



# The PRA and Personnel/Employment Related Records: Emerging Issues

Government Lawyer's Bar Association

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Public records are presumed to be subject to disclosure



Disclosure requirements are to be construed liberally, and exemptions are to be construed narrowly



Records or information can be withheld only if the law specifically allows



Agencies should redact exempt portions of records and provide the nonexempt portions

# General Principles of the Public Records Act, chapter 42.56 RCW

# Agenda



Identifying responsive records



Exemptions in the PRA and elsewhere



Special considerations for responding to requests for personnel/employment records



Questions

# Identifying Responsive Records



# General Principles for Processing Requests

A requester must request an identifiable record or class of records

Agencies are not required to be mind readers

An identifiable record is not a request for information in general

When an agency receives an unclear request, the agency should communicate with the requester to clarify the request

# Clarification Often Needed

Requests are often for the “personnel file” or the “employment records”

- What are the specific and identifiable records or categories of records?
- Good practice to clarify what is actually being sought

Further, may wish to confirm the basis under which the request is being made

- Employee – RCW 49.12.240
- Unions – Collective Bargaining
- Discovery in a litigation matter
- Peace/Reserve/Correction Officer Certification – RCW 43.101.095

# Contents of a Typical Employee Personnel File

- Employment application materials (resume, cover letter, application)
- New hire materials and benefit forms
- Education and training records
- Performance reviews
- Disciplinary records
- Awards and recognition
- Separation records

Other  
Employment  
Related  
Records that  
**SHOULD NOT**  
be Kept in  
Typical  
Personnel File

- Medical records, including ADA/WLAD accommodation records
- Misconduct investigation materials
- I-9 employment verification forms
- Payroll records



# Request for “Personnel File” or “Employee File” May Cover Some or All of These Records

## Pre-employment info

- Application for employment, resume, cover letter
- Employment documentation (employment testing, scores, and questions)

## Routine employment records

- Emergency contact information
- Personnel action forms (shows history of salary increases)
- Payroll and benefits
- Performance evaluations
- Supervisor’s file related to employee
- Training records

## Medical records

- FMLA or ADA files

## Investigation and disciplinary records

- Disciplinary notices or related performance improvement plans
- Harassment complaints

## Separation records

- Letter of termination
- Settlement agreement related to termination
- Resignation letter

# Exemptions





# Right to Privacy

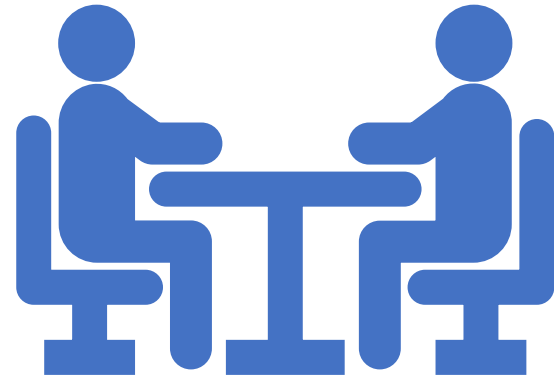
[RCW 42.56.230\(3\)](#) – Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy

The right to privacy is invaded only if disclosure:

- (1) Would be highly offensive to the reasonable person AND
- (2) Is not of legitimate concern to the public.

[RCW 42.56.050.](#)

# Pre-Employment and Hiring Records



# Application and Testing

The following employment and licensing information is exempt from public inspection and copying:

- [RCW 42.56.250\(1\):](#)
  - Test questions, scoring keys, and other examination data used to administer a license, employment, or academic examination
- [RCW 42.56.250\(2\):](#)
  - Applications for public employment (other than for vacancies in elective office) including the names of applicant, resumes, and
  - Other related materials submitted with respect to an applicant.

# Examples of Exempt Records

## RCW 42.56.250(1) – Test questions/scoring keys/other examination data

- Civil service testing
- Polygraph examinations
- Interview questions

## RCW 42.56.250(2) – Application/resume/other materials submitted with respect to an applicant

- Application
- Resume
- Cover Letter

## RCW 42.56.230(3) – Privacy in files maintained for employees

- Credit score?
- Arrest record?
- Investigative records for work history?

