

## PROCEDURAL RULES UNDER WASHINGTON'S PUBLIC RECORDS ACT: THE CASE FOR AGENCY DISCRETION

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*Abstract:* Voters adopted Washington's Public Records Act (PRA) in 1972 as part of a broader ballot measure to enhance openness in state government. The PRA requires state government agencies, including statewide agencies and municipalities, to establish procedures so that the public can request copies of records agencies generate. The PRA exempts certain records from disclosure, and other statutes and case law supply additional exemptions. When an agency refuses to disclose records, the requester may ask a court to determine whether an exemption applies. If no exemption applies, the court may compel disclosure of the records and impose monetary penalties against the non-compliant agency, including attorney fees. Under the PRA, courts review denials de novo and in light of legislative intent, erring on the side of broad public access. In addition to reviewing denials, courts have recently been asked to consider whether an agency's procedural rules under the PRA are reasonable. In analyzing procedural rules, some courts have applied the same broad interpretation used for substantive PRA questions, refusing to presume that an agency's procedural regulations are valid despite administrative law and municipal law doctrines requiring such a presumption. As a result, courts have imposed heavy penalties on public agencies at great taxpayer expense. This Comment argues that courts should presume an agency's procedural rules adopted for purposes of the PRA are valid as long as they are consistent with the statute's mandate.

### INTRODUCTION

Washington's Public Records Act (PRA)<sup>1</sup> is a "strongly worded mandate for broad disclosure of public records."<sup>2</sup> Adopted in 1972,<sup>3</sup> the PRA gives interested members of the public the opportunity to access documents reflecting the inner workings of state and municipal agencies.

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1. In this Comment, "Public Records Act" and "PRA" refer to the legislation currently found at title 42, chapter 56 of the Revised Code of Washington. As discussed *infra*, what is now the PRA was adopted as part of a broader public-disclosure statute. See Initiative Measure No. 276, ch. 1, §§ 25–34, 1973 Wash. Sess. Laws 1, 21–25 (1972). The PRA, along with the rest of this larger statute, was initially codified at title 42, chapter 17 of the Revised Code of Washington. In 2005, the Legislature transferred the public-records legislation to a new chapter, renumbered the sections, and restyled them as the Public Records Act. See Act of May 4, 2005, ch. 274, 2005 Wash. Sess. Laws 893. Opinions and other court documents predating the re-codification on July 1, 2006, *id.* § 502, 1992 Wash. Sess. Laws at 1031, frequently refer to the old numbering scheme. Throughout this Comment, where a source referred to the old numbering scheme, the reference has been altered to reflect the new numbering scheme.

2. *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 127, 580 P.2d 246, 249 (1978).

3. Initiative Measure No. 276, ch. 1, 1973 Wash. Sess. Laws 1, 31 (1972).

The PRA requires agencies to make certain records available for inspection and copying, subject to limitations in the PRA itself and rules adopted by the agencies themselves.<sup>4</sup> When an agency denies access to a record based on one of the PRA's disclosure exemptions, the requester may seek judicial review of that decision.<sup>5</sup> In reviewing agency denials, courts have generally been mindful of the Washington Legislature's declared intent to ensure broad access to public records.<sup>6</sup> As a result, courts construe the PRA's disclosure provisions broadly and its exemptions narrowly.

Historically, courts focused primarily on interpreting the PRA's disclosure and exemption provisions.<sup>7</sup> Only recently have litigants asked courts to consider the reasonableness of agency procedural rules and policies adopted to protect agency functions.<sup>8</sup> Faced with difficult facts and lacking clear guidance, state courts have taken different approaches to interpreting agency rules. As a result, some courts have imposed large awards against agencies, including attorney fees and daily statutory penalties. Taxpayers, in turn, ultimately pay these penalties through increased burdens on agency budgets.<sup>9</sup>

This Comment argues that, unlike the courts' approach to interpreting the substantive disclosure and exemption provisions of the PRA, courts should defer to an agency's own determination that its PRA procedures are reasonable. Part I discusses the PRA's history and relevant operative provisions. Part II examines the statutory mandate the PRA imposes on agencies, including a duty to adopt procedural rules as well as the duty to disclose records. Part III looks at agency procedural rules under the PRA in the broader context of administrative and municipal law. Part IV examines Washington courts' contradictory approaches to interpreting agencies' procedural rules under state administrative procedure law. Part V argues that, although the voters and the Legislature created a broad mandate for disclosure of public records, the breadth of that mandate should not overcome the rule of judicial deference to an agency's

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4. WASH. REV. CODE § 42.56.070(1) (2008) (establishing duty to make records available); *id.* § 42.56.100 (requiring agencies to adopt procedures for providing public access to public records).

5. *Id.* § 42.56.550.

6. *See* *Livingston v. Cedeno*, 164 Wash. 2d 46, 50, 186 P.3d 1055, 1057 (2008) (citing *Hangartner v. City of Seattle*, 151 Wash. 2d 439, 450, 90 P.3d 26, 31 (2004)); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wash. 2d 243, 251, 884 P.2d 592, 597 (1994). *See generally* WASH. REV. CODE § 42.56.030 (2008) (requiring disclosure provisions to be construed broadly and exemptions to be construed narrowly).

7. *See* discussion *infra* Part IV.A.

8. *See* discussion *infra* Part IV.C.

9. *See* examples *infra* Part IV.C.

interpretation of its own procedural rules. Courts should presume that such rules are valid for purposes of the PRA because doing so avoids serious pragmatic problems without violating legislative intent.

## I. THE PUBLIC RECORDS ACT IS A STRONGLY WORDED MANDATE FOR BROAD DISCLOSURE OF PUBLIC RECORDS

In 1972, Washington voters approved what is now the Public Records Act<sup>10</sup> as part of a sweeping measure designed to minimize secrecy and expose corruption in state government.<sup>11</sup> The PRA created a procedural and substantive regime under which, with a few limited exemptions, government documents are subject to disclosure upon request.<sup>12</sup> The PRA allows both state and local agencies to establish procedures for members of the public to obtain government records.<sup>13</sup>

### A. *Voters Adopted the Public Records Act as Part of an Open Government Measure*

Initiative 276 (I-276) was put to Washington voters on the November 1972 general election ballot.<sup>14</sup> The bulk of I-276 dealt with campaign finance disclosures.<sup>15</sup> It established a public disclosure commission,<sup>16</sup> required political candidates to disclose the source and amounts of all campaign contributions,<sup>17</sup> compelled lobbyists to register with the state government,<sup>18</sup> and obligated government officials to disclose certain financial interests.<sup>19</sup>

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10. *See supra* note 1.

11. *See* Initiative Measure No. 276, ch. 1, § 1, 1973 Wash. Sess. Laws 1, 1–2 (1972).

12. *See* WASH. REV. CODE § 42.56.070 (2008) (establishing duty to make records available); *id.* § 42.56.100 (requiring agencies to establish procedures).

13. *See id.* § 42.56.070 (establishing duty to make records available); *id.* § 42.56.100 (requiring agencies to establish procedures).

14. Initiative Measure No. 276, ch. 1, 1973 Wash. Sess. Laws 1, 31 (1972).

15. *Id.* §§ 3–14, 1973 Wash. Sess. Laws at 5–12 (requiring disclosure of campaign contributions); §§ 15–23, 1973 Wash. Sess. Laws at 12–18 (requiring registration of lobbyists and barring lobbyists from certain activities); § 24, 1973 Wash. Sess. Laws at 18–20 (requiring elected officials and family members to disclose financial transactions).

16. *Id.* §§ 35–37, 1973 Wash. Sess. Laws at 25–27.

17. *Id.* § 8, 1973 Wash. Sess. Laws at 7–9.

