effectively.
44-14-07003 (numbering?)	Charges for electronic records.	The "per-page scanning fee" is new and may be useful in the near future.
44-14-07004	Other statutes govern copying of particular records.	
44-14-07005	Waiver of copying charges.	Should an agency establish a written policy with criteria for waiving these charges, or is it totally discretionary?
44-14-07006	Requiring special payment. (1) Copying deposit. (2) Copying charges for each installment.	(1) Refunding any unused deposit to the requestor may need a bit more clarification, i.e., what is "unused"? Good clarification of collection of balance of copying charges. (2) Good clarification re installments.
44-14-080	Review of denials of public records. (1) Petition for review of denial of access. (2) Consideration of petition for review. (3) (Applicable to	(2) Are we locked into a two-business-day turnaround on petitions? There seems to be not only discontent among requestors to have to file within this limited period, but also differing interpretations of RCW 42.17.320 by agencies regarding this issue, and how the "response" requirement can be satisfied. More clarification, please!

	state agencies only.) Review by the attorney general's office. (4) Judicial review.	
44-14-08001	Agency internal procedure for review of denials of requests.	Some petitions for review require more research and review time than two business days will allow. Guidance is badly needed in this area.
44-14-08002	Attorney general's office review of denials by state agencies.	Mentioning that the AGO review is nonbinding upon state agencies also is important.
44-14-08003	Alternative dispute resolution.	This option was mentioned at the hearings and needs to be in the comments.
44-14-08004	Judicial review. (1) Seeking judicial review. (2) Statute of limitations. (3) Procedure. (4) Burden of proof. (5) Types of cases subject to judicial review. (6) "In camera" review by court. (7) Attorneys' fees, costs, and penalties to prevailing requestor.	(1) The two-business-day time limit is something to which I thought more requestors would object at the hearings. When you consider that this time frame does not allow for initial agency or AGO review of a denial, it is almost ludicrous. Realizing that legislation is needed to change this, the comment is made because of opinions requestors have shared with me over the past decade. (5) Good guidance provided here. (7) Thanks for the clarification of penalty as per day, not per record per day.

Overstreet, Greg (ATG)

From: ATG WWW Email AGO
Sent: Wednesday, December 14, 2005 7:41 PM
To: Overstreet, Greg (ATG)
Subject: Public Record Comments

The following message was submitted to the Office of Attorney General:

From:	M, Robert
Email Address:	
Organization:	
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	WA
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Comments:
The influx on unsolicited commercial intrusion into our lives is staggering. The laws respecting unlawful commercial phone solicitation have provided an enormous benefit to citizens. Unfortunately, no such law for unsolicited US Mail exists. I have long been registered on both the Direct Marketing Association and ADVO 'no commercial mail' preference lists. Despite my registrations, over the last so many months, I have been inundated with unwanted US Mail solicitations. I have spent a substantial amount of time trying to track down the source of my personal information being given or sold, without my wishes, to marking list companies. I've found that often the information is being derived from King County public records. While this commercial use is illegal, there is little if any enforcement of these violations by the State. Indeed, I understand from the County that the AG's office has little or no interest in doing so. The rules must be substantially beefed up to make ALL agency's require written confirmation by the requestors that such information will not be used for commercial purposes. All web sites providing user-access to such information must not only prominently display such information, but must have a button that requires the requestor to click to acknowledge compliance.