PUBLIC RECORDS ACT
AND PUBLIC AGENCY CONTRACTS

GOVERNMENT LAWYERS BAR ASSOCIATION

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Outline:

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PUBLIC RECORDS ACT
AND PUBLIC AGENCY CONTRACTS

EDUCATIONAL & SUMMARY MATERIALS ONLY;
DOES NOT CONSTITUTE LEGAL ADVICE OR A LEGAL OPINION.

THIS IS NOT AN EXHAUSTIVE LIST OF STATUTES OR CASES.
CITATIONS TO STATUTES AND CASE LAW
ARE AS OF THE DATE THESE MATERIALS WERE PREPARED (May 22, 2019).
AMENDMENTS TO STATUTES, OR LATER APPEALS OR COURT DECISIONS,
MAY CHANGE THIS SUMMARY.

A. General Requirements of the Public Records Act

The Public Records Act (PRA) at chapter 42.56 RCW mandates broad disclosure of public records. *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016).[1] The PRA is liberally construed in favor of disclosure, while its exceptions are narrowly construed RCW 42.56.030.

Under the PRA, a state or local agency may be asked to produce a public record. A "public record" is a writing **prepared, owned, used, or retained** by a **state or local agency** relating to the **conduct of government** or the **performance of any governmental or proprietary function.** RCW 42.56.010(3). "Writing" includes any recording of a communication, image, or sound. RCW 42.56.010(4).

An agency must respond to a request for an existing identifiable public record within five business days. RCW 42.56.080, .520. The initial response must: (1) produce the requested record for inspection or copying; (2) provide an internet link to the requested record; (3) acknowledge receipt of the request and provide a reasonable estimate of the time to respond; (4) acknowledge receipt of the request and ask the requester to clarify the parts that are unclear, providing an estimate of time to respond if the request is not clarified; or, (5) deny all or part of the request, in writing. RCW 42.56.080, .520.

[1] Links to and descriptions of statutes are as of the date these materials were prepared. Links to published state appellate court decisions are provided the first time the decisions are cited in these materials, where links are available on the Municipal Research and Services Center's Website, or for more recent decisions, on the Washington State Courts Judicial Opinions Public Access Website. Links are not provided to unpublished state court decisions but copies of decisions may be available on the courts' recent opinions page. For citing to unpublished state decisions, see Washington State Court General Rule 14.1. For citing federal court decisions, see FRAP 32.1.

An agency must conduct an adequate search for requested records. *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 224 P.3d 775 (2011). The search must be reasonably calculated to uncover all relevant documents. *Id.* The search may need to include non-agency locations, including personal electronic devices or personal electronic accounts that are likely to hold responsive public records. *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015). The search may need to include other non-agency locations, such as records at agency contractors. See *Concerned Ratepayers Ass'n v. Clark County PUD No. 1*, 138 Wn.2d 950, 983 P.2d 635 (1999).

An agency must make responsive public records available for public inspection and copying unless a specific statutory exemption applies. RCW 42.56.070(1). A denial must be in writing and state the reason. RCW 42.56.520; RCW 42.56.210(3). The agency must identify the specific statute relied upon for withholding and briefly explain how the exemption applies to the record. RCW 42.56.210(3). If no responsive records are found, the agency should describe generally where it searched. *Neighborhood Alliance*, 172 Wn.2d at 722.

A party that prevails in a lawsuit seeking to disclose a public record or to challenge the reasonableness of an agency's response time is entitled to costs, including reasonable attorneys' fees. RCW 42.56.550(4). A court may also award a statutory penalty of between $0 and $100 for each day that an agency improperly denies a requester the right to inspect or copy a responsive public record. *Id*.

A person who is named in a record or to whom a record pertains may seek a court order enjoining disclosure. RCW 42.56.540. Special injunction procedures related to inmate requests and requests by sexually violent predators are in RCW 42.56.565 and RCW 71.09.120(3).

B. Public Agency Contracting Records are "Public Records" – "POUR"

There are two different ways a private entity's records, such as the records of a private company bidding on a public agency contract or performing services under a public agency contract, can be subject to the PRA. In the first way, the record relates to the agency's governmental or proprietary functions, and the public agency "prepared, owned, used or retained" the record ("POUR"). That first method is described in this part (Part B). In the second way, the private entity itself is the "functional equivalent" of a public agency or public employee for PRA purposes. That second method is described in Part C, *infra*.

1. "Prepared, Owned, Used or Retained"

Public agency procurement and contracting records are public records when they were "prepared, owned, used or retained" ("POUR") by the agency. See attachment at Part J, *infra* ("public record" guide/diagram). This conclusion applies even if the contractor, not the agency,

created those records. *Laborers Int'l Union, Local No. 374 v. City of Aberdeen*, 31 Wn. App. 445, 642 P.2d 418 (2002) (private contractor's payroll records filed with a city pursuant to a public contract, in order to verify the contractor's compliance with federal public project wage laws, were public records).

2. "Used"

This conclusion---that a record is a public record if it relates to a governmental or proprietary function and it satisfies POUR---applies even if the contractor, not the agency, possesses the records when the agency "used" the contractor's records. *Id*. In *Concerned Ratepayers Ass'n v. Clark County PUD No. 1*, 138 Wn.2d 950, 983 P.2d 635 (1999), the agency referred to and reviewed but did not possess the requested records of its contractor. The State Supreme Court said the lower court in this case had correctly recognized that possession "is not determinative of the issue." *Id.* at 959. The Supreme Court stated that, "we hold that evaluating, reviewing and referring to the document constitutes 'use' within the meaning of the [PRA]." *Id.* at 950. The Court further explained,

> Whether information has been "used," however, should not turn on whether the information is applied to an agency's final work product. *Rather, the critical inquiry is whether the requested information bears a nexus with the agency's decision-making process. A nexus between the information at issue and an agency's decision-making process exists where the information relates not only to the conduct or performance of the agency or its proprietary function, but is also a relevant factor in the agency's action*. See RCW 42.17.020(36); *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 711, 780 P.2d 272 (1989). That is, certain data may still be relevant and an important consideration in an agency's decision-making process even if it is not a part of the agency's final work product. Thus, mere reference to a document that has no relevance to an agency's conduct or performance may not constitute "use," but information that is reviewed, evaluated, or referred to and has an impact on an agency's decision-making process would be within the parameters of the Act. See, e.g., *Yacobellis*, 55 Wn. App. 706 (questionnaires prepared by city's parks department to survey other governmental agencies' management of municipal golf courses were "public records" even though they were not the formal product the department intended to release to the public).
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> *Id.* at 960-961. (Emphasis added).

In *Concerned Ratepayers* the contractor and agency also later claimed that the requested records were exempt as "proprietary" information (valuable research data). The Supreme Court remanded that issue, stating, "Here, although the requested document is a public record, whether it is a disclosable public record has yet to be determined." *Id*. at 964. See discussion of possible exemptions from disclosure in Part E, *infra*.

The decisions cited above are from state courts. On occasion, the release of public records under the PRA is also the subject of federal court litigation, including in challenges concerning release of records provided by private businesses to state or local agencies. For example, see *Chamber of Commerce of the U.S. v. City of Seattle*, 274 F.Supp.3d 1155 (W.D. Wash. 2017), *aff'd in part, reversed in part and remanded on other grounds* at 890 F.3d 769 (9th Cir. 2018) (PRA claims waived on appeal). In that case, a requester had asked for certain driver records of a private entity, which the plaintiff anticipated the public agency (a city) would use in the future. The federal district court, in applying *Concerned Ratepayers*, found that the city had not prepared, owned, used or retained the requested records within the meaning of the PRA so they were not "public records." The court held:

> The PRA was enacted to ensure that the public remains informed regarding what their public servants are doing. RCW 42.56.030. Information regarding non-governmental documents—meaning documents that were not prepared, utilized, or retained by a government agency or office—would not provide insight into any government function. As for the mechanics of the PRA, the statute requires government agencies and offices to make their records available for inspection and copying (subject to certain exemptions), a requirement that makes no sense if "public records" includes documents entirely unrelated to the government and held by private parties. While it is clear that an agency or office subject to the PRA cannot avoid its disclosure requirements through the simple expedient of declining to take possession of reports, specifications, documents, and other information it uses in performing its functions, in this case the City has never seen the driver lists, much less employed or applied them for some purpose or process. *Concerned Ratepayers Ass'n v. Pub. Utility Dist. No. 1 of Clark County*, 138 Wash.2d 950, 958–59, 983 P.2d 635 (1999). Confidential business documents prepared by and in the exclusive possession of a private party are not "public records" under any reasonable interpretation of the statute.
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> *Id.* at 1175.

However, the federal court also added in a footnote that once the record is supplied to the city,

> At that point, the list will become a public record subject to the PRA. To the extent a request for disclosure is made under the PRA and the Chambers' members hope to preclude further disclosure of the list, they will have to use the third-party injunction procedures set forth in the act. RCW 42.56.540.
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> *Id.* at 1176, n.14.

Finally, in an unpublished decision, the State Court of Appeals in 2017 addressed the situation where a private contractor possessed records that predated the contract with the public agency and were unrelated to the contract performance. In that case, the court held that an email between a county's contractor and a subcontractor, written prior to both the contract with the

county and the subcontract, was not a public record. *Eggleston v. Asotin County*, No. 34340-5-III (Dec. 14, 2017) (unpublished), *petition for review denied* (2018).[2] The Court found the contractor's record was not "prepared, owned, used or retained" by the county.