18. *Id.* § 15, 1973 Wash. Sess. Laws at 12–13.

19. *Id.* § 24, 1973 Wash. Sess. Laws at 18–20.

The initiative also required the state to provide public access to government records.<sup>20</sup> In the state's official 1972 voters' pamphlet, the initiative's proponents stated that the public records provisions would make "all public records and documents in state and local agencies available for public inspection and copying," with exceptions "to protect individual privacy and safeguard essential governmental functions."<sup>21</sup> The initiative's opponents, however, went into more detail:

[Initiative] 276 doesn't tell the taxpayer about added cost of government. Virtually every office of State and Local Government will incur added expenses—staff, office space, files, supplies and computer time—at a conservatively estimated cost of more than \$2 million dollars [sic] annually. . . . It is impossible to estimate the potential cost to State, County and City Government of making all public records available for inspection and copying.<sup>22</sup>

In addition to I-276, the Legislature placed two competing public disclosure measures on the same ballot;<sup>23</sup> however, I-276 superseded both of them<sup>24</sup> and passed with seventy-two percent of the vote,<sup>25</sup> taking effect on January 1, 1973.<sup>26</sup>

*B. The Public Records Act Prescribes Both Substantive and Procedural Rules for Access to Government Records*

The PRA applies to most government agencies at the state, regional, county, and city levels.<sup>27</sup> Several of its provisions also apply to clerks of the legislative houses.<sup>28</sup> The clerks maintain "public records" subject to

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20. *Id.* §§ 25–32, 1973 Wash. Sess. Laws at 21–25 (requiring agencies to make public records available for inspection and copying).

21. WASH. SEC'Y OF STATE, OFFICIAL VOTERS PAMPHLET (GENERAL ELECTION TUESDAY, NOVEMBER 7, 1972) 10 (1972) [hereinafter VOTERS PAMPHLET].

22. *Id.* at 11.

23. *Id.* at 66–69 (Referendum Bill 24, regulating lobbying activities); *id.* at 69–74 (Referendum Bill 25, regulating campaign-finance activities and requiring candidates for office and groups supporting and opposing ballot measures to disclose financial information).

24. Initiative Measure No. 276 § 50, 1973 Wash. Sess. Laws at 30–31 (repealing both Referendum Bill 24 and Referendum Bill 25).

25. See Wash. Sec'y of State, Initiatives to the People – 1914 through 2009, [http://www.sos.wa.gov/elections/initiatives/statistics\\_initiatives.aspx](http://www.sos.wa.gov/elections/initiatives/statistics_initiatives.aspx) (last visited May 31, 2010). The November 1972 general-election ballot had the most measures of any statewide ballot up to that time. See VOTERS PAMPHLET, *supra* note 21, at 3 ("an all time record").

26. Initiative Measure No. 276 § 49, 1973 Wash. Sess. Laws at 30.

27. WASH. REV. CODE § 42.56.010(1) (2008).

28. *E.g., id.* § 42.56.010(2) (incorporating certain legislative records and administrative records

the PRA,<sup>29</sup> but the Legislature has authority to regulate access to records to prevent interference with legislative business.<sup>30</sup> Certain non-governmental entities are subject to the PRA if they are “functional equivalents” of government agencies, as often occurs in the case of outsourcing.<sup>31</sup> The PRA does not apply to courts.<sup>32</sup>

The PRA requires agencies to disclose any “writing” relating to the conduct of government or the performance of any government function, whether proprietary or explicitly governmental.<sup>33</sup> The PRA also applies to certain legislative records.<sup>34</sup> The term “writing” encompasses every method of recording communications or representations.<sup>35</sup> If the disclosure of a record would violate a person’s right to privacy, that record is exempt from disclosure.<sup>36</sup>

Agencies must follow certain procedures set by the PRA regarding public-disclosure requests. Agencies are required, for example, to make their public records available during customary office hours.<sup>37</sup> Each agency must also designate a public records officer to serve as a point of contact<sup>38</sup> and publish indexes for certain documents, such as adjudicative opinions and correspondence relating to policy matters.<sup>39</sup> Agencies are

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generated by the Legislature within the definition of “public records”); *id.* § 42.56.070(9) (limiting the powers of the Secretary and the Chief Clerk to sell records for commercial purposes); *id.* § 42.56.090 (requiring the Secretary and the Chief Clerk, along with state and local agencies, to post hours for access to records on their web sites); *id.* § 42.56.100 (requiring the Secretary and the Chief Clerk to adopt access procedures consistent with the resource limitations associated with legislative sessions).

29. *See id.* § 42.56.010(2); *id.* § 40.14.100 (defining “legislative records” as “public records” subject to the PRA).

30. *Id.* § 42.56.100 (permitting Secretary and Chief Clerk to adopt rules and regulations governing access to records, allowing for time, resource, and personnel constraints associated with legislative sessions).

31. *See Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wash. App. 185, 191–92, 181 P.3d 881, 884–85 (2008) (citing *Telford v. Thurston County Bd. of Comm’rs*, 95 Wash. App. 149, 162, 974 P.2d 886, 893–94 (1999)).

32. *City of Federal Way v. Koenig*, 167 Wash. 2d 341, 345–46, 217 P.3d 1172, 1173–74 (2009) (holding that courts are not included in the PRA’s definition of “agency”).

33. WASH. REV. CODE § 42.56.070(1) (2008) (establishing duty to make public records available for inspection and copying); *id.* § 42.56.010(2) (defining “public record”).

34. *Id.* § 42.56.010(2) (defining “public record” as including certain records maintained by the Legislature).

35. *Id.* § 42.56.010(3) (defining “writing,” which includes “pictures and sounds, and the means by which they may be recorded, such as audio or video recording and magnetic or optical media”).

36. *See id.* §§ 42.56.210–480 (listing statutory exemptions).

37. *Id.* § 42.56.090. Regardless of the agency’s customary hours, however, records must be available for inspection at least thirty hours per week. *Id.*

38. *Id.* § 42.56.580(1).

39. *Id.* § 42.56.070(3). *But see id.* § 42.56.070(4) (excusing agencies from this requirement where

also required to make their copying facilities available to members of the public for copying records.<sup>40</sup>

## II. THE PRA REQUIRES AGENCIES TO DISCLOSE RECORDS PROMPTLY UNDER PROCEDURAL RULES PROMULGATED BY THE AGENCY

In addition to the procedural rules defined in the PRA itself, agencies also adopt their own PRA procedural rules and regulations to ensure prompt compliance with the disclosure requirements while protecting records and limiting interference with other agency functions.<sup>41</sup> Once an agency receives a public-disclosure request, it has a duty to respond promptly, either by providing the record, denying access to it, or providing a reasonable estimate of the time required to fill the request.<sup>42</sup> If the agency denies access to the records, the requester may seek de novo review in superior court.<sup>43</sup> If the requester prevails in court, he or she is entitled to recover attorney fees, court costs, and per diem statutory penalties assessed against the agency.<sup>44</sup>

### A. *Agencies Adopt Procedural PRA Rules Consistent with the PRA's Mandate*

In addition to the procedural limits spelled out in the PRA, agencies may adopt procedural rules to prevent records requests from interfering excessively with other essential agency functions.<sup>45</sup> Additionally, agencies must establish rules and regulations to protect public records from damage or disorganization.<sup>46</sup> Agency rules must be “consonant with the intent of [the PRA] to provide full public access to public records,” and must “provide for the fullest assistance to inquirers and the most timely possible action on requests for information.”<sup>47</sup> All procedural rules established under the PRA must be reasonable.<sup>48</sup>

In 2005, the Legislature directed the Attorney General of Washington

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it is unduly burdensome).

40. *Id.* § 42.56.080.

41. *Id.* § 42.56.100.

