

Office of Research

Guideline 16

Faculty Resource Guide for Washington Public Records Requests

WASHINGTON STATE UNIVERSITY
November 2016

What is this guide, why do I need it, and how do I use it?

Being a state institution, Washington State University's records, including the records of its faculty, are subject to the State of Washington's Public Records Act ([42.56 RCW](#)) and any applicable exemptions.

Sometimes, requests for records are made of WSU or individual faculty members leading to questions of the importance of responding to such requests. This guide:

- (1) Provides information on the Washington Public Records Act;
- (2) Explains what public records are, what types of records may be exempt from disclosure under the Washington Public Records Act, and how WSU faculty should respond to Washington Public Records Act requests for records;
- (3) Suggests how faculty should manage their electronic records in light of the Washington Public Records Act; and
- (4) Is organized as an FAQ page. In addition to the information provided on this page, links to other sources of information and guidance may also be found below.

1. What is a Public Records Request?

A request by anyone to review a public record. According to [BPPM 90.05](#), a public record includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function that is prepared, owned, used, or retained by the University, regardless of physical form or characteristics. Public records are subject to the Washington's Public Records Act, [42.56 RCW](#). Unless an exemption applies, as determined by the WSU Public Records Office personnel, when a request for a copy of records is submitted to a state agency, the

agency is required to make the records available to the requestor within a reasonable timeframe.

2. What should I do if I receive a public records request?

Do not respond to a records request yourself. As requests for public records must be responded to within 5 business days of receipt to establish with the requestor a reasonable time when the record request will be filled. Immediately forward the request to WSU [Public Records Office \(PRO\)](#) or contact them at 509-335-3928. If you have concerns or questions about the request, or if a request is based upon a court order or subpoena, you may also contact the Attorney General's Office at 509-335-2636. Records responsive to the request cannot be destroyed while the request is pending. University personnel are responsible for protecting records from damage and disorganization for the retention periods indicated on approved retention schedules (See [BPPM 90.01](#)). [BPPM Chapter 90](#) can also be referred to for additional information concerning response to records requests.

3. Are records of the faculty considered to be public records?

WSU, as a State of Washington public institution, is subject to the Washington Public Records Act and must disclose records "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" when requests for specific records are submitted to the University, unless an exemption as determined by the WSU Public Records Office personnel or the Washington Attorney General's Office applies that protects the records from disclosure.

The following are types of records that are related to the "conduct of government" and hence "public records." These include: (i) records encompassing a faculty member's research program or independent scholarly activity ([BPPM 45.35](#)); (ii) teaching activities; (iii) communications with third parties not encompassed in the faculty member's research programs or independently scholarly activities; (iv) participation in shared governance; (v) service on University committees; (vi) conduct in the separate capacity as departmental Chair or other University administrator, and other similar activities.

Records of personal communications: Email communications that are **wholly** personal in nature do not relate to the conduct of university business and **may not**, but still could be "public records." Thus, any communications deemed wholly personal in nature may or may not be subject to disclosure. For example, non-University-related communications with a faculty member's healthcare provider, or communications with a sibling who is not a colleague, could be deemed wholly personal and not a "public record," even if stored on a University network or computer. However, please see guidance on recommended practices for use of University networks and computers. Personal use of state computers and emails may result in violation of the state Ethics Act ([RCW 42.52](#)).

4. Are research records of the faculty required to be disclosed in response to a public records request?

The types of records requested must always be individually assessed to determine first whether they are responsive, and second whether there are any exemptions that apply (See 5(A) below for an explanation of who conducts this assessment). If a public record is subject to an exemption, disclosure is not required; however, records with redacted material may still be responsive and must be provided to the PRO. Note: there is no specific higher education research exemption under [RCW 42.56](#). Determination of whether a document will be withheld or redacted is made by the PRO and record holder in consultation with the AG's Office.

