Foster Garvey

First Quarter Public Records Roundup

Legal Alert
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Public Records & Open Government

The first quarter of 2018 has seen a number of open government rulings and developments in Washington state. From a flurry of court decisions, legislative action, and a veto by the governor, to decisions addressing exemptions for education and law enforcement records, the summary below recaps recent legal developments under Washington's Public Records Act (PRA), ch. 42.56 RCW.

Governor vetoes bill regarding Washington State Legislature records. On March 1, 2018, Washington Governor Jay Inslee vetoed Engrossed Senate Bill 6617, which would have exempted from disclosure some public records of the legislature. The governor's veto message cited the "seriously flawed" process of adopting the bill and the need for a "transparent process." The bill had been criticized because it was quickly passed by the legislature only one day after its introduction. The bill's passage was spurred by a January 19, 2018 Thurston County Superior Court decision that had concluded the legislature's records were subject to public disclosure.

Education records may be redacted under the PRA and federal law. In *Arthur West v. The Evergreen State College Board of Trustees*, the Washington Court of Appeals held that the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g, was an "other statute" exemption to the PRA. FERPA restricts disclosure of student education records and personally identifiable information. In so holding, the court rejected the plaintiff's argument that FERPA was merely a spending-clause statute that didn't directly prohibit disclosure of records.

Social media postings made within the scope of public employment are subject to disclosure. In *West v. City of Puyallup*, the Washington Court of Appeals held that a Facebook post of a city councilmember could be a public record if it were made within the scope of office. However, because the posts at issue did not further the city's interests, and were not directed by the city, the posts were not within the scope of the

councilmember's employment.

Equitable tolling, discovery rule did not revive time-barred PRA claim. In *Strickland v. Pierce County*, the Washington Court of Appeals held that the plaintiff's PRA claim was time-barred under the applicable one-year statute of limitations. The court rejected the plaintiff's arguments that the statute of limitations was equitably tolled because the plaintiff had not presented any evidence of inequitable conduct. The court also rejected the argument that a "discovery rule" should apply: the plaintiff argued the one-year limitations period should start when the plaintiff comprehensively reviewed the records provided by the agency. The court concluded that application of a discovery rule would be contrary to the express language of the PRA, and there was no factual basis for the application of a discovery rule in this case.

Judicial review by motion under court rules available to public agencies in public records litigation. In *Kittitas County v. Allphin*, the requester appealed dismissal of his PRA claims against the Department of Ecology, arguing it was improper for the trial court to dismiss based on a motion for order to show cause filed by Ecology. In the published portion of its decision, the Washington Court of Appeals upheld the dismissal. The court reaffirmed that PRA proceedings are not special proceedings, and a party can proceed in any manner permitted under the civil rules. Where the show cause procedure did not prejudice the requester , it was appropriate the treat the motion as being filed under Civil Rule 7. The court explained that whether a record requester makes a show cause motion under RCW 42.56.550, or an agency makes a motion for judicial review under CR 7(b), the nature of the hearing is the same, and the PRA authorizes hearings based solely on affidavits. The court concluded, "As with other civil disputes, parties have means under the civil rules for moving a dispute toward an orderly resolution." [Note: The underlying dispute in this case has spurred multiple appellate proceedings. A separate appeal concerning application of the common interest privilege was heard by the Washington Supreme Court in March 2017 and is awaiting decision (Supreme Court Case No. 93562-9).]

Court rules sex offender evaluations are not exempt as "health care information," and sex offenders could not litigate case with "John Doe" pseudonyms. In *John Doe G. v. Department of Corrections*, the Washington Supreme Court held that special sex offender sentencing alternative (SSOSA) evaluations do not contain "health care information" under the Uniform Health Care Information Act, ch. 70.02 RCW, because "they are forensic examinations done for the purpose of aiding a court in sentencing a sex offender" and therefore do not "directly relate to [a] patient's health care." The court noted, however, that a SSOSA evaluation might sometimes be accompanied by documents that may trigger PRA protection. The court also held that the trial court erred in allowing the plaintiffs to proceed under pseudonyms because the trial court "did not justify its actions under GR 15 and *Ishikawa*." The court noted that it has still required a showing that pseudonymity was necessary and that none of the cases relied on by the Court of Appeals permitted parties to proceed under a pseudonym for parties "whose names and association to their respective crimes were already public record."

Court rejects correctional facility's claim of investigative, security exemptions in vendor contract. In *Williams v. Department of Corrections*, the Washington Court of Appeals rejected

plaintiff's contentions that the Department of Corrections violated the PRA by providing an unreasonable estimated response time and unduly delaying production. The court agreed, however, that DOC improperly redacted portions of records under RCW 42.56.240(1) and RCW 42.56.420, which exempts specific intelligence and investigative records. DOC had redacted information in a contract with J-Pay, a company providing money transfer and email service to correctional facilities. The redacted information involved keyword searches an offender could perform at the J-Pay kiosk, which the court concluded was not intelligence or investigative information, and was not a vulnerability assessment or part of an emergency and escape response plan.

Attorney General issues updated model rules for public records. Following a seven-month public notice and comment process, the Washington Attorney General's Office updated its Public Records Act Model Rules, ch. 44-14 WAC. The model rules provide information about the PRA and some suggested best practices. The rules are advisory and do not have the force of law, but they can guide public agencies in developing public records rules and procedures. The PRA was amended in 2017 to state that public agencies should consult the model rules when establishing PRA ordinances. The updated rules took effect on April 2, 2018.

Attorney General's Office offering local governments assistance through Local Government Public Records Consultation Program. In 2017, Engrossed Substitute House Bill 1594 amended the PRA to require the Attorney General to establish a program for providing information and assistance to local agencies in developing PRA best practices, including but not limited to responding to records requests, seeking additional resources for developing and updating technology information services, and mitigating liability and costs of compliance. Information about the program is available on the Attorney General's website.

If you have any questions, contact a member of our Public Records & Open Government team.