



WYOMING LEGISLATIVE SERVICE OFFICE

# Memorandum

**DATE** June 3, 2019

**TO** Joint Judiciary Interim Committee

**FROM** Brian Fuller, Staff Attorney

**SUBJECT** Topic Summary: Wyoming Public Records Act

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This summary provides an overview of the Wyoming Public Records Act, including a summary of changes to Wyoming's public-records law that were enacted in 2019 Senate File 0057.

## Approved Interim Topic

Priority No. 2: Public Meetings and Public Records

*The Committee will undertake a two-year study of the public meetings and public records statutes to modernize statutes in light of changes to the law, technology and to promote realistic transparency.*

## Wyoming's Public-Records Laws: An Overview

The Legislature first enacted public-records laws in 1969.<sup>1</sup> Generally, the first iteration of those laws provided that all of the state's public records shall be open for inspection by any person at reasonable times and provided procedures for appealing the denial of inspection and for procuring copies of public records.<sup>2</sup>

The Wyoming Supreme Court has discussed and interpreted Wyoming's Public Records Act on several occasions. The Court has said that the policy of the Act "is one of

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<sup>1</sup> See 1969 Wyo. Session Laws Ch. 145.

<sup>2</sup> 1969 Wyo. Session Laws Ch. 145, § 1.

disclosure, not secrecy."<sup>3</sup> The Court has also stated that the "legislature of this state has stressed the importance of making available to the public records, books and files of state agencies."<sup>4</sup> These statements are, according to the Court, pronouncements "from this court having to do with making the public's business available to the public whenever that is possible."<sup>5</sup> The Court has further stated that:

The courts, legislature, administrative agencies, and the state, county and municipal governments should be ever mindful that theirs is public business and the public has a right to know how its servants are conducting its business. Furthermore, it is for the government to remember that the written, viewing and broadcasting press are the eyes and ears of the people. The citizenry must be permitted to hear and see what public officers and their employees say and do whenever the imparting of this knowledge does not run contrary to the rights of those otherwise protected in a way that would result in disclosure having the effect of inflicting such irreparable harm as is recognized at law.<sup>6</sup>

### **The Wyoming Public Records Act**

The Public Records Act is contained within five statutory sections.<sup>7</sup> The Act is appended to this summary. The first section defines various terms used in the statutes. Among others, the following terms are defined:

- "Political subdivision" means every county, city, town, school district, and special district within the state;<sup>8</sup>
- "Public records," when not otherwise specified and among other things, includes "any information in a physical form created, accepted, or obtained by the state or any agency, institution or political subdivision of the state in furtherance of its official function and transaction of public business which is not privileged or confidential by law." The definition also includes documents "in paper, electronic, or other physical form."<sup>9</sup>

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<sup>3</sup> Freudenthal v. Cheyenne Newspapers, Inc., 2010 WY 80, ¶ 18, 233 P.3d 933, 938 (Wyo. 2010) (citation omitted).

<sup>4</sup> Laramie River Conservation Council v. Dinger, 567 P.2d 731, 733 (Wyo. 1977).

<sup>5</sup> Sheridan Newspapers v. Sheridan, 660 P.2d 785, 791 (Wyo. 1983).

<sup>6</sup> Id.

<sup>7</sup> See W.S. 16-4-201 through 16-4-205.

<sup>8</sup> W.S. 16-4-201(a)(iv).

<sup>9</sup> W.S. 16-4-201(a)(v).

- Public records are further classified as:
  - "Official public records," which include "all original vouchers, receipts and other documents necessary to isolate and prove the validity of every transaction relating to the receipt, use and disposition of all public property and public income from all sources whatsoever," all agreements, contracts, bonds, and claims filed against the state; and
  - "Office files and memoranda," which include all other records, correspondence, exhibits, drawings, and other documents that aren't "official public records."<sup>10</sup>
- "Application" means a written request for a public record but can also include a verbal request if a records custodian accepts it;<sup>11</sup>
- "Custodian" is the official custodian (who is the officer or employee responsible for caring for and maintaining the public records) or any authorized person having personal custody and control of the public records.<sup>12</sup>

