

“BAR RECORDS” OVERVIEW FOR SECTIONS LEADERS

OVERVIEW

This document is meant to provide just a brief overview of WSBA’s public records obligations. For more information, please see our website and General Rule (GR) 12.4.

There is a presumption of public access to Bar records – i.e., Bar records must be disclosed upon request unless they are specifically exempt from disclosure.

As of July 1, 2014, the public right of access to Bar records is governed by GR 12.4. Prior to that, it was governed by WSBA’s bylaws, and the bylaws still apply to older records.

- Note: the state Public Records Act, RCW 42.56, which is what most people are familiar with, does not apply to Bar records (other than its exemptions from disclosure, which do apply).
- Therefore, the Public Records Act’s deadlines for compliance, and its provisions for litigating public records disputes (with the potential for penalties, costs, and attorneys’ fees), do not apply to the WSBA. Instead, as described below, WSBA has its own set of requirements for responding to records requests, and its own set of procedures for resolving disputes over public records, which were adopted by the Washington Supreme Court.

WHAT RECORDS ARE COVERED?

“**Bar record**” is defined broadly to mean “**any writing** containing information relating to the conduct of any Bar function prepared, owned, used, or retained by the Bar regardless of physical form or characteristics. Bar records include only those records in the possession of the WSBA and its staff or stored under Bar ownership and control in facilities or servers.” “**Writing**” means “handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation in paper, digital or other format.”

“Bar records” do not include, however, records “solely in the possession of hearing officers, non-Bar staff members of boards, committees, task forces, commissions, sections, councils, or divisions that were prepared by the hearing officers or the members and in their sole possession, including private notes and working papers.” Furthermore, WSBA is not required to create a record not currently in its possession at the time a request is made.

Therefore, Section members and leadership should assume that all written communication with WSBA staff (including emails), and any records they give to or store with WSBA, may be considered “Bar records” and potentially subject to disclosure. However, their own personal records relating to their dealings with the WSBA, if those records remain solely in their possession, are not.

WHAT RECORDS ARE EXEMPT?

Just because a record is a “Bar record,” however, does not automatically mean that it is subject to disclosure. It may still be exempt, in which case WSBA generally would not produce it in response to a request.

Given the disciplinary function performed by WSBA and the high level of public interest in those matters, the exemption most frequently at issue in requests for Bar records is the exemption for records that are made confidential by the Rules for Enforcement of Lawyer Conduct (ELC). There are many others, however. GR 12.4 lists many specific exemptions, and also incorporates by reference exemptions and confidentiality provisions in, among others, the Rules of Professional Conduct (RPC), the Admission to Practice Rules (APR), various General Rules and, as noted above, the state Public Records Act. The state Public Records Act alone contains countless exemptions. For more information on Public Records Act exemptions, the Municipal Research Services Corporation (MRSC) website, <http://mrsc.org/Home/Explore-Topics/Legal/Open-Government/Public-Records-Act.aspx>, is a good resource.

PROCEDURE WHEN WSBA RECEIVES A REQUEST FOR PUBLIC BAR RECORDS

Requests for public Bar records are made to WSBA’s designated Public Records Officer (PRO). The PRO works with the requester to clarify the scope of the request as needed, and coordinates WSBA’s response to the request.

WSBA has the option to notify individuals if they are the subject of records that have been requested. WSBA will generally do so in situations where the records are sensitive or such that a reasonable person might object to their disclosure. Upon notification, the subject of the records has the right to provide information to the PRO for the PRO to consider in determining whether the records must be disclosed, and has the right to participate in further review of the PRO’s decision as described below.

If a requester objects to the PRO’s response to a request, he or she can request review by WSBA’s Executive Director, Paula Littlewood. If the requester objects to the Executive

Director's decision, he or she can request review by the Records Request Appeals Officer (RRAO), a volunteer position established by GR 12.4. If the requester objects to the RRAO's decision, he or she can seek discretionary review by the Washington Supreme Court.

ADVICE FOR SECTION MEMBERS AND LEADERSHIP

- Assume that all written communication with WSBA staff will be subject to disclosure if requested.
- For email correspondence with WSBA staff, use the email account that is your email address of record with WSBA, not a personal email address that you would like to remain private. An even better practice would be to open a separate email account for correspondence to and from the WSBA. Don't include other personal contact information, such as personal cell phone or home telephone numbers.
- For those who work at state agencies or municipalities subject to the Public Records Act, be aware that your involvement with WSBA may cause public records requests to be made to your place of employment. Your agency's public records officer may not be familiar with all of the confidentiality provisions and other exemptions that attach to Bar records. Therefore, the best practice would be to not use your public agency work email address for your Sections work; instead, open a separate email account as suggested above.
- Keep your personal working papers regarding your Bar activities in your own possession.
- Individuals seeking access to Bar records should not make records requests to you. However, in the unlikely event that someone contacts you and requests records relating to the work of your section, please simply respond as follows:

To request Bar records, please send your request to WSBA's public records officer at PublicRecords@wsba.org. Under Washington General Rule 12.4(e)(1), requests must be made in writing to WSBA's public records officer, and may not be made to other Bar staff or to volunteers serving on boards, committees, task forces, commissions, sections, councils, or divisions.

To ensure consistency in how requests are made and received, please do not offer anything further to the requester, such as offering to forward their request to the WSBA or to have someone at the WSBA get back to them.