The Firehouse Lawyer

Volume 23, Number 4

April 2025

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!!!

Eric T. Quinn, Editor

Joseph F. Quinn, Staff Writer

The law firm of Eric T. Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

Our office is located at:

7403 Lakewood Drive West, Suite #11
Lakewood, WA 98499-7951

Mailing Address: See above
Office Telephone: 253-590-6628
Joe Quinn: 253 576-3232

Email Joe at joequinn@firehouselawyer.com
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
firehouselawyer.com

Inside this Issue

Upcoming Seminar

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.

Public Records Act – In Need of Reform?

Recently, we have spent some time researching the public records laws of different states, because we noticed that Oregon, for one, allows government agencies to recover search fees or other labor expended in fulfilling such public records requests.

The law in Washington, however, is now and has always been interpreted to deny any such search fees or labor or charges. This is because the statute, at RCW 42.56.120, provides in pertinent part as follows: "(1) No fee shall be charged for the inspection of public records or

locating public documents and making them available for copying…" with some very limited exceptions.

But our research shows that the State of Washington is an outlier on this question, as a large majority of the fifty (50) states does in fact allow charging search fees or the time and labor spent in locating documents and making them available.

We have reviewed the Granicus website and a post therefrom entitled, "FOIA 101: Demystifying Public Records Laws in Each State."[1] In this article, we summarize the results shown in the Granicus website, by looking only at the different states' rules on search fees or labor, their differing times or days to acknowledge receipt of the records request, and their (widely) differing *penalties* for violations of the law by the government agencies.

We counted more than 40 of the 50 states that do allow search fees to be charged or for labor expended in fulfilling the records requests. More than 80% of the states allow this, but Washington does not! Many states allow the waiver of the fees under certain described circumstances, such as proven inability to pay. Some allow charging only for the more difficult requests to fill. For example, the state of Maine allows charging only after two hours of staff time has been expended, and then only at $25 per hour. Utah allows charging for labor, but only after 15 minutes of staff time has been devoted to the request.

Given the number of hours that some agencies spend having their staff fulfill sometimes voluminous requests, we think it is high time that the legislature take up this question. We are mindful that the Public Records Act—chapter 42.56 of the RCW—was first adopted by Initiative and codified in RCW 42.17. A newly revised statute would be subject to the people's power of referendum. But a better example of an "unfunded mandate" would be difficult to find.

On the second issue—the time limit for acknowledging records requests—Washington is more in the mainstream. RCW 42.56.520 requires agencies to at least acknowledge receipt of the request within five (5) days of receipt of the request, if the agency cannot provide the records sooner. The shortest time period to acknowledge receipt, of any state, is three (3) days, which only a few states require. The longest time period is thirty (30) days, which again only a few states allow. Clearly, Washington's time period is not unreasonable.

The final issue discussed on the Granicus website was the penalties allowed for violations of the records law. Again, here Washington appears to be an outlier, if not unique, because in Washington the penalties for violations have been almost entirely determined by the courts. And Washington courts have dealt extensively with this issue. In one or more cases, the courts have mandated a penalty based on how many *pages* have been wrongfully withheld from the requestor and sometimes based on the length of the delay.

In *Yousoufian v. King County,* the Court imposed a total penalty of $371,340 together with attorney fees. The maximum daily penalty is set at $100 currently (see RCW 42.56.550), but this only applies to how many days the requestor was denied the right to inspect or copy records.

In *O'Dea v. City of Tacoma,* a 2021 case, the trial court awarded a penalty of $2,607, 940 but

[1] https://granicus.com/blog/foia-101-demystifying-public-records-laws-in-each-state/

this award was reversed on appeal as a "manifest abuse of discretion." The trial court imposed a penalty of $10 per day, but on a *per-record* basis, from the day of receipt until a date nine months later. The appellate court noted that there was no finding of bad faith against the city.

Notably, the Washington Supreme Court affirmed a $500,000 penalty in the *Wade* case, and found that penalties may be assessed on a per-page basis.[2] Put another way, penalties under the PRA can be substantial.

We found no other state that assessed the penalties in such a manner. However, there were about 10 states that did not specify charges for violations, so in those states perhaps the courts have acted like the courts in Washington. More research on those states' judicial practices might be in order.