42. *Id.* § 42.56.520.

43. *Id.* § 42.56.550.

44. *Id.*

45. *Id.* § 42.56.100.

46. *Id.*

47. *Id.*

48. *Id.*

to produce a model code for state and local agencies and to adopt a set of “best practices” for agency compliance with the PRA.<sup>49</sup> The model rules offer some guidance for agencies in structuring their internal organization, public records storage, and disclosure systems.<sup>50</sup> Portions of the model rules have fill-in-the-blank provisions that agencies can adopt as their own.<sup>51</sup> No court has yet considered whether these model rules meet the PRA’s reasonableness requirement.

State agencies are required to publish their procedural rules in the Washington Administrative Code.<sup>52</sup> Local agencies must prominently display their procedural rules and make them available for inspection and copying.<sup>53</sup> Where the PRA requires regulations or requirements to be published or displayed and the agency fails to do so, requesters cannot be required to follow any such procedural rule.<sup>54</sup> Where the PRA and another statute conflict, the PRA prevails.<sup>55</sup>

### *B. Agencies Must Answer Disclosure Requests Promptly*

Agencies must respond to public-disclosure requests “promptly.”<sup>56</sup> Within five business days, the agency must provide the requested records, deny the request, or provide a “reasonable” estimate of the time needed to fill the request.<sup>57</sup> The agency may announce that it needs more time if it needs to clarify which records were requested, locate and assemble the requested records, notify third persons whose interests may be affected,<sup>58</sup> or determine whether a disclosure exemption applies.<sup>59</sup>

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49. Act of May 16, 2005, ch. 483, § 4, 2005 Wash. Sess. Laws 2043, 2045 (codified at WASH. REV. CODE § 42.56.570 (2008)) (relating to public disclosure).

50. WASH. ADMIN. CODE §§ 44-14-00001 to -04004 (2009).

51. *E.g.*, *id.* § 44-14-020 (providing space for agency description, contact information, and designation of public-records officer).

52. WASH. REV. CODE § 42.56.040(1) (2008).

53. *Id.* No cases have interpreted the “prominent display” language of the PRA; it is unclear whether this would include publication in a municipal code, posting on a website, or something else altogether. Because the parallel provision for state agencies allows for publication in the Washington Administrative Code, which necessarily invokes the rule-making provisions of the Administrative Procedure Act, publication in a similar code volume by a local agency may be a sufficiently prominent display. *See id.* §§ 34.05.310–.395.

54. *Id.* § 42.56.040(2).

55. *Id.* § 42.56.030 (“In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.”).

56. *Id.* § 42.56.520.

57. *Id.*

58. *Id.* Such third persons may then seek an injunction against disclosure. *Id.* § 42.56.540.

59. *Id.* § 42.56.520.

If an agency denies access to records, a written explanation must accompany the denial.<sup>60</sup> The denial statement must be “specific.”<sup>61</sup> Generally, it must cite the specific provisions of law that make the document exempt.<sup>62</sup> Once the agency denies the request, it must provide for a prompt review of the denial.<sup>63</sup> Even if the agency does not provide review, a denial is considered final after two business days.<sup>64</sup>

*C. Requesters Whose Public-Records Requests Are Denied May Seek Judicial Review*

If an agency denies a public-records request, the requester may take further steps that depend upon whether the agency is a state or a local entity. Requesters of both state and local agency records may seek judicial review in superior court within one year of the denial.<sup>65</sup> People seeking records from state agencies may also ask the Attorney General for an opinion as to whether the requested record is exempt.<sup>66</sup>

The PRA allows judicial review in either of two situations: where an agency has denied a request for records,<sup>67</sup> or where a requester believes that an agency’s estimate of the time required to fill a records request is unreasonably long.<sup>68</sup> Courts review agency actions de novo,<sup>69</sup> and requesters may seek relief in the county in which the agency maintains the record or, where the agency is a county, in certain neighboring counties.<sup>70</sup> In a judicial-review proceeding, the agency has the burden of proving that an exemption applies or that the agency cannot disclose the record by law.<sup>71</sup>

The judicial-review provision applies to any situation in which an agency has “denied [a requester] an opportunity to inspect or copy a

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60. *Id.*

61. *Id.*

62. *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash. 2d 243, 270, 884 P.2d 592, 607 (1994).

63. WASH. REV. CODE § 42.56.520 (2008).

64. *Id.*

65. *Id.* § 42.56.550.

66. *Id.* § 42.56.530.

67. *Id.* § 42.56.550(1).

68. *Id.* § 42.56.550(2).

69. *Id.* § 42.56.550(3).

70. *Id.* § 42.56.550(1)–(2); *id.* § 42.56.550(5) (citing *id.* § 36.01.050 (allowing suits against counties to be commenced either in the superior court of the county or in the superior courts of the two nearest judicial districts)).

71. *Id.* § 42.56.550(1)–(2).

public record.”<sup>72</sup> Thus, it applies even where an agency has not explicitly denied a request; failing to provide a record within the statutory period is considered a de facto denial.<sup>73</sup> The judicial-review provision does not specifically address the situation where a requester has been “denied an opportunity to inspect or copy a public record” as a result of the requester’s failure to comply with a duly posted agency rule.<sup>74</sup>

When a requester prevails on judicial review, that person is entitled to a monetary award.<sup>75</sup> The award must include all costs incurred in connection with bringing the action, including reasonable attorney fees.<sup>76</sup> The court is also required to award to a prevailing requester a penalty of between \$5 and \$100 for each day that records were withheld.<sup>77</sup> The penalty award is mandatory, even without evidence of bad faith or unreasonable conduct,<sup>78</sup> but the per diem amount of the award falls within the superior court’s discretion.<sup>79</sup>

### III. EXISTING ADMINISTRATIVE AND MUNICIPAL LAW REQUIRES COURTS TO DEFER TO AGENCY RULES AND MUNICIPAL ORDINANCES

State agencies adopt PRA procedures under Washington’s Administrative Procedure Act (APA),<sup>80</sup> while local agencies adopt them

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72. *Id.* § 42.56.550(1).

73. *Id.* § 42.56.520; *Doe I v. Wash. State Patrol*, 80 Wash. App. 296, 303, 908 P.2d 914, 918 (1996) (holding that the state patrol’s failure to reply to request within the statutory period was a denial of the request de facto).

74. *See* WASH. REV. CODE § 42.56.550 (2008).

75. *Id.* § 42.56.550(4).

76. *Id.* Attorney fees are calculated on a lodestar basis. *West v. Port of Olympia*, 146 Wash. App. 108, 122, 192 P.3d 926, 933 (2008) (citing *Mahler v. Szucs*, 135 Wash. 2d 398, 433, 957 P.2d 632, 651 (1998) (providing that computation of attorney fees is by “lodestar method” of multiplying the reasonable number of hours expended by a reasonable hourly rate)).

77. WASH. REV. CODE § 42.56.550(4) (2008). Before 1992, the amount was between zero and \$25 per day, and the decision of whether or not to assess a penalty was within the sound discretion of the superior court. *See Yacobellis v. City of Bellingham*, 64 Wash. App. 295, 299, 825 P.2d 324, 327 (1992).

78. *Amren v. City of Kalama*, 131 Wash. 2d 25, 36, 929 P.2d 389, 395 (1997) (stating that requester need not show bad faith in order to recover statutory penalty).

79. WASH. REV. CODE § 42.56.550(4) (2008); *see Citizens for Fair Share v. State Dep’t of Corr.*, 117 Wash. App. 411, 437, 72 P.3d 206, 220 (2003) (quoting *Yousoufian v. Office of Sims*, 114 Wash. App. 836, 847, 60 P.3d 667, 672 (2003), *rev’d in part on other grounds*, 152 Wash. 2d 421, 98 P.3d 463 (2004)) (stating that appellate review of amount of costs and statutory penalties is for abuse of discretion).

