

# The Firehouse Lawyer

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## New Location and Circuit Riding

Breaking News! We are now leasing office space from South King Fire and Rescue at Station 67 in Des Moines, WA. This means that we have offices in King County (at South King) and Pierce County (at Gig Harbor Fire and Medic One). Because our clients enjoy speaking with us face to face, we felt it was time to expand. Thank you to South King Fire and Rescue for welcoming us to Station 67!

Speaking of clients getting facetime, we have been getting a lot of compliments about our in-house availability to our clients. After all, we may be the only attorneys in the country that are physically present—renting office space—in fire stations. In that spirit, and because of the changing technological climate, we have decided to introduce the concept of “circuit riding” into our practice. Under this concept, we would set office hours at various fire stations operated by our clients, and would provide one lawyer to be “in the house,” i.e. physically present, in those fire stations, for approximately three hours out of each month. Such office hours would give the client the opportunity to consider any legal issues that arise, and ask those during our office hours, while we are “riding the circuit” and are physically present, for a face-to-face discussion. Of course, we will only invoice for those services actually provided during the office hours!

## Be Careful about Five-Day Letters

Under the Public Records Act, within five business days of receiving a public records request, generally, a public agency must respond by denying the request; providing an internet address for where the records can be found; granting the request and providing the records or providing a reasonable estimate of when the records are expected to be disclosed—or some combination of the above. RCW 42.56.520. Recently, the Washington Court of Appeals, Division One, found that an agency did not provide a reasonable estimate—and did not even provide of five-day letter—of when certain records would be provided. *See Rufin v. City of Seattle*, No. 74825-4-1 (2017). To the court, this violated the PRA. We tend to agree.

Of course, RCW 42.56.550(4) authorizes a penalty for the denial of the right to inspect or copy a public record, but **does not** authorize a freestanding penalty for lack of a five-day letter. *See Sanders v. State*, 169 Wn.2d 827, 860, 240 P.3d 120 (2010). Therefore, Division One found, there was no separate grounds for a penalty based on the failure to provide the five-day letter in this case. The court ultimately decided that the agency produced the records within a reasonable time. But the failure to provide a five-day letter was a violation of the PRA, nonetheless.

Consequently, when your agency receives a public records request, prior to commencing a thorough search for public records, consider where the records are reasonably likely to found and the time and resources it will take to find the records—or whether such records exist. When your PRO finishes that assessment, provide a five-day letter that denies the request,

grants the request, provides an internet address, and/or provides a reasonable estimate. Additionally, do not hesitate to ask for clarification if the request does not adequately enumerate what records re being requested. Admittedly, the *Rufin* case does not stand for the proposition that your public agency may be financially penalized for failing to provide a five-day letter, in the same way that your agency may be penalized for wrongfully withholding non-exempt public records. However, attorney's fees may still be assessed for violation of the PRA—the plaintiff in *Rufin* was awarded reasonable attorney's fees.

## Most-Recent Municipal Roundtable

This June, there have not been many novel legal issues that we have not already addressed in the *Firehouse Lawyer*. Consequently, we thought we would recap our most-recent municipal roundtable, held at East Pierce Fire and Rescue (thanks again, Chief Backer, for hosting us).

At this roundtable, we discussed the advantages and disadvantages of the following funding sources (handy links to *Firehouse Lawyer* articles on these funding sources below):

1. Property Taxes<sup>1</sup>
2. Benefit Charges<sup>2</sup>

1

<http://www.firehouselawyer.com/Newsletters/v01n08dec1997.pdf>

2

<http://www.firehouselawyer.com/Newsletters/2016SeptemberFINAL.pdf> (take note that the initial imposition of a benefit charge by either an RFA or a fire district requires a 60% majority, NOT 60% + validation.)

