The Firehouse Lawyer

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Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to public agencies, which include labor and employment law, public disclosure law, mergers and consolidations, financing methods, risk management, and many other practice areas!!!

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UPCOMING SEMINARS

Eric Quinn will be teaching some essential seminars in the coming months.

On April 5, 2025, Eric will be teaching on behalf of WFCA—the Washington Fire Commissioners Association. This training pertains to differentiating between the functions of fire commissioners and fire chiefs, and how this becomes important in the context of evaluating the fire chief. Eric will also be discussing how the fire commissioners should approach executive sessions in the context of evaluating the fire chief's performance. Information regarding this training is located here: https://wfca.wa.gov/page/SpringSeries2025

On April 12, 2025, Eric will be teaching for the Pierce County Fire Commissioners Association on the Formation and Administration of Regional Fire Authorities, from 0900 to 1200. This will be done in person at South Sound 911, 3580 Pacific Ave. Tacoma, Washington. This free seminar will also be offered remotely via Zoom. The Meeting ID is 815 7774 7587 and the Passcode is 868669.

Please email Denise Ross to register: dross@centralpiercefire.org. Please state whether you plan to attend in person or remotely so we can plan accordingly. The formal announcement of this training is attached here.

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DO YOU HAVE POLICIES ON ELECTRONIC FUND TRANSFERS?

Many of our readers may not be aware of the provisions of RCW 39.58.750. This statute authorizes the use of electronic fund transfers (EFTs) by and through "the state treasurer or any treasurer or other custodian of public funds…." The statute goes on to provide that such transfers of funds must be done "in accordance with accounting standards established by the state auditor under RCW 43.09.200…to safeguard and insure accountability for the funds involved." That statute, contained in the chapter of the RCW governing the State Auditor, generally provides for a uniform system of accounting for local governments, commonly known as the BARS system.

We recommend that all of our clients adopt a detailed policy, setting forth their procedures and policies governing their use of EFTs to deal with accounts payable. A few of our clients have begun paying their attorneys by using EFTs, which saves time and money for all concerned, not to mention the problems created when a check or warrant is lost in the mail. It seems to us that very few fire districts and regional fire authorities are availing themselves of the time-saving benefits of paying many of their vendors by EFT.

Use of EFT and/or ACH is also consistent with chapter 1.80 of the Revised Code of Washington, the statutes relating to electronic records and electronic signatures being deemed as acceptable as paper records and/or "wet" signatures.

A sample EFT policy and resolution are attached to this article. Said policy should be updated to reflect your agency's practices and administrative functions.

ANOTHER SIGNIFICANT PRA CASE

On March 4, 2025, Division II of the Court of Appeals handed down another significant case arising under the Public Records Act, Chapter 42.56 RCW. In *Hood v. City of Vancouver,* #59242-8-II,[1] Division II of the Court of Appeals reversed the trial court's summary judgment decision, and dealt with requests for clarification and what constitutes an adequate search for responsive records.

Since we often advise clients that a clarification request is appropriate when dealing with ambiguous requests for records, we feel this case is worth discussing.

Eric Hood requested records from the City of Vancouver, Washington, pertaining to the most recent audit of the Downtown Redevelopment Authority, a local entity created by the City. As the Court pointed out repeatedly in their opinion, even if some parts of a record request seem to require clarification, you still need to respond and produce records as to the clear and unambiguous parts of the request.

Pointing out that the agency does not need to be a mind reader, the Court stated that RCW 42.56.520 (3)(a) and (b) *require* an agency to seek clarification of an unclear request, citing *Neigh. All. Of Spokane County v. Spokane County,* 172 Wn. 2d 702, 727, 261 P.3d 119 (2011).

The Court found that Hood's initial request contained ambiguities. Also, in an unusually long footnote, the Court cited two unpublished

[1] https://www.courts.wa.gov/opinions/pdf/D2%2059242-8-II%20Published%20Opinion.pdf

opinions and one published opinion, which all involved ambiguous Hood PRA requests, and all of which seemed similar. This footnote suggested to us that the Court was thinking that part of the ambiguity may have been an intentionally-laid trap by Mr. Hood, who failed to learn from prior court decisions.

The Court also noted that the following language in the City's final communication did not constitute a valid request for clarification:

> "If you feel that there are any missing documents or additional types of materials that your request sought, which are not included in the enclosed response, please contact me so your request may be clarified."

We always urge our clients to provide a clear closing letter in your final response to a PRA request, because that activates the one-year statute of limitations on any PRA lawsuit. The City's final email quoted in part above is precisely the wrong response, in our opinion, to operate as your last word on a PRA request, but that language seems to keep the PRA request open for further action by the City. We can provide our readers with our typical closing letter, which basically states the exact opposite of the language quoted above.

Another important part of the *Hood* opinion dealt with the adequacy of the search for records; it was this issue that resulted in the Court's reversal of the trial court. The Court found that there was a genuine issue as to a material fact, on this issue of the adequacy of the search. The Court said the facts of the case are always the key to figuring out if the search was adequate. The gist of their decision was that the request was clear enough that email communications about the back and forth between the State Auditor and city officials were within the scope of the request. It seemed to the Court that parts of the City's responses showed they understood or should have, that emails were being requested because they knew he requested "records sent/received to/from the state auditor's office." The City never really searched the email accounts of the involved city officials for such communications.

In summary, the *Hood* case teaches us what not to do with respect to clarification requests and with reasonable searches for records.

DID YOU KNOW?

As some of our readers may know, the pre-employment inquiry guide, contained in the Washington Administrative Code, provides guidelines and some absolute prohibitions, on what you may ask in an interview process for new hires, and employment applications.

