

MODEL PUBLIC RECORDS ACT POLICY FOR ELECTRONIC RECORDS

1. Intent. *[Purpose is to emphasize competing public policy concerns to justify hospitals erring on the side of protecting privacy.]*

Public Hospital Districts are required by State and federal laws to protect all patient Health Care Information from disclosure. Public Hospital Districts are also subject to the Public Records Act, which makes almost all of its records, including patient records, public records. But the purpose of the Public Records Act is “to allow public scrutiny of government, rather than to promote scrutiny of particular individuals who are unrelated to any governmental operations.” *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 218 (1998). The federal and state privacy mandates require that certain information in these public records be redacted before disclosed. This mandate is consistent with the Public Records Act, which provides, “To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details[.]” RCW 42.56.070(1).

Electronic records pose a special challenge for Public Hospital Districts responding to public records request. Electronic records, like paper records, can be “public records” subject to the Public Records Act. But it is not always feasible to redact exempt information from electronic records when the records are still in their Native Electronic Format. Thus, to ensure patient privacy, it will sometimes be necessary to either print the record out and redact it by hand, or convert the record into an electronic format that can be electronically redacted.

2. Definitions.

a. “Native Electronic Format” means the electronic format an electronic record originally exists as. For example a Word document’s native formation would have the “.doc” extension.

b. “Health Care Information” means “individually identifiable health information” as defined in 42 U.S.C. 1320d(6) and any information “that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care” under RCW 70.02.010. *[Added to emphasize policy issues.]*

Comment. A patient’s actual medical records will generally be exempt in their entirety, but Health Care Information about a patient can appear in a host of other records.

c. “Quality Improvement Information” means information and documents created specifically for, and collected and maintained by a quality improvement committee under RCW 43.70.510 or 70.41.200, or by a peer review committee under RCW 4.24.250, or by a quality assurance committee pursuant to RCW 74.42.640 or 18.20.390, or by a hospital, as defined in RCW 43.70.056, for reporting of health care-associated infections under RCW 43.70.056, and notifications or reports of adverse events or incidents made under RCW 70.56.020 or 70.56.040. *[Added so issue is not overlooked.]*

Comment. Most records that are collected or created as part of the Quality Improvement process will be exempt in their entirety, but Quality Improvement Information will appear in other records as well.

d. “Exempt information” means any information that may be redacted pursuant to the Public Records Act, including but not limited to Health Care Information and Quality Improvement Information.

e. “Electronically redact” means redacting information from electronic records in such a way that the exempt information is permanently removed from the record and cannot be in anyway recovered.

Comment. A Public Hospital District is not required to create a new record in order to electronically redact information but may choose to do so, as provided in Section 6.a below..

f. “Metadata” is data about data. It is typically generated by programs that create electronic documents, and is attached as part of that document as hidden text. It includes information describing aspects of actual data items, such as name of the author, formatting, content, editing history, and origins of the document. It can be displayed through tools in the program that created the document.

g. “Reasonably locatable” means an electronic record that can be located with typical search features and organizing methods contained in the Public Hospital District’s current software.

Comment. For example, a retained e-mail containing the term "XYZ" is usually reasonably locatable by using the e-mail program search feature. However, an e-mail search feature has limitations, such as not searching attachments, but is a good starting point for the search. Information might be "reasonably locatable" by methods other than a search feature. For example, a request for a copy of all retained e-mails sent by a specific hospital employee for a particular date is "reasonably locatable" because it can be found utilizing a common organizing feature of the agency's e-mail program, a chronological "sent" folder. Another indicator of what is "reasonably locatable" is whether the Public Hospital District keeps the information in a particular way for its business purposes. For example, a Public Hospital District might keep a data base of vendors including the name of the business. The Public Hospital District does not separate the businesses by whether they are publicly traded corporations or not because it has no reason to do so. A request for the names of the businesses which are publicly traded is not "reasonably locatable" because the agency has no business purpose for keeping the information that way. *[From the AG’s Model Rules, added because it emphasizes what an agency does not have to do to find records.]*

3. Requests for electronic records.

Non-exempt reasonably locatable electronic records are subject to disclosure.

- a. If the requester has requested an electronic record but has not specified any particular format, the Public Hospital District may produce the record in paper format with any necessary redactions. If a requester requests a copy in electronic format, the records shall be burnt onto a compact disc or other available medium. If the requester requests to review the record or has requested a copy but lacks the necessary software to review the record in electronic form, the Public Hospital District may make a computer available to allow the requester to review the record electronically.
- b. If the requester has requested an electronic record in electronic format that does not contain any exempt information, then the records shall be produced as specified in Section 4 below.
- c. If the requester has requested an electronic record in electronic format that contains exempt information, then the records shall be produced with the exempt information redacted as specified in Section 5 below.

4. Electronic records containing no exempt information.

Electronic records that do not contain exempt information (including in any metadata) shall be produced in their Native Electronic Format if requested in that format.

