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. Does the writing contain information relating to the **conduct of government or the performance of any governmental or proprietary function of a state or local agency?**

→ If NO, STOP. Not a public record.

If YES, proceed to Question # 2

2. Is the writing a **certain record** held by a **qualified volunteer**?
(See volunteer exception criteria on reverse.)

→ If YES, STOP. Not a public record.

If NO, proceed to Question # 3

3. Was the writing **prepared, owned, used or retained** by the state or local agency? → **If YES, is a public record.**

If uncertain (about record's preparation, use, ownership or retention), or to determine if the answer is "no," **ask (a), (b) & (c).**
The (a) – (c) analysis may be fact-specific. Additional analysis might be appropriate in a particular situation.

(a) Is the writing located in/on the state or local **AGENCY'S** files, servers, accounts, devices?

- **If YES, is a public record.**
- **If NO, consider other places where records are reasonably likely to be located. Go to (b) & (c).**

(b) Is the writing located in/on **AGENCY EMPLOYEES' OR OFFICIALS' PERSONAL** (non-agency) files, servers, accounts, devices?

- **If NO, consider other reasonable locations. Go to (c).**
- If **YES**, did the employee or official create/store the writing in his/her **public employment or official capacity** (within "scope of employment")? (Was the writing "related to" the employee's/official's public responsibilities?) Ask ALL THREE questions below: (i) – (iii). *(Fact-specific)*
  - (i) Did the job **require** the writing? OR
  - (ii) Did the **employer direct** the writing? OR
  - (iii) Did the writing **further the employer's interests**? *(Must be more than a mere reference, mention or comment about the employee's or official's public duties.)*

  → **If (i), (ii) OR (iii) is YES, is a public record.**

  If ALL are NO, STOP. Not a public record.

(c) Is the writing located in/on **THIRD PARTY'S** files, servers, accounts, devices? *(Third party = non-agency entities performing functions for the agency --- ex.: contractors/consultants)*

- If **YES**, (i) Did the agency **prepare, own**, or **use** the writing? Or (ii) Does only the third party **retain** the writing but the writing involves the contract work &/or has a nexus to agency's decision process? *(Fact-specific – more analysis may be needed)*
- If **YES**, is the third party the "**functional equivalent**" of a public agency/public employee? *(Fact-specific – see "Telford Test")*
- **If NO, STOP. Not a public record.**

If any YES, is a public record.

If NO, STOP. Not a public record.

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Citations & Resources

The flow chart on the reverse is an illustrative guide only. It is designed to assist in using the analytical steps to determine a "public record." Determining the status of a particular record may depend upon a review of more facts or require further legal analysis. For more analysis or research, see the resources listed below. This is not an exhaustive list. An agency should consult with its legal counsel if it needs legal research or legal advice. In addition, changes in statutes, and new court decisions, may affect the analytical steps in this guide. See the circled date below and on the reverse for the last revision to this guide.

Public Records Act (PRA) Definitions - RCW 42.56.010

(3) **"Public record"** includes any **writing** containing **information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency** regardless of physical form or characteristics **...**

> This definition **does not include records that are not otherwise required to be retained* by the agency and are held by volunteers who**:
>
> (a) Do not serve in an administrative capacity;
> (b) Have not been appointed by the agency to an agency board, commission, or internship; and
> (c) Do not have a supervisory role or delegated agency authority.

Volunteer Exception Criteria

(4) **"Writing"** means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

* *Retention laws are at RCW 40.14. See the Secretary of State – State Archives website for agencies' retention schedules.*

Examples of Published PRA Decisions and Other Resources

- **Records On/In Personal Devices/Accounts - Analysis**

Mechling v. City of Monroe, 152 Wn. App. 830, 222 P.3d 808 (2009)
O'Neill v. City of Shoreline, 170 Wn.2d 138, 240 P.3d 1149 (2010)
Forbes v. City of Gold Bar, 171 Wn. App. 857, 288 P.3d 384 (2012)
Nissen v. Pierce County, 183 Wn.2d 863, 357 P.3d 45 (2015)
West v. Vermillion, 196 Wn. App 627, 384 P.3d 634 (2016)
West v. Puyallup, 2 Wn. App. 2d 586, 410 P.3d 1197 (2018)
SEIU Local 925 v. Univ. of Wash., Freedom Foundation, 193 Wn.2d 860, 447 P.3d 534 (2019)

- **Other Decisions Regarding What is a "Public Record," "Use"**

Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1, 138 Wn.2d 950, 983 P.2d 635 (1999)
SEIU Local 925 v. Univ. of Wash., Freedom Foundation, 193 Wn.2d 860, 447 P.3d 534 (2019)
Tiberino v. Spokane County, 103 Wn. App. 680, 13 P.3d 1104 (2000)

- ***See also:*** Attorney General's Office Model Rule Comment at WAC 44-14-03001 ("'Public record' defined.")

- **Records of a Non-Public Agency Entity - "Functional Equivalent" of a Public Agency for PRA Purposes – "Telford Test"**

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

- ***See also*** **Reference to Analogous "Telford Test" Regarding "Functional Equivalent" of Public Employee for PRA Purposes**

Cedar Grove Composting v. City of Marysville, 188 Wn. App. 695, 354 P.3d 249 (2015)

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