



Public Records Act Update Winter 2009

By Ramsey Ramerman

Table of Contents

I. Case Law Updates	Page 1
<i>Yousoufian v. Office of Ron Sims</i> : What agencies can learn	Page 1
<i>RHA v. City of Des Moines</i> : New uncertainties concerning exemption log	Page 4
<i>Parmelee v. Clarke</i> : Enforcing your PRA policy.....	Page 6
II. Open Government Articles	Page 8
Four Short Cautionary Tales for Local Governments.....	Page 8
Ending the “Gotcha” Nature of the Public Records Act.....	Page 10
About Foster Pepper’s Public Disclosure Team	Page 12

I. CASE LAW UPDATES¹

***Yousoufian v. Office of Ron Sims*: Supreme Court reverses the LARGEST court-assessed Public Records Act penalty in Washington State history – because it was TOO SMALL: What agencies can learn**

On the 15th of January, the Washington Supreme Court reversed a \$124,000 Public Records Act penalty – according to Justice Owens, the largest PRA penalty ever assessed – and returned the case to the trial court for reconsideration. To assist the trial court, the Supreme Court offered several “factors” the trial court should consider when determining where on the \$5-to-\$100-per-day range the daily penalty should fall. The Court’s reasoning for reversal? – \$15 per day to was too low. The decision suggests several steps agencies can take to better comply with the PRA and minimize their liability.

Factual and procedural history

Armen Yousoufian made a request for public records to King County. After being denied records, Yousoufian waited until the end of the 5-year limitation period to file suit. This delay – no fault of the County’s – had the effect of increasing the potential penalty (up to \$100 per day). A trial court found that King County had been repeatedly negligent in how it had handled the records request, and that its conduct amounted to a lack of good faith. But, the trial court elected to impose the minimum daily penalty because the court found the minimum amount was sufficient to penalize the County.

On the first trip to the Washington Supreme Court, that Court ruled that given the uncontested finding of a lack of good faith, the minimum penalty was insufficient. It also ruled

¹ These three case updates originally appeared in MRSC’s Open Government Advisor column: <http://www.mrsc.org/focus/opengovadvisor/opengov0109.aspx>



that the Court could not consider the length of delay in filing suit when calculating penalties because this was a decision the legislature made when it set the statute of limitations (the legislature promptly amended the Public Records Act (“PRA”) to reduce the statute of limitations to one year). The Supreme Court refused to adopt any standards to guide the trial court on remand, other than holding that the minimum penalty should be reserved for instances where an agency acts in good faith.

Supreme Court adopts factors to guide trial courts in imposing penalties

On remand, the trial court calculated the penalty at \$15-per-day and imposed a \$124,000 penalty, which amounted to the largest court-assessed PRA penalty in the state’s history. Yousoufian was not satisfied and appealed, again. The Supreme Court reversed the trial court a second time and remanded for a new (third) hearing on penalties. In a fractured opinion, the Court suggested numerous factors that a trial court should consider when imposing penalties.² These factors can be broken down into 10 factors:

- (1) Clarity of the public records request
- (2) Promptness of agency’s response (including requester’s need for the records)
- (3) Strict compliance with procedures and exemptions
- (4) Training and supervision of staff
- (5) Reasonableness of explanation for noncompliance
- (6) Agency attitude: whether the agency was helpful, negligent, reckless, dishonest, or acted in bad faith
- (7) Agency’s tracking procedures
- (8) Potential for harm, including economic loss and loss of government accountability
- (9) Deterrence effect of penalty based on size of the agency
- (10) Specific facts of the case

Three steps agencies can take to minimize liability

These factors suggest three steps an agency can take to minimize its liability, should a court find the agency violated the PRA.

