

CONTRACTS, CONTRACTORS AND PUBLIC RECORDS



IACC
INFRASTRUCTURE ASSISTANCE
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Disclaimer

- This presentation is educational only and is not legal advice or a legal opinion. The PRA changes over time. Later court decisions or changes in statutes can impact the PRA and an agency's obligations.
- Opinions and thoughts shared today are not necessarily the views of the AGO or the Attorney General.
- Each contract may require unique terms and conditions to achieve the contract's objectives. We recommend you consult with your attorney on specific contracts and contract provisions.

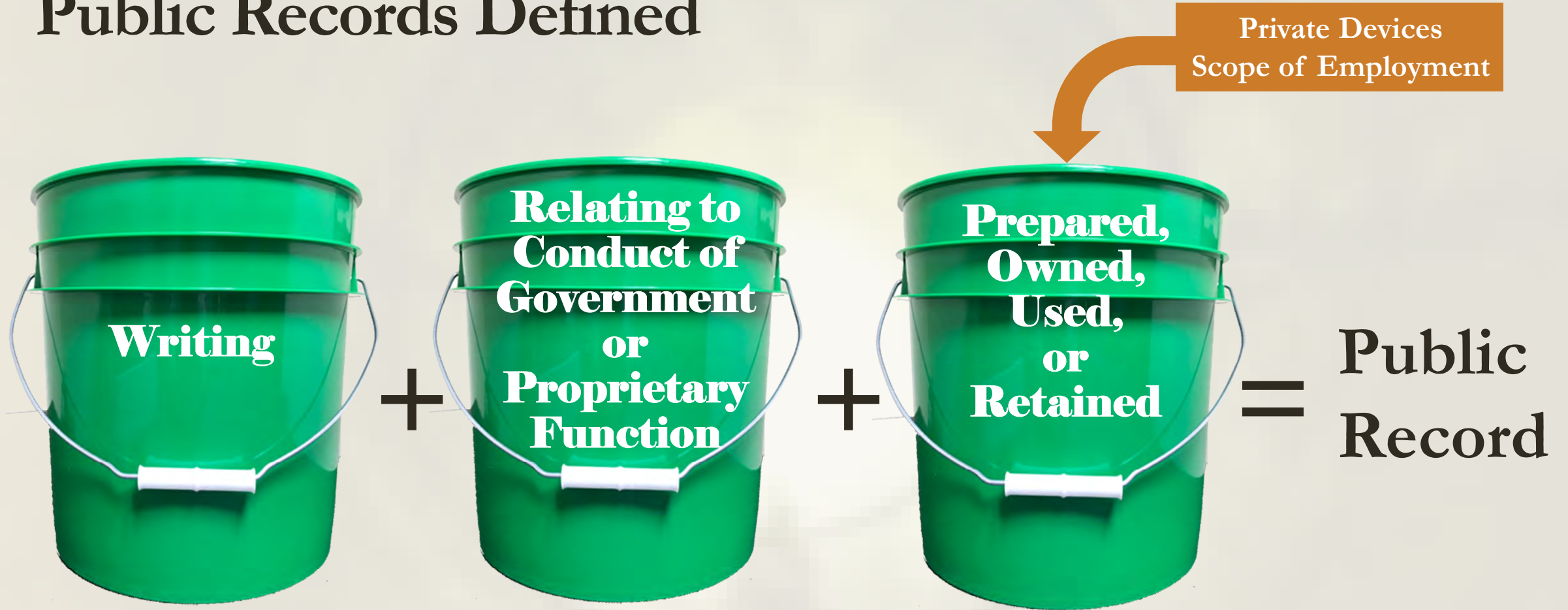
Public Records Act (RCW 42.56)

Consistent with the PRA's 'strongly worded mandate for broad disclosure of public records,' we construe the statute's disclosure requirements liberally and its exemptions narrowly.

Washington State Supreme Court

- Public records of government agencies are **presumed to be open to disclosure**.
- Non-exempt public records must be disclosed.
- Records or information in records can be withheld only if law allows. Exemptions are “narrowly construed.”
- Location does not matter. Public records can be located in/on agency files/accounts/servers or non-agency files/accounts/servers.
- Public records must be retained pursuant to records retention laws (RCW 40.14).

Public Records Defined



RECORDS SEARCH RESPONSIBILITIES

“The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents.”

Plan searches:

- Understand your agency. Who holds what records. What are the records storage locations and systems.
- “Easy” vs Complex searches.