# Proof of COVID-19 Vaccination

EEOC requires that medical condition or history information for current and former employees and applicants must be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record

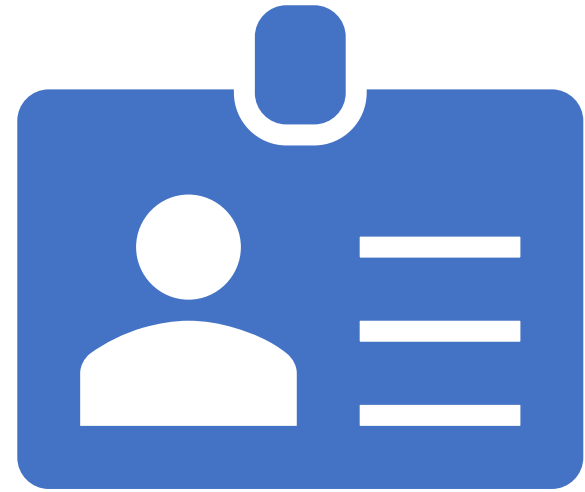
- Access to such files must only be on a “need to know” basis

October 13, 2021: EEOC Issues [Updated COVID-19 Technical Assistance](#)

## **K.4. Is information about an employee’s COVID-19 vaccination confidential medical information under the ADA? *(Updated 10/13/21)***

Yes. The ADA requires an employer to maintain the confidentiality of employee medical information. Although the EEO laws do not prevent employers from requiring employees to provide documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee’s personnel files under the ADA.

# Routine Employment Records





# Contact Information

[RCW 42.56.250\(4\)](#) exempts the following information in personnel records, public employment related records, volunteer rosters, or any mailing list of employees or volunteers:

- For employees/volunteers: Residential addresses, residential telephone numbers, personal wireless telephone numbers, personal email addresses, social security numbers, driver's license numbers, identicard numbers, (payroll deductions – more on later slide), and emergency contact information
- For dependents: Names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal email addresses, social security numbers, and emergency contact information
- **Caution: location of the information matters**

# Employee Dates of Birth and Photographs

The following employment and licensing information is exempt from public inspection and copying:

- [RCW 42.56.250\(8\)](#):
  - Photographs and month and year of birth in the personnel files of employees or volunteers of a public agency, including employees and workers of criminal justice agencies
  - The news media, as defined in RCW 5.68.010(5), shall have access to the photographs and full date of birth.
- Amended in 2020 – previously only covered criminal justice agency employees.
- News media? *Green v. Pierce County*, 197 Wn.2d 841 (2020).
  - Owner of a YouTube channel did not qualify because it was not one of the listed traditional news outlets, nor was it an “entity” as it lacked a legal identity separate from the owner.

# Salary and Benefits

- Generally, salary and paid benefits are public information
- Examples:
  - Gross pay
  - Vacation/sick time awarded
  - Employer retirement contributions
- Exempt information:
  - Payroll deductions including the amount and identification of the deduction. [RCW 42.56.250\(4\)](#) – exemption added in 2020
  - Previously, agencies would generally deduct voluntary benefits under privacy exemption
    - Deferred compensation contributions
    - Charitable donations
- Emerging issues:
  - COVID-19 vaccination incentives (ex: additional leave)

# Routine Performance Evaluations

- Performance evaluations (not discussing specific instances of misconduct) are generally exempt under RCW 42.56.230(3)
  - Production is presumed to be highly offensive, and there is no legitimate public interest in these evaluations (or the potential harm from disclosure outweighs it)
    - *Dawson v. Daly*, 120 Wash.2d 782 (1993)
    - *Church of Divine Earth v. City of Tacoma*, 13 Wn. App. 2d 497 (2020)
  - Presumption may be overcome when the agency can effectively remove identifying information to protect employee privacy

# Evaluations of High-Ranking Public Officials

- Analysis of whether there is a legitimate public interest may come out differently for high-ranking officials

“The position of Spokane City Manager is not like that of other public employees. The Spokane City Manager is the City’s chief executive officer, its leader and a public figure. The performance of the City Manager’s job is a legitimate subject of public interest and public debate.”

*Spokane Research v. City of Spokane*, 99 Wn.App. 452 (2000).

# Location and Context Matters

For several exemptions, records must be “in” personnel files or employment related records.

- [RCW 42.56.230\(3\)](#) – Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy
- [RCW 42.56.250\(4\)](#) exempts the following information in personnel records, public employment related records, volunteer rosters, or any mailing list of employees or volunteers:

Does not cover:

- Employee choosing to email personal information to fellow employees
- Using personal email address to conduct agency business (personal email address is not exempt in that situation)

Medical Records



# Employee Health Care Information

- Generally, records are confidential
- Possible exemptions:
  - ADA – 42 USCA 12112(d)
  - FMLA – 29 CFR 825.500(g)
  - HIPAA – 45 CFR Part 160
  - Mental Health Records – RCW 70.02.230
  - Medical Records – RCW 70.02.020(1)
  - Substance Abuse – 42 USC 290dd-2

Analysis is fact specific. Consult your legal advisor.