First, make sure agency staff approach their duties with the attitude that they are serving the public when responding to public records requests. And a good attitude starts at the top –

² While the Court listed 16 factors, because of overlap, they can be summarized in 10 factors listed above. The 16 factors were broken into seven mitigating factors and nine aggravating factors. The mitigating factors were: (1) the lack of clarity of the PRA request; (2) an agency’s prompt response or legitimate follow-up inquiry for clarification; (3) good faith, honest, timely, and strict compliance with all the PRA procedural requirements and exceptions; (4) proper training and supervision of personnel; (5) reasonableness of any explanation for noncompliance; (6) helpfulness of the agency to the requestor; and (7) the existence of systems to track and retrieve public records. The aggravating factors were: (1) a delayed response, especially in circumstances making time of the essence; (2) lack of strict compliance with all the PRA procedural requirements and exceptions; (3) lack of proper training and supervision of personnel and response; (4) unreasonableness of any explanation for noncompliance; (5) negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA; (6) dishonesty; (7) potential for public harm, including economic loss or loss of governmental accountability; (8) personal economic loss; and (9) a penalty amount necessary to deter future misconduct considering the size of the agency and the facts of the case.



agency executives need to put appropriate priority in the agency’s PRA compliance program. Every agency employee who works with public records should be encouraged to read and re-read RCW 42.56.030, dictating: “The people of this state do not yield their sovereignty to the agencies that serve them.”

Second, make sure agency staff is fully trained in the PRA. A properly trained staff will more quickly respond, fully comply with statutory requirements, and, only withhold records on supportable grounds.

Third, agencies must adopt and enforce comprehensive PRA rules and procedures. The Supreme Court emphasized that the agency’s procedures must provide for the fullest assistance to requesters. The procedures should go beyond the minimum statutory requirements and address how communications with the requester will be handled, how searches should be conducted and how requests will be tracked.

More important than simply giving an agency a good argument that the minimum penalty should apply after a violation, these steps will help ensure that requests are handled properly and there is no violation in the first place.

Some of the Court’s factors lack statutory support and conflict with established law

Some of the Court’s factors are particularly problematic for agencies. Specifically, the Court’s ruling that a trial court should consider the requester’s need and the potential harm seems to conflict with the well-established rule that agencies are prohibited from requiring a requester to explain why the requester wants the records. Thus, the Court holds that penalties should be increased for factors that the agency has no control over and may not even know. It also seems to suggest that requesters should be treated differently, depending on why they need the records. This conflicts with another well-established rule – that all requesters should be treated the same.

The Court’s holding that to be an effective deterrent, an agency’s size should be taken into account, suggests that larger agencies should pay higher penalties than smaller agencies. There is no statutory justification for this distinction.

**A bad attitude can cost
your agency money**





RHA v. City of Des Moines: Supreme Court Underscores the Requirement to Produce a Exemption Log Under the Public Records Act

In its most recent Public Records Act decision, *Rental Housing Authority v. City of Des Moines*, 2009 WL 2009 WL 146541 (Jan. 22, 2009), the Supreme Court ruled that the City of Des Moines did not trigger the one-year statute of limitations for Public Records Act claims until after the City had produced its “PAWS II” exemption log.³ The Court held that an earlier letter listing specific categories of withheld records was insufficient. In light of this opinion, local governments should be sure to include a complete exemption log whenever they withhold exempt records.

A few facts are necessary to understand this holding. On August 17, 2005, the City produced almost 600 pages of records to RHA and included a letter that contained a description of categories of records it was withholding and the legal bases for withholding these records. It did not, however, list each individual record. Eight months later, on April 14, 2006, the City produced an exemption log that detailed each record the City had withheld. The requester filed suit January 16, 2007, more than one year after the City’s first letter, but within one year of the complete exemption log.

The statute of limitations provision in the PRA provides, “Actions under this section must be filed within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.” RCW 42.56.550(6). In 2005, the Legislature shortened the period from five years in response to a case where a requester waited for several years to make a claim, which increased the mandatory daily penalties. The issue in the case was whether the statute of limitations began to run from the City’s claim in the August 17, 2005 letter that the records were exempt or the April 14, 2006 exemption log that detailed those records.

The PRA requires that agencies provide “a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.” RCW 42.56.210(3). In *PAWS II*, the Supreme Court determined that this explanation should include “[1] the type of record, [2] its date and [3] number of pages, and, unless otherwise protected, [4] the author and [5] recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content.”

In *RHA*, the Supreme Court held that because the City’s August 17 letter did not comply with the requirements of *PAWS II*, the August 17 letter was not a “claim of exemption” sufficient to trigger the statute of limitations. Instead, the statute of limitations was triggered by the production of the April 14 *PAWS II* exemption log. The lawsuit was filed within one year of April 14, and thus the suit was timely.