Cast a wide net and document all of your search efforts including:

- Search terms used.
- Locations searched.
- Description of records produced & how.
- Description of records not produced.

What if a contractor has agency records?



CONTRACTOR RECORDS

Contractor records may become public records under the PRA if:

1. Records created by the contractor are found within public agency systems and were **“prepared, owned, used or retained.”**

-or-

2. The contractor itself is the “functional equivalent” of a public agency or public employee.

WHEN DOES AN AGENCY “USE” A CONTRACTOR’S RECORD?

- Was the record used by the agency in any decision-making process?
- Does the record relate to the conduct of the agency or a proprietary function, and is also a relevant factor in the agency's action?
- Information in a record may have been "used," but does not always apply to an agency's final work product.
- Simple reference to a record that has no relevance to an agency's conduct or performance may not constitute "use." However, if the information in the record has been reviewed, evaluated, or referred to and has an impact on an agency's decision-making process it would be within the parameters of the Act.



CPU River Road Generation Plant

THE TELFORD TEST: IS A CONTRACTOR THE “FUNCTIONAL EQUIVALENT” OF A PUBLIC AGENCY?

Prevents governments from evading public oversight through creative contracting.

Is derived from case law interpreting the federal Freedom of Information Act (FOIA).

Fact specific inquiry to determine if a private contractor is the “functional equivalent” of a public agency or public employee:

1. Whether the private entity performs a governmental function.
2. The level of government funding.
3. The extent of government involvement or regulation.
4. Whether the entity was created by government.

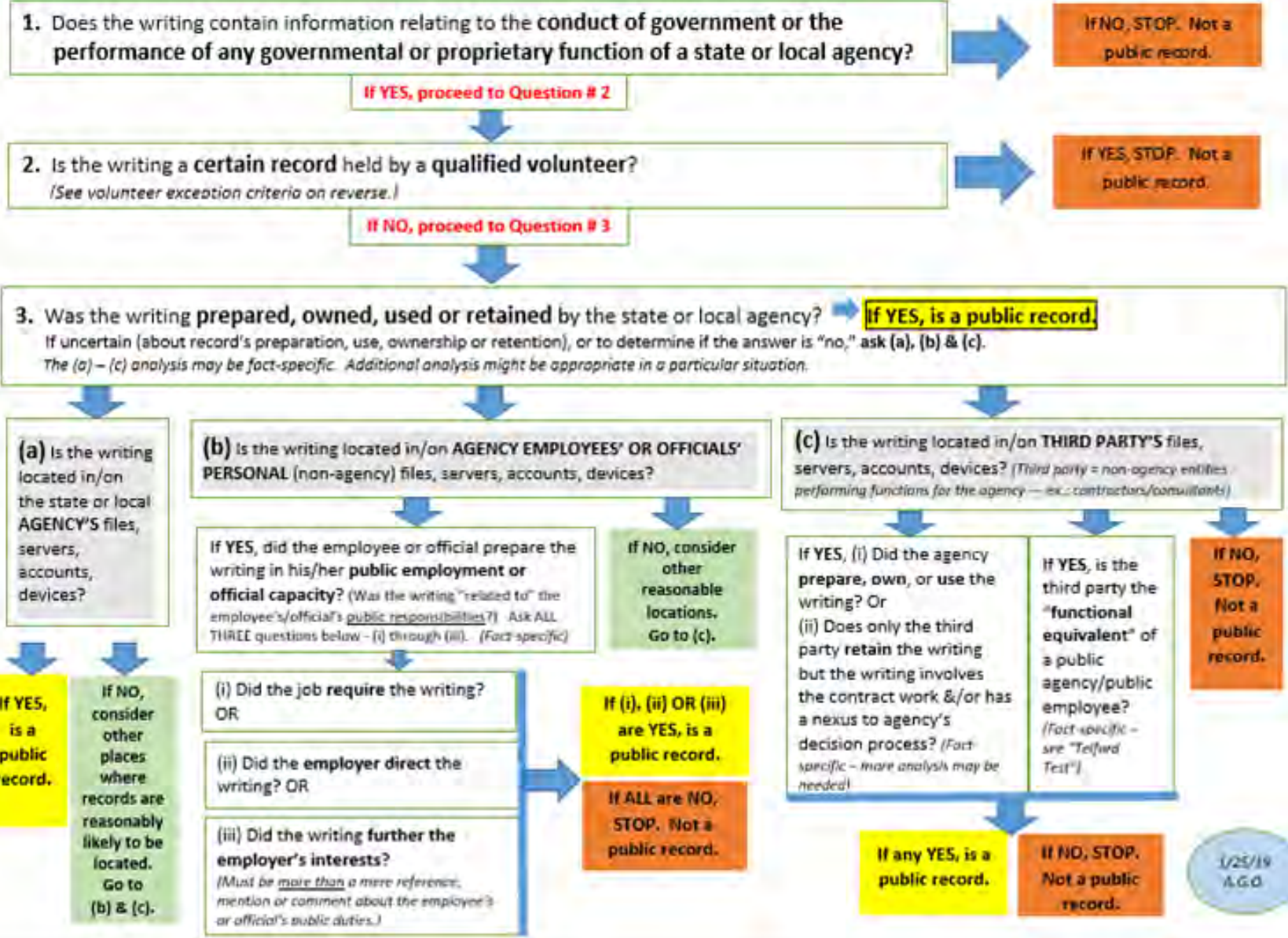
Fortgang v. Woodland Park Zoo, 187 Wn.2d 509, 387 P.3d 690 (2017)

