

PRACTICE TIPS

For Local Government Success



These practice tips are intended to provide practical information to local government officials and staff about electronic records and requirements under the Public Records Act (PRA) ([chapter 42.56 RCW](#)) and records retention law ([chapter 40.14 RCW](#)). The tips are based on real-world experiences, as played out in our courts and otherwise.*
For more information and resources visit www.mrsc.org/opmapra.

Key Initial Point

In the context of these practice tips, it's important to keep in mind that the vast majority of records – including electronic records – that agencies deal with are public records. That said, it's also important to recognize that: (1) not all records prepared, owned, used, or retained by an agency are public records; and (2) not all public records have retention value.

Key Terms as Used in These Practice Tips

Electronic record: An electronic record (e-record) is a record you can access through an electronic device. E-records include documents, emails, voice messages, texts, tweets, instant messages, photos, and videos.

Electronic device: An electronic device (e-device) is any device you can use to access e-records. E-devices include desktop computers, laptops, smart phones, other cell phones, and tablets.

Remember These General Principles for Electronic Records

1. **Think *before* you "POUR."** Regardless of the e-device you use to create or access an e-record, if that e-record, no matter its form, is prepared, owned, used, or retained by the agency, relates to the conduct of government or the performance of any governmental or proprietary function, it's a public record. Remember, agencies act exclusively through their employees and officials. Thus, the work product you send (and receive) while acting in the scope of your employment – regardless of whether it resides on a personal device or an agency device – is a public record.
2. **Establish agency policies/procedures.** Agencies should adopt effective policies and/or procedures related to e-communications and e-devices, including appropriate use and retention requirements.
3. **Failure to comply can be costly.** Knowledge of, and compliance with, the rules that apply to production and retention of e-records and use of e-devices is essential, because even inadvertent mistakes can result in serious consequences for your agency.

What kind of consequences? If a PRA requester wins in court, an agency will be subject to daily penalties ranging from \$0-\$100 per day (the trial court decides the amount, and can impose penalties per day *and* per page), and the court will award attorney fees and costs to the requester. In the

context of records retention requirements, it's a felony to willfully and unlawfully destroy public records. Also, lack of compliance commonly leads to lost productivity because agency resources are diverted from other tasks to defend the agency's actions, as well as to a loss of public trust in the agency's commitment to open government. See, e.g., [RCW 42.56.550](#) (PRA penalties), [chapter 40.16 RCW](#) (injury to and misappropriation of a public record).

4. **Be aware of metadata.** Metadata is data about data, or hidden information, about e-records that's automatically created by software programs, and which describes the history, tracking, and/or management of an e-record. Metadata is subject to the PRA, but a requester must specifically ask for metadata for an agency to be required to produce it. See, e.g., *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 147-52 (2010).

E-DEVICE Should I Use My Agency E-Device or My Personal E-Device for Agency Business?

It's best to use only agency-issued e-devices to conduct agency business. By doing so, you allow your agency to properly retain its public records and locate those records in response to a PRA request. Also, you eliminate the basis for a search of your personal e-devices in response to a PRA request (see below).

But What If I Happen to Use a Non-Agency E-Device to Conduct Agency Business?

Preferred option: If agency staff and officials will be using e-devices to conduct agency business off-site and/or remotely, we recommend that your agency set-up a remote system that allows agency personnel to securely access the agency's network via non-agency devices.

Alternative option if your agency doesn't have such a remote access system: If you don't have the option of accessing your agency's system remotely as above described, it's critical to ensure that agency and non-agency e-records are easily distinguishable and not mixed together on your non-agency e-device. This can be done, for example, by keeping all of your agency related e-files in a separate folder.

But keep in mind ... If you use a non-agency e-device to conduct agency business, that device could be subject to a search in response to a PRA request.

Don't I Have Privacy Rights Related to My Personal E-Devices?

Yes, but public employees and officials have no constitutional right to privacy in a *public* record. As an alternative to submitting your personal e-device to the agency for a responsive records search, you have the option of conducting your own search of your device. If you do conduct your own search, work with your agency's legal counsel on drafting a detailed affidavit describing the extent of your search and if personal records have been withheld, provide sufficient facts to show these records are not public records and, thus, not responsive.

TEXT MESSAGE Can I Send Agency-Related Text Messages from a Cell Phone or Smartphone?

Yes, remember that work-related texts sent and received by employees and officials when acting within the scope of their employment are a public record, even if located on a personal phone. If you use texting (or instant messaging) to conduct agency business, key considerations for you and your agency relate to who has custody and control of the record, and how to access and retain such records. Commonly, the service provider (e.g., phone company) will retain texts only for a limited time (e.g., 5-10 days).

Recommendation: If texting is used to conduct agency business, consider adopting and enforcing an agency policy that limits texting to those for whom it's truly necessary (e.g., for specified law enforcement and emergency management functions). The policy should address whether work-related texting is allowed from personal phones. If such texting is allowed on personal phones, the agency should have a plan for obtaining those public records. Consider investing in capture tools (i.e., software) to capture all texts on agency devices and retain those that have retention value.

EMAIL

Should I Use My Agency Email Account or My Personal Email Account for Agency Business?

It's best to use only an agency-issued email account for agency business. Just like use of agency e-devices, use of agency email accounts allows your agency to properly retain its emails and locate them in response to a PRA request. This principle applies as well for other e-communications related to agency business (e.g., texts, instant messages, tweets).

But What If I Receive an Email on My Personal Email Account That Relates to Agency Business?

If this occurs, forward that email to your agency email account and advise the sender that you don't use your personal email address to conduct agency business, and to send any future agency-related emails to your agency email address.

But What If My Agency Doesn't Have Agency-Issued Email Accounts?

Urge your agency to establish an email system that allows the agency to assign individual addresses to each official and staff member. If the agency doesn't set up an agency email system, you should create a separate email account that's used solely for agency business (e.g., commissioner-jones@gmail.com, councilmember-robertson@msn.com).

And keep in mind ... If you use a non-agency email address/account, consult with your agency's public records officer and legal counsel to address issues such as determining how those records will be retained in compliance with records retention law, and how the records will be located and made available in response to a PRA request.

VOICE MAIL

Do I Have to Keep Voice Mail Messages?

If a voice mail message relates to agency business and it has retention value, that message needs to be captured electronically and, if that's not possible, the content of the message needs to be saved in some other manner.

Recommendation: The agency should have a voice message system that allows it to capture voice mail messages electronically, such as through an integrated voice mail and email system, so all voice messages are created also as e-files that become part of the email system. If that's not possible, it's recommended that the agency save voice mail messages through some other means.

SOCIAL MEDIA

What Are Some Public Records Considerations Related to Social Media?

Facebook and Twitter, for example, can be effective tools to connect with the public. But, if your agency is going to create social media accounts, public records considerations need to be thought through and addressed. Unless the agency is posting only secondary copies of agency records to, for example, the agency's Facebook page or Twitter feed, it's advisable to presume that all posts, comments, and tweets are public records and to consider how to manage posts and tweets, retain such records, and use software tools to capture those records.

Recommendation: Don't use your personal Facebook page, Twitter feed, or blog for agency business. It's advisable for agencies to have clear and enforceable policies regarding such activities. Also, if you're an incumbent elected official who is a candidate, don't mix your election activities with agency business.