A possible exemption that may be applicable to the work of a faculty member's research program or independent scholarly activity can be found under [RCW 42.56.270](#), *Financial, commercial, and proprietary information*:

"Valuable formulae, designs, drawings, computer source code or object code, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss" (This may include pending grant proposals, ongoing research projects, pending intellectual property activities, etc.)

5. How should I respond to notice from the WSU Public Records Office that my records have been requested?

The PRO is responsible for managing and responding to public records requests, so you are required to respond to its request. Please note that some departments may have procedures in place for collecting records (e.g. one person collecting and submitting all responsive records) so you should follow that process if there is one in place.

- A. When the PRO (or your college/department) informs you that your records have been requested, you should carefully review the request to determine if you have the records and to raise any concerns you may have as to the appropriateness of disclosing such records. If you believe the records sought are not "public records," or that you are exempt from disclosure [see Question 4 above], you should immediately notify the PRO. The PRO will consult, as needed, with the Attorney General's Office to assess whether the records are subject to disclosure. It is not your decision to withhold records or information, so you should submit all responsive records; however, it is your prerogative to notify the PRO of concerns so that your viewpoints about applicability and/or redaction are considered in making a response. If a record contains both business and private information or responsive and non-responsive information there is no exemption for the non-responsive or private portion of the record (although there may be other exemptions that apply). **Do not redact any**

information prior to submitting the record(s) to the PRO. The PRO is required to create an index cataloging each redaction and the reason for it.

- B. You should immediately begin searching for the responsive records and keep track of the time expended in order to properly complete a public records request form. Determinations concerning redaction of withholding of records are made on an on-going basis and it is important to provide records in a timely manner. Importantly, the obligation to disclose records rests with the University and all its employees are responsible for providing responsive documents when notified by the PRO. Thus, it is the University administration, through the PRO, after appropriate consultation, that makes the determination of whether and what records must be disclosed. Once that determination is made, you must assist in obtaining the responsive records. The PRO may send courtesy notices to any third parties named in the records.
- C. Notify the PRO whether you have the requested disclosable records.
- D. Forward copies of the requested records to the PRO with the completed response form including the amount of time it took to collect the records. By request to the PRO, a secure server link can be emailed to you with instructions for uploading the records, other options include sending to wsu.pubrecords@wsu.edu as email attachments (not recommended for a large number of records), via intercampus mail to campus zip 1045, or hand delivered to the PRO. If there are an extraordinarily large number of records, arrangements can be made to submit them in installments. Please consult with the PRO if this is necessary.
- E. You are not required to, and should not create records that do not otherwise exist in hardcopy, electronic or some other form. Note: WSU Public Records Office or Assistant Attorney General's Office may be required to compile data or to construct a computer report to extract data that is only maintained electronically, such as in a database. Should that be required in order to produce the requested information, you should notify the PRO of this requirement and the estimated time and effort that you expect would be involved in extracting this type of record.
- F. Public records stored on private devices (tablets, phones, home computer) must be provided if responsive.

6. What happens if there is a dispute with the requestor as to whether the records are subject to disclosure?

The University administration, after consulting with the Attorney General's Office, determines whether a record must be produced in response to a public records

request. If the requestor disagrees with that determination, the requestor may seek a supplemental response, or file a court action seeking to compel the University to produce the requested records.

7. What happens if the requestor files a lawsuit to compel production of the records?

In any court action to compel compliance with the State of Washington's Public Records Act, the University, not the faculty member, is the party to the lawsuit. WSU would be responsible for litigation defense costs and any penalties that may be imposed. **Penalties for not complying with the PRA can range from \$1-\$100 per page, per day. Additionally, in any such lawsuit, if the requestor is deemed to be the prevailing party, the University may be required to pay for the reasonable attorney's fees incurred by the requester. There may be personal liability for state employees who intentionally withhold or destroy records.**

8. How should I manage my electronic communications in light of the potential obligation to disclose public records in the future?

Although electronic resources may be used for minimal personal use, it is best not to include any personal communications on a University email account or to store personal records on a University system. Use a personal email account for personal matters on a non-university machine. If you use a personal email account or computer for University-related activities, the records are still considered to be "public records" and are subject to disclosure. As a reminder, public records stored on private devices must be provided if responsive.

