

## INDIAN LAW NEWS YOU CAN USE

### Eat the Document: Non-Tribal Public Records Acts in Washington Indian Country



By Anthony S. Broadman<sup>1</sup>

#### INTRODUCTION

State and federal public records acts ensure transparency and accountability within non-Tribal governments. They give citizens one mechanism for gathering information necessary to keep government responsible for its actions.

But these same laws, which keep non-Tribal governments honest, have had profoundly negative impacts on Tribal interests. Critically, the Freedom of Information Act (“FOIA”)<sup>2</sup> and state public records laws manifest non-Tribal governments’ intentions regarding non-Tribal governmental information. Applying them, even indirectly, to Tribal governmental records violates the most basic tenets of Tribal sovereignty: the right of Tribes to “make their own laws and be ruled by them.”<sup>3</sup>

Although public record acts do not generally apply directly to Tribes, they do function to strip protections from information passed between Tribes and federal, state, and local governments.

The dangers associated with disclosing valuable information to the government, and the necessity to work proactively to protect against public disclosure requests, are often unknown until it is too late.

The following overview of the Freedom of Information Act and the Washington State Public Records Act are followed by descriptions of three cases in which Tribes were unable to protect information from public records requests because they disclosed the information to another government. Rather than providing strategies for preserving information in the face of public records requests, Tribes should scrutinize information to be released through intergovernmental relationships and develop internal processes, including Tribal legislation, to the extent any Tribal information is shared.

#### FEDERAL AND STATE PUBLIC RECORDS ACTS

##### I. Freedom of Information Act

Following World War II, the United States Government routinely concealed information from the American people.<sup>4</sup> Political campaigns and media condemned the

approach, culminating in a congressional subcommittee on Government Information.<sup>5</sup> In 1966 the FOIA was passed.<sup>6</sup>

Subject to limited exceptions,<sup>7</sup> FOIA gives any person the right to access the public records of the Federal Government.<sup>8</sup> FOIA applies to any “agency” of the Federal Government, including any executive department, military department, Government owned or controlled corporation, or any independent regulatory agency.<sup>9</sup> Anyone can request “public records” from these agencies, which refers to all information held by an agency in any format.<sup>10</sup> Although FOIA serves the interests of democracy by providing governmental transparency, it can have dire consequences for Indian Tribes.

In general, public record requests made directly to Tribes are not permissible under FOIA.<sup>11</sup> However, any record, communication, or piece of information passed from a Tribe to the federal government becomes a public record that can be disclosed upon request under FOIA unless an exception applies.<sup>12</sup> The discussion below of *DOI v. Klamath Water Users Protective Association* provides an example of the consequences facing Tribes who communicate information with the federal government.<sup>13</sup>

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##### II. Washington State Public Records Act

The Washington State Public Records Act (“PRA”)<sup>14</sup> was passed in 1972, in the wake of the Watergate scandal and the passage of the federal Freedom of Information Act.<sup>15</sup> By giving citizens the power to request public records, the PRA was meant to promote transparency in local and state government.<sup>16</sup> The scope of the PRA is limited, in the broadest sense, to “agencies” and “public records.”<sup>17</sup> The term “agency” is broadly defined under the statute to include all state and local offices, departments, divisions, bureaus, boards, commissions, etc.<sup>18</sup> The term “public record” is defined in a similarly broad fashion as any writing pertaining to the conduct or performance of government, and prepared, owned, used, or retained by government.<sup>19</sup> Subject to limited exceptions, anything written for and used by the government can be obtained using a public record request under the PRA.<sup>20</sup>

With regard to Indian Tribes, the PRA does not in any way grant the State of Washington the power to enforce public records requests against a Tribe.<sup>21</sup> However, a Tribe can nevertheless find itself an inadvertent subject of public records disclosures for any documents that it has provided to a state or local agency.<sup>22</sup> Courts have held that any documents disclosed to state government by Tribes are not protected by federal law and can be disclosed as

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public records.<sup>23</sup> The following discussions of *The Confederated Tribes of the Chehalis Reservation v. Johnson*<sup>24</sup> and *Great Northern Paper v. Penobscot Nation*<sup>25</sup> provide examples of the inherent danger Tribes face when disclosing documents to respective state and local governments.

