

# **PUBLIC RECORDS MANAGEMENT: ISSUES AND OPPORTUNITES**

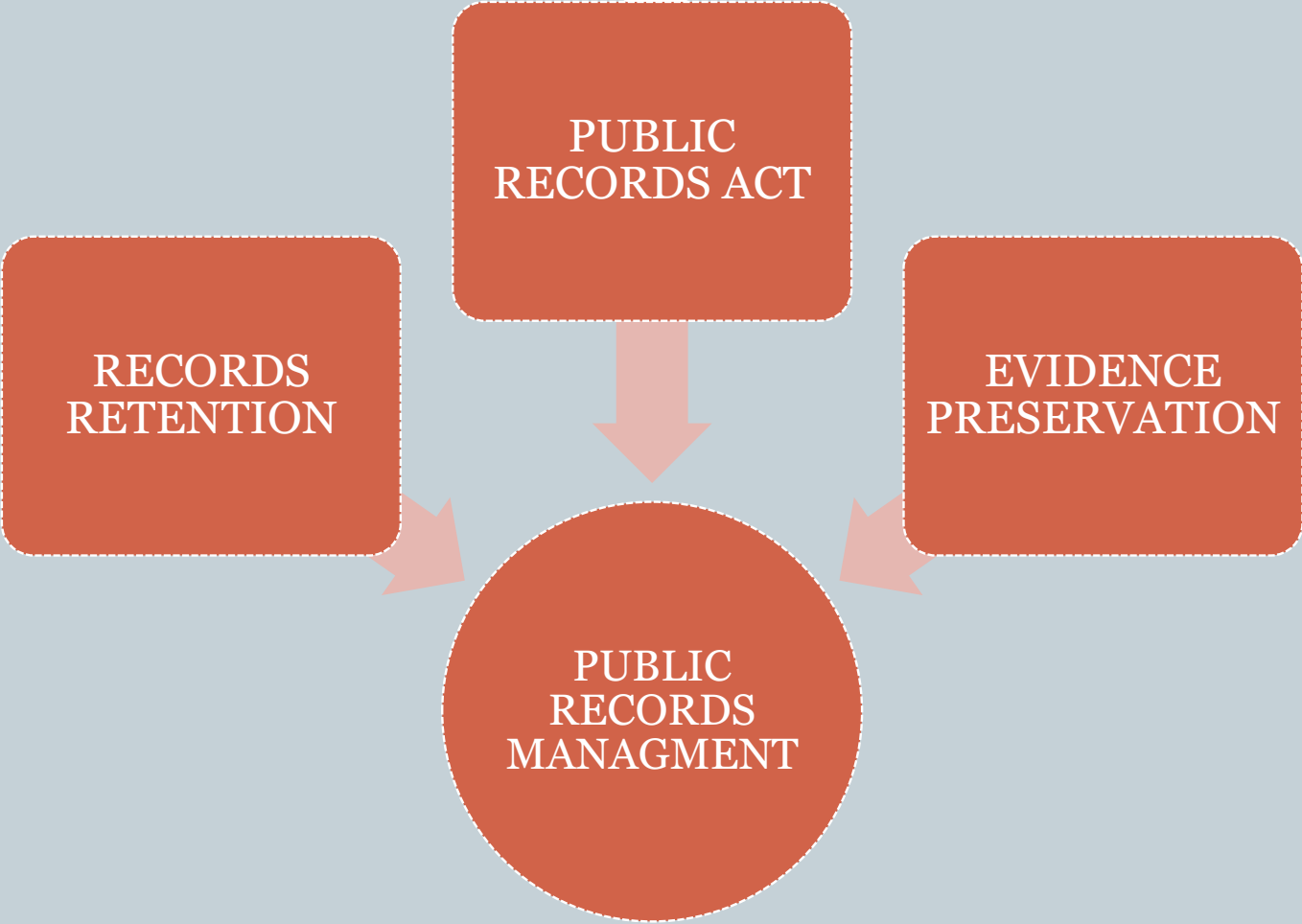


**PRESENTATION TO THE FISH AND WILDLIFE COMMISSION**

**JUNE 12, 2015**

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# OVERVIEW



# PUBLIC RECORDS ACT



WHAT YOU NEED TO KNOW

# PUBLIC RECORDS ACT—RCW 42.56



*The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. RCW 42.56.030*

# PUBLIC RECORDS ACT



Broad mandate in favor of disclosure of public records



Exemptions narrowly construed

# BASIC REQUIREMENTS



- Agencies must make all public records available for inspection and copying, unless exempt from disclosure. RCW 42.56.070
- Prompt response required—Within 5 business days, agency must either:
  - Provide the requested records
  - Deny the request
  - Acknowledge receipt and provide a reasonable estimate of time necessary to respond

# REASONS FOR MORE TIME TO RESPOND



- Clarify the intent of the request
- Locate and assemble the information requested
- Notify third persons or agencies affected by the request, if appropriate
- Determine whether any of the information requested is exempt and should be withheld from disclosure

# DENIALS



If WDFW denies all or part of a public records request, it must:

- Inform requestor in writing
- Explain reasons, citing to specific exemption(s) relied upon
- Provide any non-exempt information in the requested record



# IDENTITY/PURPOSE OF REQUESTOR



- Agencies generally cannot distinguish among persons requesting records
- Requesters not required to indicate the purpose for their request unless it is relevant to an applicable exemption

# “PUBLIC RECORD” BROADLY DEFINED



- Any writing containing information relating to the conduct of government or the performance of government or proprietary function that is **prepared, owned, used, or retained** by any state or local agency regardless of physical form or characteristics. RCW 42.17.020(41)
- Writing means handwriting, typewriting, printing, photographing, sound recording, and any other means of recording any form of communication or representation.

# PUBLIC RECORDS INCLUDE . . .



- **Electronic Records**
    - Email, data compilations, electronic calendars, etc.
  - **Paper Records**
    - Drafts, handwritten notes, etc.
  - **Audio and Visual Records**
    - Photographs, maps, Commission meeting recordings