C. A Contractor Itself Might be a "Public Agency" or "Public Employee" For PRA Purposes – "*Telford* Test"

1. "Functional Equivalent" of Public Agency

The PRA defines "agency" to include "all state agencies and local agencies." RCW 42.56.010(1). The term "agency" is not strictly limited to government entities. The PRA might apply to records of private entities, including contractors, when the entities themselves are the "functional equivalent" of a public agency. A non-government entity that performs governmental or quasi-governmental functions may be considered the functional equivalent of an "agency" itself for PRA purposes if, on balance, it satisfies four criteria (below). *Telford v. Thurston County Board of Commissioners*, 95 Wn. App. 149, 974 P.2d 886 (1999); *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 181 P.3d 881 (2008); *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 387 P.3d 690 (2017). Here is a brief discussion of these published decisions that concern when a private contractor is a "public agency" for PRA purposes, and a fourth decision discussing when a private contractor is a "public employee" for PRA purposes.[3]

The four criteria constitute the "*Telford* test" articulated in *Telford v. Thurston County Board of Commissioners*. The test requires a review and balancing of the following four criteria on a case-by-case basis:

(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 government.

95 Wn. App. at 161-165.

The *Telford* test is fact-specific: the criteria on balance should suggest that the entity in question is the functional equivalent of a state or local agency. *Id.* at 162. In *Clarke v. Tri-Cities Animal Care & Control Shelter*, the issue involved whether an agency contractor was the "functional equivalent" of a public agency for PRA purposes. The court in *Clarke* applied the

[2] This opinion should not be confused with a different PRA published decision with the same parties, *Asotin County v. Eggleston*, 7 Wn. App. 2d 143, 432 P.3d 1235 (2019). That 2019 PRA decision involved an award of penalties and attorneys' fees.

[3] For an example of an unpublished decision applying the *Telford* test, see *Freedom Foundation v. SEIU Healthcare NW, Training Partnership, a 501(c)(3)*, No. 76319-9-I (August 27, 2018).

Telford test to a privately-run corporation that had contracted with the Tri-Cities area animal control authority to provide euthanasia services. 144 Wn. App. at 188. The court then held that three of the four factors—all but the entity's "origin"—weighed in favor of applying the PRA to the contractor.

In *Fortgang*, the State Supreme Court stated that it had "implicitly endorsed" the *Telford* test in an earlier case, *Worthington v. Westnet*, 182 Wn.2d 500, 507-508, 341 P.3d 995 (2015). In *Fortgang*, the Supreme Court now firmly adopted the *Telford* test, holding:

> The *Telford* test—which derives from case law interpreting the federal Freedom of Information Act (FOIA) — furthers the PRA's purposes by preventing governments from evading public oversight through creative contracting. 5 U.S.C. § 552; see *Cedar Grove Composting, Inc. v. City of Marysville,* 188 Wn. App. 695, 720, 354 P.3d 249 (2015). It is consistent with related precedent from this court and with the approach taken by numerous other jurisdictions interpreting similar transparency laws. We now hold that the *Telford* test is an appropriate way to decide whether a private entity must comply with PRA disclosure requirements

187 Wn.2d at 513 (internal footnote omitted).

In *Fortgang*, the Supreme Court found that, in applying the *Telford* test, a nonprofit foundation that had contracted with a city for certain zoo operations was not the "functional equivalent" of a public agency, so it was not subject to the PRA.

2. "Functional Equivalent" of Public Employee

Finally, the *Telford* test is used to determine when a private contractor is the functional equivalent of a public agency. In *Cedar Grove Composting v. City of Marysville*, 188 Wn. App. 695, 354 P.3d 249 (2015), however, the Court of Appeals applied a test "analogous" to the *Telford* test under the "exceptional" circumstances of that case and determined that a contractor was the functional equivalent of public employee.

In *Cedar Grove Composting*, the court found that a contractor's record can effectively become the agency's public record even if the agency never prepared, saw or possessed the record, when there is a nexus between the record and the agency's decision-making process and the contractor is the "functional equivalent" of a "public employee." The court found that the records requested from the city's contractor (consultant) related to public relations activities for the city were subject to the PRA. As detailed in the opinion, the court found the following facts relevant:

- The documents generated on behalf of the city (by the contractor) were made instrumental to the city's purposes in the campaign against Cedar Grove;
- Those records directly related to activities the contractor performed at the behest of the city to further the city's interests;
- The city knew what the contractor was doing;

- The city paid the contractor for those activities;
- The city was generally aware that the contractor possessed documents created during those activities; and,
- The city discussed the contents of some of those records with the contractor.[4]

However, the *Cedar Grove Composting* court also cautioned:

> We wish to be clear about what we are not doing in this opinion. We are not articulating a new standard that makes every record a government contractor creates during its engagement with an agency a public record subject to the PRA. Nor do we create a new duty on the part of a public agency to search the records of all its third-party contractors each time it receives a PRA request. Instead, we have applied established precedent about a private entity acting as the functional equivalent of a public agency to the analogous situation of a private entity acting as the functional equivalent of a public employee.
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> 188 Wn. App. at 733.

D. Bid and Contract Language Concerning Public Records

An agency cannot contractually override the PRA's legal mandate for disclosure. Withholding information in public agency records must be justified by a specific statutory exception – not just by a bid notice document or contract provision. See RCW 42.56.070(1). An agency cannot promise confidentiality of a public record if a law does not permit withholding of the record or information. See *Yakima Newspapers v. Yakima*, 77 Wn. App. 319, 890 P.2d 544 (1995) (settlement agreement between city and former employee was a public record and was not confidential; same exemption procedures apply to that contractual agreement); *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 769 P.2d 283 (1989); *Adams v. Department of Corrections*, 189 Wn. App. 925, 361 P.3d 749 (2015).

As a result, agencies cannot enter into non-disclosure agreements relevant to public records unless the terms of non-disclosure directly correspond with existing statutory exemptions.[5]

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[4] Joe Levan, *Court Clarifies How the PRA Can Apply to Contractor Records*, Municipal Research and Services Center (MRSC) (July 22, 2015), http://mrsc.org/Home/Stay-Informed/MRSC-Insight/July-2015/Washington-Court-of-Appeals-Clarifies-How-the-PRA.aspx.

[5] If entering into a non-disclosure agreement consistent with a particular statute, an agency might also want to add that it can withhold information only "to the extent permitted by law" or use a similar phrase. See, e.g., *Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 418 P.3d 102 (2018) ("In response to L/R concerns regarding data confidentiality, a mediation provision stated that " '[t]he

Moreover, an agency should cite the statutory exemptions, rather than the bid notice or contractual agreement, as the basis for any withholding in response to a request under the PRA. See also discussion in Part G., *infra*, concerning data sharing agreements with contractors.

1. Bids and Bid Notice Language

Agency bid documents and other information provided by an agency to bidders and would-be contractors (such as those who respond to requests for proposals or requests related to sole-source contracts), should inform those persons and entities of the applicable public disclosure statutes and any pertinent agency bid procedures relevant to bid records.

For example, some statutes govern bid procedures, permitting agencies to withhold the bid submission records until the agency announces an apparent successful vendor. See state agency procurement statutes for contracts governed by chapter 39.26 RCW, specifically at RCW 39.26.030 ("Bid submissions and bid evaluations are exempt from disclosure until the agency announces the apparent successful bidder.") A comparable bid process general exemption for temporarily withholding all bids received by local agencies has not been located at this time.[6] However, the 2019 Legislature enacted at least three bills that, among other things, address disclosure of certain bid records including some of local governments. (These new laws are effective July 28, 2019, unless an act or section of an act has a different effective date). See, for example, SHB 1295 (Chap. 212, 2019 Laws), which exempts certain financial information supplied for the purpose of submitting a bid or proposal for alternative public works (chapter 39.10 RCW) and those bid documents until the agency notifies the highest scoring finalist or the selection process is terminated, except that a scoring summary may be provided upon the request of a bidder not selected as a finalist. Under ESSB 5418 (2019) (signed with partial veto; session law number yet to be assigned), municipalities seeking bids on a public works project governed by RCW 39.04.105 must provide copies of bids if those records were requested by a bidder. In addition, ESB 5453 (2019) (signed; session law number yet to be assigned) addresses certain activities and records of irrigation districts. This new law amends RCW 87.03.435 to provide that notices calling

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city will work to achieve the highest possible level of confidentiality for information provided *within the confines of state law*.'") *Id.* at 774. (Emphasis added.)

[6] In 2016, the Public Records Exemptions Accountability Committee ("Sunshine Committee") recommended in its report to the State Legislature that the Legislature repeal RCW 39.26.030 and amend the PRA to provide an exemption for both state and local agency bids during the bid process. Bills with this language were introduced in 2017-2018 (HB 1160/SB 5418) but did not pass. See further details and links to bills on the Sunshine Committee Webpage. Bills proposing to incorporate that recommendation were again introduced in the 2019 session of the Legislature (SB 5246/HB 1538 (2019)), but did not pass. For more information on the status of the bills referenced in these materials or other bills that may amend the PRA or other state laws governing agency records or contracting procedures, see the Legislature's website at https://app.leg.wa.gov/billinfo/.

for bids must be published on the district's website or the county's website if the district does not have a website, and, after an award is made the bid quotations "shall be open to public inspection and available by electronic request."

Sometimes bidders make PRA requests for others' bids, particularly if the requesting bidder was unsuccessful. Sometimes unsuccessful bidders seek the agency's bid evaluation records. (*Note:* Agencies should clarify if such an unsuccessful bidder's request is being made pursuant to the PRA, or only pursuant to the agency's bid protest procedures, or perhaps even both.)[7] Sometimes other persons, such as interested members of the public including the media, may make PRA requests for bid documents and bids.

Agencies should inform bidders that if they seek to protect bid information they provide to the agency because they believe it is proprietary or otherwise exempt, they must identify the information sought to be protected and preferably explain to the agency the statutory basis asserted for exempting the information from disclosure, in writing.[8] One process for agencies to consider in requiring bidders to mark their confidential or proprietary information is in the State Utilities and Transportation Commission (UTC) rule at WAC 480-07-160 at (4)(c) and (5)(c). That rule also provides in part at (5)(a) that:

> Any provider claiming that information provided to the commission is confidential must make that claim in writing at the same time the provider submits the document containing the information and must state the basis for the claim. To the extent feasible, the provider also must identify any person (other than the provider) who might be directly affected by disclosure of the confidential information.