We do not recall being asked, until very recently, whether it is acceptable to require applicants to submit a photograph with their application or prior to hiring, as for example, at the interview. It may seem logical to ask for a photograph, so as to be able to identify or recognize the applicant at the interview.

However, the pre-employment inquiry guide prohibits this, and in fact even if you make it *voluntary,* the practice is forbidden.[2] I guess the reason is apparent: the powers that be found it would be too easy for such photos to be used to discriminate on the basis of race or ethnicity. So,

[2] https://app.leg.wa.gov/WAC/default.aspx?cite=162-12-140

dear readers, if you are doing that now, please stop!

INTERESTING BILLS

There are several bills of interest to the fire service in the State of Washington, currently pending in the state legislature. In this article we discuss a few proposed bills that are considered high priority by the Washington Fire Commissioners Association.

House Bill 1001 would add a new chapter to Title 43 RCW, which covers state government. The bill would require the State Department of Commerce to establish a competitive grant program to award funding for local governments in rural counties in the state for the construction of fire protection facilities or related "capital projects."

Under the new law, "rural county" means a county with a population density of fewer than 100 persons per square mile or a county smaller than 225 square miles.

The department is tasked with establishing a committee to develop the criteria for approving grants and the process of prioritizing grant requests. This committee of at least four persons shall include at least one representative of the Commerce Department, and one each representing a city, county, and fire protection district.

The statute goes on to provide a nonexclusive list of seven (7) factors in prioritizing the projects, but the factors may be considered in any order of importance. Funds awarded under such grants may only be approved after the commitment of private or public matching funds. Those matching funds, however, may be in the form of cash, equipment, land, buildings or like-kind contributions. No jurisdiction may obtain more than $2 million from this fund in any biennium.

Lastly, the final substantive section of the bill requires the Commerce Department to provide a report annually as to the details of performance of the grant program.

Interesting bill, but we do not know the chances of it actually being adopted by the Legislature and signed by the Governor.

CAN FIRE BENEFIT CHARGES BE ASSESSED AGAINST TRIBALLY-OWNED PROPERTIES? ARGUABLY, YES

We think that fire benefit charges, authorized for fire districts by Chapter 52.18 RCW, and for regional fire authorities by RCW 52.26.180 et seq., could be lawfully assessed on tribal properties.

In September 2023,[3] we addressed in the *Firehouse Lawyer* how, and under what circumstances a state law could be applied in Indian country, particularly with regard to civil and not criminal issues. In that article, we expressed the opinion that the case of *Oklahoma, v. Castro-Huerta,* 597 U.S. ____, 2022 WL 2334307, 2022 US LEXIS 3222 (2022) is very important. That 5-4 decision of the U.S. Supreme Court approved of a balancing test first explained in *White Mountain Apache Tribe.v. Bracker,* 448 U.S. 136 (1980). In that case, Justice Thurgood Marshall applied a test to

[3] https://firehouselawyer.com/Newsletters/September2023FINAL.pdf

balance tribal interests, federal interests and state interests.

Justice Gorsuch, in his dissent in *Castro-Huerta* (which was joined by three other justices) argued that tribal sovereignty is absolute within Indian country, except if there is a federal statute providing otherwise.

In our September 2023 issue we argued that the *Bracker* Court recognized that tribes retained attributes of sovereignty particularly with respect to their members and use of their property in Indian country. Clearly, the tribes have unfettered authority to regulate their internal and social relations in Indian country, according to the *Bracker* court.

Based on a synthesis of *Bracker* and *Castro-Huerta,* we believe that a state law would not be enforced or be applicable in Indian country if there is either express or implied pre-emption by a federal statute.[4] Similarly, a regulatory law purporting to regulate activities within Indian country would not be enforceable if it interfered with tribal sovereignty in any way. However, we opined in that article that a state statute, allowing withdrawal of tribal lands or tribal trust lands from a fire district or regional fire authority, would be an enforceable state law. After that article was written an RFA client of ours withdrew tribal lands from its legal boundaries and the Superior Court approved of that withdrawal and dismissed litigation challenging that withdrawal action.

Now let us consider whether the *Bracker* balancing test, as applied in *Castro-Huerta,* would support assessing a fire benefit charge by a fire district or a regional fire authority upon lands within Indian country, i.e. lands either owned by a tribe itself or tribal trust lands.

We know that courts have held that property taxes cannot be levied within Indian country. Indeed RCW 84.36.010 explicitly so provides, at least with respect to property used for essential governmental services. However, we contend that businesses conducted within Indian country, such as casinos and hotels, are essentially profit-making businesses that require fire protection services, just like non-Indian casinos and hotels.

Indeed, many clients tell us repeatedly that such Indian casinos and/or hotels represent a very significant part of their call volume. We also know that RCW 52.30.080—a permissive statute—allows for contracts of services to tribes. But what if the tribe refuses to enter into a contract that adequately and fairly compensates the fire department, but the department really does not want to withdraw the tribal lands from the district under the applicable statute? We think that the fire benefit charge is a viable alternative because (1) it is not a tax under controlling law (it is a service charge) and (2) under the balancing test the benefit charge—which is not regulatory, but rather a revenue source based on the benefit provided—should pass muster as not interfering with tribal sovereignty, but rather is just a fee for service.

[4] A federal *regulation*, 25 CFR 163.28, relating to the Bureau of Indian Affairs, may *arguably* preempt state law in the area of *wildfire protection*, but said regulation contains no clause indicating express preemption of state law: https://www.ecfr.gov/current/title-25/chapter-I/subchapter-H/part-163/subpart-B/section-163.28