Telford v. Thurston Cnty Bd of Comm’rs, 95 Wn. App. 149, 974 P.2d 886 (1999)

Shavlik v. Dawson Place, 11 Wn. App. 2d 250, 452 P.3d 1241, *review denied*, 195 Wn.2d 1019, 464 P.3d 208 (2020)

When is a "Writing" a "Public Record" under the Public Records Act?

A Guide for Illustrative Purposes Only. Not Legal Advice/Opinion. Consult RCW 42.56 (PRA) and PRA Case Law for Further Analysis. Some Citations on Reverse.



1/25/19
A.G.O.

Contracts – A starting point

- The contract is a public record.
- What's in a name? Contract, Solicitation, Grant, etc.
- Agencies cannot contract away statutory obligations under the PRA.
- Agency cannot promise confidentiality of a public record if the law does not permit withholding of the record or information.

Contracts – What we are not going to cover

- Advance Payments
- Indemnification
- Hold Harmless
- Limitations of Liability
- Disclaimer of Warranties
- Insurance
- Automatic Renewal
- Choice of Law and Venue
- Force Majeure Clauses
- Termination Clauses

Types of contracts

Public Agency contracts generally fall into two categories:

1. Contracts between the public agency and a contractor where the agency **receives** “goods or services.” Contracts to perform work on behalf of the agency that the agency doesn’t have the capacity, skills or knowledge to perform itself. For example; a contract with an IT company for website design/hosting or provide waste management for the area under the agencies jurisdiction.
2. Contracts between a public agency and a contractor where the agency **provides** services. For example; a contract to provide funding such as grants or loans or contracts to lease agency owned buildings or land.

Contracting Considerations

(Things to think about as you prepare.)

- Does the contractor have any experience contracting with a public agency or Washington's Public Records Act?
- What statutory exemptions might apply to records under the contract?
- What are the records retention requirements for records under the contract?
 - How are records to be stored and the retention period?
 - Are any records to be turned over or provided to the agency at the end of a contract?
- Does the contractor understand who is ultimately responsible for decision-making about responsiveness, withholding, and disclosure? (*Potential contract provision.*)

Include PRA Clauses in Solicitations and Contracts

At minimum, contract provisions should address the contracting party's obligation to retain public records and produce them if requested:

- Put contractor ON NOTICE about PRA (RCW 42.56), and obligations.
- Put contractor ON NOTICE about records retention (RCW 40.14), and obligations.

Solicitation announcements should address how the agency will handle records provided in the applications for public agency contracts and awards.



Expanded PRA Clauses in Solicitations and Contracts

- Identify the contact person at the contractor's office for contract related records?
- Does the contract address the parties' respective obligations when a PRA request is received including:
 - Threshold for contractor notification of PRA request and opportunity to enjoin.
 - The parties' respective search obligations and documentation.
 - Time requirements for providing records.
 - Responsibility for records production including exemption log.
 - Responsibility if a court imposes PRA liability.
- Indemnification and hold harmless provisions if the contractor fails to provide documents that are responsive or doesn't conduct an appropriate search.
- 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)?

What is the Contract – an aside on drafting Contracts URLs or Hyperlinks

- Totality of the Agreement

"URL Terms" means the "SLA" and "Services" definitions, and other terms with which Customer must comply, which are located at a URL and referenced in this Agreement.