### CASES

The following three cases present examples of Tribes that lost the ability to protect Tribal information because of their collaborative efforts with federal and state governments. In each case, the Tribes communicated information with a government agency that became the subject of a public records request. The Tribes' attempt to protect their information by invoking tribal sovereignty, principles of federal Indian law, and the exceptions of their respective public records legislation fell by the wayside. The information was released, leaving Tribes to balance the benefits of cooperation with federal and local governments with the threat that any information they provide will become a part of the public record.

#### I. Federal Law: *DOI v. Klamath Water Users Protective Association*

In 1995, the Department of the Interior approached the Klamath and Basin Tribes to consult regarding a water reclamation project that allocated water among competing water users in southern Oregon and northern California.<sup>26</sup> In preparation for a suit brought by the Bureau of Indian Affairs ("BIA") to protect the Klamath Tribe's water rights in the Klamath River Basin, the Klamath Tribe and BIA exchanged written communications concerning the lawsuit.<sup>27</sup> Due to the scarcity of water in the Klamath River Basin, a number of parties were in an adverse position to that of the Klamath Tribe, including the Klamath Water Users Protective Association ("the Association").<sup>28</sup> Pursuant to the FOIA, the Association filed requests with BIA for all communications between BIA and the Klamath Tribe concerning the Project.<sup>29</sup> The BIA refused to produce some of the documents, claiming that they were exempt from FOIA. The Association filed suit to compel production of the documents.<sup>30</sup>

FOIA requires federal agencies to disclose public records for all requests not falling under FOIA's enumerated exceptions.<sup>31</sup> In particular, Exemption 5 protects inter agency or intra agency communications not generally discoverable by the courts.<sup>32</sup> There are two requirements for a document to qualify as exempt under Exemption 5.<sup>33</sup> First, its source must be a government agency.<sup>34</sup> Second, the document must fall under a privilege against discovery using judicial standards that would govern litigation against the agency that holds it.<sup>35</sup> In this case, the Court grappled with the issue of whether agency communications with an

Indian Tribe qualified as being sourced from a government agency as required by the statute.<sup>36</sup>

The DOI first argued that the tribe was acting as a consultant for the BIA.<sup>37</sup> In previous case law, documents prepared for a federal agency by outside consultants have been regarded as sourced by a government agency and exempt from FOIA under Exemption 5.<sup>38</sup> But the Court rejected that argument. Writing for a unanimous Court, Justice Souter reasoned that because Indian tribes represent their own interests when consulting with BIA, while an outside consultant hired by a government agency would remain neutral, their communications are not to be considered as sourced from a government agency.<sup>39</sup>

The DOI also argued that the application of Exemption 5 was necessary for the government to fulfill its trust obligation to Indian tribes.<sup>40</sup> The DOI reasoned that frank communications are essential to the proper discharge of that duty.<sup>41</sup> The Court rejected this argument as well, explaining that the trust obligation of the government does not outweigh the textual requirement that Exemption 5 documents be sourced from a government agency.<sup>42</sup> The judgment against the DOI was affirmed.<sup>43</sup>

The impact of this case was to eliminate FOIA protection for documents created by Tribes for federal agencies unless protected by another federal statute. In light of *Klamath Water Users*, it is now safe to assume that any document sent by a Tribe to a federal agency becomes a public record that can be requested of and transmitted by the receiving agency.

#### II. Washington State Law: *The Confederated Tribes of the Chehalis Reservation v. Johnson*

In *The Confederated Tribes of the Chehalis Reservation v. Johnson*, Washington Tribes entered into a Tribal-State gaming compact with the State of Washington under the Indian Gaming Regulatory Act.<sup>44</sup> Like many tribes, the Tribes in *Johnson* agreed to contribute to a fund that supports local non-tribal agency costs for law enforcement, emergency services, etc.<sup>45</sup> The fund was administered by a committee composed of representatives from the Washington State Gambling Commission, the Tribes, and local agencies impacted by the gambling operation.<sup>46</sup> Under Washington's PRA, James M. Johnson, who now sits on the Washington State Supreme Court, requested all documents concerning the amounts paid into the funds by Indian Tribes engaged in gaming.<sup>47</sup> The Tribes objected to the release of the records and filed suit in Thurston County Superior Court, where Mr. Johnson filed a cross complaint seeking an order to disclose the records.<sup>48</sup>