³ See *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 271 n.18 (1994) (“*PAWS II*”).



Exemption log requirements

There is a clear lesson from this opinion – local governments should always produce an exemption log that complies *PAWS II*. At a minimum, the log should contain the following six pieces of information:

1. Type of document/description of document
2. Date
3. Author/Sender
4. Recipient (including CCs) if applicable
5. Statutory exemption and brief explanation for withholding (see note below)
6. Number of pages

Note, the “brief explanation for withholding” requires local governments to provide enough facts to allow the requester to understand how the statutory exemption applies to the withheld record. If it is a correspondence with an attorney, then not much is required. But other exemptions may require a more extensive “brief explanation.”



***Parmelee v. Clarke: Court Holds Agencies Can Enforce Their Public Records Act Policies***

In a recently published opinion, *Parmelee v. Clarke*, -- Wn. App. --, 2008 WL 5657802 (publication ordered Feb. 2009), Division II of the Court of Appeals gave teeth to the Department of Correction's Public Records Act procedures. The Department's procedures specifically identify the Public Records Officer and provide that all requests should be sent to that officer. The Court held that, because the requester had actual knowledge of those procedures, the requester was required to follow those procedures and make public records requests to the identified officer. Thus, the court dismissed the requester's claims that were based on requests made to other persons.

The opinion is rooted in the statutory language of the Public Records Act. The Act requires agencies to publish their procedures for how they will handle public records requests. RCW 42.56.040. The procedures should help agencies (1) provide full access to records, (2) protect public records from damage, (3) prevent excessive interference with other essential functions, and (4) provide requesters the fullest assistance. RCW 42.56.100.

The Act then provides:

Except to the extent that he has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published or displayed and not so published or displayed. RCW 42.56.040(2).

In *Parmelee v. Clarke*, the Court recognized that, based on the language of section .040(2), if a requester has actual knowledge, then the procedures are enforceable. In other words, and to paraphrase the statute, to the extent a requester has actual and timely notice of the terms of an agency's procedures, the person may be required to follow those procedures.

Practice Tip 1: Include a copy of your agency's Public Records Act policy or the essential information from that policy in every 5-day response.

The crux of Division II's decision was the requester's actual knowledge of the policy and its requirements. To rely on this opinion, an agency should take all reasonable steps to inform the public about its policy. Beyond the obvious practice of making sure the agency policy is easy to find on the website, consider sending a PDF copy of the policy as part of your 5-day response, if you send the response by email. If you send a paper letter, include essential information regarding the policy, such as (1) who the Public Records Officer is, and (2) where your policy requires requests to be sent. This will inform the public and, if necessary, allow you to prove the requester has actual knowledge of your policy.

Practice Tip 2: Make sure your agency's policy is up-to-date.

If an agency's policy contains inaccurate information, the agency cannot enforce its policy. In 2005, the Legislature added new requirements for PRA policies. So, if you haven't updated your PRA policy since then, now is the time.



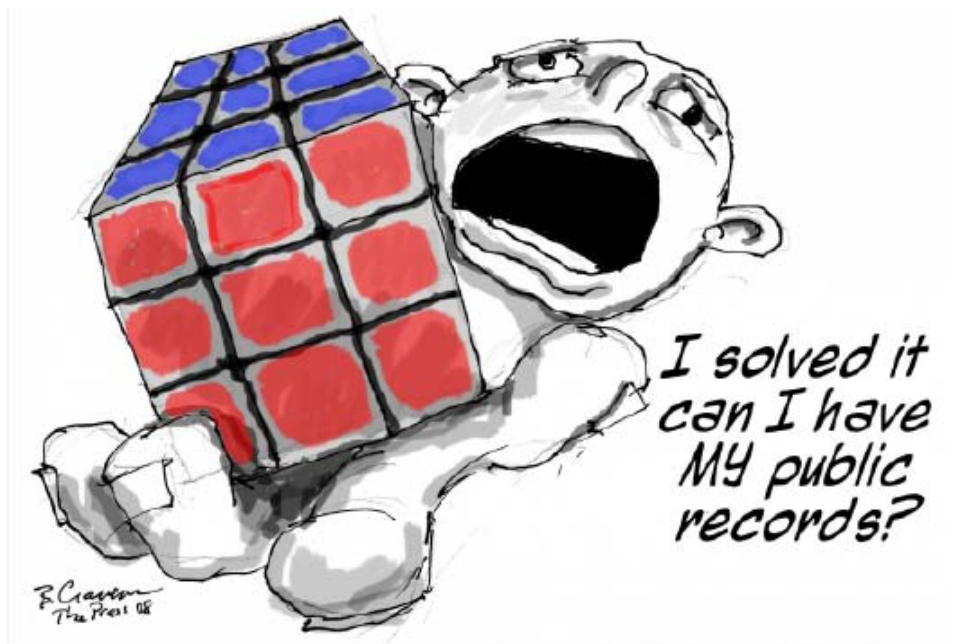
Practice Tip 3: Make sure your agency is not using its policy to create road blocks for requesters.