When communicating by electronic communications consider the following:

A. Limit addressees

- To: Only those who need to take action or are leading the effort
- Cc: Only people who need to be informed
- Remember: If people are included on the email address list, their records may be subject to Washington Public Records Act requests
- Caution: "Reply All" – Don't use this without first deciding all recipients need the response (even duplicative records are responsive and have to be collected).

B. Use a descriptive subject line

- If the email dialogue changes into another subject matter, start a new email with a new subject line
- If the email string is relevant to the new subject, modify the subject line to reflect the new subject
- If the email is attorney-client privileged, consider including that in the subject line — Merely copying a University attorney is not sufficient to make a

communication attorney- client privileged; to be privileged, the communication must seek or provide legal advice

- C. Limit the scope of the content
 - Keep all messages short and on point
 - Only include relevant portions of prior emails in new emails to prevent lengthy email strings. This has the following effects:
 - Easier for recipients to read
 - Aids review and redaction
- D. Limit personal and sensitive information
 - Don't include names, addresses, phone numbers, email addresses or other identifying information in the body of the email
- E. Remember that other electronic devices are subject to the same obligations
 - Voice messages
 - Calendar entries
 - Emails copied to calendars
 - Department websites
 - Text messages
 - Social networking sites and YouTube
- F. Have a retention and disposal practice that is reasonable for good business, educational, or research practices
 - If you need to keep a communication for legitimate reasons, keep it (preferably in a file regarding that subject)
 - If you do not need to keep communications, routinely dispose of those records
 - If you have drafts that are intended to be replaced by a final report, routinely dispose of any unneeded drafts (including emails where the draft may have been circulated)
 - Remember that special rules for preservation of records apply when a *notice to preserve evidence* has been received — The duty to preserve evidence arises when there is pending litigation or such litigation is reasonably anticipated; any routine disposal practice must be halted when evidence preservation is required
 - Remember that special rules for preservation of records apply when a *notice to preserve evidence* has been received — The duty to preserve evidence arises when there is pending litigation or such litigation is reasonably anticipated; any routine disposal practice must be halted when evidence preservation is required
 - The Washington State University Records Retention Schedule can be found here: [https://www.sos.wa.gov/assets/archives/RecordsManagement/Washington-State-University-Records-Retention-Schedule-v.1.0-\(June-2016\).pdf](https://www.sos.wa.gov/assets/archives/RecordsManagement/Washington-State-University-Records-Retention-Schedule-v.1.0-(June-2016).pdf)

9. How are the Federal Freedom of Information Act procedures different?

The Freedom of Information Act ("FOIA"), 5 U.S.C. §552, et seq., is a Federal law that applies to Federal – not state – agencies. It requires federal agencies to make documents available to the public, including documents that federal agencies may have obtained from WSU. The law provides certain exemptions set forth in 5 U.S.C. § 552 (b), <https://transition.fcc.gov/foia/5USC552b.pdf>.

Because WSU is not a federal agency, it is not subject to FOIA requests, but WSU's records may be disclosed by a federal agency that holds such records.

Some of the exemptions that may apply to faculty records held by a federal agency include records that are specifically exempted by statute, trade secrets and proprietary information, personnel, medical and other records the disclosure of which would be an invasion of personal privacy, and information compiled for law enforcement where release could affect health and safety.

Unlike the Washington Public Records Act, however, there is no exemption to disclosure obligations if the public interest served by not disclosing the records clearly outweighs the public interest served by disclosure. If a federal agency receives a FOIA request that includes records that WSU's faculty might deem proprietary, the agency will typically notify the affected faculty member of the request so that the faculty member can provide input. The decision as to disclosure, however, remains with the federal agency. If a faculty member receives such notice from a federal agency, he or she may seek assistance from the Office of Research Support and Operations at 335-9661 or the AG's Office at 335-2636.