As noted above, Washington's PRA operates in much the same way as FOIA in that it requires all state and local agencies to provide public records upon request, unless

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the requested document is exempt.<sup>49</sup> The enumerated exemptions are narrowly interpreted by the courts in the interests of maximizing public disclosure by the state.<sup>50</sup> The Tribes argued that the requested records were not “public records” as defined by the PRA, that the records were trade secrets not subject to the PRA, and that the “Other Statute” exemption applied to the documents.<sup>51</sup>

The primary issue in *Johnson* was whether the requested documents were public records properly requested under the PRA.<sup>52</sup> The PRA defines a “public record” as, “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristic ....”<sup>53</sup> The Tribes argued that the requested information did not relate to the conduct of government or execution of governmental functions, but rather related solely to the internal functions of the Tribes.<sup>54</sup> The court rejected this argument, explaining that the documents were prepared for use by the Gambling Commission to aid in its governmental functions.<sup>55</sup>

The Tribes also argued that the information was a ‘trade secret’ exempted from requests made under the PRA.<sup>56</sup> Trade secrets are protected under the PRA, and are defined as information that is novel and not readily ascertainable.<sup>57</sup> The Tribes reasoned that from the requested records someone could calculate their casino’s profitability and further gauge the market, which made the information novel.<sup>58</sup> However, the court explained that the profitability and general market for gambling could be measured through other means available to the public, making the information readily ascertainable.<sup>59</sup> The information was held not to be a trade secret exempt from the PRA.<sup>60</sup>

The Tribes also argued that the Tribal-State gaming compact exempted the documents from PRA requests.<sup>61</sup> The “Other Statutes” exemption to the PRA exempts any documents explicitly protected by another statute.<sup>62</sup> The Tribes argued that the Tribal-State gaming compacts implicitly protected the requested information from record requests.<sup>63</sup> Again, the court rejected the Tribes’ arguments,<sup>64</sup> holding that Tribal-State gaming compacts did not explicitly protect any documents from the PRA, and that the compact was not a statute.<sup>65</sup> The court ultimately ruled against the Tribes, holding that the documents should be disclosed under the PRA.<sup>66</sup>

This case accomplished at a state level what *DOI v. Klamath* accomplished at the federal level. Documents shared by Tribes with state and local agencies are generally subject to PRA requests, whether the Tribe wanted them

disclosed or not. Again, this was a strong statement from the State of Washington that any information that Tribes wish to protect should absolutely not be shared with the State government. Ironically, Justice Johnson likely caused the opposite result he sought: Tribes should and will be less willing to share information with non-Tribal governments. State agencies should expect Tribal governments to be reluctant to share any sensitive documents, absent a clear exemption.

**III. State Law: *Great Northern Paper v. Penobscot Nation***

In *Great Northern Paper v. Penobscot Nation*,<sup>67</sup> it was alleged that Great Northern Paper discharged wastewater into the St. Croix River, which borders the Penobscot Nation in Maine.<sup>68</sup> The State of Maine applied to the Environmental Protection Agency (“EPA”) to take control of the issuance of wastewater discharge permits throughout the State, and the Penobscot Nation appealed to the EPA to protect their sovereign right to regulate water resources

within their reservation.<sup>69</sup> Recognizing the potential threat to their interests in wastewater discharge if the Penobscot Nation were to gain regulatory control over the St. Croix River, the Great

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Northern Paper Company requested all documents regarding the appeal under the Maine Freedom of Access Act.<sup>70</sup> However, unlike the previous two cases, Great Northern Paper sought documents directly from the Nation rather than a state or federal agency.