Agencies must be cautious not to read too much into *Parmelee*. Your agency’s Public Records Act policy should be used as a funnel to try to guide requesters into using the procedures that will best insure all responsive records are provided in a timely fashion. Agencies should not start ignoring requests every time a requester fails to comply with a particular provision in the agency’s policy. Agencies still need to provide the fullest assistance and cannot use their procedures to create road blocks to public disclosure.

Moreover, *Parmelee* is only a Court of Appeals’ opinion (a petition for review has been filed) and only addresses one distinct question – whether an agency can require requesters to send requests to a designated person. Agencies should only consider invoking the *Parmelee* holding in situations similar to those in *Parmelee*. If a repeat requester refuses to make requests to the person designated in your policy, then at some point, the agency may want to inform the requester that only requests sent to the designated person will be honored. There may also be other situations where a requester is violating an agency’s policy in a way that interferes with the agency’s other essential functions, when the agency may also insist on following its known procedures. But any such action should be guided by legal counsel.

Finally, remember that these are public records and any actions that appear obstructionist, even if legally defensive, will make your agency look less open and create distrust.

Don’t create hurdles that block access





II. OPEN GOVERNMENT ARTICLES

Four Short Cautionary Tales for Local Governments

Oops, maybe I shouldn't have given you that – the risks of inadvertently disclosing privileged records

Washington recognizes that a record may be withheld from disclosure in response to public records requests if the record is an attorney-client communication. But what happens if your agency accidentally turns over a privileged record? The recent case out of Division II – *Sitterson v. Evergreen School District*, -- Wn. App. --, 196 P.3d 735 (2008), addresses that question.

In the case, a school district turned over several sensitive, privileged memoranda in response to discovery requests. Three years later, on the eve of trial, the district recognized its error and attempted to prevent the other party from using the memoranda as exhibits at the trial.

The trial court held that the district had waived the privilege as to these memoranda, so the other party could rely on them at trial. On appeal, Division II affirmed. In doing so, it adopted a five-factor test to determine whether an inadvertent disclosure should amount to a waiver:

- (1) the reasonableness of the precautions taken to prevent inadvertent disclosure
- (2) how long it took the agency to try to get back the inadvertently disclosed record
- (3) the total volume of records produced
- (4) the number of records inadvertently disclosed
- (5) general fairness

In the *Sitterson* case, because there were relatively few records at issue (439 total documents), because the district did not present any evidence regarding the precautions it took to avoid inadvertent disclosure, and because the district failed to try to recover the records for three years, Division II held that the privilege had been waived. Under Washington law, this waiver would apply to anyone who requested the record in the future. The waiver might also apply to the entire subject matter of the memo, which could result in the attorneys who prepared the disclosed records being subject to questioning about the subject matter of the disclosed records.

While the *Sitterson* case involved discovery requests, not public records requests, it is likely a court would apply similar standards in determining whether an agency waived the attorney-client privilege by erroneously turning over a privileged document in response to a public records request. Thus, agencies must be careful to review records carefully when there is a risk the records could include attorney-client communications. And if a mistake is made, act promptly to try to recover the inadvertently produced document if you want to avoid waiver.



**Oops, maybe I shouldn't have deleted that (part 1) –
the risks of emails and retention requirements.**

The Washington Supreme Court is currently considering whether it should take up a case dealing with a deleted electronic record. *See O'Neill v. Shoreline*, 145 Wn. App. 913 (2008). As I reported this summer[link], the Court of Appeals ruled in the case that the City had to do a full search of a hard drive for a deleted email, even though the email may have been deleted in compliance with the City's retention guidelines and before the request was made.

