

Via email

Date: January 19, 2022

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To: Keri Lamb, Board of Tax Appeals, bta@bta.wa.gov

CC: Bill Pardee, Chair, Administrative Law Section, W.S.B.A.

Subject: WSR 22-01-155 Proposed Rule WAC 456-12-075 “records indexes”

On behalf of the Administrative Law Section of the Washington State Bar Association,¹ we submit these comments concerning the proposed repeal of WAC 456-12-075 “Records indexes.”

From what we can read, no new language would replace WAC 456-12-075. This rule should not be repealed. Rather, it should be revised to contain the elements required by the Public Records Act.

RCW 42.56.070(5) of the Public Records Act requires all state agencies to create, by rule, maintain and make publicly available an index of four types of documents. We reproduce the entire section 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 the following types of post-June 30, 1990, records (as defined in the Administrative Procedure Act) –

- Final orders in adjudicatory cases “that contain an analysis or decision of substantial importance to the agency in carrying out its duties”;²
- Declaratory orders;
- Interpretive statements;
- Policy statements.

It is our understanding that the BTA does not issue declaratory orders or formal policy or interpretative statements. If that is correct, then the PRA only requires the BTA to index its significant final orders.³

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.

The rule should provide criteria for determining which final decisions “contain an analysis or decision of substantial importance,” i.e. which are “significant.”

¹ As authorized by the Section’s Executive Committee in compliance with the WSBA Comment Policy for sections.

² Sometime called “significant decisions.” See for example, the Department of Children, Youth and Families significant decisions index rule, WAC [110-03-0585](#).

³ This requirement might overlap that of RCW [82.03.110](#) Publication of findings and decisions: “The board [of tax appeals] shall either publish at its expense or make arrangements with a publishing firm for the publication of those of its findings and decisions which are of general public interest, in such form as to assure reasonable distribution thereof.”

RCW 42.56.070(5)'s requirement is important because it allows everyone to know which cases the BTA may rely on in making its decisions. RCW 42.56.070(6) provides as follows:

(6) A public record may be relied on, used, or cited as precedent by an agency against a party other than an agency and it may be invoked by the agency for any other purpose only if:

- (a) It has been indexed in an index available to the public; or
- (b) Parties affected have timely notice (actual or constructive) of the terms thereof.

We have reviewed the rules of about 250 state agencies, boards, commissions, and higher education entities 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.

RCW [42.56.070](#) Documents and indexes to be made public

[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.