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[7] For discussion of situations where records may be requested in more than one way, *see, e.g.*, *Department of Transportation v. Mendoza de Sugiyama*, 182 Wn. App. 588, 330 P.3d 209 (2014) (A requester's discovery order in another case restricting discovery of certain records did not prohibit her PRA request for same records); *Quinn Const. Co. LLC v. King Co. Fire Prot. Dist. No. 26*, 111 Wn. App. 19, 44 P.3d 385 (2002) (unsuccessful bidder could make a PRA request for bid records, regardless of discovery stay in pending bid protest litigation); *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 25 P.3d 426 (2001) (discovery and PRA requests can both proceed); and, *Beltran v. Dep't of Soc. & Health Servs.*, 98 Wn. App. 245, 989 P.2d 604 (1999) (court applied same exemption to records requested both in discovery and a PRA request).

[8] *See* proposed legislation at SB 5246/HB 1538 (2019) (see discussion in note 6, *supra*). These bills contain the Sunshine Committee's recommendation that persons/entities should be required by the PRA to mark records as confidential or proprietary when they are submitted to an agency and provide an explanation to the agency about the harm with disclosure, and when bidders or contractors are claiming the information is exempt under RCW 42.56.270(1). *See also* John Delaney, Comment, *Safeguarding Washington's Trade Secrets: Protecting Businesses from Public Records Requests*, 92 Wash. L. Rev. 1905, 1942-1953 (2017) (discussion of Sunshine Committee recommendation).

Many additional details are in that rule; see the rule attached at Part I (samples) (*infra*), along with other samples of notices to bidders.

It also may be prudent for agencies to advise such bidders that if litigation is filed over whether a record submitted by a bidder is sought to be disclosed by the agency pursuant to a PRA request, the bidder will need to be a participant or party in court. The agency may also state it will give the bidder notice of the PRA request and inform that bidder that unless the agency receives an injunction court order from the bidder on a date certain, the agency will release the requested records. RCW 42.56.540. See details *infra* in Part F (third party notices and injunctions).

2. Contract Language

When preparing a contract, an agency should consider how the PRA might intersect with the parties' relationship under the agreement. To illustrate, the agency may want to contemplate the following questions.

- Will public records be created or affected?
- Do statutory exemptions apply to records under the contract?
- What are the contractor's obligations to mark records it believes should not be disclosed because they are proprietary or confidential pursuant to a state or federal law?
- What are the parties' respective obligations when a PRA request is received?
- How will the parties communicate with the requester and with one another?
- What are the parties' respective search obligations?
- Does the contractor understand that it may need to go to court to argue for withholding of a record or records?
- If records are to be produced, how will records be produced?
- Who is the contact person at the contractor with respect to records relevant to the contract?
- How long are the records to be retained?
- Will the contractor be permitted to bill the agency for any work related to searching and producing records in response to a request for records (PRA or discovery)?
- Are any records to be turned over or provided to the agency at the end of a contract?

The agency may wish to detail these understandings and obligations in contract language. Again, see the UTC rule at WAC 480-07-160 for possible language to consider. At minimum, contract provisions should address the contracting party's obligation to retain public records and produce them if requested. See sample provisions attached at Part I, *infra*. Agencies can also incorporate the PRA's third party notice and injunction provisions into the contract. See discussion in Part F, *infra*. One means to do this is to have the bid or contract state that:

- The bidder/contractor will initially identify (mark) any claimed proprietary or confidential records;

- The agency will timely notify the bidder/contractor of any request for claimed proprietary or confidential records;
- The agency will provide the bidder/contractor a reasonable amount of time to obtain a court order enjoining production under RCW 42.56.540 (a common period is 10 days); and,
- The agency will disclose the claimed proprietary records if the contractor does not obtain a court order prior to the agency deadline.

An agency might also want to follow up in writing with the contractor after entering a contract to remind the contractor in writing again of its records' obligations. See samples attached at Part I, *infra.*

E. Possible Exemptions Relevant to Bid or Contracts Records

The PRA provides that a public record is exempt from disclosure if the record falls within the PRA or any "other statute" that exempts or prohibits disclosure of specific information or records. RCW 42.56.070(1). The agency will need to assert an exemption if it withholds records or information in records in response to a PRA request. If the bidder or contractor, or the agency, proceeds to court to seek an injunction restricting disclosure, an appropriate exemption or exemptions must be established to the court's satisfaction.

As noted previously, an agency cannot contractually override the PRA's legal mandate for disclosure. Withholding information in public agency records must be justified by a specific statutory exception – not by a bid notice or contract provision. Given the agency's potential obligation to pay penalties and attorneys' fees under the PRA if the court so orders pursuant to RCW 42.56.550, agreeing to withhold and defend a contractor's alleged confidential records or information without a sufficient basis in law places an agency at risk of PRA liability if a court disagrees with the agency's position.

An agency should also consider whether it would be in an effective position to defend (to a court) a bidder or contractor's assertion that a record or information it created or provided to the agency is proprietary or otherwise confidential. When an agency withholds a record from public inspection, it bears the burden of proving that the claimed exemption is valid, including in testamentary evidence and argument it must provide to the court. RCW 42.56.550; RCW 42.56.210(3); *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 884 P.2d 592 (1994) ("*PAWS II*"). In many situations, only the bidder or contractor will have the necessary evidence and arguments to present to a court. Therefore, rather than taking on that defense of nondisclosure for arguments that a private bidder's or contractor's records are proprietary, as an alternative, agencies can shift the risk of litigation to the bidder or contractor.

When an agency notifies a contractor about a request for claimed proprietary information, and gives it the opportunity to obtain an injunction (see Part F, *infra*), the agency can also notify the requester that third party notice is being given to the contractor under the PRA. The agency might describe that the contractor may file a lawsuit naming the requester and the agency, seeking to enjoin production. Upon receiving such information, a requester might choose to participate in the litigation, choose not to participate in the litigation, or might also choose to amend or clarify his/her request to exclude the claimed proprietary information.

A number of exemptions from disclosure may be relevant to records of a particular bid or contract, depending upon the agency, the nature of the contract, the nature of the information contained in the records, and the relevant laws. Here are just a few examples. This is not an exhaustive list or a complete discussion of all possible exemptions.

1. Bid Records

See discussion in Part D.1, *infra*, describing several statutes that permit withholding of certain bid records for a period of time.

For more information on state agency and master contract bid procedures, see the website of the Washington State Department of Enterprise Services. For more information on local government bid procedures generally, *see* the "Purchasing and Contracting" page on the website of the Municipal Research and Services Center including two publications: *City Bidding Book – Washington State* (July 2018) and *County Bidding Book – Washington State* (July 2018). *See also* the Washington State Auditor's Center for Government Innovation *Basics of Bid Law*.

2. Trade Secrets, Financial Information, Commercial Information, and Proprietary Information

Federal and state laws may protect "intellectual property." "United States [federal] intellectual property law protects four main categories of intellectual property: patents, trademarks, copyright and trade secrets." John Delaney, Comment, *Safeguarding Washington's Trade Secrets: Protecting Businesses from Public Records Requests*, 92 Wash. L. Rev. 1905, 1911-1912 (2017). In addition, state laws might also provide protections for a business's intellectual property, or its proprietary or financial information.

A bidder or contracting party may claim that its business-related information in procurement and/or contracting documents is proprietary and confidential under state or federal laws such as RCW 19.108 (Uniform Trade Secrets Act); RCW 42.56.270 (financial, commercial, and proprietary information); or, 17 U.S.C. §106 (copyright), to name a few. The bidder or contractor may seek to define the scope of the alleged proprietary content and want to obligate the agency to withhold it.

The PRA at RCW 42.56.270 lists "financial, commercial, and proprietary" information as exempt from public inspection. RCW 42.56.270(1) exempts, "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." The purpose of this exemption is to "prevent private gain derived from the exploitation of potentially valuable intellectual property created for the public benefit." *PAWS II*, 125 Wn.2d at 255; *Evergreen Freedom Foundation v. Locke*, 127 Wn. App. 243, 110 P.3d 858 (2005) ("Private parties could interfere with, or compete with, project plans to benefit their own company.")

A party claiming confidentiality of records under RCW 42.56.270(1) as "research data" must show they are "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). A party claiming confidentiality of records as research data, or "valuable formulae" must show disclosure would result in (1) unfair private gain and (2) "public loss." In *Robbins, Geller, Rudman, & Dowd, LLP v. Office of the Attorney General*, 179 Wn. App. 711, 328 P.3d 905 (2014), the plaintiff law firm was seeking to enjoin disclosure of records submitted to the Attorney General's Office related to procurement of outside legal services, and which were requested under the PRA. The law firm claimed the information would be valuable to its competitors, and "public loss" would result, based on AGO responses to discovery requests. Those discovery responses stated that:

> The AGO believes…that disclosure could, as the law firms have asserted, inhibit firms' desire to compete for the State's legal work. This is because the firms may be reluctant to provide proprietary information as part of the procurement process if they believe that information will be made available to their competitors. If that is indeed the case, there would be a public loss attributable to the inability to procure the best outside legal services.