Next, the Act provides a right of inspection of all public records and procedures for providing the records and responding to requests. Except as provided in the Act or elsewhere in law, "all public records shall be open for inspection by any person at reasonable times, during business hours of the state entity or political subdivision."<sup>13</sup> The official custodian is authorized to make rules regarding the inspection of records to protect the records and prevent unnecessary interference in the custodian's duties or the duties of the office.<sup>14</sup> Statute also provides procedures for producing electronic records for inspection and copying.<sup>15</sup>

If the custodian or other authorized person does not have custody or control of the requested records or if the records are in active use or in storage, the custodian or other authorized person must notify the applicant within seven business days after acknowledging receipt of the request, except if "good cause exists preventing a response" within seven business days.<sup>16</sup> An applicant is authorized to petition the district court to challenge whether the custodian can demonstrate that "good cause" exists to delay release

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<sup>10</sup> W.S. 16-4-201(a)(vi).

<sup>11</sup> W.S. 16-4-201(a)(ix).

<sup>12</sup> W.S. 16-4-201(a)(i) and (ii).

<sup>13</sup> W.S. 16-4-202(a).

<sup>14</sup> Id.

<sup>15</sup> See W.S. 16-4-202(d).

<sup>16</sup> W.S. 16-4-202(b) and (c).

of the records.<sup>17</sup> Research revealed no case where the Supreme Court has directly interpreted "good cause" for purposes of W.S. 16-4-202. But in a case with an early version of the Wyoming Public Records Act the Court has suggested that "good cause" relates to "cause" that was contemplated in the Act related to exceptions for denying or delaying the right of inspection.<sup>18</sup> The Court has also provided that "no obligation exists under the public records act to create a public record if none exists."<sup>19</sup>

Otherwise, if the public records are "readily available," they shall be "released immediately to the applicant so long as the release does not impair or impede the agency's ability to discharge its other duties."<sup>20</sup>

Next, the Public Records Act provides that the custodian shall allow the right of inspection except if doing so is (1) contrary to any state statute, (2) contrary to any federal statute or regulation having the force and effect of law, or (3) prohibited by Wyoming Supreme Court rules or by the order of any court of record.<sup>21</sup> For example, allowing inspection of information the Legislative Service Office obtains related to an audit would be contrary to W.S. 28-8-108(a), which deems that information as not a public record and must remain confidential in LSO's possession.<sup>22</sup> The Act also requires custodians to deny inspection of several categories of records, including:

- Medical, psychological, and sociological data on individual persons (except for coroners' verdicts and written dockets under W.S. 7-4-105(a));
- Adoption or welfare records;
- Personnel files, except that information may be available to elected and appointed officials who supervise the employee's work, and employment contracts shall be available for public inspection;
- Trade secrets and confidential commercial data;
- Various hospital and school-district records;
- Records or information compiled solely for investigating violations of and enforcing internal personnel rules;
- Information related to state IT and physical security systems;

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<sup>17</sup> W.S. 16-4-202(b) and (c).

<sup>18</sup> See Sheridan Newspapers, 660 P.2d at 801 & n.5.

<sup>19</sup> Williams v. Matheny, 2017 WY 85, ¶ 21, 398 P.3d 521, 528 (Wyo. 2017).

<sup>20</sup> W.S. 16-4-202(c).

<sup>21</sup> W.S. 16-4-203(a).

<sup>22</sup> See W.S. 28-8-108(a) ("All information obtained by the legislative service office related to an audit is deemed not to be a public record and shall remain confidential information in the possession of the legislative service office.").

- Records of the Consensus Revenue Estimating Group that disclose information considered by, or deliberations or tentative decisions of, the group.<sup>23</sup>

A complete list of exclusions is listed in W.S. 16-4-203(d). The Wyoming Supreme Court has stated that the "clear implication of this subsection is that records not within any of the enumerated exceptions are public records."<sup>24</sup> Further, the custodian is authorized to deny the right of inspection to the following records if disclosure to the applicant would be contrary to the public interest:

