



STATE OF WASHINGTON
DEPARTMENT OF AGRICULTURE
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November 7, 2013

D. Ellsworth
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Re: Petition to amend WAC 16-06-201(29)

Dear Mr. Ellsworth,

The Department received your petition for rulemaking filed on behalf of Citizens for Sustainable Development dated September 23, 2013. In your petition, you request that the Department amend WAC 16-06-210(29). You also provide a lengthy analysis and a number of exhibits. We summarize your request to be, first, that the Department commence rulemaking to make WAC 16-06-210(29) applicable to all state and local agencies and, second, that the Department revise the numerical ranges provided for in WAC 16-06-210(29).

The Department adopted WAC 16-06-210(29) as a result of the Legislature's passage of two exemptions to the disclosure of public records which are codified at RCW 42.56.610 and RCW 90.64.190. Those sections of law provide that certain information from specified records (including number of animals, volume of livestock nutrients generated, number of acres covered by the plan or used for land application of livestock nutrients, livestock nutrients transferred to other persons, and crop yields) may be redacted and replaced with a numerical range. The stated purpose of these exemptions to disclosure is to allow these specific and targeted redactions to the covered records to ensure confidentiality of business information while still providing meaningful information to the public.

The language contained in RCW 42.56.610 and RCW 90.64.190 is somewhat unique as the exemptions to disclosure apply to information in the specified records held by state and local agencies but the Legislature directed only the Department of Agriculture to adopt rules establishing the numerical ranges that would replace the redacted information. The Department fulfilled the directive of the Legislature by consulting with affected agencies and adopting a set of ranges in WAC 16-06-210(29) in 2009.

We do understand that Department may not have been consistent or clear in how it has communicated about the applicability of WAC 16-06-210(29). I would like to take this opportunity to explain the difficulties inherent in the situation and clarify the Department's position. First, the Department has no ability to guarantee that another agency would not be penalized under the Public Records Act if they chose to redact information and replace it with the numeric ranges in WAC 16-06-210(29) and a court later decided the redaction was in error. Second, each agency is responsible for its own legal analysis to determine whether their records are those covered by RCW 42.56.610 and RCW 90.64.190 and whether the redaction and replacement with a numeric range is appropriate for their records.

It is not the Department's position that WAC 16-06-210(29) does not apply to other agencies. Instead, the Department's position is that it cannot decide for other agencies whether they may make the redactions prescribed by the rule. The Department of Agriculture (WSDA) cannot make guarantees or take on the potential for liability if it turns out the other agency should have released the records in full. Each agency must conduct its own analysis. Some agencies may feel they can cite to the WSDA rule when redacting records. Others may feel they need to adopt their own rules or policies. Yet others may feel that the Legislature was not sufficiently clear on the application of the exemption to disclosure to risk the possibility of penalties under the Act and will release records in full.

All state and local agencies are subject to the Public Records Act. The Act is a clear directive to these agencies to make all records available to the public unless the Act or other law provide for an exemption to disclosure of those records. RCW 42.56.030 states that "this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected." In following this mandate, agencies must determine whether the records they hold are subject to any exemption to disclosure. If an agency withholds or redacts a record that should have been provided in full, an agency may be subject to heavy penalties under the Act. Because of this, agencies must be conservative when deciding to withhold or redact records. This can be a difficult decision and only the agency holding the records will have all the information about the records necessary to make this determination. Often agencies will decide to release records in full rather than risk misapplying an exemption to disclosure.

Agencies other than the Department face this situation when deciding whether to redact information and replace it with the numerical ranges in WAC 16-06-210(29). Since the issue has never been decided by a court, agencies cannot be sure that they will be allowed to cite a WSDA rule as a basis for redacting records. Given that RCW 42.56.610 and RCW 90.64.190 are not mandatory exemptions and RCW 42.56.060 removes liability when agencies release records in good faith, it is not surprising that other agencies may believe that applying the redactions per WAC 16-06-210(29) presents unacceptable legal risk and instead will decide to release the information in full. (Of course, it is also possible that another exemption to disclosure may apply to the records in question.)

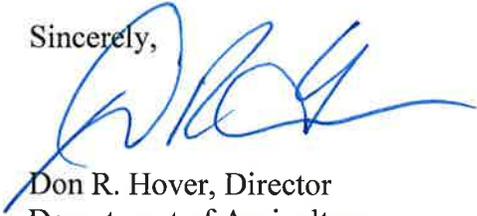
Letter to D. Ellsworth
November 7, 2013
Page 3

For this reason, WSDA declines your first request to adopt amendments to WAC 16-06-210(29) that purport to make the redactions described in that rule applicable to all state and local agencies. Any other agency can now perform the independent analysis to determine whether the rule applies to their records and the redactions can or should be made. Additional changes to the rule are not necessary to address your concerns.

Your second request is that WSDA commence rulemaking to re-examine the numeric ranges in WAC 16-06-210(29). WSDA grants this request and will shortly be filing a statement of inquiry under RCW 34.05.310 to solicit comments from the public on a subject of possible rule making. You will be added to the Department's list of interested stakeholders and will be provided with a copy of the statement of inquiry (commonly known as a CR-101). In that document you will be provided with information about the process by which you may participate in the rulemaking process.

If you have questions or wish to discuss this matter further, please contact Elizabeth McNagney at (360) 902-1809 or emcnagney@agr.wa.gov.

Sincerely,



Don R. Hover, Director
Department of Agriculture