80. WASH. REV. CODE §§ 34.05.001–903 (2008).

under their charters and state law.<sup>81</sup> Outside the PRA context, duly-adopted agency rules and ordinances are presumed valid by courts. This presumption is based upon both statutory authority and a well-developed body of case law relating to administrative agencies and municipalities.

A. *State Agencies Enact PRA Regulations Under the Administrative Procedure Act*

The APA prescribes the method by which state agencies adopt regulations and adjudicate disputes within their respective mandates. Its procedures apply equally to regulations implementing the PRA as they do to the other regulations an agency adopts.<sup>82</sup>

Under the APA, state agencies adopt regulations through a notice-and-comment process.<sup>83</sup> In the typical case, agencies publish proposed rules in the Washington State Register.<sup>84</sup> A proposed rule must include the statutory authority for the rule; a short explanation of the rule; and agency comments or recommendations regarding statutory provisions, implementation, enforcement, and fiscal matters.<sup>85</sup> The agency must then give interested members of the public an opportunity to make comments on the proposed regulation, including oral comments made during a public hearing.<sup>86</sup> The agency may adopt the rule only after considering the public's submitted comments.<sup>87</sup> If the final rule varies substantially from the proposed rule, the agency must either supplement its public notice-and-comment process or start the rulemaking process anew.<sup>88</sup> Much of the information the agency produces relating to the rulemaking

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81. *See id.* § 34.05.220 (permitting state agencies to adopt procedural rules under the state's Administrative Procedure Act); WASH. CONST. art. XI, § 11 (permitting municipalities to adopt regulations not in conflict with general laws); *see also* Branson v. Port of Seattle, 152 Wash. 2d 862, 870, 101 P.3d 67, 71 (2004) (citing 2A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10:5 (Thomson West, 3d ed., rev. vol. 2006)).

82. *See* WASH. REV. CODE § 34.05.010(16) (defining "rule" as "any agency order, directive, or regulation of general applicability . . . (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law"); *see also id.* § 42.56.040 (requiring state agencies to publish their rules of procedure in the Washington Administrative Code); *id.* § 34.05.210 (requiring the Code Reviser to publish the Washington Administrative Code, which must contain "[a]ll current, permanently effective rules of each agency").

83. *See id.* §§ 34.05.310–395.

84. *Id.* § 34.05.320.

85. *Id.*

86. *Id.* § 34.05.325.

87. *Id.* § 34.05.335(2).

88. *Id.* § 34.05.340.

process, including all public submissions, is included in a rulemaking file that becomes part of the record upon which judicial review is based.<sup>89</sup>

State agencies must promulgate their PRA procedural regulations in accordance with the methods outlined in the APA.<sup>90</sup> For example, Western Washington University recently deleted its old PRA procedural rules and adopted new ones conforming with the Attorney General's model rules.<sup>91</sup> The University proposed the rule in the Washington Register,<sup>92</sup> ordered it adopted in a board-of-trustees meeting,<sup>93</sup> and published the final rule in the Washington Register.<sup>94</sup> This was all done in accordance with the trustees' statutory authority,<sup>95</sup> the PRA's mandate, and the APA's procedural rules.<sup>96</sup> The new PRA regulation describes the University's internal structure and designates a public-records officer,<sup>97</sup> creates a procedure for inspecting and requesting public records,<sup>98</sup> and lists some statutory exemptions to disclosure specified outside the PRA.<sup>99</sup>

#### *B. Municipal Entities Adopt PRA Ordinances in Accordance with Their Charters or State Law*

Like state agencies, local agencies adopt PRA procedural rules using formal procedures. Municipalities—including counties, cities, and towns—enact ordinances in connection with their charters or general provisions in the Revised Code of Washington.<sup>100</sup> PRA procedural rules

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89. *Id.* § 34.05.370.

90. *See supra* note 82 and accompanying text.

91. WASH. ADMIN. CODE §§ 516-09-010 to -080 (2009) (establishing university procedural rules); *id.* §§ 44-14-00001 to -08004 (establishing Attorney General's model rules).

92. 07-19 Wash. Reg. 115 (proposed Sept. 18, 2007).

93. Minutes of the Bd. of Trs. of W. Wash. Univ. at 4588-89 (Dec. 14, 2007), *available at* <http://content.wvu.edu/u/?BOTmin,4099>; 08-01 Wash. Reg. 164, 164 (Dec. 18, 2007) (citing order of adoption).

94. 08-01 Wash. Reg. 164 (Dec. 18, 2007) (codified at WASH. ADMIN. CODE ch. 516-09) (final rule).

95. WASH. REV. CODE § 28B.35.120(12) (2008) (granting university trustees authority to promulgate rules and regulations deemed necessary).

96. *Id.* § 42.56.100 (requiring agencies to adopt public-records rules and regulations).

97. WASH. ADMIN. CODE § 516-09-020 (2009).

98. *Id.* § 516-09-030.

99. *Id.* § 516-09-060.

100. *See* WASH. REV. CODE § 36.32.120(7) (2008) (granting county legislative authorities the power to "make and enforce . . . all such police and sanitary regulations as are not in conflict with state law"); *id.* § 36.01.010 (listing county corporate powers); *id.* § 36.32.005 (stating that county

are adopted in the form of ordinances and resolutions and, therefore, have the force of law.<sup>101</sup>

The Washington State Constitution grants municipalities the power to adopt “police, sanitary and other regulations as are not in conflict with general laws.”<sup>102</sup> Commentators have noted, and case law has illustrated, that municipalities exercise their powers in two distinct modes: governmental and proprietary.<sup>103</sup> Courts generally interpret proprietary powers more liberally than governmental powers.<sup>104</sup> Governmental functions are “those conferred on a municipal corporation . . . to be employed in administering the affairs of the state and promoting the public welfare generally.”<sup>105</sup> Proprietary powers, on the other hand, are “those relating to the accomplishment of private corporate purposes in which the public is only indirectly concerned.”<sup>106</sup> PRA regulations might fall into the latter category because they define how the municipality will protect its records and prevent interference with its operations.<sup>107</sup> On the other hand, local agencies generate records as part of their governmental functions to promote public welfare and administer the affairs of the state. No Washington court has squarely addressed in which category PRA regulations belong, and as a result the courts have

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powers can only be carried out by county commissioners or officers acting with legal authority); *id.* § 35.22.020 (stating that first-class cities shall exercise their powers, functions, and duties in accordance with their charters); *id.* § 35.23.010 (listing corporate powers of a second-class city); *id.* § 35.23.211 (specifying the requisites of a valid ordinance in a second-class city); *id.* § 35.27.370(1) (empowering town councils to pass ordinances not in conflict with state or federal law); *id.* § 35.27.010 (listing town corporate powers); *id.* § 35A.11.020 (granting to the legislative body of a code city the “power to organize and regulate its internal affairs within the provisions of this title and its charter, if any”); *id.* § 35A.11.010 (listing corporate powers of code cities); *see also* WASH. CONST. art. XI, § 11 (granting municipalities the power to make and enforce “police, sanitary, and other regulations as are not in conflict with general laws”).

101. *See* *City of Tacoma v. Lillis*, 4 Wash. 797, 802, 31 P. 321, 323 (1892) (“It may be stated as a general legal proposition that valid ordinances have the force of laws, and are as binding upon the inhabitants of a municipality as are the statutes of the state upon its citizens generally.”) (citing 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 308 (4th ed. 1890); *Milne v. Davidson*, 5 Mart. (n.s.) 409 (La. 1827)).