Id. at 729, n.11. However, the AGO was willing to release the records nonetheless.[9] The court rejected the plaintiff's argument because, "the AGO's willingness to disclose, notwithstanding its supposition that disclosure *could* inhibit participation in future RFQQs, along with other law firms decisions not to seek an injunction to protect their submissions, tends to show that disclosure of RFQQ responses is not a meaningful deterrent to future participation in RFQQs." *Id.* at 732 (italics in original). The court added, "As the party asserting the exemption, Robbins Geller had the burden to prove that disclosure would cause public loss. Because its assertion of public loss is merely conjecture and it does not respond to Gresham's specific contradictions, we hold that Robbins Geller failed to prove the requisite public loss." *Id.*

As another example, trade secrets are confidential and exempt from PRA production under RCW 19.108, the Uniform Trade Secrets Act (UTSA). The UTSA, which protects trade secrets, qualifies as an "other statute" under RCW 42.56.070(1). *PAWS II*, 125 Wn.2d at 262. The PRA may not be used to acquire knowledge of a trade secret. *Id.* However, as noted *supra*, public agencies are often not in a position to have sufficient information to successfully defend

[9] Depending upon the language of the relevant statute, many PRA exemptions are permissive, rather than mandatory. See, for example, Op. Att'y Gen. 1 (1980).

withholding a private entity's records under this trade secret exemption, even though the private entity claiming the exemption might itself have sufficient information to present to a court. To illustrate, a "trade secret" is defined as:

> Information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

RCW 19.108.010(4). The Court of Appeals has noted:

> To be a trade secret, information must be 'novel' in the sense that the information must not be available from another source. A key factor in determining whether information has 'independent economic value' under the statute is the effort and expense that was expended in developing the information. The alleged unique, innovative, or novel information must be described with specificity and, therefore, *'conclusory' declarations that fail to 'provide concrete examples' are insufficient to support the existence of a trade secret.*

Robbins, Geller, Rudman, & Dowd, LLP, 179 Wn. App at 722 (internal citations omitted, italics added). *See also Belo Mgmt. Servs., Inc. v. Click! Network*, 184 Wn. App. 649, 657, 343 P.3d 370 (2014) (The declarations and affidavits "must provide specific, concrete examples illustrating that the…information meets the requirements of a trade secret.")

Agencies are often not in a position to provide "specific, concrete examples" in declarations to the court explaining why a bidder's or contractor's record is a protected trade secret. In that situation, any arguments to that effect to a court, and evidence to support those arguments, would need to be made by the bidder or contractor. For more discussion of the UTSA and the PRA, asserted trade secrets in public agency records, and the application of *PAWS II*, *see Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 418 P.3d 102 (2018) (trade secrets is not a categorical exemption from PRA and PRA injunction standard must also be satisfied; *Lyft* decision is also discussed in Part F, *infra*.)

By way of final example, while the federal Copyright Act exempts certain copyrighted material from production under the PRA, public inspection of copyrighted material may still be permitted under the "fair use" doctrine, which allows any person to reproduce a copyrighted work for "fair use." *Lindberg v. County of Kitsap*, 133 Wn.2d 729, 948 P.2d 805 (1997). The "fair use" doctrine is "an equitable rule of reason and each case must be decided on its facts." *Lindberg,* 133 Wn.2d at 743-44. Thus, to defend withholding a record under federal copyright law, a party must show: (a) the record is protected by federal copyright law; and, (b) the requestor's reproduction of the record is not permitted under "fair use." In general, sometimes public agencies might not be in the best position to know the reach of federal copyright law or its applicability to the requested

records of a bidder or contractor, or even less likely, to be able to sufficiently demonstrate lack of "fair use" to a court. The bidder or contractor asserting the copyright protection is often the more appropriate party to provide that information to a court.

3. Preliminary Drafts, Notes, Recommendations

The PRA at RCW 42.56.280 exempts "Preliminary 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."

This exemption might be considered by an agency during the bid process, when an agency does not have a stand-alone exemption providing for non-disclosure of records during that process, and particularly for its bid evaluations. However, agencies that are considering asserting this exemption need to be aware of its limits.

Preliminary drafts or recommendations, notes and intra-agency communications may be withheld by an agency if they pertain to the agency's deliberative process and show the exchange of opinions within an agency before it reaches a decision or takes an action. The purpose of this exemption limits its scope. *PAWS II*, 125 Wn.2d 243; *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978). Its purpose is to "protect the give and take of deliberations necessary to formulation of agency policy." *Hoppe*, 90 Wn.2d at 132-133. This exemption only protects records during a limited window of time while the action is "pending," and the withheld records are no longer exempt after the agency takes final action. *Id.*

The test to determine whether a record is covered by this exemption has been summarized by the Washington Supreme Court as follows:

> In order to rely on this exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not raw factual data on which a decision is based. *PAWS II*. It is not, however, required that documents be prepared by subordinates to be exempt.

ACLU v. City of Seattle, 121 Wn. App. 544, 89 P.3d 295 (2004).

The exemption applies only to documents that are part of the deliberative or policy-making process; records about implementing policy are not covered. *Cowles Publishing v. City of Spokane*, 69 Wn. App. 678, 849 P.2d 1271 (1993). Matters that are factual, or that are assumed to be factual for discussion purposes, must be disclosed. *Brouillet v. Cowles Publishing Co*., 114 Wn.2d 788, 791 P.2d 526 (1990); *Hoppe*, 90 Wn.2d 123 (description of a taxpayer's home by a

field assessor treated as fact by agency appraisers). Thus, unless disclosure of the records would reveal or expose the deliberative process, as distinct from the facts used to make a decision, the exemption does not apply.

Additionally, under this statute, records are not exempt if "publicly cited in connection with an agency action." Therefore, an evaluation of a real property site requested by a city attorney was not exempt from disclosure under the deliberative process exemption where it was cited as the basis for a final action. *Overlake Fund v. City of Bellevue*, 60 Wn. App. 787, 810 P.2d 507 (1991). Subjective evaluations are not exempt under this exemption if they are treated as raw factual data and not subject to further deliberation and consideration. *PAWS II*, 125 Wn.2d at 256.

4. Other Exemptions

A number of other exemptions may be applicable to certain financial, commercial and proprietary records of some types of private businesses. RCW 42.56.270 provides a long list of exemptions relevant to certain businesses. Here are a few other examples outside of that statute, specific to particular types of businesses:

- Public Utilities and Transportation Records: RCW 42.56.330; RCW 42.56.335
- Agriculture and Livestock Records: RCW 42.56.380; RCW 42.56.610
- Insurance and Financial Institution Records: RCW 42.56.400
- Marijuana and Industrial Hemp Information: (RCW 42.56.270); RCW 42.56.620; RCW 42.56.625; RCW 42.56.630
- Business Licensing Information: RCW 19.02.115

Further discussion of these and other exemptions can be found in Chapter 2 of the Attorney General's Office *Open Government Resource Manual* (October 2016) and the *Washington State Bar Association Public Records Act Deskbook - Washington's Public Disclosure and Open Public Meetings Laws* (2nd Ed.) (2014).[10]

[10] *Note:* The Legislature has amended several of the statutes referenced in these 2014 and 2016 publications, and the courts have issued a number of PRA appellate decisions since that time. Therefore, readers are reminded to check the current laws when referring to the statutes and decisions summarized in these publications, and to check any updates to these publications.

F. PRA Third Party Notice to and Injunctions by Bidders and Contractors To Enjoin Disclosure

1. Third Party Notice

The PRA gives agencies the option to notify affected third parties about a records request to allow them to seek injunctive relief to stop disclosure of records or information in records, except when notice is required by law. RCW 42.56.540 provides:

> The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice.

See also Doe v. Washington State Patrol, 185 Wn.2d 363, 374 P.3d 63 (2016); and, the PRA at RCW 42.56.520(2) (agencies may take additional time to notify third parties of a PRA request) and RCW 42.56.210(2) ("Inspection or copying of any specific records exempt under the provisions of the PRA may be permitted if the superior court in the county in which the record is maintained finds, after a hearing with notice thereof to every person in interest and the agency, that the exemption of such records 'is clearly unnecessary to protect any individual's right of privacy or any vital governmental function.'")

Under this notice process, the agency typically notifies the person/entity that it has received a PRA request, and provides the person/entity a deadline on which to obtain an injunction order prohibiting disclosure of specific records and/or information in records. This notification procedure is often called "third party notice." Sometimes, those "third parties" are agency bidders or contractors. If the third party (bidder or contractor) does not timely provide the agency a court order by the deadline, the agency should immediately produce the records to the requester, to minimize potential PRA liability.

The PRA does not require the agency to first determine if an exemption applies prior to giving third-party notice. *Doe L. et al. v. Pierce County, Zink*, 7 Wn. App. 2d 157, 433 P.3d 838 (2018) ("Indeed, to require an exemption to be identified first contravenes RCW 42.56.540's mechanism for allowing the *third person* to then move to enjoin the examination of the record by

showing that an exemption exists. *See Yakima Herald-Republic*, 170 Wn.2d at 808.") (Emphasis added).[11]

The courts have also held that it is not a violation of the PRA for agencies to take additional time to give such third party notice while processing a PRA request, since the PRA specifically authorizes agencies to give such notice. *Doe v. Benton County, Zink*, 200 Wn. App. 781, 403 P.3d 861 (2017). Sometimes, an agency might be required to give notice, such as in a collective bargaining agreement. An agency may give a third party reasonable time to obtain an injunction. *Wade's Eastside Gun Shop v. Department of Labor and Industries*, 185 Wn.2d 270, 372 P.3d 97 (2016). Attorney General's Office Model Rules comments state that ten days' notice (ten days to obtain a court order) is a common agency practice. WAC 44-14-04003(12). The agency should notify third parties promptly after identifying that an affected third party may wish to be notified so as to seek to enjoin disclosure. In *Wade's* the State Supreme Court held that the agency (the State Department of Labor and Industries (L&I)) waited too long to provide the third-party notice, creating an unnecessary delay:

> L&I is correct that the PRA allows public agencies to notify affected persons of a public records request and permits a reasonable delay to permit affected parties a "realistic opportunity" to obtain a protective order. *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 758, 958 P.2d 260 (1998); see RCW 42.56.520, .540. However, as the superior court noted, L&I waited almost six months before notifying the affected employers that it had received a PRA request. L&I failed to justify this delay, providing no explanation why it did not notify the employers when it received the request or at the close of its investigations. By waiting until July 25, 2013, to notify the companies, L&I created an unnecessary delay in releasing the records. The superior court appropriately found that L&I violated the PRA. We affirm that ruling.
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> 185 Wn.2d at 291.