In Maine, the relationship between tribes and the state is not governed by general federal Indian law.<sup>71</sup> Rather, in 1980 numerous tribes, the State of Maine, and the federal government entered into an agreement that granted limited sovereignty, land grants, money, and federal recognition to the tribes.<sup>72</sup> In return, the State of Maine eliminated the tribes’ land claims throughout the state and retained jurisdiction over the tribes and tribal lands as if the reservations were municipalities of the state.<sup>73</sup> Since Maine treats tribal governments as municipal governments, the issue of the case became whether the Maine Freedom of Access Act could be applied to Tribal governments.<sup>74</sup>

The Maine Freedom of Access Act does not contain an exception for Tribes or Tribal governments.<sup>75</sup> The Maine Implementing Act, however, which defines the rights of tribes in the State of Maine, states that the internal affairs of the tribe are to be free from state interference.<sup>76</sup> The Penobscot Nation argued that the Maine Implementing Act stood as a bar to enforcement of the Maine Freedom of Access Act because any documents relating to tribal affairs are internal to the tribe.<sup>77</sup> Although the court ultimately

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agreed with the Nation as to internal documents, it went on to hold that whenever a tribe communicates in its municipal capacity with another government it is subject to the Maine Freedom of Access Act.<sup>78</sup> In effect, anytime a Tribe in Maine communicates with a local or state government, those communications become subject to public disclosure under the Maine Freedom of Access Act.

This case serves as another warning for Tribes to be extremely cautious when providing information to state or local agencies. By holding that a tribe's internal information was only protected as long as it remained internal, the state court reinforced the notion that Tribes should severely limit their disclosures to local and state governments. The Maine Freedom of Access Act simply fails to provide any safeguards for Tribes seeking to protect information once that information has been disclosed to a public agency.

### TRIBAL LEGISLATION

Without protections from state or federal law, and because those laws do not apply directly to tribes, it behooves Indian governments to take total control of access to tribal documents. Some tribes have, as discussed below. Tribal legislation is prudent. First, tribes may wish to share information with their members, or even non-members. Where this is the case, clear legislation regarding how and when such information is shared is critical to ensure uniformity and precision in what is released.

Second, where tribes elect not to share any information, tribal legislation fills the vacuum. Challenges to withholding information will be more easily disposed of in tribal and non-tribal courts if tribal legislation clearly addresses the situation. Moreover, a law that clearly addresses a situation will dispel the star-chamber aura requesters often complain surrounds tribal information. If tribes confer due process to information requesters, even when requests are appropriate denied for reasons made clear in legislation, tribal opponents will have less ammunition for complaints, whether in court or the court of public opinion.

Third, new provisions of the Indian Civil Rights Act,<sup>79</sup> modified by the Tribal Law and Order Act,<sup>80</sup> require Tribes wishing to expand their sentencing authority to "make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the refusal of judges in appropriate circumstances) of the tribal government ...."<sup>81</sup>

Fourth, where a Tribe has legislated how it will share information, when federal, state, or local agencies approach that Tribe seeking information, tribal legislation clearly defines the course such requests must take. Federal agencies that commonly seek information and documents from tribes – such as OSHA, the IRS, and the National Indian Gaming Commission ("NIGC") – can be directed to tribal

legislation that clearly dictates how and when a tribe will provide documents to a federal agency. Where such laws exist, federal agencies can slow and make more reasonable what are generally thoughtless invasions of tribal sovereignty made in the name of federal regulatory authority.

Tribes have legislated different levels of access to their records. The Yurok Tribe Freedom of Information Act provides a mechanism for enrolled members of the Yurok Tribe to review financial records, business records, and records relating to the administration of tribal programs.<sup>82</sup> The scope of the Act is limited to records relating to committees, offices, programs, or projects established by the Yurok Tribal Council, and does not extend to records of a personal nature.<sup>83</sup> The Yurok Tribal Council also has broad power to exempt records from the act as confidential that relate to gaming, tribal enrollment, tribal personnel, and closed Council sessions.<sup>84</sup> Any refusal by the Tribal Council to grant access to records can be appealed to the Yurok Tribal Court following exhaustion of administrative remedies; upon appeal, the court's authority to grant relief is limited to equitable relief, which arguably fails to incentivize cooperation in the same way that monetary damages would.<sup>85</sup> Non-members and non-Indians can obtain records under the Yurok Tribe's Freedom of Information Act following written approval by the Yurok Tribal Council.<sup>86</sup>