102. WASH. CONST. art. XI, § 11.

103. *See* Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495, 496 (2000). *See generally* 2A MCQUILLIN, *supra* note 81 (collecting cases nationwide).

104. *Branson v. Port of Seattle*, 152 Wash. 2d 862, 870, 101 P.3d 67, 71 (2004) (citing 2A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10:22, at 378 (Clark Boardman Callaghan, 3d ed., rev. vol. 2, 1996)).

105. 2A MCQUILLIN, *supra* note 81, at 391.

106. *Id.* at 392–93.

107. *See* WASH. REV. CODE § 42.56.100 (2008) (requiring procedural rules to protect records and ensure that providing records does not interfere with other agency functions).

not specified whether a liberal construction of a municipal agency's powers under the PRA is appropriate.

Municipalities enact ordinances differently depending on whether the municipality is a county, a city, or a town, and whether the municipality has a charter or is governed by the generic provisions of the Revised Code of Washington.<sup>108</sup> For example, Snohomish County, which has its own charter,<sup>109</sup> adopted PRA regulations as ordinances.<sup>110</sup> These regulations designate a public-records officer, specify that the officer is the primary point of contact for PRA requests, and give the officer the power to adopt more detailed procedural rules.<sup>111</sup> The regulations also require departments to designate public-records specialists,<sup>112</sup> allow informal PRA requests under certain circumstances,<sup>113</sup> and specify procedures requesters may follow when their requests are denied.<sup>114</sup> Other municipalities have PRA ordinances that direct city officials to promulgate regulations to implement the PRA.<sup>115</sup>

*C. Regulations and Ordinances Are Entitled to a Presumption of Validity, Even When They Are Subject to Review De Novo*

Outside the PRA context, courts generally presume that state agency regulations and municipal ordinances are valid.<sup>116</sup> Washington courts invalidate state agency regulations for only four reasons: the rule is unconstitutional, exceeds the agency's statutory authority, was adopted outside of the statutory rule-making procedure, or is arbitrary and

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108. *See supra* note 100.

109. SNOHOMISH COUNTY, WASH., AMENDED CHARTER (2007), available at [http://www.co.snohomish.wa.us/Documents/Departments/Council/county\\_code/CountyCharter.pdf](http://www.co.snohomish.wa.us/Documents/Departments/Council/county_code/CountyCharter.pdf).

110. SNOHOMISH COUNTY, WASH., CODE §§ 2.51.010–.120 (2009), available at [http://www.co.snohomish.wa.us/Documents/Departments/Council/county\\_code/CountyCodeTitle2.pdf](http://www.co.snohomish.wa.us/Documents/Departments/Council/county_code/CountyCodeTitle2.pdf).

111. *Id.* § 2.51.035.

112. *Id.* § 2.51.040.

113. *Id.* § 2.51.060.

114. *Id.* § 2.51.080.

115. SEATTLE, WASH., MUN. CODE § 3.104.030 (1985) (requiring Seattle city agencies to promulgate PRA-compliant procedures); BELLEVUE, WASH., CITY CODE §§ 2.26.005–.080 (1994) (authorizing the Bellevue city clerk to promulgate PRA-compliant regulations).

116. *See* 2 AM. JUR. 2D *Administrative Law* § 228, at 207 (2004) (explaining that courts presume regulations are valid when adopted under a delegation of authority and in conformity with an administrative procedure statute); 6 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 20:6, at 33 (3d ed., rev. vol. 2007) (explaining that courts presume municipal ordinances are valid; “every intendment will be indulged” in favor of the validity of a municipal ordinance except where the ordinance appears to be ultra vires).

capricious.<sup>117</sup> Washington courts presume that administrative rules adopted in both substantive and procedural conformity with applicable statutes are valid and will uphold them on judicial review as long as they are reasonably consistent with the substantive statute being implemented.<sup>118</sup>

Courts likewise presume that municipal ordinances are valid.<sup>119</sup> Where local government agencies have discretion, courts should not examine the methods by which the agencies exercise that discretion<sup>120</sup> unless an agency's actions are arbitrary or capricious.<sup>121</sup> When local governments carry out grants of power, courts construe those grants liberally.<sup>122</sup> While municipalities cannot act contrary to statutory or constitutional provisions,<sup>123</sup> municipalities are free to adopt regulations within legislated limits.<sup>124</sup> Thus, courts typically presume that agency regulations and municipal ordinances—including PRA-implementing regulations and ordinances—are valid.

#### IV. WASHINGTON COURTS HAVE TAKEN CONTRADICTORY APPROACHES WHEN REVIEWING AGENCIES' PROCEDURAL RULES UNDER THE PRA

The jurisprudence that has evolved around the PRA's substantive requirements reflects the Legislature's stated intent that access to public records should be as broad as possible.<sup>125</sup> Recent cases have considered the reasonableness of agency procedures, as distinct from the substantive question of whether a given record is subject to disclosure.<sup>126</sup> While the Supreme Court of Washington has suggested through dicta that agencies

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117. WASH. REV. CODE § 34.05.570(2)(c) (2008).

118. *Campbell v. Wash. Dep't of Soc. and Health Servs.*, 150 Wash. 2d 881, 892, 83 P.3d 999, 1006 (2004).

119. *Heinsma v. City of Vancouver*, 144 Wash. 2d 556, 561, 29 P.3d 709, 712 (2001).

120. *Mount Spokane Skiing Corp. v. Spokane County*, 86 Wash. App. 165, 178, 936 P.2d 1148, 1155 (1997) (citing *Haga v. City of Seattle*, 3 Wash. 2d 31, 39–44, 99 P.2d 623, 626–29 (1940)).

121. *Id.*

122. *See City of Tacoma v. Taxpayers of Tacoma*, 108 Wash. 2d 679, 692, 743 P.2d 793, 799–800 (1987) (stating that the rule of strict construction of municipal powers does not apply to “mode or means” of carrying out those powers (citing 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 239 (5th ed. 1911))).

123. *Id.* at 685–86, 743 P.2d at 796.

124. *Heinsma*, 144 Wash. 2d at 561, 29 P.3d at 712.

125. WASH. REV. CODE § 42.56.030 (2008) (explaining that “[t]his chapter shall be liberally construed and its exemptions narrowly construed to promote” public policy favoring broad access to public records).

126. *See infra* Part IV.C.

have discretion in adopting procedural rules under the PRA,<sup>127</sup> one division of the Court of Appeals of Washington, faced with peculiar facts in difficult cases, has applied the PRA's requirement that its exemptions be construed narrowly to the procedural domain.<sup>128</sup>

A. *Washington Courts Interpret the PRA Broadly to Promote Disclosure*

Washington courts have characterized the PRA as “a strongly worded mandate for broad disclosure of public records.”<sup>129</sup> Consistent with the Legislature's intent that courts interpret the Act's disclosure provisions broadly and its exemptions narrowly,<sup>130</sup> the courts generally construe the PRA to promote full access to public records.<sup>131</sup> Courts avoid interpreting the PRA in a way that would tend to frustrate that purpose.<sup>132</sup>

*Hearst Corp. v. Hoppe*<sup>133</sup> is one of the Supreme Court of Washington's earliest expressions on the judiciary's role in interpreting and applying the PRA. In *Hearst Corp.*, the Court introduced the oft-cited “strongly worded mandate” language.<sup>134</sup> The Seattle Post-

127. See *infra* Part IV.B.

128. See *infra* Part IV.C.

129. *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 127, 580 P.2d 246, 249 (1978).