3. Federal Grants
4. The 450 Tax<sup>3</sup>
5. Local Improvement Districts<sup>4</sup>
6. Impact Fees and SEPA Mitigation<sup>5</sup>
7. Fees for Service under RCW 52.12.131
8. Contracts under RCW 52.30.020<sup>6</sup>
9. GEMT—RCW 41.05.730

## Correction

In a recent article, we spoke about the 450 Tax—see link at Footnote 3 below. We stated that “[U]nder Washington law, a county or city may impose an additional sales and use tax of “three-tenths of one percent of the selling price in the case of a sales tax, or value of the article used, in the case of a use tax.” RCW 82.14.450 (1). This is not entirely accurate: **Counties may impose a sales and use tax of 3/10 of one percent; cities may impose a sales and use tax of 1/10 of one percent—one third of either the 3/10 or 1/10 must go for “criminal justice**

3

<http://www.firehouselawyer.com/Newsletters/April2017FINAL.pdf>

4

<http://www.firehouselawyer.com/Newsletters/February2016FINAL.pdf>

5

<http://www.firehouselawyer.com/Newsletters/v10n03mar2010.pdf>; *See Also*  
[http://www.firehouselawyer.com/Newsletters/July\\_2015\\_FINAL\\_2.pdf](http://www.firehouselawyer.com/Newsletters/July_2015_FINAL_2.pdf)

6

<http://www.firehouselawyer.com/Newsletters/May2017FINAL.pdf>; *See Also*  
<http://www.firehouselawyer.com/Newsletters/v12n03sep2014.pdf>

## **purposes, fire protection purposes, or both.”**

The remainder of that article is perfectly accurate, but we felt the need to correct the record. There is one additional aspect of the 450 Tax that we find interesting: RCW 82.14.450, the statute enabling the 450 Tax, does not appear to contain a sunset provision. This could certainly mean that according to RCW 82.14.450, once passed by a simple majority of voters, the 450 Tax stays “on the books” permanently, except in the case of a referendum—a citizen-initiated law that repeals another law.

## **Retainage and Closing Out of a Public Works Project**

While the question does not come up often, sometimes (and once very recently) we are asked about what to do (and when) with the retainage of 5% of the contract price, when a public works project is ready for closeout. This article is based on a memo to the file we created a few years ago for internal use.

The purpose of this "memo" is to succinctly summarize the requirements and procedures for closing out public works projects, including paying out the retainage. The process is fairly simple.

I am assuming: (1) The general contractor has requested final payment and payment of all retainage; and (2) the architect or owner has certified the job as being substantially completed and ready for final payment.

Here are the requirements:

1. Once the contract work is done (except there may be landscaping remaining) the contractor may request payment of the

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retainage. Sixty days thereafter you must release and pay the retainage (except for the 5% retainage on any landscaping work remaining to be done), *subject to the provisions of chapter 39.12 RCW on prevailing wages and chapter 60.28 RCW on retainage.*

2. That “subject to” language above means there are some exceptions, but basically you ordinarily have 60 days to release and pay, after the request. If you do not then pay on time, the contractor may have a claim, at least for interest due.
3. Check and make sure there are no lien claims. Those are supposed to be filed no less than 45 days after the completion date. (Note the relationship between the 45 and the 60 day periods.) Since the law requires them to provide you with that 45-day notice, you would know if there are liens.
4. You must make sure the “Affidavits of Wages Paid” have been properly filed with you before paying the retainage. *See RCW 39.12.040(1)(b).* The statute requires that following final acceptance, the officer charged with disbursement of public funds (someone at the public agency) must require the contractor *and all subcontractors* to submit those affidavits, before the retainage is released.
5. You must also make sure all taxes are paid to the Department of Revenue. *See RCW 60.28.020 and .021.* The statutes provide that you must get a certificate

from the Department of Revenue, certifying that all taxes have been paid.

In summary, once you are sure that (1) there are no liens of any kind against the retainage; (2) that prevailing wages have been paid by all parties; **and** (3) that all taxes have been paid, only then is it safe to pay over the retainage to the general contractor. After all, that is what the retainage was created and held for in the first place. It is important to note that if you pay prematurely, and it turns out there is a claim, the district may have to pay the claimant regardless of what the contractor does, and at the risk of things like contractor bankruptcy, etc.

See, I told you there was nothing to it and it is very simple.

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