2. Injunction Hearing Process

General. The injunction hearing is a civil court process typically conducted by the superior court (or on occasion, by a federal court) on written briefs and declarations/affidavits.

[11] One method for an agency to more expeditiously process a PRA request and to determine that a record may be arguably exempt, however, is to require the bidder or contractor to mark those records it believes are proprietary or confidential prior to providing them to the agency, and preferably explain why. *See* Attorney General's Office Model Rule comment about third party notices at WAC 44-14–04003(12) ("Before sending a notice, an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requestor's access to a disclosable record.")

Sometimes, a court might be asked to consider live testimony. The court might also be asked to conduct or it may require review of unredacted documents *in camera*.

If the agency, or the bidder or contractor, decides it may seek a court order enjoining disclosure of public records in such a court proceeding, those involved should consider at least four things with respect to the parties, the burden of proof, the injunction standard, and the injunction order. Other considerations may be appropriate as well depending on the claims, relevant laws or court decisions, court rules including local court rules, or other relevant matters.

Parties. First, in court actions to enjoin disclosure of a record, both the requester (or someone representing the requester's interests) and the agency from which the records were requested are typically necessary parties to a third party's court action.

See RCW 42.56.540 (in proceedings under this court injunction statute, "An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice."); RCW 42.56.210(2) (referencing "notice thereof to every person in interest and the agency" in court hearings regarding inspection or copying of public records); *Burt v. Department of Corrections*, 168 Wn.2d 828, 231 P.3d 191 (2010) (joinder of requester as a necessary party); *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 346 P.3d 737, n.1 (2015) (media requesters did not participate in the litigation but the public's interests in full disclosure were represented by the school district, which was a party); *Cedar Grove Composting*, 188 Wn. App. at 710 (third party private contractor which had records that had been requested possessed a "personal stake in the outcome of the PRA action so had standing to sue" as a party.)[12]

Burden of Proof. Second, the burden of proof in court is on the party seeking nondisclosure.[13] In *Doe v. Washington State Patrol*, the State Supreme Court explained the PRA injunction statute at RCW 42.56.540 in part as follows:

> When an agency intends to release records to a requester under the PRA, an interested third party—to whom the records specifically pertain—may seek to enjoin disclosure. RCW 42.56.540; *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 34-35, 769 P.2d 283 (1989). In an action brought under the injunction statute, RCW 42.56.540, the party seeking to prevent disclosure, here

[12] If the requester was provided notice but declined to participate in the injunction litigation, the agency or third party may want to ensure that information is in the court record and/or findings.

[13] Note that for injunctions relevant to records requests from inmates or sexually violent predators (SVPs) and which are sought under the criteria in RCW 42.56.565(2) or RCW 71.09.120(3), the court action may also involve a request to enjoin disclosure of non-exempt records. For other procedures relevant to injunctions under those two statutes, see the statutes and see *Janssen v. Dep't of Social and Health Services, Payne*, No. 50412-0-II (March 19, 2019) (unpublished).

the John Does, bears the burden of proof. *Ameriquest Mortg. Co. v. Office of Att'y Gen.*, 177 Wn.2d 467, 486-87, 300 P.3d 799 (2013) (*Ameriquest II*).

185 Wn.2d at 370-371.

Injunction Standard. Third, the PRA has its own injunction standard, distinct from the courts' usual and lesser injunction procedures set forth in the courts' Civil Rule 65. *Lyft, Inc. v. City of Seattle*, 190 Wn.2d at 784-790. To obtain an injunction, the party must show that a legal exemption applies and that disclosure "would clearly not be in the public interest and would substantially and irreparably damage any person, or ... vital governmental functions." *Id. See also Morgan v. City of Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009); *PAWS II*, 125 Wn.2d 243; RCW 42.56.540; RCW 42.56.210(2).

In *Lyft*, the issue involved whether a private entity's records provided to a public agency were exempt as trade secrets under the Uniform Trade Secrets Act (UTSA) (chapter 19.108 RCW). Therefore, a related issue in the litigation was whether the PRA injunction process or the UTSA injunction process applied. The State Supreme Court held that the PRA process applied. "The UTSA may not be invoked to carve out trade secrets from application of PRA procedural provisions. As is clear from the fact that [the private company - Lyft] initially sought injunctive relief under RCW 42.56.540, this is a PRA case and not a trade secrets case." *Lyft*, 190 Wn.2d at 790. The State Supreme Court further detailed this PRA injunction process as follows:

> As noted above, our case law interpreting the PRA injunction statute makes clear that finding an exemption applies under the PRA does not ipso facto support issuing an injunction. *See Spokane Police Guild*, 112 Wn.2d at 36 (noting that once records are exempt, the "judicial inquiry" must commence); *accord Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007) (plurality opinion) ("[T]o impose the injunction contemplated by RCW 42.56.540, the trial court must find that a specific exemption applies *and* that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest."); *Morgan v. City of Federal Way*, 166 Wn.2d 747, 756-57, 213 P.3d 596 (2009) (same); *Belo Mgmt. Servs., Inc. v. Click! Network*, 184 Wn. App. 649, 661, 343 P.3d 370 (2014) (even if the party seeking an injunction proves that it possesses a trade secret under an "other statute," it still must "prove the requirements for an injunction under RCW 42.56.540"); *see also* PUBLIC RECORDS ACT DESKBOOK § 17.3, at 17-11 ("the party seeking to prevent disclosure bears the burden of proving both that a specific exemption applies, and that the additional RCW 42.56.540 injunction elements are satisfied" (citation omitted)). As this court explained in *Soter*, "[i]t may be that in most cases where a specific exemption applies, disclosure would also irreparably harm a person or a vital government interest. But if we assume that the additional findings contemplated by RCW 42.56.540 are unnecessary, then a significant portion of the statute is rendered superfluous." 162 Wn.2d at 756-57.

Id. at 786.

In sum, the *Lyft* Court ruled:

> Our holding today reinforces our prior precedent adhering to a two-step inquiry under the PRA when an injunction is sought. First, the court must determine whether the records are exempt under the PRA or an "other statute" that provides an exemption in the individual case. Second, it must determine whether the PRA injunction standard is met.
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> *Id.* at 790.

Injunction Language – Checklist. Finally, the parties may want to consider several issues in the litigation, and specifically in drafting injunction language, if a court is to enter an order enjoining an agency from disclosing certain public records or certain information in records. See suggested checklist below. There may be other issues, statutes or factors to consider in preparing injunction order as well, depending upon the records or the relevant laws, or the issues raised in the litigation. These suggested items in the checklist below are in no particular order. *Note:* if an injunction is entered prohibiting the agency from disclosing certain information or disclosing certain information to certain persons, the agency will need to keep track of the injunction and take steps to ensure that it is implemented for the period of time it is in effect. An agency should consider which persons and departments should receive a copy of the injunction order; the agency's public records officer is one logical recipient.

PRA Injunction Language - Suggested Checklist:

- ☐ **What specific records or information are/is enjoined from disclosure?**
  - See *West v. City of Tacoma*, No. 49884-7-II (Nov. 14, 2018) (unpublished) (Differing views between requester and agency about what records were within the scope of the PRA request that led to the injunction hearing.)

- ☐ **What is the statutory basis the court finds permits the withholding the records or information?**
  - See Part E, *supra,* for possible statutory exemptions.

- ☐ **Has the court also found that disclosure would clearly not be in the public interest and would substantially and irreparably damage any person, or vital governmental functions, and an injunction should therefore issue under RCW 42.56.540?**
  - RCW 42.56.540; RCW 42.56.210(2)
  - *Lyft*, 190 Wn.2d 769.

- **Is the agency enjoined from providing the information or records to just the requester involved in this case, or to any other person?**
    - What is the scope of the injunction? To whom does it apply?
    - Did the requester, or someone representing the requester's interests, participate in the injunction proceeding?
    - If there are other pending PRA requests for the same information/records, or future requests, does the injunction apply?
    - *Compare Doe v. Wash. Dep't of Fish & Wildlife, Loomis*, No. 49186-9-II (Oct. 16, 2018) (unpublished) (Trial court properly declined to enter injunction as to future requests; Court of Appeals declined to enter advisory opinion as to future requests); *with Kitsap County v. Robert Jesse Hill* (W. Dist. Wash.), No. 3:14-cv-05979-RJB (2015) (unpublished) (Federal court injunction entered as to prohibit release of requested records to the requester "or to any other member of the public.") *See also Janssen v. Dep't of Social and Health Services, Payne*, No. 50412-0-II (March 19, 2019) (unpublished) (Injunction relevant to records requests by a sexually violent predator was overbroad to the extent it applied to any PRA request from any person).

- **What is the period of time for which the injunction applies?**
    - Is the injunction time restricted?
    - Is the injunction permanent? *See, e.g., Doe L. et al. v. Pierce County, Zink,* 7 Wn. App. 2d 157, 433 P.3d 838 (2018) (Permanent injunction entered barring release of certain unredacted juvenile sex offender records that were not in the official juvenile court file.)
    - Does the injunction remain in effect during any appeals?