Roughly half of the fifty states specify by statute either a minimum penalty, a maximum penalty, or both. Presumably, the courts in those states can exercise discretion within those legislated parameters. For example:

- Illinois has a $2500 minimum and a $5,000 maximum.
- Michigan has a $2500 minimum and a $7500 maximum.
- Nevada charges $1000 for the first offense but that escalates to $5,000 and $10,000 for repeat offenses.
- New Jersey has a $1000 minimum and $2500 maximum, but a repeat offender may be sentenced to up to 10 years in jail (really!).
- In Utah, a violation may be a Class D misdemeanor.

We suggest that the Washington legislature should address this issue by establishing some minimum and maximum penalties, while still allowing the courts to exercise discretion within those parameters. The legislature could even codify the factors set forth in the case of *Yousoufian, supra,* to allow for enhancement or mitigation of the penalty based on those factors used by the court, with that penalty to not exceed, for example, $10,000. This would (hopefully) disincentivize records requesters from abusing the PRA to extract taxpayer money from local governments.

ANOTHER IMPORTANT PRA CASE?

On April 1, 2025, Division 2 of the Court of Appeals decided to publish a previously unpublished opinion in a case decided in February. We think the Court has answered a question that we have been dealing with lately in Superior Court. That issue is: Is failure to acknowledge receipt of a public records request within the statutorily allowed five days a meaningful, standing alone, a violation of the Public Records Act (PRA) for which a requester may recover penalties? Is it still a violation if the reason you did not acknowledge the request is that you never saw it, because the PRA request went into a junk or spam folder? One might ask, "Have I received something when I did not know it?"

The case is *Pilloud v. Employment Security Department,* No. 59149-9-II.[3] Andrew Pilloud requested of that state department the names and

[2] https://caselaw.findlaw.com/court/wa-supreme-court/1730161.html

[3] https://www.courts.wa.gov/opinions/pdf/D2%2059149-9-II%20Published%20Opinion.pdf

addresses of all individuals who applied for an exemption from the Long-Term Services and Supports Trust Program, commonly known as the "WA Cares Fund." An email filter routed his PRA request to a junk folder. After finding the request 17 days later, ESD acknowledged receipt. ESD then created a custom spreadsheet listing 480,000 Washington employees who applied for an exemption. ESD redacted all information as private except for the exemption status of the applicants. They produced the spreadsheet slightly more than two months after Pilloud sent the request.

The trial court dismissed Pilloud's complaint, finding that ESD responded within five business days after they received "fair notice" of the request, that ESD provided a reasonable estimate of time to respond, and that the redactions were proper. Division 2 judges unanimously affirmed the trial court.

After *Pilloud* did not hear back promptly from ESD, he sent a physical letter and another email, so that is how ESD discovered it had "received" a PRA request earlier. The first request had been filtered by ESD's cybersecurity software and sent to junk mail, apparently due to the unique domain name from whence it came. The only relief the trial court provided to Pilloud was $250 in costs because the ESD initially gave an insufficient "brief explanation" of the redactions (not because of untimely acknowledgement).

Interestingly, the Court of Appeals held that the failure to acknowledge issue was **moot**, as there was no way to provide effective relief. The Court pointed out that the PRA does not provide a freestanding penalty for procedural violations, citing *Hikel v. City of Lynnwood,* 197 Wn.App. 366, 379, 389 P.2d 677 (2016). Procedural delay can be an aggravating factor when determining penalties for *withholding* records, but that is not what occurred in this case.

Pilloud argued that the delay was a constructive denial of the request. But the Court disagreed with that argument because the records were produced in approximately seven weeks and the redactions were proper. The Court found there was no unreasonable delay, holding that ESD acted with reasonable diligence and thoroughness in responding to his request.

We think this case is important in two ways: (1) the Court clearly noted that the PRA provides remedies in RCW 42.56.550(4) but not for failure to acknowledge within 5 days and (2) the Court approved of the concept that the five days to acknowledge starts when the agency has "fair notice" of the request. Logic tells us that you cannot acknowledge receipt of something without actual knowledge. Also, it seems ridiculous to award costs for a technical procedural violation unless the agency actually unreasonably delays exercise of the right to inspect or copy records.

After all, that is the only violation for which the statute provides a monetary penalty. The statute provides that they can receive costs and reasonable attorney fees (but not if they have no attorney). The court can also provide an amount "not to exceed one hundred dollars" (and per page under the *Wade* case depending on the circumstances) for each day of delay.