



## “Ask the CRM”

January 2010

**Subject: ‘Public Disclosure and Unfunded Mandates’:**

**Based on a The News Tribune article, 5 January 2010, titled “Public Records pest no excuse to limit access”**

On November 7<sup>th</sup>, 2005, I wrote an article for this column titled ;“What are your feelings on the new changes to Chapter 42.17 RCW – Disclosure – Campaign Finances – Lobbying – Records?”, based on a meeting I attended on Open Government sponsored by the Washington State Attorney General’s Office for the purpose of:

- Gathering input on best practices for the public disclosure act model rules, and;
- Educate the public on the new public disclosure act law ... and how it helps government officials more effectively comply with requests in a timely manner.

I spoke at this meeting and mentioned that as a taxpayer I found it extremely upsetting at a time when agencies are working with limited budgets the legislature had written another unfunded mandate effecting local government agencies and the changes to the law that made the Public Records Officer responsible for public records requests.

On completion of their fact finding, the legislature created the Public Records Act under RCW 42.56. Like many states, the cost in Washington charged to the requestor is limited to a reasonable fee to cover the cost of copies and use of agency equipment. The new law allows the agency to collect an installment fee (10% of the expected cost) for the anticipated cost of documents to be copied. There is absolutely no reimbursement for the required time of the staff conducting the search and retrieval of the documents.

I have two problems with the law as it was written:

1. The law was changed to make the Public Records Officer responsible for public disclosure requests. Previously it made the Public Records Officer the coordinator for public records requests. I’m not a lawyer, but in every management book where authority and responsibility is mentioned, you can’t do one without the other. For example, the Attorney General of the State of Washington has designated an individual who is filling an **authorized** position which includes the duties of the Public Records Officer.for the Office of the State Attorney General. My guess is that the incumbent does not work directly under the Attorney General, but under a director. I doubt she has the authority to direct and make changes to insure compliance. So she has responsibility without authority. My guess this is probably true in most if not all agencies, local or state, in any state within the United States. It is in my opinion a bad law and unfair on the person filling the position, as they may be held responsible under law for something they have no control over.

2. The cost of providing public records needs to be addressed to insure that government agencies are not being burdened with costs originating in the state legislature. The State of Washington has a law that precludes unfunded mandates as follows:

“The people of Washington State have established a restriction on the financial burdens placed on local government by state directives. The fundamental purpose of the prohibition on what have been popularly referred to as “unfunded mandates” is expressed in RCW 43.135.010(4): “It is therefore the intent of this chapter to: . . . (c) Assure that the state does not impose responsibility on local governments for new programs or increased levels of service under existing programs unless the costs thereof are paid by the state; . . .” This general intent has been implemented through specific statutory prohibition in RCW 43.135.060(1) which provides:

After July 1, 1995, the legislature shall not impose responsibility for new programs or increased levels of service under existing programs on any political subdivision of the state unless the subdivision is fully reimbursed by specific appropriation by the state for the cost of the new programs or increases in service levels. Reimbursement by the state may be made by: (a) A specific appropriation; or (b) increases in state distributions of revenue to political subdivisions occurring after January 1, 1998”.

Apparently it is another law that no one pays attention to. But as a taxpayer I have serious concerns on the cost and potential abuse of the program to the detriment of the public. I image this cost problem effects every government agency throughout the United States.

In addition, the legislature also created and directed the Attorney General of the State of Washington the Public Records Act Model Rules as reflected in WAC 44-14. The legislature also granted the Attorney General authority to revise the Model Rules.

Having been granted the authority and producing the Model Rules, the Attorney General then proceeded to make the rules non-binding on any agency. While the rules do provide good guidance, it perplexes the writer, why they would leave a loop-hole in the rules. However, if I was a lawyer, which I am not, in litigation with a local government agency, I believe I would use the model rules to point out to a judge that the State of Washington has produced a law, although not binding, that the agency ignored.

My guess is that few local government agencies in any state in the union have a dedicated Public Records Officer on their payroll. If they have a Public Records Officer or Records Manager, it may be part of their duties, but probably originally only supposed to be a small part of their duties that has grown and devoured their time from the job they were hired to do. It should be noted that some local government agencies within the State of Washington have been forced, based on the burden of responding to requests, to add a Public Records Officer just to manage ever-increasing volume of public records requests. I recommended at the meeting that they do a study of the requests by cities within the state to determine the actual cost of the program with complying with requests and the effect on the agencies.

One of the things that I have noted in news articles on the records management listserv is the number of apparent requests and need for litigation to receive information under “public records acts” in the State of Washington and other states. I believe it has shown, as was some of the testimony at the forum, that there is an apparent need to insure that the public agencies are aware of the requirements of the laws. However, in our state, it appears, based on

litigations involving public records requests and newspapers and other news media; there is still a need for training on the model rules at all levels of government to insure compliance. But, and a big but, the new law still doesn't appear to address my concerns as follows:

1. The cost is still on the local agency in violation of RCW 43.135.010(4).
2. The proposed model act is non-binding.
3. If the agency does not comply with a request, the requestor must sue the agency at their expense and hope to get their legal fees paid by the agency.

Fortunately, the City of Lakewood, Washington, with the backing of Association of Washington Cities, is working on legislation that would reduce the financial and staffing burden to the city by restricting excess usage provided in the current law and increase fees to recover some actual costs associated with the public records request.

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*Note: My thanks to editor, Barbara Werelius, Records Manager and Guru at Tacoma Public Utilities, and a member of the Puget Sound Chapter of ARMA for her assistance in the development of this article. Other articles by Mr. Dalton can be reviewed and copied at his BLOG site: [askthecrm.blogspot.com](http://askthecrm.blogspot.com)*