- **If relevant, do the injunction's findings, if any, or the court record, describe that the agency was prepared to release the information or records absent a court order?**
    - *See, e.g., Robbins, Geller, Rudman, & Dowd, LLP*, 179 Wn. App. at 722 ("Here, the AGO was willing to produce the protected information but was prevented from doing so by a court order. As previously discussed, even if Gresham succeeds in overturning the injunction, Gresham will not have prevailed over the AGO for purposes of awarding costs, attorney fees, and penalties under RCW 42.56.550(4). *Bainbridge Island Police Guild*, 172 Wn.2d at 421 n.14. Accordingly, we deny his request for attorney fees, costs, and penalties against the AGO even though we vacate most of the trial court's permanent injunction order.") *See also Belo Mgmt. Servs., Inc.*, 184 Wn. App. at 663 (City had determined no exemptions applied and stated it intended to release records, and was prohibited from doing so only due to the superior court order; therefore, the Court of Appeals denied request for an attorneys' fees award against the city).

- **If relevant, is there other or related litigation involving access to or disclosure of the records, the agency, the bidder/contractor, and/or the requester? If so, does the injunction also apply to discovery requests for the information or records and discovery orders in those cases, and vice versa?**
    - How will the injunction and any discovery orders relate to each other?
    - *See, e.g., Department of Transportation v. Mendoza de Sugiyama*, 182 Wn. App. 588, 330 P.3d 209 (2014) (A requester's discovery order in another case restricting discovery of certain records did not prohibit her PRA request for same records); *Quinn Const. Co. LLC v. King Co. Fire Prot. Dist. No. 26*, 111 Wn. App. 19, 44 P.3d 385 (2002) (Unsuccessful bidder could make a PRA request for bid records, regardless of discovery stay in pending bid protest litigation); *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 25 P.3d 426 (2001) (Discovery and PRA requests can both proceed); *Beltran v. Dep't of Soc. & Health Servs.*, 98 Wn. App. 245, 989 P.2d 604 (1999) (Court applied same exemption to records requested both in discovery and a PRA request).

- **If the requester is an inmate or a sexually violent predator,** and the bidder/contractor seeks an injunction under RCW 42.56.565 or RCW 71.09.120(3), rather than or in addition to RCW 42.56.540, are the injunction criteria in those statutes reflected in the injunction order or findings, if any?

G. Confidential Information Provided to Contractors – Data Sharing Agreements

There may be times when a public agency needs to share its data with its contractors in order for the contractors to perform their duties under the contract. Perhaps some of the data is protected from disclosure by state or federal law. If that is the case, the agency will want to ensure that its contract or a separate data sharing agreement at minimum addresses certain provisions. Those could include, for example: that the data is the property of the agency, the contractor has an obligation to maintain the confidential nature of the records under cited laws and is not authorized to duplicate or disclose the data (providing details of the steps the contractor will take to protect the data), and the contractor must notify the agency of any unauthorized disclosures or data breaches under relevant data beach notice laws, including RCW 42.56.590 and RCW 19.255.010. The agency should also require a return of the data at the end of the contract.

H. Records Retention – Contract Records

Agencies must retain public records pursuant to the retention schedules adopted by state and local records committees under the authority of the Secretary of State at chapter 40.14 RCW. Agency schedules are available on the Secretary of State – State Archives website.

The *State Government Records Retention Schedule* (June 2016) ("General Schedule") contains several sections that address various state agency contracting records, including but not limited to Section 3.4 ("Contracts and Purchasing"). In addition, many agencies have supplemental agency-specific schedules that address retention and destruction of certain specific records.

With respect to local agencies' records, the Secretary of State – State Archives website contains several retention schedules. Those include the *Local Government Common Records Retention Schedule* (May 2017) ("CORE") applicable to local government agencies, and other schedules specific to certain types of local agencies. For example, the CORE's Section 1.1 addresses some contractor communications, and the CORE's Section 1.5 addresses "Contracts and Agreements."

I. Samples 

Illustrative & General Sample Language Only –

May Need to Be Tailored/Changed Depending Upon a Particular Bid/Contract/Relevant Law.

An Agency Should Consult with Legal Counsel Before Using This Illustrative Language.

Bid Notice Samples – State Agencies

Department of Enterprise Services WAC 200-320-405 - Bid information disclosure.

Upon submission, all bids become the property of the agency and, except for purposes of evaluation, shall not be released or otherwise distributed until after the agency completes the evaluation and issues its notice of intent to award. Evaluation team members shall maintain confidentiality of information to ensure the integrity of the process. After award and distribution of award information or posting of such information electronically for public review, the bids, quotes, and proposals of all bidders shall be open to public inspection at the offices of the purchasing activity during normal office hours. Copies of documents subject to public disclosure will be made available upon request in accordance with purchasing activity policy. The purchasing activity assumes no responsibility for the confidentiality of bids, quotes or proposals after award. Any document(s) or information which the bidder believes is exempt from public disclosure per RCW 42.17.310 [RCW 42.56] shall be clearly identified by bidder and placed in a separate envelope marked with bid number, bidder's name, and the words "proprietary data" along with a statement of the basis for such claim of exemption. The state's sole responsibility shall be limited to maintaining the above data in a secure area and to notify bidder of any requests for disclosure within a period of five years from date of award. Failure to so label such materials or failure to provide a timely response after notice of request for public disclosure has been given shall be deemed a waiver by the bidder of any claim that such materials are, in fact, so exempt.

Public records and exempt information – Bid Notice

All responses submitted become the property of the State of Washington and after contract execution may be subject to public disclosure under the Public Records Act, RCW 42.56. Only after contract execution is bid information available for public inspection (See, RCW 39.26.)

Any information contained in the response that is exempt from public disclosure because it is proprietary, a trade secret or otherwise exempt must be clearly designated. Marking of the entire response or entire sections of the response as exempt will not be accepted or honored. DES will not honor designations by the bidder where pricing is marked proprietary.

Prior to release, DES will give notice to the bidder of any request for disclosure of identified exempt information received within five years from the date of submission. DES will delay release of the information identified as exempt for up to 10 business days to allow the bidder to obtain court protection from release. Failure to label such materials as exempt or to timely respond after notice of request for public disclosure has been given shall be deemed a waiver by the submitting bidder of any claim that such materials are, in fact, so exempt.

Alternate:

Proprietary Information/Public Disclosure – Bid Notice

Any information contained in the Response that is considered proprietary or confidential by the Bidder must be clearly designated. Marking of the entire Response or entire sections of the Response as proprietary or confidential will not be accepted nor honored. DES will not accept Responses where pricing is marked proprietary or confidential, and the Response will be rejected.

To the extent consistent with Chapter 42.56 RCW, the Public Disclosure Act, DES shall maintain the confidentiality of Bidder's information marked confidential or proprietary. If a request is made to view Bidder's proprietary information, DES will notify Bidder of the request and of the date that the records will be released to the requester unless Bidder obtains a court order enjoining that disclosure. If Bidder fails to obtain the court order enjoining disclosure, DES will release the requested information on the date specified.

The State's sole responsibility shall be limited to maintaining the above data in a secure area and to notify Bidder of any request(s) for disclosure for so long as DES retains Bidder's information in DES records. Failure to so label such materials or failure to timely respond after notice of request for public disclosure has been given shall be deemed a waiver by Bidder of any claim that such materials are exempt from disclosure.

Retention/Inspection - Contractor

The [CONTRACTOR] shall maintain:

i. All books, records, documents, data and other materials relating to this Contract, including but not limited to accounting procedures and practices which sufficiently and properly reflect all direct and indirect costs of any nature expended in the performance of this Contract.

ii. All documents, records, correspondence, e-mail, notes, audio and/or video recordings, reports and any other materials related to this Contract including all iterations and drafts of such materials that [CONTRACTOR] creates or receives from any source.

iii. All such materials described in subparagraphs i and ii above, whether they are in paper, electronic, or other form, in such a manner that they can be readily identified and located as records relating to this Contract. To the greatest extent practicable, materials relating to this Contract shall be segregated from materials relating to other matters handled by the [CONTRACTOR], and materials containing privileged d or confidential information relating to this Contract shall be segregated from other materials relating to this Contract.

The [CONTRACTOR] shall retain any and all materials identified above until advised by the [agency] that retention is no longer required. In the event that [CONTRACTOR] has entered a business associate agreement and has accessed PHI, retention and/or destruction of PHI is to be coordinated with the [agency] upon conclusion of the Contract, as set forth in subparagraph [X] of this section.

At no additional cost, all materials, including materials generated under the Contract, shall be subject at all reasonable times to inspection, review, or audit by the [agency], personnel duly authorized by the [AGENCY], the Washington State Auditor's Office, and federal and state officials so authorized by law, regulation or agreement.

Contractor Compliance with PRA

[CONTRACTOR] understands and agrees that the records it obtains or produces under this Contract may be public records under chapter 42.56 RCW (the Public Records Act, or "PRA"), or its successor act. The [CONTRACTOR] shall cooperate in a timely manner with the AGENCY in responding to public records requests ("PRRs") related to this Contract or the services provided under this Contract. Such cooperation shall include searching all records regarding the "Services Provided" described in Section [x] of the Contract, and producing all records that are potentially responsive to a PRR to the [AGENCY]. CONTRACTOR shall mark and segregate all materials in its possession that are protected by [TYPE OF EXEMPT INFORMATION] to protect against inadvertent disclosure of such documents and to facilitate the [AGENCY'S] application of allowable PRA exemptions. [CONTRACTOR] shall not charge [AGENCY] for the time spent gathering and producing records pursuant to a PRR.

Contractor Which Receives Confidential Information (Example – health care records)

The [CONTRACTOR] will be provided information to enable it to perform its duties under this contract that is exempt from disclosure under the Public Records Act, chapter 42.56 RCW, or other state or federal law. Confidential information may include [LIST TYPES OF PROTECTED INFORMATION]. The [CONTRACTOR] shall not use, disclose, or share any information concerning the [agency] or any information provided to it under this Contract for any purpose not directly connected with the performance of its duties under this Contract, except with prior written consent of the Contract Manager, or as may be required by law. The [CONTRACTOR] shall protect such information against disclosure,

using the degree of care a reasonable person would use to protect its own confidential or protected information.