- Records of investigations conducted by law enforcement or prosecutors;
- Test questions, scoring keys, and exam information for licensing examinations;
- The specific details of bona fide research projects that a state institution, agency, or any other person is conducting;
- The content of real-estate appraisals made for the state or political subdivision (except the appraisals can be released to the owner or if statute provides otherwise);
- Memoranda or letters between agencies or within the same agency that would not be available to a private party in litigation with the agency;
- Security information and procedures, building plans and blueprints, and records related to security threats for state buildings and buildings of political subdivisions;
- An application for the position of president at a higher-education institution, including reference letters and other information relating to the search process;
- Sensitive wildlife location data in the custody of the Game and Fish Department that could be used to determine the specific location of an individual animal or groups of animals.<sup>25</sup>

In addition to the enumerated exemptions in W.S. 16-4-203, the Wyoming Supreme Court has held that the Public Records Act incorporates the deliberative-process privilege as a ground to exempt documents from disclosure under the Act.<sup>26</sup> Ultimately, the Court

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<sup>23</sup> W.S. 16-4-203(d).

<sup>24</sup> Sheaffer v. State ex rel. Univ. of Wyo., 2006 WY 99, ¶ 10, 139 P.3d 468, 473 (Wyo. 2006).

<sup>25</sup> W.S. 16-4-203(b).

<sup>26</sup> See Aland v. Mead, 2014 WY 83, ¶ 78, 327 P.3d 752, 773 (Wyo. 2014). In order to assert the privilege, the state or political subdivision must show that: (1) the record is an interagency or intra-agency communication; (2) the record is pre-decisional and deliberative; and (3) disclosure is not in the public interest. Id. ¶ 39, 139 P.3d at 766.

construes the exemptions listed in W.S. 16-4-203 narrowly.<sup>27</sup> This construction is based on the overarching goal that "disclosure, not secrecy, should prevail."<sup>28</sup>

If the right of inspection of a record falls within any of the listed classifications in W.S. 16-4-203 is allowed to any media officer or employee of one newspaper, television station, radio station, or other media outlet, that record "may be allowed to all news media."<sup>29</sup> If a custodian denies the right to inspect, the applicant may request a written statement for the grounds for denial, including the law under which access is denied.<sup>30</sup> A person denied the right to inspect any record covered by the Act can apply to the district court for an order directing the custodian to show cause why the custodian should not permit inspection of the record.<sup>31</sup> Similarly, the custodian can apply to the district court for an order restricting disclosure if the custodian believes that disclosure would "do substantial injury to the public interest, notwithstanding the fact that the record might otherwise be available to public inspection."<sup>32</sup> The Wyoming Supreme Court has stated that the remedies available to one denied access are limited to those listed in the Public Records Act.<sup>33</sup>

A person who can inspect records under the Act may request copies or printouts of the records.<sup>34</sup> The official custodian can charge a reasonable fee for furnishing copies, and the Department of Administration and Information must adopt uniform rules for state agencies to use for procedures, fees, costs, and charges for inspecting and copying records.<sup>35</sup> The Wyoming Supreme Court has held that "if the only way for the custodian to provide the record is to produce a copy of it," the party making the request must bear the costs of producing that copy.<sup>36</sup>

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<sup>27</sup> See Sheaffer, ¶ 13, 139 P.3d at 473.

<sup>28</sup> Allsop v. Cheyenne Newspapers, 2002 WY 22, ¶ 10, 39 P.3d 1092, 1095 (Wyo. 2002).

<sup>29</sup> W.S. 16-4-203(c).

<sup>30</sup> W.S. 16-4-203(e).

<sup>31</sup> W.S. 16-4-203(f).

<sup>32</sup> W.S. 16-4-203(g).

<sup>33</sup> See Guy v. Lampert, 2015 WY 148, ¶¶ 18–19, 362 P.3d 331, 338 (Wyo. 2015) ("This Court will not read remedies into a statute that were not put there by the legislature.").

<sup>34</sup> W.S. 16-4-204(a).

<sup>35</sup> W.S. 16-4-204(a) and (e).

<sup>36</sup> Cheyenne Newspapers, Inc. v. Bd. of Trustees, 2016 WY 113, ¶ 14, 384 P.3d 679, 684 (Wyo. 2016). Two justices dissented in this case, concluding that the Public Records Act prohibits governmental entities from charging a fee for the inspection of electronic records. Id. ¶ 33, 384 P.3d at 687 (Davis, J., dissenting).