The Washington Supreme Court may take guidance from the Ohio Supreme Court. In a recent opinion, the Ohio Court ruled that a public records requester cannot require an agency to search its hard drive for a deleted email when the email was deleted in compliance with the agency's retention guidelines. *State ex rel. Toledo Blade Co. v. Seneca County Board of Commissioners*, -- N.E. 2d --, 2008 WL 5157733 (Ohio Dec. 9, 2008). The burden is on the requester to demonstrate any lack of compliance. But in the Ohio case, because the requester demonstrated that emails were improperly deleted, the Ohio Supreme Court ultimately ordered a forensic search of computer hard drives.

This case highlights the risk of failing to ensure your agency is fully complying with the retention guidelines. A forensic search of a hard drive can cost several thousand dollars. To avoid the situation in the Ohio case – where individual employees had the ability to delete emails – make sure all agency emails are maintained on a central server and those emails are only deleted pursuant to the retention guidelines. Also, before any emails are deleted, make sure there are no outstanding public records requests.

**Oops, maybe I shouldn't have deleted that (part 2) –
\$1.5 million tab for deleting emails**

A court order requiring a forensic search of a hard drive isn't the only cost of improperly deleting emails. Outgoing Missouri Governor Matt Blunt's decision to delete emails has cost Missouri \$1.5 million dollars. The case stems from a whistleblower complaint that alleged the governor's office had an unwritten policy that encouraged staff to promptly delete emails. The governor defended by asserting that there was no need for a written policy and employees had the discretion to delete emails as they wished.

The whistleblower was terminated and sued for wrongful termination. His complaint prompted the state attorney general to sue the governor for violating the state public records law. The defense of the whistleblower's suit has cost \$900,000 and defense of the attorney general suit has cost \$600,000. The second suit has now been settled without the governor admitting any wrongdoing.

This case serves as a dramatic example of how a government's actions, even if not illegal, can end up costing the taxpayers and eroding public trust. And the antidote is simple – all governments need to have a well-defined retention policy that is properly implemented and enforced.



**Oops, maybe I shouldn't have deleted that (part 3) –
White House spends \$10 million looking for missing emails**

The forensic search of a single hard drive is cheap compared to what the White House had to spend to search backup tapes after it was discovered the White House had illegally deleted nearly 14 million emails over a three-year period, 2003-2005. The White House had to hire private contractors to conduct a search of backup tapes at a cost to taxpayers of \$10 million. This case proves the conventional wisdom that electronic records are hard to delete. The missing emails were located, preserving important records during the crucial period when President Bush decided to invade Iraq.

End the “Gotcha” Nature of the Public Records Act

Two features make the Public Records Act (“PRA”) a “gotcha” law for public agencies. First, the PRA does not require requesters to file a claim or work with agencies before they file suit. Second, attorney fees are mandatory for any failure to disclose non-exempt records, even when the requester already had copies of the withheld records and the agency made a good faith mistake.

A simple example demonstrates how this can lead to abuse. Requester A sends the Email to an agency about the upcoming budget. Six months later, Requester A files a public records request for all documents related to the budget. The agency produces records but fails to produce the Email that Requester A sent. Nine months later, Requester A files suit, claiming the agency violated the PRA by failing to produce the Email he sent to the agency. Faced with this lawsuit, a court would be required by the PRA to rule in favor of Requester A and award nine months of daily penalties and attorney fees under the current law – even though Requester A already had a copy of the Email and did not even bother to inform the agency that the agency’s response was incomplete. This is a lose-lose situation for taxpayers because they will have to foot the bill for the fees and penalties, and there is no corresponding benefit of more transparency.

The above is based upon actual experiences of local governments. This situation and numerous similar situations have occurred, where requesters know exactly what records an agency has not produced, but rather than confer with the agency, they file suit.

The PRA should be amended to address this type of “gotcha” game in a way that will increase transparency and save taxpayers money.