Alternate:

The [CONTRACTOR] acknowledges that some of the material and information that may come into its possession or knowledge in connection with this Contract or its performance of the services under the Contract may consist of information that is exempt from disclosure to the public or other unauthorized persons under either chapter 42.56 RCW or other state or federal statutes ("Confidential Information"). Confidential Information includes, but is not limited to, [CONTRACTOR], [AGENCY and/or AGENCY] communications delivered in order to provide the services described in Section 2 of the Contract; [AGENCY] source code or object code; [AGENCY] security data; or Personal Information. The [CONTRACTOR] shall hold Confidential Information in strictest confidence and not make use of Confidential Information for any purpose other than the performance of this Contract. [CONTRACTOR] will release Confidential Information only to employees and others requiring access to such information for the purposes of carrying out duties under this Contract, and will not release, divulge, publish, transfer, sell, disclose, or otherwise make the information known to any other party without the [AGENCY'S] express written consent or as provided by law. The [CONTRACTOR] agrees to implement industry standard security procedures and guidelines to prevent unauthorized access to Confidential Information.

After consultation with the AGENCY, the [CONTRACTOR] must comply with Washington State RCW 42.56.590, Personal Information – Notice of Security Breaches, and RCW 19.255.010, Disclosure, notice – Definitions – Rights, remedies.
AGENCY reserves the right to monitor, audit, or investigate the use of Confidential Information collected, used, or acquired by the [CONTRACTOR] through this Contract. The monitoring, auditing, or investigating may include, but is not limited to, salting databases. "Salting" is the act of placing a record containing unique but false information in a database that can be used later to identify inappropriate disclosure of data contained in the database.

Follow-Up Letter to Contractor to Confirm Records Retention Responsibilities

Thank you again for serving as a [CONTRACTOR] .

The purpose of this letter is to remind you of your record retention obligations as a [CONTRACTOR]. You are expressly directed to preserve all materials related to your services as a [CONTRACTOR]. That direction includes your obligation to preserve all correspondence, e-mail, notes, audio and/or video recordings, medical records, reports and any other materials (whether handwritten, printed, electronic or otherwise). If you have retained [subcontractors], or others within your firm are performing services, you must also ensure they are adhering to the same requirements.

Your obligation to preserve records does not mean necessarily that records would be disclosed under the rules of discovery or Washington's public records laws. It does mean that you need to preserve them for review should a request for discovery or disclosure be received by you or by the [agency] until you are advised by our [agency] that retention is no longer required.

Alternate:

Thank you again for serving as a [CONTRACTOR].

I write to emphasize our AGENCY'S expectations and requirements for the retention and production of documents you may create or receive in connection with your work under this contract.

First, we ask that you keep any and all tangible or electronic documents, records or files that you create or receive from any source in connection with your work on this matter, including without limitation:

- all correspondence (including billing and scheduling communications);
- email;
- notes (whether handwritten, printed or electronically stored);
- audio and/or video recordings;
- records;
- data;
- reports; and
- any other materials related to the above matter.

This requirement covers all iterations of such materials (i.e. drafts, notes, or recordings later converted to a report) and applies to materials you generate and those you receive from our office or any other source.

At the appropriate time and juncture, we will work with you, [opposing counsel, and if necessary the court], to determine which of these documents must be produced in discovery (or pursuant to the requirements of the Public Records Act). If you do not retain all documents, we cannot determine or advance arguments about whether they must be produced, and may instead face court orders imposing monetary sanctions or instructing the jury to assume that the content of missing documents would have been damaging to our case.

Second, we ask you to retain all of these documents, records and files in a format and in a manner that allows them to be easily retrieved. Doing so will help us comply with our discovery obligations. And in the event that a court orders a forensic search of the files and repositories of all of the participants (lawyers and witnesses alike) in a case, it is important that the search can be made without concerns about revealing or compromising

your personal information or confidential information pertaining to other matters that you may be working on. Consequently, please retain and store all documents, records and materials related to this matter in separate, segregated files/folders which can be readily searched and easily produced upon demand. If you need help setting up or organizing such files/folders, please let us know.

Third, documents and materials which you receive or produce in connection with this matter are subject to certain retention schedule pursuant to state law or court rules.

Consequently, please retain any and all documents and materials relating to this matter until you are advised by this office that retention is no longer required. If you have any questions about the retention requirements, please contact me.

The important message is short. Until notified otherwise, please keep everything in a way that is segregated and can easily be produced when needed.

Third Party Notice to Contractor – Contract Language

Contractor acknowledges that the Agency is subject to RCW 42.56, the Public Disclosure Act, and that this contract shall be a public record as defined in RCW 42.56. Any specific information that is claimed by the Contractor to be confidential or proprietary must be clearly identified as such by the Contractor. To the extent consistent with RCW 42.56, the Agency shall maintain the confidentiality of all such information marked confidential or proprietary. If a request is made to view the Contractor's information, the Agency will notify the Contractor of the request and the date that such records will be released to the requester unless Contractor obtains a court order enjoining that disclosure. If the Contractor fails to obtain a court order enjoining disclosure, the Agency will release the requested information on the date specified.

Other Samples:

- Washington Department of Enterprise Services Contracts Database
- Washington State University's Standard Contract Terms website.
- Municipal Research and Services Center's Contracts/Agreements website.

Utilities and Transportation Commission Rule on Marking Confidential Records

WAC 480-07-160

Confidential and other restricted information.

Several statutory provisions limit or prevent disclosure of certain information provided to the commission, including provisions exempting specified public records from disclosure or preventing the release of confidential information until affected parties have an opportunity to obtain a court order forbidding the release. The commission will provide

special handling of, and restrict access to, information provided to the commission under these statutory provisions. This rule addresses each of these types of restricted information, including how to designate documents as containing exempt information, confidential information, or highly confidential information. Chapter 480-04 WAC governs the commission's specific process for responding to requests for public records that seek restricted information. WAC 480-07-420 governs access to, and exchange of, restricted information by parties in commission adjudicative proceedings.

(1) **Designated official.** The commission's secretary is the designated official responsible for the commission's compliance with the Public Records Act, chapter 42.56 RCW, and for the implementation of this rule. The secretary may designate one or more persons to serve as public records officer to assist in the implementation and application of this rule.

(2) **Definitions.**

(a) *Document* means any writing as the legislature has defined that term in the Public Records Act, chapter 42.56 RCW.

(b) *Confidential information* means valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer-specific usage and network configuration and design information, as provided in RCW 80.04.095 and 81.77.210.

(c) *Exempt information* means information protected from inspection or copying under an exemption from disclosure under chapter 42.56 RCW or any other provisions of law providing an exemption from public disclosure.

(d) *Highly confidential information* means confidential information subject to heightened protection pursuant to a commission-issued protective order with provisions governing such information.

(e) *Provider* means any person who submits information to the commission or commission staff under a claim that disclosure of the information is restricted pursuant to this rule; provided that for purposes of complying with subsection (5) of this section, "provider" does not include individuals who provide their own financial or personally identifiable information to the commission.

(f) *Redacted version* means the version of a document submitted to the commission with restricted information masked.

(g) *Requester* means any person who submits a request for public records under the Public Records Act, chapter 42.56 RCW.

(h) *Restricted information* means exempt, confidential, or highly confidential information.

(i) *Unredacted version* means the version of a document submitted to the commission with all information unmasked and visible.

(3) **Waiver.** A provider may claim the protection of this rule only by strict compliance with its requirements. The commission may refuse to accept for filing any document that fails to comply with these requirements. Failure to properly designate confidential or highly confidential information as required in this rule, WAC 480-07-420, or a commission protective order may result in disclosure of the information in response to a request for public records or in discovery. If a provider fails to properly designate, or

otherwise does not properly treat, exempt, confidential, or highly confidential information that belongs to another person, that person may petition or file a motion with the commission seeking to protect the information and requesting any other appropriate relief.

(4) **Exempt information.**

(a) *Designating information as exempt from disclosure.* Any provider claiming that information provided to the commission is exempt from disclosure must make that claim in writing at the time the provider submits the document containing the information. The provider must also state the basis for the claim of exemption at the time the provider submits information claimed to be exempt.

(b) *Provision of documents with information designated as exempt.* Any provider claiming that a document contains exempt information must submit both a redacted and an unredacted version to the commission.

(c) *Marking and submission.*

(i) The provider must clearly designate information claimed to be exempt on each page of the unredacted version by highlighting the text with no more than twenty percent gray shading. The provider must clearly mark each copy of the document with the designation, "Shaded information is designated as exempt per WAC 480-07-160" on the first page of a multipage document and on each specific page that the provider claims contains exempt information, except as modified pursuant to subsection (7)(a) of this section or WAC 480-07-420 and except as provided in subsection (8) of this section.

(ii) The provider must print on yellow paper any required paper copy of the pages of the unredacted version of a document that contain information designated as exempt and submit that document, in its entirety, in a sealed envelope. A provider submitting more than one document containing information designated as exempt as part of the same filing must collate all of these documents into a set, and to the extent feasible, must enclose each entire set in a separate envelope. If the commission requires more than one paper copy of documents to be submitted, the provider must submit each set of documents containing information designated as exempt in a separate envelope to the extent feasible.

(iii) The provider must label the redacted version of the document as redacted. The provider must either completely black out the information claimed to be exempt or leave a blank space where that information is located in the redacted version. The redacted and unredacted versions of a document must have the same pagination, and the text on each page must appear on the same lines. If the provider submits a document under a claim that all of the substantive information contained on multiple contiguous pages is exempt, the provider may submit a single page in the redacted version for the contiguous exempt pages if that page identifies the pages claimed to contain exempt information.

(iv) The provider must file the redacted and unredacted versions with the commission in the same web portal submission. If using another type of submission, the provider must file the redacted and unredacted versions at the same time but in separate submissions. When submitting electronic unredacted versions, the provider must state in the description field of the web portal submission, in the subject line of the transmitting email, or on a visible portion of the disc or electronic storage medium, whichever is applicable, that one or more documents in the filing contain information designated as exempt under this section.