5. Electronic records containing exempt information.

- a. **Records.** When a record contains exempt information, the exempt information shall be redacted before the record is produced. Redactions may be made by either printing the record and redacting exempt information by hand or converting the record into an electronic format that can be electronically redacted and electronically redacting the exempt information. Alternatively, if the requester wants the record in its native electronic format, then the Public Hospital District shall treat the request as seeking customized access, to be handled in the manner described in Section 6 below

Comment. It is usually not possible to electronically redact information for a record in its native format. Metadata can be particularly difficult to redact. Because Public Hospital Districts are under a State and federal mandate to protect certain information, Public Hospital Districts cannot risk unsuccessful redactions. Thus, to ensure all Health Care Information, Quality Improvement Information or other exempt information is redacted, it will be necessary to print the record and redact, convert the record into an electronic format that can be electronically redacted and electronically redact the exempt information, or provide for customized access.

- b. **Databases.** If the Public Hospital District can generate a report from the database with the requested non-exempt information through the standard process it uses for creating

reports from this database, then the Public Hospital District shall generate a report with the specified information and handle the request as it would any request for an electronic record not containing exempt information, pursuant to Section 4 above. If the request requires additional steps, then the Public Hospital District shall treat the request as seeking customized access, to be handled in the manner described in Section 6 below.

***Comment.** When a request is for certain information contained in a database, the Public Hospital District should consider the effort and expense necessary for creating a report with the requested information when responding. If the Public Hospital District regularly generates reports for the database and can generate a report from the database with the requested non-exempt information through the standard process it uses for creating reports from this database, then the Public Hospital District shall generate a report with the specified information. This is true even if the information would not typically be included in a report the Public Hospital District normally generates. If, however, it would take additional programming or other steps to generate a report, then the Public Hospital District may treat the request as one requiring customized access. The Public Hospital District should get the requester's commitment to pay for this access before it incurs the cost. [Databases qualify as public records but are often meaningless in paper form. Thus, requests for information from databases need to be handled differently. While printing a report may be creating a new record, it's the least cumbersome way to respond to requests for information on databases.]*

6. Customized access. *[Sometimes there is no substitute to viewing records in their native format. Thus, allowing for customized access may be necessary. The policy puts the cost on the requester because customizing access is more like copying, rather than searching for records. RCW 43.105.280 also allows an agency to charge for this access.]*

a. Creating a new record. When a requester seeks an electronic record in its native format that contains exempt information, the Public Hospital District “redact” the exempt information by creating a new record in the native format without the exempt information, provided that the requester agrees to pay for the costs of this customized access. The Public Hospital District may also choose to create a new record as the most cost-effective way to redact information, provided that the requester consents.

***Comment.** The Public Records Act does not require public agencies to create records in response to a public records request. Creating a new record, however, may be the only way to allow access to an electronic record in its native format when the original record contains Health Care Information, Quality Improvement Information or other exempt information that must be redacted. There are also times when creating a new record may be the most cost-effective way for the Public Hospital District to redact exempt information from an electronic record. For example in a spreadsheet, it will often be easier to create a new spreadsheet without a column that contains exempt information, rather than print and redact the column by hand. Under these circumstances, if the requester consents, the Public Hospital District should consider this option without charging the requester. [The AG's Model Rules take the position that creating a new record is simply a form of redaction, not of customized*

access. This policy reaches a middle ground to allow access to records in their native format as long as the requester is willing to pay the cost.]

b. Computer programming. If the requester seeks information from a database that requires additional programming to generate a report with the requested information, the Public Hospital District may provide this customized access, provided that the Public Hospital District possesses the technological capability to do such programming and provided that the requester agrees to pay for the costs of this customized access. If a requester seeks access to the actual database itself and additional programming is required to allow this access or to insure the requester cannot access exempt information, the Public Hospital District may provide this customized access, provided that the Public Hospital District possesses the technological capability to do such programming and provided that the requester agrees to pay for the costs of this customized access. Under no circumstances shall a requester be given access to a database if it is not possible to protect Health Care Information, Quality Improvement Information or other exempt information.

c. Metadata. If a requester seeks metadata from a record that contains Health Care Information, Quality Improvement Information or other exempt information and the Public Hospital District possesses the technological capability, the Public Hospital District may provide a report containing that metadata with all Health Care Information, Quality Improvement Information or other exempt information redacted. *[Metadata itself qualifies as a public record but is not easy to redact. It is possible, however, to print out a report of the metadata. Thus, for situations where the metadata must be stripped from a record or will be lost when the record is converted or printed, it is important to have a way a requester can obtain the metadata.]*

7. Costs. *[Costs must be based on the actual cost of the materials and hourly time for the person making the copies, and cannot be used as a profit-generating tool.]*

a. Costs for customizing access. Customizing access requires specialized knowledge and skills in computer programming. As part of the copying costs, a Public Hospital District may charge for the costs of customizing access, at a rate of [[\$___]] per hour, which reflects the hourly rate paid Public Hospital District information technology staff. The Public Hospital District may collect a deposit of up to 10% of the projected cost before creating customized access.

b. Costs for records in electronic format. When native files are burned onto a CD, the requester shall be charged [[\$1.00]] per CD. When records are scanned from paper to .pdf, the requester shall be charged [[\$0.10]] per page plus [[\$1.00]] per CD. When records are directly converted from their native format to .pdf without printing, the requester shall be charged [[\$0.05]] per page, plus [[\$1.00]] per CD.