# Employee Health Care Information

- Remember, EEOC requires that medical information be maintained in separate medical files and treated as a confidential medical record.
- Case law in the context of employee right to privacy is not as consistent:
  - Injunction denied because release of firefighters' disability information was not highly offensive because the illnesses involved were not “unpleasant, disgraceful, or humiliating.” *Seattle Fire Fighters Union, Local No. 27 v. Hollister*, 48 Wn.App. 129 (1987).
  - In a non-PRA case, a tort claim for release of medical information in a press release was allowed to proceed. *White v. Township of Winthrop*, 128 Wn.App. 588 (2005).
- Be careful about what information you ask for, and where you store it.

# Investigation and Discipline Records



# Complaint and Investigation Records

General rule: accusations of misconduct by public employees and records related to investigations of those accusations **are** subject to disclosure – but with these exceptions:

- Discrimination and harassment complaints are exempt
- Certain unsubstantiated claims can be redacted

# Discrimination and Harassment Complaints are Exempt

The following employment and licensing information is exempt from public inspection and copying under this chapter:

Investigative records compiled by an employing agency in connection with an investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws or an employing agency's internal policies prohibiting discrimination or harassment in employment.

[RCW 42.56.250\(6\)](#)

# Discrimination and Harassment Complaints are Exempt

- Investigation is active and ongoing:
  - Records are exempt in their entirety.
- After agency has notified the complaining employee of the outcome:
  - The records may be disclosed only if the names of complainants, other accusers, and witnesses are redacted, unless a complainant, other accuser, or witness has consented to the disclosure of his or her name.
  - The employing agency must inform a complainant, other accuser, or witness that his or her name will be redacted from the investigation records unless he or she consents to disclosure.

## Certain Unsubstantiated Claims can be Redacted

- Extremely sensitive area
- Allegations must be stigmatizing to meet the “highly offensive” standard
  - *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199 (2008) (disclosure of unsubstantiated allegations of sexual misconduct by teachers is highly offensive)
  - *West v. Port of Olympia*, 183 Wn.App. 306 (2014) (disclosure of unsubstantiated allegations of theft by a Port employee is not highly offensive)
- Agency may redact the employee’s identifying information
  - *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398 (2011)
- Public has a legitimate public interest in the investigation

- Records outside of annual performance evaluation may also be exempt under same employee privacy reasoning
- Factors to consider:
  - Does record relate to a specific incident or general critique?
  - Was incident used in discipline proceedings or to help improve performance?
  - Was the employee penalized?
  - Is it the type of incident or conduct that would normally be included in a performance evaluation?

## Distinguishing Performance Improvement from Discipline

# Separation Related Records





# Settlement Agreements

- Settlement agreements are of legitimate public concern and are subject to disclosure
  - *Yakima Newspapers v. Yakima*, 77 Wn. App. 319 (1995)
- Agency and the employee cannot enter an agreement that public information will remain private
- Keep an eye out for clauses requiring notification to former employee and/or union prior to producing records



# Agency Specific Exemptions

- State agency and higher education employees' voluntarily-submitted demographic information – [RCW 42.56.250\(11\)](#)
- State agencies cannot disclose records pertaining to an agency employee to the perpetrator of workplace sexual harassment or stalking; and must give notice to the agency employee if anyone else requests the records – [RCW 42.56.660](#)
- Higher education institutions cannot disclose the identity of witnesses or victims of sexual misconduct committed by an employee unless the witness or victim consents – [RCW 42.56.375](#)



# Religious Affiliation Exemption

All records that relate to or contain personally identifying information about an individual's religious beliefs, practices, or affiliation are exempt from disclosure under this chapter.

[RCW 42.56.235](#)

- Became effective June 7, 2018. No appellate case law interpreting this exemption.
- Potential records:
  - Accommodations for religious practices, including requests for time off for religious holidays
  - Vaccine exemption requests

# Special Considerations



# Third Party Notice

Upon receipt of a request for information located exclusively in an employee's personnel, payroll, supervisor, or training file, the agency must provide notice to the employee, to any union representing the employee, and to the requester.

## [RCW 42.56.250\(12\)](#)

- Notice requirement added in 2020
- Statute sets forth required elements in the notice
- May be other situations where notice is appropriate
- Logistical issues:
  - Former employees
  - Bulk pay requests

# Lists of Employees

- Common requests for personnel information that is NOT exempt:
  - Employee names
  - Work contact information
  - Salary information
- Beware RCW 42.56.070(8) – Lists of individuals for commercial purposes
- Potential constitutional issues
  - Survivors of domestic violence and sexual assault have a substantive due process right to personal security and bodily integrity
  - Disclosing name, physical work location, and work contact information might violate these rights if disclosure would threaten the employee's safety, or that of a family member
  - *Wash. Fed'n of State Empls., Council, 28 v. State* (Div. I, March 28, 2022)

# Questions/Comments



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