

Clarification Regarding Privilege/Exemption Logs Under Public Records Act
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Our office continues to receive numerous inquiries from our public agency clients regarding their responsibility to complete a privilege/exemption log in response to a request for public records under the Public Records Act (“PRA”), located at RCW 42.56, et. seq. A series of reported and unreported cases from Washington Courts over the last calendar year has underscored the importance of preparing a timely, complete, and accurate privilege/exemption log in response to any and all public records requests wherein records will be withheld due to exemption or privilege.

Prior to January 22, 2009, a public agency desiring to withhold records in response to a public records request due to exemption or privilege was required to provide the requestor with the claimed exemption, and a brief explanation of how the exemption applies to the record or portion withheld. RCW 42.56.210(3). In Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243 (1994) (“Paws II”), the Washington Supreme Court attempted to clarify the statutory requirement, providing as follows:

Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. Moreover, without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiated.

Id. at 270.

However, the Court stopped short of announcing mandatory standards to comply with the statutory requirements. Instead, the Court announced what it considered to be adequate or sufficient criteria in a footnote, providing as follows:

The identifying information need not be elaborate, but should include the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content. Where use of any identifying features whatever would reveal protected content, the agency may designate the records by a numbered sequence.

Id. at 271, FN 2.

As a result of these seemingly permissive (i.e. not mandatory) standards, agencies continued to interpret the requirements as to (i) whether an actual privilege/exemption log (or other “withholding log”) would be used, and (ii) the content of the log or other document used to disclose the exemptions to the requestor. For example, in our experience, agencies often elected to inform the requestor in a cover letter that “five email documents have been exempted for attorney-client privilege under RCW 42.56.070.”

Subsequently, on January 22, 2009, the Washington State Supreme Court decided Rental Housing Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525 (2009), which fundamentally changed the form and content of an acceptable privilege/exemption log. In Rental Housing, the Court clarified that the following information is required to be included in any/all privilege/exemption or other withholding logs: type of document/description of document; date; author/sender; recipient (including cc's) if applicable; statutory exemption and brief explanation for withholding (see note below); number of pages. The Court further confirmed that the “brief explanation” should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as “proprietary” or “privacy” are insufficient. Any log that fails to include any of these minimal details may be deemed insufficient or noncompliant with the PRA, thereby subjecting the agency to mandatory penalties and attorneys’ fees.

The importance of the privilege/exemption log as it relates to filing causes of action has been emphasized in recent cases such as Rental Housing, and Francis v. Dept. of Corrections, No. 63433-0-I (February 1, 2010). These cases confirm that the one year statute of limitations to file a cause of action alleging a violation of the PRA, set forth in RCW 42.56.550(6), does not begin to run until the agency has produced the requisite log. Thus, an agency that fails to produce a timely privilege/exemption log extends the timeframe for which their response to a public records request may be challenged.

A follow-up inquiry that we often receive from agencies is whether the agency may be compensated for the time it takes to complete or create the required privilege/exemption log. In that case, our response is that the agency is not authorized to charge requestors for the costs to complete a privilege/exemption log, regardless of how much time it takes to complete.

Ultimately, our recommendation to agencies is that they always complete a privilege/exemption log no matter how small or large the request and the resulting withheld documents. The agency should not charge the requestor for the cost to complete the log. In addition, the log should be produced at the same time the responsive records are produced. Finally, the agency should keep a complete copy of the records produced, the privilege/exemption log, and the records that have been withheld pursuant to the privilege/exemption log.

A sample log form is attached as follows:

Privilege/Exemption Log
City of _____

Public Records Request of _____, Dated _____, 2010

Document Description	Date	Author	Recipient	Exemption	Pages
Email re: personnel issues	1-21-10	Julie Norton	Brad Snyder	Attorney/Client RCW 5.60.060; RCW 42.56.070	2
Memorandum re: termination	2-2-10	Brad Snyder	Emily Michaels; cc: Julie Norton	Work Product, RCW 42.56.290; RCW 42.56.280 – Prepared at direction of attorneys and in anticipation of litigation	4