First, the law could be amended to require requesters and agencies to meet and confer with each other, and then second, wait 15 days before filing suit. The “meet and confer” requirement would serve to increase transparency by making sure the agency knows exactly what records are being requested and the requester knows exactly why she is not getting the record. It would save taxpayers money by encouraging the parties to resolve disputes before a lawsuit is filed.



We know this would work because this type of “meet and confer” requirement is already the law in civil litigation, where parties are required to confer in person or over the phone before either can file a discovery motion in court. Civil Rule 26(i). This way courts have to hear fewer discovery motions because they get resolved.

We also know it works for PRA disputes. In my practice, I help local governments with complex and voluminous public records requests. Often one of my first tasks is to call up the requester to see exactly what she is looking for. If a dispute arises, both sides try to negotiate to avoid a trial. The primary reason for not talking is that the person doesn’t really want the records.

We know the 15-day delay works because it is already the law too – before someone can sue an agency or the state, he must file a claim and wait 60 days. RCW 4.92.100 (state); RCW 4.96.020 (local governments). This is in place so the governments can consider whether to settle the claim. We also know it works for PRA disputes. Again in my practice I get consulted on complex legal questions about exemptions. A delay helps each side evaluate the other side’s position. When a dispute arises over the meaning of an exemption, the 15-day delay allows each side time to consider the other side’s position. It also gives an agency time to make an additional search for records.

Rather than encourage parties to confer about disputes, as currently drafted, the PRA encourages the person playing the gotcha game to lay low without letting the agency know there is a problem – all the while daily penalties are incurring, and then rush to court before the agency knows there’s a problem. If the requester files suit, and then an agency releases a record, a court will presume the lawsuit caused the release and award daily penalties and attorney fees. If the agency releases the records before a suit is filed, then the agency won’t be liable for penalties. Thus, the more certain a requester is that an agency has not produced a record, the more incentive there is for that party to file suit rather than explain what documents the requester is looking for.

There are times, however, when a requester cannot wait 15 days to get the records, or is certain a conference would not resolve any dispute. (Because the agency has control over the release of the records, there is no reason for an agency to have to file suit in less than 15 days.)

This could be addressed by a second change. If a requester files suit without meeting and conferring with the agency, or without waiting the 15 days, the suit would still go forward, but the attorney fee and penalty provisions are amended so that a trial court has discretion not to award attorney fees and penalties if the requester elects to file suit without the “meet and confer” or without waiting 15 days. The court would also have this discretion if it rules that the requester did not negotiate in good faith.

When there are grounds for not conferring or for not waiting 15 days, the court would still be able to award the full amount of attorney fees and penalties. But the court would also have the discretion to deny fees and penalties when the requester is merely playing the “gotcha” game.



About Foster Pepper’s Public Disclosure Team

State and federal public records laws impose significant requirements and disclosure duties on public entities that can (at best) be difficult to navigate and (at worst) create traps for the unwary – posing nuances that can ensnare not only the public entity involved but also the private sector businesses dealing with that entity. Foster Pepper’s Public Disclosure Team has years of experience on behalf of public clients alike in dealing with information requests and disclosure obligations under these State and federal laws. Team members include Ramsey Ramerman, Chair, Milt Rowland, Rosa Fruehling-Watson (labor and employment), Manny Jacobowitz and Sven Peterson (health care).

About Ramsey Ramerman, Chair of the Public Disclosure Team

Ramsey’s practice is concentrated on helping cities, counties, public hospital districts, ports and other municipal entities comply with their obligations under Washington’s various open government laws, including the Open Public Meetings Act, the Public Records Act and the Public Disclosure Act. He serves as the unofficial local government representative on the “Sunshine Committee” that is currently reviewing the exemptions to the Public Records Act.

Ramsey writes the “Open Government Advisor Column” for the Municipal Research and Services Center and is the editor of Foster Pepper’s new blog, www.LocalOpenGovernment.com. He also lectures on the Public Records Act at the UW School of Law and regularly teaches courses for other lawyers and other industry groups on open government issues. In 2008 Ramsey worked with 10 different local government associations to train over 1000 local elected officials and employees throughout the State the PRA and OPMA. Ramsey’s experience has given him broad exposure to the conflicts between confidentiality and open access. Ramsey graduated from University of Washington School of Law with High Honors in 2000, where he served as managing editor on law review.