130. WASH. REV. CODE § 42.56.030 (2008). The Legislature added this liberal-interpretation language in 1992 as part of a package of amendments to what is now the PRA. Act of Mar. 31, 1992, ch. 139, § 2, 1992 Wash. Sess. Laws 559, 564. The legislative history of the 1992 amendments discloses the Legislature's intent to strengthen the record-disclosure provisions and to limit the interpretation of the record exemptions; however, the history says nothing about interpreting procedural rules. See WASHINGTON HOUSE OF REPRESENTATIVES, SUBSTITUTE HOUSE BILL REPORT, H.R. 52-2876, 1992 Reg. Sess., at 2–4 (Feb. 7, 1992).

131. *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wash. 2d 734, 745–46, 958 P.2d 260, 265 (1998).

132. *Hearst Corp.*, 90 Wash. 2d at 127, 580 P.2d at 249.

133. 90 Wash. 2d 123, 580 P.2d 246 (1978).

134. *Id.* at 128, 580 P.2d at 249. The Court would go on to cite the same “strongly worded mandate” language in numerous cases over the next several decades. See *Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wash. 2d 30, 33, 769 P.2d 283, 284 (1989); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wash. 2d 677, 682, 790 P.2d 604, 606 (1990); *Dawson v. Daly*, 120 Wash. 2d 782, 788, 845 P.2d 995, 999 (1993); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wash. 2d 243, 251, 884 P.2d 592, 597 (1994); *Servais v. Port of Bellingham*, 127 Wash. 2d 820, 826, 904 P.2d 1124, 1127 (1995); *Amren v. City of Kalama*, 131 Wash. 2d 25, 31, 929 P.2d 389, 392 (1997); *Newman v. King County*, 133 Wash. 2d 565, 570, 947 P.2d 712, 714 (1997); *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wash. 2d 734, 745, 958 P.2d 260, 265 (1998); *Limstrom v. Ladenburg*, 136 Wash. 2d 595, 603, 963 P.2d 869, 873 (1998); *Guillen v. Pierce County*, 144 Wash. 2d 696, 711, 31 P.3d 628, 637 (2001); *Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wash. 2d 628, 635, 115 P.3d 316, 319 (2005); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wash. 2d 89, 100, 117 P.3d 1117, 1123 (2005);

Intelligencer had filed a public-records request as part of an investigation into whether the King County Assessor had given “special favors” to his political supporters.<sup>135</sup> The Court held that the courts have the power to determine which records are subject to disclosure and when exemptions apply.<sup>136</sup> The Court did not directly address procedural discretion. Since *Hearst Corp.*, courts have construed claims of exemption against agencies and in favor of disclosure.<sup>137</sup> But *Hearst Corp.* and most of its progeny deal with substantive denials under the PRA; the *Hearst Corp.* opinion does not explicitly address the extent to which courts can or should defer to an agency’s PRA-implementing procedural regulations and ordinances.<sup>138</sup>

*B. Although It Has Not Squarely Addressed the Issue, the Supreme Court of Washington Has Suggested that Agencies Have Discretion in Establishing Public-Records Procedures*

In its *Hearst Corp.* opinion, the Supreme Court of Washington stated in dicta that “[a]gencies are afforded some discretion concerning the procedures whereby agency information is made available.”<sup>139</sup> In subsequent cases, the Court has further defined the extent to which agencies should have discretion in adopting procedural rules to protect records from destruction and to prevent public-records requests from interfering with other essential functions of the agency.<sup>140</sup>

The PRA requires that such procedural rules be reasonable,<sup>141</sup> and recently several court of appeals decisions have examined agency rules

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Koenig v. City of Des Moines, 158 Wash. 2d 173, 180, 142 P.3d 162, 168 (2006); Soter v. Cowles Pub. Co., 162 Wash. 2d 716, 730, 174 P.3d 60, 68 (2007); Bellevue John Does 1-11 v. Bellevue Sch. Dist., 164 Wash. 2d 199, 209, 189 P.3d 139, 144 (2008); Yousoufian v. Office of Sims, 165 Wash. 2d 439, 457, 200 P.3d 232, 239 (2009), *modified on reconsideration*, 168 Wash. 2d 444, 229 P.3d 735 (2010); Rental Hous. Ass’n of Puget Sound v. City of Des Moines, 165 Wash. 2d 525, 527, 199 P.3d 393, 394 (2009); City of Federal Way v. Koenig, 167 Wash. 2d 341, 355, 217 P.3d 1172, 1179 (2009).

135. *Hearst Corp.*, 90 Wash. 2d at 126, 580 P.2d at 248.

136. *Id.* at 130, 580 P.2d at 250.

137. *See* Livingston v. Cedeno, 164 Wash. 2d 46, 50, 186 P.3d 1055, 1057 (2008); Yousoufian v. Office of Sims, 152 Wash. 2d 421, 429, 98 P.3d 463, 467 (2004); Confederated Tribes of the Chehalis Reservation v. Johnson, 135 Wash. 2d 734, 735–36, 958 P.2d 260, 265 (1998); Progressive Animal Welfare Soc’y v. Univ. of Wash., 125 Wash. 2d 243, 251, 884 P.2d 592, 597 (1994).

138. *See infra* Part IV.B.

139. *Hearst Corp.*, 90 Wash. 2d at 129, 580 P.2d at 250.

140. *See, e.g.*, Livingston v. Cedeno, 164 Wash. 2d at 57, 186 P.3d at 1060 (holding that the Department of Corrections had the power to adopt a mail policy incidentally limiting inmate access to public records delivered by mail).

141. WASH. REV. CODE § 42.56.100 (2008).

and regulations under that standard.<sup>142</sup> These cases adopt varying approaches, but no court considering the issue has addressed the threshold matter of whether courts should defer to agencies' implementation of PRA procedural rules and, if so, how much. Instead, some courts have applied, without discussion, the same standard of review to procedural questions that they have applied in cases of substantive denials.

*C. The Court of Appeals Has Applied Varying Standards of Review to Questions of Procedural Rules Implemented Under the PRA*

In *Zink v. City of Mesa*,<sup>143</sup> a city councilwoman (formerly mayor) of Mesa, Washington, and her husband filed about 170 public-disclosure requests with the city between July 2002 and January 2005.<sup>144</sup> Many of these requests related to a building-permit dispute with the city.<sup>145</sup> The councilwoman described herself as a “watchdog type,” and when the city resisted her requests, she argued that the resistance was due to resentment of her watchdog activities.<sup>146</sup> At a judicial-review hearing under the PRA, the trial court heard live testimony from the city clerk that the councilwoman told her “‘you better do this,’ ‘look this up,’ and ‘if you don’t do this just right, I’m gonna sue ya.’”<sup>147</sup>

The clerk’s office limited the councilwoman’s access to public records to one hour per day because complying with her voluminous PRA requests was interfering with the office’s other responsibilities.<sup>148</sup> Despite that limitation, the trial court found that the city “more than substantially complied” with the requests.<sup>149</sup> The court was not persuaded by the councilwoman’s claim that the clerk would have acted more expeditiously for someone else.<sup>150</sup> The court of appeals reversed, holding that the clerk’s limitation violated the PRA.<sup>151</sup> The court cited *Hearst Corp.* for the proposition that “substantial compliance” with the PRA is insufficient and that administrative inconvenience cannot excuse

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142. See *infra* Part IV.C.

143. 140 Wash. App. 328, 166 P.3d 738 (2007).

144. *Id.* at 333, 166 P.3d at 740.

145. *Id.*

146. *Id.* at 333–334, 166 P.3d at 740.

147. *Id.* at 343, 166 P.3d at 745.

148. *Id.* at 339, 166 P.3d at 744.

149. *Id.* at 335, 166 P.3d at 741.

150. *Id.* at 341–42, 166 P.3d at 744.