Comcast Website or Website: The Comcast website where the General Terms and Conditions, PSAs and other Comcast security, use and privacy policies applicable to the Agreement will be posted. The current URL for the Website is business.comcast.com/terms-conditions-smb. Comcast may update the Website documents and/or URL from time to time.

URLs or Hyperlinks

(Problems and Options)

Problems

- Terms of the contract and associated definitions can be unilaterally altered.
- Difficult to fully understand and make an informed decision about what you're agreeing to.
- Most companies general terms and conditions contain a blanket copyright or proprietary clause.

Options

- Preferred: Substitute your terms and definitions in lieu of URLs **OR** gather content from all URLs into one master agreement and make that document serve as the agreement.
- Fallback 1: Ensure that amendment provision only allows changes with written agreement of the parties; ensure that you have copies of all of the URL content at the time of the agreement.
- Fallback 2: Add provision that requires notice of any potential revisions of the URL terms/conditions and an opportunity to opt out.

Confidentiality

- Vendors will often include a blanket confidentiality provision in contracts. (In the private sector it is common for even a potential transaction to be considered confidential.)
 - Typically private parties (in non-state contracts) will request an NDA upfront before sharing any data or even additional contract templates.
 - The Vendor contract templates may be designated as proprietary and confidential.
 - Vendors tend to take an expansive view on what the scope of their potential proprietary interest may be in an effort to maximize their protection on intellectual property rights and minimize information access to competitors.
- These are genuine interests of Vendors, however, these come into conflict with the interests of public agencies under the Public Records Act.

Confidentiality – a parade of problems

- Problems:
 - The definition of Confidential Information is broad and vague. E.g. “information that is clearly identified in writing at the time of disclosure as confidential *as well as any information that, based on the circumstances under which it was disclosed, a reasonable person would believe to be confidential.*”
 - Agreements that call for an agency to “use commercially reasonable efforts *not to make each other’s Confidential Information available in any form to any third party.*”
 - A clause calling for the agency to “*cooperate in the other party’s efforts to obtain a protective order* or other reasonable assurance that confidential treatment will be afforded the Confidential Information.”

The reviewer should keep the *Lyft* case in mind when reviewing such terms. *Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 418 P.3d 102 (2018).

Confidentiality Provision - options

Negotiation Approach: Through the solicitation and negotiation process reach agreement on a provision with the contract's unique issues in mind.

- Educate the Vendor about the limited ability of the Agency to change how the PRA would be applied to them.

Standard Approach: Propose a standard Public Records Act term or edit term to specifically mention the PRA.

- Allow the Vendor to designate proprietary and confidential information in a separately marked folder.
- Inform the Vendor of their ability to defend their proprietary and confidential information.
- Inform them that the Agency will not represent the Vendor if a request for disclosure arises.

Catch-all Provision: (Risky Alternative) Include a catch-all provision about “the confines of state law.”

- Not informing the Vendor of their obligations under the PRA may lead to future conflict with the Vendor.
- Vendor may fail to comply with laws they are unaware of related to retention.

Proprietary Information

Agencies should be very clear how they will handle any proprietary or confidential information provided by the contractor.

Recommended language for contracts and solicitations include the following:

- 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 business days).
- The agency will disclose the claimed proprietary records if the contractor does not obtain a court order prior to the agency deadline.
- The contractor may and likely will need to go to court to argue for withholding of a record or records.

Sample Vendor Proprietary Information Provision

Here is a sample provision that may come up in a Vendor Template:

7.6 Confidential Information. Each party may have access to information that is confidential to the other party (“Confidential Information”). For purposes of this Agreement, Confidential Information shall include any information that is clearly identified in writing at the time of disclosure as confidential as well as any information that, based on the circumstances under which it was disclosed, a reasonable person would believe to be confidential. Customer’s Confidential Information shall include, but not be limited to, Customer Data. A party’s Confidential Information shall not include information that (i) is or becomes a part of the public domain through no act or omission of the other party; (ii) was in the other party’s lawful possession prior to the disclosure without any obligation of confidentiality and had not been obtained by the other party either directly or indirectly from the disclosing party; (iii) is lawfully disclosed to the other party by a third party without restriction on disclosure; (iv) is independently developed by the other party without use of or reference to the other party’s Confidential Information, as established by written records. The parties agree to use commercially reasonable efforts not to make each other’s Confidential Information available in any form to any third party. Notwithstanding the foregoing, Customer acknowledges and agrees that [REDACTED] may disclose Customer’s Confidential Information to its Third Party Vendors solely to the extent necessary to provide products or services under this Agreement. This Section will not be construed to prohibit disclosure of Confidential Information to the extent that such disclosure is required by law or valid order of a court or other governmental authority; provided, however, that a party who has been subpoenaed or otherwise compelled by a valid law or court order to disclose Confidential Information (the “Responding Party”) shall first have given sufficient and prompt written notice to the other party of the receipt of any subpoena or other request for such disclosure, so as to permit such party an opportunity to obtain a protective order or take other appropriate action. The Responding Party will cooperate in the other party’s efforts to obtain a protective order or other reasonable assurance that confidential treatment will be afforded the Confidential Information. If the Responding Party is compelled as a matter of law to disclose the Confidential Information, it may disclose to the party compelling the disclosure only that part of the Confidential Information as is required by law to be disclosed.

