WAC 44-14-03001 "Public record" defined. For most public records, the act uses a three-part test to determine if a record is a "public record." The document must be: A "writing," containing information "relating to the conduct of government" or the performance of any governmental or proprietary function, "prepared, owned, used, or retained" by an agency. Effective July 23, 2017, records of certain volunteers are excluded from the definition. RCW 42.56.010(3) (chapter 303, Laws of 2017).

(1) **Writing.** A "public record" can be any writing "regardless of physical form or characteristics." RCW 42.56.010(3). "Writing" is defined very broadly as: "… handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated." RCW 42.56.010(4). An email, text, social media posting and database are therefore also "writings."

(2) **Relating to the conduct of government.** To be a "public record," a document must relate to the "conduct of government or the performance of any governmental or proprietary function." RCW 42.56.010(3).[1] Almost all records held by an agency relate to the conduct of government; however, some do not. A purely personal record having absolutely no relation to the conduct of government is not a "public record." Even though a purely personal record might not be a "public record," a record of its existence might be if its existence was used for a governmental purpose.[2] For example, a record showing the existence of a purely personal email sent by an agency employee on an agency computer would probably be a "public record," even if the contents of the email itself were not.[3]

(3) **"Prepared, owned, used, or retained."** A "public record" is a record "prepared, owned, used, or retained" by an agency. RCW 42.56.010(3).

A record can be "used" by an agency even if the agency does not actually possess the record. If an agency uses a record in its decision-making process it is a "public record."[4] For example, if an agency considered technical specifications of a public works project and returned the specifications to the contractor in another state, the specifications would be a "public record" because the agency "used" the document in its decision-making process.[5] The agency could be required to obtain the public record, unless doing so would be impossible. An agency cannot send its only copy of a public record to a third party for the sole purpose of avoiding disclosure.[6]

Sometimes agency employees or officials may work on agency business from home computers or on other personal devices, or from nonagency accounts (such as a nonagency email account), creating and storing agency records on those devices or in those accounts. When the records are prepared, owned, used or retained within the scope of the employee's or official's employment, those records (including emails, texts and other records) were "used" by the agency and relate to the "conduct of government" so they are "public records."[7] RCW 42.56.010(3). However, the act does not authorize unbridled searches of agency property.[8] If agency property is not subject to unbridled

searches, then neither is the home computer, or personal device or personal account of an agency employee or official. Yet, because the records relating to agency business are "public records," they are subject to disclosure (unless exempt). Agencies should instruct employees and officials that all public records, regardless of where they were created, should eventually be stored on agency computers. Agencies should ask employees and officials to keep agency-related documents with any retention requirements on home computers or personal devices in separate folders temporarily, until they are provided to the agency. An agency could also require an employee or official to routinely blind carbon copy ("bcc") work emails in a personal account back to an agency email account. If the agency receives a request for records that are located solely on employees' or officials' home computers or personal devices, or in personal accounts, the agency should direct the individual to search for and provide any responsive documents to the agency, and the agency should process the request as it would if the records were on the agency's computers or in agency-owned devices or accounts. The agency employee or official may be required by the agency to sign an affidavit describing the nature and extent of his or her search for and production of responsive public records located on a home computer or personal device, or in a nonagency account, and a description of personal records not provided with sufficient facts to show the records are not public records.[9]

Agencies could provide employees and officials with an agency-issued device that the agency retains a right to access. Or an agency could limit or prohibit employees' and officials' use of home computers, personal devices or personal accounts for agency business. Agencies should have policies describing permitted uses, if any, of home computers, personal devices or personal accounts for agency business. The policies should also describe the obligations of employees and officials for retaining, searching for and producing the agency's public records.[10]

Notes:

[1]*Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 748, 958 P.2d 260 (1998) (broadly interpreting the provision concerning governmental function).

[2]See *Mechling v. Monroe*, 152 Wn. App. 830, 867, 222 P.3d 808 (2009) ("[P]urely personal emails of those government officials are not public records."); *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015) (describing that an employee or official must provide the agency responsive "public records" but is not required to provide "personal records").

[3]*Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000) (record of volume of personal emails used for governmental purpose).

[4]*Concerned Ratepayers v. Public Utility Dist. No. 1*, 138 Wn.2d 950, 958-61, 983 P.2d 635 (1999); *Nissen*, 183 Wn.2d at 882. (For a record to be "used" it must bear a nexus with the agency's decision-making process; a record held by a third party, without more, is not a public record unless an agency "uses" it.)

[5]*Concerned Ratepayers,* 138 Wn.2d 950.

[6]See Op. Att'y Gen. 11 (1989), at 4, n.2 ("We do not wish to encourage agencies to avoid the provisions of the public disclosure act by transferring public records to private parties. If a record otherwise meeting the statutory definition were transferred into private hands solely to prevent its public disclosure, we expect courts would take appropriate steps to require the agency to make disclosure or to sanction the responsible public officers.")

[7]*Nissen*, 183 Wn.2d at 882; *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016). In *Nissen* the State Supreme Court held that a communication is "within the scope of employment" when the job requires it, the employer directs it, or it furthers the employer's interests. This inquiry is always case- and record-specific.

[8]See *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).

[9]*Nissen,* 183 Wn.2d at 886-887.

[10]*Id*. at 877, 886-887.

[Statutory Authority: RCW 42.56.570. WSR 18-06-051, § 44-14-03001, filed 3/2/18, effective 4/2/18. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. WSR 06-04-079, § 44-14-03001, filed 1/31/06, effective 3/3/06.]

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency.