

WSR 23-06-076
PROPOSED RULES
COMMISSION ON
JUDICIAL CONDUCT

[Filed March 1, 2023, 10:34 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 22-23-156.

Title of Rule and Other Identifying Information: Access to commission on judicial conduct (commission) complaint records and access to commission administrative records.

Hearing Location(s): On Friday, April 21, 2023, at 1:30 p.m., teleconference via Zoom. The public hearing will be held in conjunction with the commission's regular business meeting. Internet and phone login instructions will be posted on the commission's website the morning of the hearing at www.cjc.state.wa.us.

Date of Intended Adoption: April 21, 2023.

Submit Written Comments to: Commission on Judicial Conduct, P.O. Box 1817, Olympia, WA 98507, email RulesComments@cjc.state.wa.us, fax 360-586-2918, by Wednesday, April 12, 2023.

Assistance for Persons with Disabilities: Contact Tanya Calahan, phone 360-753-4585, fax 360-586-2918, email tcalahan@cjc.state.wa.us, by Wednesday, April 12, 2023.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Implements Rule 12 and 12.1 of the Commission on Judicial Conduct Rules of Procedure (CJCRP) and repeals chapter 292-10 WAC in its entirety. The CJCRP is the constitutionally required avenue to establish rules regarding access to commission complaint and administrative records. Case law has established that the Public Records Act, chapter 42.56 RCW, does not apply to the judicial branch. WAC regulations implemented under chapter 42.56 RCW therefore do not apply.

Reasons Supporting Proposal: Case law has established that the Public Records Act, chapter 42.56 RCW, does not apply to the judicial branch, so as a constitutionally created agency of the judicial branch, directed under Constitution Article IV, Section 31(10) to establish rules of procedure governing confidentiality of proceedings, the commission prepared these rules under the CJCRP governing public access to commission complaint and administrative records.

Statutory Authority for Adoption: Washington State Constitution, Article IV, Section 31.

Statute Being Implemented: Not applicable.

Rule is necessary because of state court decision, *Nast v. Michels*, 107 Wn.2d 300 (1986); *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584 (1981); *City of Federal Way v. Koenig*, 167 Wn.2d 241 (2009); *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775 (2011); and *West v. Washington State Association of District and Municipal Court Judges*, 190 Wn.2d 931 (2015).

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: Implements Rule 12 and 12.1 and repeals chapter 292-10 WAC in its entirety. No fiscal impact.

Name of Proponent: Commission on judicial conduct, governmental.

Name of Agency Personnel Responsible for Drafting and Implementation: Tanya Calahan, Records Request Officer, 1110 Capitol Way South, Suite 120, Olympia, WA, 360-753-4585; Enforcement: J. Reiko Callner,

Executive Director, 1110 Capitol Way South, Suite 120, Olympia, WA, 360-753-4585.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. Does not apply. No fiscal impact.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party.

Is exempt under RCW 19.85.025(4).

Scope of exemption for rule proposal:

Is fully exempt.

February 28, 2023
J. Reiko Callner
Executive Director

Commission on Judicial Conduct Rules of Procedure Rule 12

ACCESS TO COMMISSION COMPLAINT RECORDS

(a) Policy and Purpose.

It is the policy of the Commission on Judicial Conduct (Commission) to facilitate access to complaint records as provided by Article IV, Section 31 of the Washington State Constitution. Access to Commission case records is not absolute and shall be consistent with confidentiality requirements as provided by Article IV, Section 31 of the Washington State Constitution, with reasonable expectations of personal privacy as provided by Article I, Section 7 of the Washington State Constitution, and shall not unduly burden the Commission or substantially interfere with agency operations and the administration of justice.

(b) Scope.

This rule applies to all Commission complaint and investigative records, regardless of the physical form of the record, the method of recording the record or the method of storage of the record. Administrative records are not within the scope of this rule.

(c) Definitions.

(1) "Access" means the ability to view or obtain a paper or electronic copy of a Commission record.

(2) "Administrative record" means any record pertaining to day-to-day agency operations or the administration of the Commission, including any committee appointed by the commission.

(3) "Commission" means collectively, the appointed regular and alternate members comprising the Commission on Judicial Conduct and its staff as an organization, including temporary or contract employees.

(4) "Executive Director" means the Commission's chief executive appointed by Commission members to supervise and administer day-to-day agency operations.

(5) "Investigation records" include but are not limited to: All pleadings, papers, evidence records, and files of the commission, including complaints and the identity of complainants, compiled, or obtained during an investigation or initial proceeding of a complaint alleging judicial misconduct or disability.

(6) "Panel deliberation materials," regardless of physical format, are those materials used or created by a Commission hearing panel during case deliberations.

(7) "Probable cause records" include only those specific records of the initial proceeding that were the basis of a finding of probable cause as identified by the Commission members pursuant to CJCRP 17 (d) (4) (C).

(8) "Fact-finding records" include probable cause records, statement of charges, and subsequent records filed as part of official fact-finding proceedings and any stipulated agreement, and excluding records sealed by the presiding officer.

(9) "Identifiable public record" means existing public records that do not require substantial alteration or manipulation, as determined by the Commission, to produce.

(d) Access.

(1) The Commission's records on complaints that are under investigation or are dismissed are investigation records and are permanently exempt from public access and disclosure as required by Article IV, Section 31 of the Washington State Constitution, and established case law. Once a Statement of Charges is served on the respondent judge, documents filed thereafter are presumptively considered public records. Stipulated resolutions must be filed at a public meeting and are thereafter public records. Records requests for public complaint records are deemed satisfied and the Commission is not obligated to respond further if requesters are directed to the Commission's website, www.cjc.state.wa.us, and all the releasable and identifiable case records in the request are available in this location. There is no charge for records available on the Commission's website. Records requested and provided in an alternative manner, outside the Commission's website, are subject to the Commission's published fee schedule.

(2) The public shall have access to probable cause records as of the date of a public hearing except those specifically excluded under Commission rules.

(3) Requests for general information about the Commission do not constitute requests for identifiable public records. The Commission is not obligated to respond to requests that are not for existing and identifiable public records. Merely including the phrase "public records request" or similar language in a request does not in and of itself, constitute a proper request for identifiable public records and does not obligate the Commission to respond to the request as a public records request. The Commission is not obligated to respond more than once to a requester for the same records.

(4) Panel deliberation materials are not public and shall not be provided as public records.

(5) It is the Commission's policy to respond to requests for public records within five business days of receipt with either (1) the requested records or (2) an explanation why the Commission cannot provide the records. The Commission may seek clarification of requests. If no clarification is received, the Commission is not obligated to respond further, and the request is deemed satisfied. If additional time is required for a response, the Commission will state this to the requester and provide a new estimated timeline for response. The Commission may provide records in batches as they are available to provide the fullest assistance to requesters.

(6) The Commission will provide access to identifiable public records during regular business hours as published on its website after arrangements for viewing the records is made in advance.

(7) A fee may not be charged to view identifiable public records at the Commission's office.

(8) Fees charged for research, scanning, and copying shall be determined by the Executive Director and published on the Commission's website. The Executive Director will evaluate fee schedules from time to time and cause such fees to be updated and published on the Commission's website.

(9) If a fee is assessed, it must be paid in full prior to the Commission fulfilling a partial or complete request. The Commission is not obligated to fulfill a partial request, or complete request if the required fee is not paid. The request is deemed satisfied if no fee is paid and the Commission will close the request without further obligation to respond further.

(e) Method for requesting records.

The public records form provided on the Commission's website should be used for expediency. Alternatively, written requests shall include the following: current date, name, mailing address or email address, and phone number of the requester, preferred delivery method of the records and a description of the identifiable public records requested. Requests are directed to the Commission's Public Records Officer.

(f) Appeals.

Appeals of denials of access to Commission records shall be made within 30 days of the denial, and directed to the Commission's Executive Director. A denial by the Executive Director may be appealed within 30 days to the Executive Committee of the Commission. The decision of the Executive Committee is final. Requests for appeals should be made in the same manner as above.

[Adopted effective _____.]

**Commission on Judicial Conduct Rules of Procedure
Rule 12.1**

ACCESS TO COMMISSION ADMINISTRATIVE RECORDS

(a) Policy and Purpose.

It is the policy of the Commission on Judicial Conduct (Commission) to facilitate access to administrative records as provided by Article IV, Section 31 of the Washington State Constitution. Access to Commission administrative records is not absolute and shall be consistent with confidentiality requirements as provided by Article IV, Section 31 of the Washington State Constitution and shall not unduly burden the Commission or substantially interfere with agency operations and the administration of justice.

(b) Scope.

This rule applies to all Commission administrative records, regardless of the physical form of the record, the method of recording the record or the method of storage of the record. Complaint records are not within the scope of this rule.

(c) Definitions.

(1) "Access" means the ability to view or obtain a paper or electronic copy of a Commission record.