151. *Id.* at 341, 166 P.3d at 744.

a lack of strict compliance,<sup>152</sup> even though *Hearst Corp.* stated that administrative efficiency was relevant to PRA procedural considerations.<sup>153</sup> The *Zink* court also held that the PRA requires that offices remain open for inspection of records during certain hours of the day and that the agency cannot shorten those hours.<sup>154</sup>

In *Neighborhood Alliance of Spokane County v. County of Spokane*,<sup>155</sup> an alliance of concerned residents discovered an office seating chart containing the first names of two persons whom the county's planning department had not yet hired.<sup>156</sup> Suspecting that the county was engaging in illegal hiring practices, the alliance filed a public-disclosure request for all draft seating charts for the department in question.<sup>157</sup> The county provided the draft seating charts as requested.<sup>158</sup> The alliance then requested the names of the employees in question and the file-creation date of one of the draft seating charts.<sup>159</sup> The county provided the requested information—including the file-creation date, which was later than the date on the chart itself.<sup>160</sup> As it turned out, the employee's computer on which the seating chart had been created had been replaced with a newer computer, and the old computer's hard drive had been wiped.<sup>161</sup>

The alliance filed suit, seeking to compel disclosure of the original seating chart.<sup>162</sup> The county successfully moved for summary judgment, arguing that it had provided the requested file-creation date.<sup>163</sup> The court of appeals reversed, holding that the county's search procedure was not sufficiently detailed to produce records that would respond to the alliance's request and that the procedure was therefore inadequate for PRA purposes.<sup>164</sup> In reaching this conclusion, the court principally relied

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152. *Id.* at 338, 166 P.3d at 743 (citing *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 140, 580 P.2d 246, 255 (1978)).

153. *Hearst Corp.*, 90 Wash. 2d at 131–32, 580 P.2d at 252.

154. *Zink*, 140 Wash. App. at 341, 166 P.3d at 744 (citing WASH. REV. CODE § 42.56.090 (2008) (requiring that public records be available for inspection during the customary office hours of the agency; before 1995, these hours were at least 9 a.m. to 12 p.m. and 1 p.m. to 4 p.m.)).

155. 153 Wash. App. 241, 224 P.3d 775 (2009).

156. *Id.* at 246–47, 224 P.3d at 778.

157. *Id.* at 247, 224 P.3d at 778.

158. *Id.*

159. *Id.* at 248, 224 P.3d at 778–79.

160. *Id.* at 249, 224 P.3d at 779.

161. *Id.* at 249–51, 224 P.3d at 779–80.

162. *Id.* at 251, 224 P.3d at 780.

163. *Id.* at 252, 224 P.3d at 780.

164. *Id.* at 265, 224 P.3d at 787.

upon cases analyzing the Freedom of Information Act, the federal analogue of Washington's PRA.<sup>165</sup>

In contrast to its decisions in *Zink* and *Neighborhood Alliance*, the Court of Appeals of Washington deferred to agency procedural rules in *Parmelee v. Clarke*.<sup>166</sup> In *Parmelee*, a prison inmate sued the Department of Corrections for failing to respond to his public-disclosure requests.<sup>167</sup> The inmate had submitted his requests to a grievance coordinator at the prison, and the coordinator had responded with instructions on how and to whom to submit public-records requests.<sup>168</sup> The inmate did not follow the established procedure, but instead filed suit to compel disclosure; he also sought statutory penalties.<sup>169</sup> The Department of Corrections moved for summary judgment, which the trial judge granted after finding that the inmate had been informed of the department's procedures yet had not followed them.<sup>170</sup> The court of appeals held that the department should not be penalized when an inmate fails to follow internal procedures that are publicly available even if they are not promulgated as part of the Washington Administrative Code.<sup>171</sup>

The *Zink*, *Neighborhood Alliance*, and *Parmelee* courts each evaluated the validity of agency rules and policies in response to their duties under the PRA. The *Parmelee* court did not consider the validity of the agency's procedural rules; instead, it presumed validity without explicitly saying so. The *Neighborhood Alliance* court reasoned by analogy to federal practice without directly considering how much deference to afford an agency's own procedural rules. The *Zink* court simply incorporated the strict-interpretation provisions of the PRA's substantive disclosure and exemption requirements into the area of PRA procedural rules. None of these cases establishes clear guidance for courts to follow when reviewing procedural rules adopted under the PRA.

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165. *Id.* at 256, 224 P.3d at 783.

166. 148 Wash. App. 748, 201 P.3d 1022 (2008).

167. *Id.* at 750–51, 201 P.3d at 1024.

168. *Id.* at 751, 201 P.3d at 1024.

169. *Id.* at 752, 201 P.3d at 1024–25.

170. *Id.* at 753, 201 P.3d at 1025.

171. *Id.* at 759, 201 P.3d at 1028.

V. WASHINGTON COURTS SHOULD PRESUME THE  
VALIDITY OF AGENCY PROCEDURAL RULES ADOPTED  
UNDER THE PUBLIC RECORDS ACT

Given the somewhat confused state of the nascent jurisprudence of PRA procedural rules, courts should turn to established administrative and municipal jurisprudence and presume the validity of governmental rules and regulations. Pragmatic considerations caution against imposing attorney fees and statutory penalties for non-disclosure where agencies have adopted reasonable rules consistent with the statutory mandate and requesters have not followed those rules. The PRA's text does not require liberal interpretation of its procedural provisions; only its substantive provisions are subject to the broad reading that courts have so far applied. Agency rules are subject to evaluation for reasonableness. Thus, absent contrary language in the PRA, courts should presume the regulations' validity.

A. *The Court of Appeals Has Not Considered the Threshold Question of Presumptive Validity*

In each of the three PRA procedural cases the Court of Appeals of Washington has considered, the court reached its conclusion without first determining the appropriate basis for review. In both *Zink* and *Parmelee*, the court of appeals grafted the de novo standard used for substantive denials onto the enforceability of procedural rules.<sup>172</sup> However, the court in *Neighborhood Alliance* did not consider whether the agency's reasonable procedural rules should receive any deference at all.

When considering the validity of an agency's PRA procedural rules, courts should first consider whether and to what extent they should presume that the agency has acted within its statutory discretion. The state's Administrative Procedure Act requires no less respect for the actions of the coordinate branches of government.<sup>173</sup> While courts may not always conclude that agency rules are "reasonable" for PRA purposes and may fashion remedies accordingly, their discussion of an agency rule's validity should start with a presumption of validity. Thus,

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172. See *Zink v. City of Mesa*, 140 Wash. App. 328, 335–37, 166 P.3d 738, 741–42 (2007) (announcing that the standard of review is de novo; the court of appeals would review the trial court's factual findings for substantial evidence); *Parmelee*, 148 Wash. App. at 753, 201 P.3d at 1025 (stating that review of challenged agency actions under the PRA is de novo).

173. See *supra* Part III.C.

an opponent of an agency rule should bear the burden of demonstrating that the rule exceeds the scope of the agency's discretion.

*B. There Is Little Statutory Basis for Imposing Penalties for Denials Stemming From Reasonable Procedural Rules*

The PRA's judicial-review provision does not address what should happen when an agency's procedural rules are not followed. The provision, read as a whole, focuses on substantive denials as opposed to procedural denials.<sup>174</sup> For example, the judicial-review provision places upon agencies the burden of proving that an exemption applies.<sup>175</sup> Nowhere does the text of the PRA, however, equate a procedural rule with a substantive exemption.<sup>176</sup>

Whereas most non-PRA regulations and ordinances may be struck down if they are arbitrary and capricious, procedural rules adopted under the PRA are reviewed for reasonableness.<sup>177</sup> Additionally, courts review *de novo* those agency actions taken or challenged under the PRA's substantive provisions, which include the provisions directing agencies to adopt reasonable rules and regulations.<sup>178</sup> Reading the reasonableness and *de novo* requirements together, *de novo* review of an agency's procedural regulation should focus on the reasonableness of the regulation.