- . . . If related to conduct of government and “prepared, owned, used or retained”

# THE SEARCH FOR PUBLIC RECORDS



- Upon receipt of a PDR, agency must conduct a search for responsive records; Search must be “**reasonably calculated**” to locate responsive records
- Search must include all places where responsive records are reasonably likely to be located
- May include personal computers, mobile phones, cloud storage used by agency staff or officials

# RESPONDING TO PUBLIC RECORDS REQUESTS



- If you receive a request directly:
  - Immediately forward to WDFW staff for processing
- If WDFW staff asks you to provide responsive records:
  - Do a **reasonable search** for responsive records
  - Promptly provide all responsive records to assigned staff, including records you think are exempt from disclosure
  - Don't assume someone else will produce a record
  - Do not destroy or discard any records that are subject to a pending public records request, even if the agency records retention policy would normally allow

# EXEMPTIONS



- List of statutory exemptions
- Exemptions narrowly construed
- Burden of proof on agency
- Partially exempt records: redaction and disclosure
- Non-disclosure log required
- Most exemptions are permissive, not mandatory
- WDFW consults with AGO on applicability of exemptions

# FISH AND WILDLIFE EXEMPTIONS



## RCW 42.56.430 Synopsis:

- Commercial fish catch data
- Sensitive wildlife data
- Certain personally identifying information of commercial and recreational licensees
- Certain information WDFW obtained but can't disclose under the Magnuson-Stevens Act

# GENERAL EXEMPTIONS OF INTEREST



- RCW 42.56.230: Certain employee personal info when disclosure would violate right to privacy
- RCW 42.56.240: Investigative records; non-disclosure essential to law enforcement/privacy
- RCW 42.56.260: Real estate appraisals until complete/abandoned
- RCW 42.56.280: Deliberative Process: Prelim drafts, notes, recommendations; opinions expressed or policies formulated
- RCW 42.56.290: Work Product/AC Privileged



# COMPLIANCE ISSUES



- Strict liability statute: Intent does not matter
- Penalties up to \$100 per violation per day
- Costs and attorney fees
- Immunity for damages resulting from good faith release of records in attempt to comply with Act.