The Siletz Public Records Ordinance grants a limited right to Siletz Tribal members to access to Siletz government records that either have an effect on them, or involve general government activities.<sup>87</sup> However, the Ordinance gives the responding government officer the broad power to refuse the request if it interferes with government operations, violates the confidentiality expectations of tribal members or tribal government, jeopardizes the confidential activities of the Tribe, or where applicable laws restrict access to the requested documents.<sup>88</sup> Any such refusal can be appealed to the General Manager of the Tribe, whose decision is final.<sup>89</sup> Non-members can only obtain records under the Ordinance following approval by the General Manager of the Tribe, who can place any conditions she or he deems appropriate on the release of the requested documents.<sup>90</sup> It is important to note that, unlike FOIA which creates a presumption that requested documents should be disclosed, the Ordinance only provides that reasonable access should be granted to tribal records.<sup>91</sup>

The Snoqualmie Tribal Central Records and Public Access Act creates a right for Snoqualmie Tribal Members to access Tribal records, which includes any record in any form created or received by the Snoqualmie Indian Tribe.<sup>92</sup> Requests are addressed to the Secretary of Tribal Affairs, who can reject the request if it concerns police records, medical records, personnel records, trade secrets, enrollment records, and records protected by the attorney

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client privilege.<sup>93</sup> The Act further provides that document requests can be denied on confidentiality grounds, or given a Tribal, State, or Federal law that restricts disclosure of the requested documents. Public record requests that are denied by the Secretary of Tribal Affairs can be appealed to the Snoqualmie Tribal Council, whose decision is final.<sup>94</sup> Although non-members can also file public records requests with the Secretary of Tribal Affairs, the ultimate power to decide whether to grant disclosure of Tribal documents to non-members rests with the Tribal Council, who is advised by the Secretary of Tribal Affairs.<sup>95</sup>

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In light of non-Tribal court cases exposing Tribal information through non-Tribal laws, tribal governments should proactively shield themselves from unwanted disclosures under state public records acts and FOIA. The most effective strategy for protecting valuable information is for tribes to severely limit information disclosures to state and federal government agencies, through policy or more formal tribal legislation. Tribes may accurately view disclosures of information to any government agency as a public disclosure that anyone can access through a public records request. Only diligence in monitoring outgoing documents will ensure that valuable tribal information remains protected.

Tribes can also lobby state and federal lawmakers to pass laws protecting tribal information held by a government entity from public disclosure.<sup>96</sup> Both the federal government and state governments have a strong interest in open communication between themselves and tribes. As it is, though, such communication is jeopardized by the lack of protections for information disclosed by tribes. Furthermore, the federal government's trust duty vis-à-vis tribal governments mandates that the federal government maintain and further develop open lines of communication. However, the trust duty cannot be fulfilled if tribes are not able to communicate openly with their fiduciary for fear of public disclosure requests. By limiting disclosures to state and local governments – legislating to fill the tribal void that currently exists – tribal governments can better protect valuable information from falling into the wrong hands.

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2 5 U.S.C. § 552 (2002).

3 *Williams v. Lee*, 358 U.S. 217, 220 (1959).

4 HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW 18-19 (Greenwood Press, 1999); see also WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 624 (2d ed. 2001) (noting that the FOIA was created in response to pressure from media interests for legislation that would "open up the decision making processes of agencies" and create "a new right of access to government information").

5 FOERSTEL, *supra* note 3, at 18-19.

6 *Id.* at 42.

7 5 U.S.C. § 552(b) (2006).

8 5 U.S.C. § 552(a)(3)(A).

9 5 U.S.C. § 552(f)(1).

10 5 U.S.C. § 552(f)(2)(A).

11 5 U.S.C. § 552(f)(1) (defining "agency" without explicit or implicit reference to Indian Tribes).

12 5 U.S.C. § 552(f)(2)(A).

13 532 U.S. 1 (2001).

14 The Washington State Public Records Act, WASH. REV. CODE §42.56.030 (2010), provides a good example of a state public records act, and is used in this article as a general representation of state public records acts throughout the United States.

15 PUBLIC RECORDS ACT DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS 1-2, 2-2 (Washington State Bar Association 2006).

16 *Id.*

17 *Id.* at 3-1.