(d) *Procedures upon a request for information designated as exempt.* If a requester submits a public records request for information that a provider has designated as exempt, the commission will follow the procedures outlined in chapter 480-04 WAC.

(e) *Challenges to designations of information as exempt.* The commission or a party to a proceeding in which a provider submits a document with information designated as exempt may challenge that designation. The commission will provide an opportunity to the provider and the parties to any adjudication to respond before ruling on the challenge. The commission may express its ruling orally on the record in an adjudicative proceeding, or in a written order.

(5) **Confidential information.**

(a) *Designating information as confidential information.* Any provider claiming that information provided to the commission is confidential must make that claim in writing at the same time the provider submits the document containing the information and must state the basis for the claim. To the extent feasible, the provider also must identify any person (other than the provider) who might be directly affected by disclosure of the confidential information.

(b) *Provision of documents with information designated as confidential.* Any provider claiming that a document contains confidential information must submit both a redacted and an unredacted version to the commission.

(c) *Marking and submission.*

(i) The provider must clearly designate information claimed to be confidential on each page of the unredacted version by highlighting the text with no more than twenty percent gray shading. The provider must clearly mark each copy of the unredacted version of the document with the designation, "Shaded information is designated as confidential per WAC 480-07-160" on the first page of a multipage document and on each specific page the provider claims contains confidential information except as modified pursuant to subsection (7)(a) of this section or WAC 480-07-420 with respect to confidential information provided pursuant to a protective order and except as provided in subsection (8) of this section.

(ii) The provider must print on yellow paper any required paper copy of the pages of the unredacted version of a document that contain information designated as confidential and submit that document, in its entirety, in a sealed envelope. A provider submitting more than one document containing information designated as confidential as part of the same filing must collate all of these documents into a set, and to the extent feasible, must enclose each entire set in a separate envelope. If the commission requires more than one paper copy of documents to be submitted, the provider must submit each set of documents containing information designated as confidential in a separate envelope to the extent feasible.

(iii) The provider must label the redacted version of the document as redacted. The provider must either completely black out the information claimed to be confidential or leave a blank space where that information is located in the document. The redacted and unredacted versions of a document must have the same pagination, and the text on each page must appear on the same lines. If the provider submits a document under a claim that all of the substantive information contained on multiple contiguous pages is confidential, the provider may submit a single page in the redacted version for the contiguous

confidential pages if that page identifies the pages claimed to contain confidential information.

(iv) The provider must file the redacted and unredacted versions with the commission in the same web portal submission. If using another type of submission, the provider must file the redacted and unredacted versions at the same time but in separate submissions. When submitting electronic unredacted versions, the provider must state in the description field of the web portal submission, in the subject line of the transmitting email, or on a visible portion of the disc or electronic storage medium, whichever is applicable, that one or more documents in the filing contain information designated as confidential under this section.

(d) *Request for information designated as confidential.* If a requester submits a public records request for information that a provider has designated as confidential, the commission will follow the applicable process in chapter 480-04 WAC, WAC 480-07-420, or applicable protective order.

(e) *Challenges to designations of information as confidential.* The commission or a party to a proceeding in which a provider submits a document with information designated as confidential may challenge that designation. The commission will provide an opportunity to the provider and the parties to any adjudication to respond before ruling on the challenge. The provider of the information designated as confidential bears the burden to show that part or all of that information should be protected from disclosure. The commission may express its ruling orally on the record in an adjudicative proceeding, or in a written order.

(6) **Highly confidential information.**

(a) *Designating information as highly confidential.* Any provider claiming that information provided to the commission is highly confidential must make that claim in writing at the time the provider submits the document containing the information. The provider also must identify the highly confidential protective order providing the basis for the claim.

(b) *Provision of documents containing highly confidential information.* Any provider claiming that a document contains highly confidential information must submit a redacted and an unredacted version to the commission.

(c) *Marking and submission.*

(i) The provider must clearly designate information claimed to be highly confidential on each page of the unredacted version by highlighting the text with no more than twenty percent gray shading. The provider must clearly mark each copy of the document with the designation, "Shaded information designated as highly confidential per protective order in Docket (insert docket number)"on the first page of a multipage document and on each specific page which the provider claims contains highly confidential information, except as modified pursuant to subsection (7)(a) of this section or WAC 480-07-420 and except as provided in subsection (8) of this section.

(ii) The provider must print on blue paper any required paper copy of the pages of the unredacted version of a document that contain information designated as highly confidential and submit that document, in its entirety, in a sealed envelope. A provider submitting more than one document containing information designated as highly

confidential as part of the same filing must collate all of these documents into a set, and to the extent feasible, must enclose each entire set in a separate envelope. If the commission requires more than one paper copy of documents to be filed, the provider must submit each set of documents containing information designated as highly confidential in a separate envelope to the extent feasible.

(iii) The provider must label the redacted version of the document as redacted. The provider must either completely black out the information claimed to be highly confidential or leave a blank space where that information is located in the redacted document. The redacted and unredacted versions of a document must have the same pagination, and the text on each page must appear on the same lines. If the provider submits a document under a claim that all of the substantive information contained on multiple contiguous pages is highly confidential, the provider may submit a single page in the redacted version for the contiguous restricted pages if that page identifies the pages claimed to be highly confidential.

(iv) The provider must file the redacted and unredacted versions with the commission in the same web portal submission. If using another type of submission, the provider must file the redacted and unredacted versions at the same time but in separate submissions. When submitting electronic unredacted versions, the provider must state in the description field of the web portal submission, in the subject line of the transmitting email, or on a visible portion of the disc or electronic storage medium, whichever is applicable, that one or more documents in the filing contain information designated as highly confidential under the applicable protective order.

(d) *Request for information designated as highly confidential.* If a requester submits a public records request for information that a provider has designated as highly confidential, the commission will follow the applicable procedures in chapter 480-04 WAC, WAC 480-07-420, or the applicable protective order.

(e) *Challenges to designations of information as highly confidential.* The commission or a party to a proceeding in which a provider submits a document that the provider claims contains highly confidential information may challenge that designation. The commission will provide an opportunity to the provider and the parties to respond before ruling on any challenge. The provider of the information designated as highly confidential bears the burden to show that a part or all of that information should be protected from disclosure under the terms of the protective order. The commission may express its ruling orally on the record or in a written order.

(f) *Initial filing.* A provider may withhold information from an initial filing that the provider intends to designate as highly confidential after the commission enters a protective order under the following conditions:

(i) The provider describes the withheld information with reasonable particularity;

(ii) The provider files and serves complete unredacted and redacted versions of all documents that contain information designated as highly confidential as soon as practicable after the commission enters a protective order; and

(iii) The initial filing otherwise complies with all filing requirements in these rules including, but not limited to, the general rate proceeding filing requirements in subpart B.

The commission may reject an initial filing if the withheld information is necessary for the commission to determine whether the filing complies with applicable filing requirements.

(7) **Procedures for documents containing multiple types of restricted information.** Documents submitted to the commission may contain more than one type of restricted information. For example, a document may contain exempt information on one page and highly confidential information on another page. Any provider submitting a document containing more than one type of restricted information must comply with the provisions of this rule for each type of restricted information, subject to the provisions of this subsection. When the commission receives a request for a document containing more than one type of restricted information, the commission will also follow the procedures listed above for each relevant type of restricted information.

(a) *Differentiating types of restricted information.* The provider is responsible for distinguishing each type of restricted information from another when a document contains more than one type of restricted information. Possible methods for doing so include, but are not limited to, underlining or bracketing one type of information. The provider must identify the method used on each page of the document that contains that type of restricted information, e.g., by modifying the required designations to state, "Underlined and shaded information designated as highly confidential per protective order in Docket (insert docket number)," and "Shaded only information designated as exempt under WAC 480-07-160." The method used must be visible on both the redacted and unredacted versions of the document.

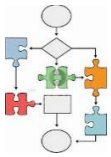
(b) *Documents containing no highly confidential information.* When a document contains both exempt and confidential information but no highly confidential information, the provider must submit a single unredacted version with all restricted information marked in accordance with subsections (4)(c), (5)(c), and (7)(a) of this section except as provided in subsection (8) of this section. The provider must submit a single redacted version with all restricted information masked.

(c) *Documents containing highly confidential information in addition to other types of restricted information.* When the document contains highly confidential information in addition to one or more other types of restricted information, the provider must submit a single unredacted version with all restricted information marked in accordance with subsections (4)(c), (5)(c), (6)(c), and (7)(a) of this section, as applicable, except as provided in subsection (8) of this section. The provider must submit at least two different redacted versions of the document. The first redacted version must mask all highly confidential information, but leave all other restricted information unmasked. The second must mask all highly confidential information and all other restricted information.

(8) **Spreadsheets.** If the cells in a spreadsheet or other tabular document include information that has been designated as exempt, confidential, or highly confidential and that would be impractical or unduly burdensome to mark as required in subsections (4) through (7) of this section, the provider need not comply with those requirements but must identify that information in a way that reasonably provides the commission with sufficient identification of the information to be protected and the basis for that protection.

(9) **Designation or redesignation of exempt, confidential, or highly confidential information.** No later than the time for filing briefs or, if no briefs are filed, within ten

days after the close of the record in an adjudication in which a party has designated information as exempt, confidential, or highly confidential, that party must verify the accuracy of all such designations in the record and in the exhibit list for the proceeding, and submit to the commission any proposed corrections or changes. Absent a statement of proposed corrections or changes, the designations in the record and in the exhibit list are final, and the commission will change those designations only if the provider voluntarily removes, or is required by law to remove, the designation.

J. "Public Record" Guide/Diagram 

- See attached or separate handout.