The Act also contemplates requests for public records that exist primarily or solely in electronic format. Among other things, electronic-record inspection and copy are subject to the following:

- The requestor must bear the "reasonable costs of producing a copy of the public record," including the costs of programming and computer services;
- An agency is required to "provide an electronic record in alternative formats unless doing so is impractical or impossible";
- An agency is not required "to compile data, extract data or create a new document to comply with an electronic record request if doing so would impair the agency's ability to discharge its duties";
- An agency isn't required to allow inspection or copying of a record in electronic format if doing so would jeopardize the security or integrity of the original record or any proprietary software where the record is maintained.<sup>37</sup>

For various special districts and boards that are listed in W.S. 16-12-202, the Public Records Act governs those entities' public-record disclosure requirements.<sup>38</sup> The Special District Act specifies certain documents of which the covered entities must maintain copies and make readily accessible to the public.<sup>39</sup>

### **Changes to the Public Records Act in 2019 Senate File 0057**

The Legislature enacted Senate File 0057 in the most recent session. The bill takes effect on July 1, 2019, and it amends various provisions in the Public Records Act, including:

- Streamlining definitions and references throughout the Act to refer to "governmental entity," which means the State of Wyoming, an agency, political subdivision, or state institution of Wyoming;<sup>40</sup>
- Requiring applications for public records to be made to a designated public-records person and requires all governmental entities to designate a public-records person, with that information being listed on the Department of Administration and Information's website;<sup>41</sup>

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<sup>37</sup> W.S. 16-4-202(d).

<sup>38</sup> See W.S. 16-12-302(a); Wyo. Jet Center, LLC v. Jackson Hole Airport Bd., 2019 WY 6, ¶ 32, 432 P.3d 910, 919 (Wyo. 2019).

<sup>39</sup> Wyo. Jet Center, LLC, ¶ 32, 432 P.3d at 919.

<sup>40</sup> W.S. 16-4-201(a)(xiii), as created by 2019 Senate File 0057.

<sup>41</sup> W.S. 16-4-202(a) and (e), as amended by 2019 Senate File 0057.

- Requiring the governmental entity to respond to an applicant within seven business days after receiving the request to inform the applicant that the records are not in the custody or control of the governmental entity and give the name and contact information of the appropriate designated public-records person, regardless of whether good cause exists to prevent a response within seven days;<sup>42</sup>
- Requiring all public records to be released not later than 30 calendar days after acknowledging receipt of a request, unless good cause exists;
- If good cause exists, requiring the public records to be released on a mutually agreed-upon date. If the applicant and governmental entity cannot agree on a date, the applicant can file a complaint;<sup>43</sup>
- Requiring the governor to appoint an ombudsman to receive and review complaints from applicants;<sup>44</sup>
- Authorizing the ombudsman to mediate disputes, prescribe timelines for releasing records, and waive any fees the governmental entity charges.<sup>45</sup>

Senate File 0057 also clarifies that any person aggrieved by the failure of a governmental entity to release records on a specified date or by the governmental entity failing to comply with an order of the ombudsman (instead of, as currently provided, any person denied the right to inspect any covered record) can (1) apply to the district court for an order directing the custodian to show cause why inspection should not be permitted and to compel production of the record or (2) file a complaint with the ombudsman. Under the revised Act, the applicant "may petition the district court for a determination as to whether the custodian has demonstrated good cause."<sup>46</sup>

This summary is meant to provide a broad and basic overview of Wyoming's Public Records Act and changes made to the Act in 2019 Senate File 0057. If you have any questions, please let me know.<sup>47</sup>

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<sup>42</sup> W.S. 16-4-202(b), as amended by 2019 Senate File 0057.

<sup>43</sup> W.S. 16-4-202(c), as amended by 2019 Senate File 0057.

<sup>44</sup> 2019 Senate File 0057, § 2.

<sup>45</sup> W.S. 16-4-202(f), as amended by 2019 Senate File 0057.

<sup>46</sup> W.S. 16-4-202(c)(v), as created by 2019 Senate File 0057.

<sup>47</sup> The Public Records Act is provided in a separate appendix, as is 2019 Senate File 0057.