Sample PRA/Confidentiality Provision

Vendor's Proprietary Information. The Vendor acknowledges Agency is subject to chapter 42.56 RCW, the Public Disclosure Act, and this Contract shall be a public record as defined in RCW 42.56.040 through 42.56.550. Any specific information submitted to Agency and claimed by the Vendor to be confidential or proprietary, must be clearly identified as such by the Vendor. To the extent consistent with chapter 42.56 RCW, Agency shall maintain the confidentiality of all such information marked or identified as confidential or proprietary. If a request is made to view the Vendor's proprietary information and Agency intends to release the information, Agency will notify the Vendor of the request and notify the Vendor of the date that such records will be released to the requester. It will be the responsibility of the Vendor to obtain any necessary court order enjoining that disclosure. If the Vendor fails to obtain the court order enjoining disclosure, Agency will release the requested information.

Statutes may require a specific contract provision or process for confidentiality or propriety information.



A Case Study in Handling Third Party Confidential & Proprietary Information

NWCAA works with many business with confidential & proprietary information eg. four petroleum refineries, numerous agricultural operations

- If the business is submitting more than needed they are asked to remove the confidential information prior to submission.
- When CBI is a part of the required submittal, NWCAA asks for two copies:
 - Copy one is complete
 - Copy two is highlighted (redacted) to show CBI and a separate page defines the CBI.
- When a request is made for records with CBI, NWCAA offers the redacted version to the requester and then contacts the business to confirm the information on the records is still confidential.
 - If the information is deemed no longer confidential by the business, NWCAA releases the full records.
 - If the information is deemed confidential by the business, NWCAA provides 3rd Party Notice giving 10-day notice period allowing the business to seek an injunction and prevent our agency from disclosure. Ultimately, the business is the one to determine what is confidential.

PRA LIABILITY

- **Who is liable under the PRA?**
 - Public agency, or
 - Functional equivalent of public agency.
- **Agency may have to obtain public records from agency contractor in response to public records request.**
 - Educate contractor regarding obligations.
 - Design a process in advance.
 - Plan for the worst and what if's.

DATA - CONFIDENTIAL INFORMATION PROVIDED TO CONTRACTORS

If contractor is given access to data or records that are sensitive, exempted from public disclosure by state or federal laws or if unauthorized access or release requires notice of “data breach,” contract should address contractor’s obligations.

- Clarity of who “owns” the data and return of data to agency.
- Permissible uses of data, restrictions on further dissemination and what contractor staff will have access to data.
- Circumstances triggering agency notification of data breach, timing, investigation, victim notice, responsibility for costs associated with victim notice, corrective action, hiring experts, legal costs, etc.
- Data breach insurance including possibility of agency as an “additionally insured.” (See OCIO)
- Data storage and protection requirements.
- Other provisions required by state or federal laws, or agency policies.
- Be cautious of vague, undefined terms like “industry standards.”
- Data security (physical, personnel, and technological);
- Location of servers (inside US)
- Limits on Vendors use of data
- Data breach responsibilities (response, cost, etc.)
- End of Contract Transition
- Return of data in format that facilitates migration to new solution
- Destruction of data
- Data availability and service level agreements
- Third party access (in addition to Public Records)
- Notice of subpoenas, warrants, or legal orders seeking your data
- Agency’s related needs
- PRA Request Holds
- Discovery and litigation holds (Spoliation)
- Authentication

LOCAL GOVERNMENT PRA CONSULTATION PROGRAM



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Technical Assistance – Training – Risk Mitigation – Best Practices