Elsewhere, the PRA places the burden of proving an exemption on the agency.<sup>179</sup> Nowhere does the PRA equate an agency's procedural rule with a disclosure exemption. Indeed, the PRA gives some presumptive weight to the enforceability of procedural rules: procedural rules can

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174. *See supra* Part II.C.

175. WASH. REV. CODE § 42.56.550(1) ("The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.").

176. While the PRA does require that its disclosure provisions be read broadly and its exemptions narrowly, the text of the PRA treats the procedural provisions separately from the substantive disclosure provisions, and agencies have no discretion to declare a record exempt. *Compare* WASH. REV. CODE § 42.56.100 (2008) (requiring agencies to adopt rules to protect records from damage and to avoid interference with essential agency functions), *with id.* § 42.56.550(1) (stating that agencies have the burden of proving that an exemption applies). *See also supra* note 130 (no indication in legislative history of an intent to deprive agencies of procedural discretion in adopting rules to protect records and prevent interference with agency functions).

177. *See supra* Part I.B.

178. WASH. REV. CODE § 42.56.550(3) (2008) ("[R]eview of all agency actions taken . . . under RCW 42.56.030 through RCW 42.56.520 shall be *de novo*."). This requirement of *de novo* review would therefore include section 100 of this chapter, which requires agencies to adopt and enforce reasonable rules. *Id.* § 42.56.100.

179. *See supra* note 71 and accompanying text.

bind requesters only if those rules are published in the Washington Administrative Code or prominently displayed.<sup>180</sup> Logic suggests that the converse should be true: requesters must follow procedural rules that are published in the Washington Administrative Code or prominently displayed, but they may challenge those rules on the basis of reasonableness.

*C. Presuming Rule Validity Reflects Legislative Intent and Addresses Pragmatic Concerns*

When courts review agency PRA regulations and local ordinances de novo for reasonableness, they should presume validity as they do with non-PRA rules. The PRA is silent as to what standard of review should apply to procedural questions, but the state supreme court has suggested that they receive greater deference.<sup>181</sup> Furthermore, deferring to agencies on procedural matters is consistent with legislative intent favoring disclosure. Washington courts review procedural rules to make sure the rules do not exceed an agency's statutory authority.<sup>182</sup> Therefore, a court reviewing a PRA procedural rule, even presuming that rule is reasonable, would still have to consider its reasonableness in light of the authority-granting statute: the PRA.

One example of this kind of deference is the deference courts exercise in determining whether an agency has exceeded its statutory mandate. When courts examine whether agency actions exceed statutory authority, the inquiry is into an error of law, and review is de novo. Courts, however, will generally defer to an agency's view of the law.<sup>183</sup> To reconcile disparate levels of deference, courts have held that de novo review does not lessen the presumption of validity.<sup>184</sup> Thus, de novo review is compatible with the presumption of validity.

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180. *See supra* notes 52–54 and accompanying text.

181. *See supra* Part IV.B.

182. *See supra* notes 117–118 and accompanying text.

183. *Franklin County Sheriff's Office v. Sellers*, 97 Wash. 2d 317, 325, 646 P.2d 113, 116–17 (1982).

184. *See Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wash. 2d 415, 424, 166 P.3d 1198, 1203 (2007) (stating that Growth Management Act hearings board's conclusions of law are reviewed de novo but are entitled to substantial weight with respect to the board's interpretation of the statute); *City of Seattle v. Wilson*, 151 Wash. App. 624, 628–29, 213 P.3d 636, 638 (2009) (stating that question of whether a municipal ordinance defining traffic infraction which leads to injury or death as misdemeanor assault conflicts with state law is a question of law subject to de novo review; the ordinance is presumed valid, and the burden of proof is on the challenger to prove otherwise).

Pragmatic considerations also favor a deferential standard for procedural rules. Courts have imposed large monetary judgments which, while encourage broad disclosure, also burden already limited public resources and, ultimately, the taxpayers whose interests the PRA is meant to protect. On remand, the trial court in *Zink v. City of Mesa* imposed attorney fees, costs, and statutory penalties totaling \$239,000, nearly a quarter of the city's annual \$1 million in tax revenue, or approximately \$544 for each of the city's 440 residents.<sup>185</sup> Mesa's annual operating budget is \$340,000, and the city is considering filing for bankruptcy.<sup>186</sup> Other cases have resulted in similar large awards. By his own estimation, a south King County man has made between \$30,000 and \$50,000 (net of attorney fees) suing agencies under the PRA.<sup>187</sup> He is a named party in five separate cases that have reached appellate courts in Washington.<sup>188</sup>

Washington courts that have considered procedural questions under the PRA<sup>189</sup> might have reached the same result had they applied a deferential de novo standard.<sup>190</sup> While the court in *Parmelee v. Clarke* did not explicitly state that it was presuming the validity of the Department of Corrections' procedural rules, it nonetheless reached its conclusion based on the inmate's failure to comply with the department's rules.<sup>191</sup> The court in *Neighborhood Alliance* did not examine whether the county had a procedural rule requiring that the old hard drive be searched in connection with a public-records request. If a rule governing the internal disposition of public-records requests existed, however, and that rule did not call for the public-records officer to notify the computer technicians who possessed the hard drive at the time the request was made, the court should have evaluated the rule for its

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185. Kristi Pihl, *Judgment Puts Future of Mesa in Question*, TRI-CITY HERALD (Pasco, Wash.), Dec. 13, 2009, at B1, available at <http://www.tri-cityherald.com/2009/12/13/828480/judgment-puts-future-of-mesa-in.html>.

186. *Id.*

187. Rob Tucker, *Man Takes Records Fight Regionwide*, NEWS TRIBUNE (Tacoma, Wash.), Apr. 21, 2008, at A1, available at <http://www.thenewstribune.com/2008/04/21/340472/federal-way-man-has-won-thousands.html>.

188. *City of Federal Way v. Koenig*, 167 Wash. 2d 341, 217 P.3d 1172 (2009); *Koenig v. City of Des Moines*, 158 Wash. 2d 173, 142 P.3d 162 (2006); *Koenig v. City of Lakewood*, No. 37761-6-II, 2009 WL 1864001 (Wash. Ct. App. June 30, 2009) (unpublished opinion); *Koenig v. Pierce County*, 151 Wash. App. 221, 211 P.3d 423 (2009); *West v. Port of Olympia*, 146 Wash. App. 108, 192 P.3d 926 (2008).

189. *See supra* Part IV.C.

190. *Id.*

191. *See supra* notes 166–171 and accompanying text.

reasonableness. Finally, the court in *Zink* based its decision at least in part on the statutory provision requiring that the city's offices be open between certain hours to allow the public to inspect public records and requiring that the city not discriminate among requesters. Even under the more deferential standard suggested here, the *Zink* court may have reached the same conclusion because the city violated a clear provision in the PRA.

## CONCLUSION

In its 1992 amendments to the Public Records Act, the Legislature stated that “[t]he people of this state do not yield their sovereignty to the agencies that serve them.”<sup>192</sup> The PRA is designed to reflect this relationship between the people and the government they create to serve them. The presumption favoring disclosure encourages the broad access to public records and minimizes government secrecy. There is some danger, however, in subjecting every regulation and rule adopted under the PRA to the strictest scrutiny. Agencies and members of the public alike will be increasingly unsure of what they must do to comply with the Act's mandate. As a result, and for the sake of consistency with the rest of administrative and municipal law, courts should presume the validity of an agency procedural rule unless an adverse requester can show that the rule is unreasonable.

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192. Act of Mar. 31, 1992, ch. 139, § 2, 1992 Wash. Sess. Laws 559, 564 (codified at WASH. REV. CODE § 42.56.030 (2008)).