(2) "Administrative record" means any record pertaining to day-to-day agency operations or the administration of the Commission, including any committee appointed by the commission.

(3) "Commission" means collectively, the appointed regular and alternate members comprising the Commission on Judicial Conduct and its staff as an organization, including temporary or contract employees.

(4) "Executive Director" means the Commission's chief executive appointed by Commission members to supervise and administer day-to-day agency operations.

(5) "Preliminary investigation records" include but are not limited to: All pleadings, papers, evidence records, and files of the commission, including complaints and the identity of complainants, compiled, or obtained during an investigation or initial proceeding of a complaint alleging judicial misconduct or disability.

(6) "Probable cause case records" include only those specific records of the initial proceeding that were the basis of a finding of probable cause pursuant to CJCRP 17 (d) (4) (C).

(7) "Identifiable public record" means existing records that do not require substantial alteration or manipulation, as determined by the Commission to produce. Requests for information or answers to questions do not constitute requests for identifiable public records. The Commission is not obligated to respond to requests that are not for existing and identifiable public records. Merely including the phrase "public records request" or similar language in a request does not in and of itself, constitute a proper request for identifiable public records and does not obligate the Commission to respond to the request. The Commission is not obligated to respond more than once to a requester for duplicative requests for the same public records.

(8) "Public" includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency, however constituted, or any other organization or group of persons, however organized.

(d) Access.

(1) Administrative Records—Access. Commission administrative records are subject to public disclosure unless access is exempted or prohibited under this rule, other Commission rules, federal statutes, state statutes, court orders, or case law. To the extent that records access would be exempt or prohibited if the Public Records Act applied to the Commission's administrative records, access is also exempt or prohibited under this rule. In addition, to the extent required to prevent a significant risk to individual privacy or safety interests, the Commission shall redact identifying details in a manner consistent with this rule when it makes available or publishes any public record; however, in each instance, the justification for the redaction shall be provided in writing.

(2) Public records requests for administrative records are deemed satisfied and the Commission is not obligated to respond further if requesters are directed to the Commission's website, www.cjc.state.wa.us, and all the releasable records are available in this location. There is no charge for records available on the Commission's website. Records requested and provided in an alternative manner, outside the Commission's website, are subject to the Commission's published fee schedule.

(3) It is the Commission's policy to respond to requests for public records within five (5) business days of receipt with either (1)

the requested records or (2) an explanation why the Commission cannot provide the records. The Commission may seek clarification of requests. If no clarification is received, the Commission is not obligated to respond further, and the request is deemed satisfied. If additional time is required for a response, the Commission will state this to the requester and provide a new estimated timeline for response. The Commission may provide records in batches as they are available to provide the fullest assistance to requesters.

(4) The Commission will provide access to identifiable public records during regular business hours as published on its website after arrangements for viewing the records is made in advance.

(5) A fee may not be charged to view identifiable public records at the Commission's office.

(6) Fees charged for research, scanning, and copying shall be determined by the Executive Director and published on the Commission's website. The Executive Director will evaluate fee schedules from time to time and cause such fees to be updated and published on the Commission's website.

(7) If a fee is assessed, it must be paid in full prior to the Commission fulfilling a partial or complete request. The Commission is not obligated to fulfill a partial request, or complete request if the required fee is not paid. The request is deemed satisfied if no fee is paid and the Commission will close the request without further obligation to respond further.

(8) RECORDS REQUESTS THAT INVOLVE HARASSMENT, INTIMIDATION, THREATS TO SECURITY, OR CRIMINAL ACTIVITY. The Commission may deny a records request if it determines that: the request was made to harass or intimidate the Commission or its employees; fulfilling the request would likely threaten the security of the Commission; fulfilling the request would likely threaten the safety or security of Commission members, staff, family members of Commission members or staff, or any other person; or fulfilling the request may assist criminal activity.

(e) Method for requesting records.

The public records form provided on the Commission's website should be used for expediency. Alternatively, written requests shall include the following: current date, name, mailing address or email address, and phone number of the requester, preferred delivery method of the records and a description of the identifiable public records requested. Requests shall be made to the Commission's Public Records Officer.

(f) Appeals.

Appeals of denials of access to Commission records shall be made within 30 days of the denial, and directed to the Commission's Executive Director. The decision of the Executive Director may be appealed within 30 days to the Executive Committee of the Commission. The decision of the Executive Committee is final. Requests for appeals should be made in the same manner as above.

[Adopted effective _____.]

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

REPEALER

The following chapter of the Washington Administrative Code is repealed:

WAC 292-10 PUBLIC RECORDS.