Via email to Shanan.Gillespie@brpels.wa.gov

Date: **DATE** 2021

To: Shanan Gillespie, Board of Registration for Professional Engineers and Land Surveyors

From: Richard E. Potter and John M. Gray

Subject: WSR 21-16-027 Proposed Rule WAC 196-09-150, re records indexes

These comments concern subsection (2) of the Board’s proposed new WAC 196-09-150:

(2) Records index. An index of public records, consisting of the retention schedules applicable to those records, is available to members of the public at the board's office.

While making the public aware of the existence of the Board’s records retention schedule is somewhat informative and useful, it is not sufficient to comply with the requirements of the Public Records Act (1) for creating, maintaining and making available to the public indexes of four types of records and (2) for enacting a rule describing the indexing system.[[1]](#footnote-1)

We understand that the Board became independent of the Department of Licensing a couple of years ago and is in the process of adopting rules for itself. This current rulemaking is an opportunity to create the rule and the indexes required by RCW 42.56.070(5) of the Public Records Act. We set forth that entire section verbatim at the end of these comments.

In short, in addition to maintaining pre-July 1, 1990 indexes for any type of record that state agencies might have had, the statute requires state agency indexes for these types of post-June 30, 1990 records (as defined in the Administrative Procedure Act (APA) –

* Final orders in adjudicatory cases “that contain an analysis or decision of substantial importance to the agency in carrying out its duties’ [often called “significant decisions”];
* Declaratory orders;
* Interpretive statements;
* Policy statements.

The indexes must allow an inquirer to identify and locate specific documents, such as a decision in case XYZ, a policy statement on Topic A, or an interpretive statement on issue B.

The agency’s rule that establishes and implements the required indexing system must set forth, at a minimum –

* requirements for the form and content of the index,
* the index’s location and availability to the public, and
* the schedule for revising or updating the index.

We have reviewed the rules of about 250 state agencies, boards and commissions and found, unfortunately, that very many have no records index rule at all and of those that do, only a handful come close to meeting all the requirements of the statute. This is an opportunity for the Board to become one of those best practices agencies.

Our Spring 2020 newsletter article highlighted the new Department of Children, Youth and Families (DCYF) significant decisions index rule, which is a good implementation of the final orders index part of the statute. Three agency rules that cover all four types of documents listed in the PRA are WAC 467-02-130 (Traffic Safety Commission), WAC 390-14-045 (Public Disclosure Commission), and WAC 136-03-100 (County Road Administration Board). We can provide some suggested rule templates, should the Board be interested in that.

DCYF, and some other agencies, also make their significant decisions indexes, and the listed decisions themselves, available online, a very useful and highly desirable public service these days. The Board should include that feature in its indexes system and rule.

A final point: beyond the absence of the listed rule components set forth in the statute, the Board’s proposed approach of relying on its records retention schedule as an index cannot satisfy the statute, because that schedule only lists documents by category. It does not identify specific documents, such as a decision in case XYZ, a policy statement on Topic A, or an interpretive statement on issue B.

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**RCW** [**42.56.070**](http://app.leg.wa.gov/RCW/default.aspx?cite=42.56.070) **Documents and indexes to be made public**—Statement of costs.

*[Bolding added. Part of the final paragraph reformatted using bullet points, for ease of reading.]*

(5) **Each state agency shall, by rule, establish and implement** a **system of indexing** for the **identification and location** of the **following records**:

(a) All records issued before July 1, 1990, for which the agency has maintained an index;

(b) **Final orders** entered after June 30, 1990, that are issued **in adjudicative proceedings** as defined in RCW 34.05.010 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(c) **Declaratory orders** entered after June 30, 1990, that are issued pursuant to RCW 34.05.240 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(d) **Interpretive statements** as defined in RCW 34.05.010 that were entered after June 30, 1990; and

(e) **Policy statements** as defined in RCW 34.05.010 that were entered after June 30, 1990.

**Rules establishing systems of indexing shall include, but not be limited to**,

* requirements for the form and content of the index,
* its location and availability to the public, and
* the schedule for revising or updating the index.

State agencies that have maintained indexes for records issued before July 1, 1990, shall continue to make such indexes available for public inspection and copying. Information in such indexes may be incorporated into indexes prepared pursuant to this subsection. State agencies may satisfy the requirements of this subsection by making available to the public indexes prepared by other parties but actually used by the agency in its operations. State agencies shall make indexes available for public inspection and copying. State agencies may charge a fee to cover the actual costs of providing individual mailed copies of indexes.

1. We have written articles on this topic for the newsletter of the Administrative Law Section of the Washington State Bar Association. <https://www.wsba.org/legal-community/sections/administrative-law-section> Scroll down to the newsletter links. See the articles in the Fall 2018, Winter 2019 and Spring 2020 newsletters. [↑](#footnote-ref-1)