18 WASH. REV. CODE § 42.56.010(1) (2010).

19 WASH. REV. CODE § 42.56.010(2).

20 PUBLIC RECORDS ACT DESKBOOK, *supra* note 15, at 3-1.

21 The Confederated Tribes of the Chehalis Reservation v. Johnson, 135 Wash.2d 734, 745 (1998) (limiting scope of PRA to State and Local agencies).

22 *Id.* at 753 (holding that commission records of Tribe's contribution not exempt from disclosure under public records act).

23 *Id.*

24 *Id.*

25 770 A.2d 574 (Me. 2001).

26 Dept. of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 5 (2001).

27 *Id.*

28 *Id.* at 13.

29 *Id.* at 6.

30 *Id.*

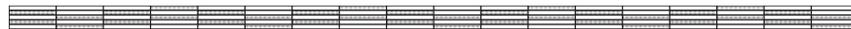
31 *Id.* at 7.

32 5 U.S.C. § 552(b)(5).

33 Klamath Water Users, 532 U.S. at 8.

34 *Id.*

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- 35 *Id.*
- 36 *Id.*
- 37 *Id.* at 10.
- 38 *Id.* (citing Hoover v. Dept. of Interior, 611 F.2d 1132, 1138 (5th Cir. 1980)).
- 39 532 U.S. at 11.
- 40 *Id.* at 11.
- 41 *Id.*
- 42 *Id.* at 12.
- 43 *Id.* at 16.
- 44 135 Wash.2d at 740.
- 45 *Id.* at 741-42.
- 46 *Id.* at 742.
- 47 *Id.*
- 48 *Id.* at 743.
- 49 *Id.* at 745.
- 50 *Id.* at 746.
- 51 135 Wn.2d at 746.
- 52 *Id.*
- 53 WASH. REV. CODE § 42.56.010(2).
- 54 135 Wash.2d at 748.
- 55 *Id.*
- 56 *Id.*
- 57 *Id.* at 749.
- 58 *Id.*
- 59 *Id.* at 749-50.
- 60 *Id.* at 750.
- 61 *Id.*
- 62 *Id.*
- 63 *Id.* at 751-52.
- 64 *Id.* at 752.
- 65 *Id.* at 750.
- 66 *Id.* at 756.
- 67 770 A.2d 574.
- 68 *Id.* at 577.
- 69 *Id.* at 577-78.
- 70 *Id.*
- 71 *Id.* at 580.
- 72 *Id.*
- 73 *Id.* at 584.
- 74 *Id.* at 585.
- 75 *Id.* at 587.
- 76 *Id.* at 588.
- 77 *Id.*
- 78 *Id.* at 589-90.
- 79 25 U.S.C. §§ 1301-03.
- 80 25 U.S.C. 2801 *et seq.*
- 81 25 U.S.C. § 1302(c)(4).
- 82 YUOK TRIBAL ORDINANCE, YUOK TRIBE FREEDOM OF INFORMATION ACT, § 1 (2006), available at [http://www.narf.org/nill/Codes/yurokcode/freedom\\_information\\_act.pdf](http://www.narf.org/nill/Codes/yurokcode/freedom_information_act.pdf).
- 83 *Id.* at § 2(d), (f).
- 84 *Id.* at § 10.
- 85 *Id.* at § 7.
- 86 *Id.* at § 4.
- 87 SILETZ TRIBAL CODE § 2.900, Ordinance No. 2008-01, Resolution No. 2008-257 (2008), available at <http://www.ctsi.nsn.us/uploads/downloads/Ordinances/Public%20Records%20Ordinance%20Final%206-13-08.pdf>.
- 88 *Id.* at § 2.901.
- 89 *Id.* at § 2.903.
- 90 *Id.* at § 2.904.
- 91 *Id.* at § 2.901.
- 92 SNOQUALMIE TRIBAL CODE, tit. 5, ch. 3, § 15.0(a), § 4.0 (2008) (Resolution No. 105-08), available at <http://www.snoqualmientation.com/Tribal%20Code/Public%20Records%20Act.5.3.Codified.pdf>.
- 93 *Id.* at §§ 20.0, 16.0.
- 94 *Id.* at § 21.0(a).
- 95 *Id.* at § 15.0(b).
- 96 See e.g. 42 C.F.R. § 137.176 (tribal records related to Tribal self-governance public health entities are generally not subject to FOIA).