# PRA'S BY THE NUMBERS



Number of public records requests to WDFW is on the rise:

- 2013 = 648
- 2014 = 715
- 2015 = 311 (though 6/10/15)

# PUBLIC RECORDS ACT--SUMMARY



1. Any writing relating to Commission work is a public record that is subject to disclosure if requested
2. Disclosure is the rule; withholding is the exception
3. Violations can be costly
4. Promptly respond to public records requests
5. Diligently search for all responsive records, and provide to public records staff, regardless of possible exemptions.

# RECORDS RETENTION



WHAT YOU NEED TO KNOW

# BASIC REQUIREMENTS—RCW 40.14



- Public records are the property of the State
- State law dictates schedules for retention of public records based on content
- Schedule may be suspended in event of public records request or actual/anticipated litigation
- Retention Schedules:
  - Statewide
  - Agency-Specific

# EVIDENCE PRESERVATION, E-DISCOVERY, AND LITIGATION HOLD NOTICES



WHAT YOU NEED TO KNOW



Court rules and case law mandate how WDFW must--

- Locate
- Preserve; and
- Disclose

Electronically Stored Information (ESI)

# GETTING TO KNOW ESI



- **What is ESI?**
  - Computer data or electronic recorded media of any kind that is stored in a digital medium from which it can be retrieved and examined.
  - Examples: email, Word documents, data files, text message, web content
- **Where is it located?**
  - Any electronic device used for state work ESI
  - Examples: desktop computers, laptops, blackberries, PDAs, thumbdrives, CDs, cell phones
  - Includes any personal devices you have at home and use for work purposes



# BASIC REQUIREMENTS



- Where litigation has been filed or is “reasonably anticipated,” parties must preserve potential evidence that may be needed in the litigation.
- AGO will issue a Litigation Hold Notice
- WDFW will distribute to staff who may have potential evidence
- Litigation hold suspends ordinary disposal schedule under records retention policy
- Notify WDFW staff if you believe litigation is reasonably anticipated

# WDFW PROCEDURE 1020B



In response to litigation hold:

- Assistant Director identifies who may have relevant records
- Litigation Hold Coordinator distributes hold notice
- Works with AD and AGO to develop search terms
- Preserves vaulted emails
- Tracks compliance

# IF YOU RECEIVE A LITIGATION HOLD



- Follow directions in hold notice
- Review your records and involvement in the matter as described in the notice
- Identify responsive records and complete checklist if requested
- Preserve responsive records in native format
- Suspend any process that may delete/alter
- If you need help contact Commission Executive Assistant or WDFW Help Desk

# COMPLIANCE ISSUES



- **Spoliation: Wrongful destruction of evidence relevant to a legal action.**
- **Penalties include:**
  - Monetary Sanctions and Terms
  - Disallowance of claims or defenses
  - Adverse Inference Jury Instructions
  - Contempt Orders

# RECORDS MANAGEMENT BEST PRACTICES



- Don't unnecessarily create records
- Manage and store records for easy search and retrieval; use discrete locations
- Discard/delete records per the retention schedule and when no longer needed, EXCEPT—
- Preserve records that may relate to anticipated litigation or a pending PRA request
- Promptly/diligently respond to litigation holds and Public Record requests
- Segregate personal and agency records

# AVAILABLE TOOLS



## Information Technology Offerings to the Commission:

- WWA State enterprise username and password
- WA State enterprise email account (segregates business from personal email)
- WA State enterprise web email access (Outlook Web Access (OWA) provides convenient and secure email access from any web browser)

# AVAILABLE TOOLS



## Additional Information Technology Offerings:

- WA State enterprise email archive (Symantec Vault archives all retainable-worthy content and provides search and restore)
- WA State enterprise VPN (virtual private network) to securely connect to WA State inside-networked resources
- DFW Laptop
- DFW SharePoint (later)

# QUESTIONS?

