

A Primer on Public Records

The Basics of Records Retention
For
Elected and Appointed Officials
& Other Public Employees

Who needs to know?

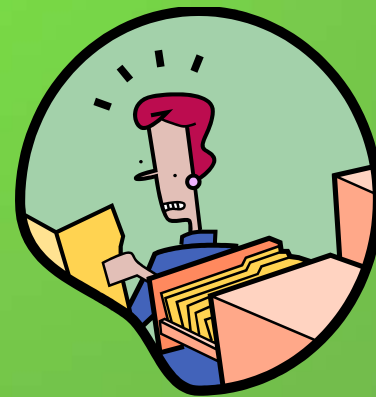
All employees of state and local government entities including:

- Elected and appointed officials
 - Contract employees,
- Subcontractors and volunteers

In other words, anyone that creates and uses records for or on behalf of a public agency, board or commission

Overview

- What are the rules and requirements regarding public records?
- Why should I care?
- Common misconceptions and myths about public records
- What should I be doing?



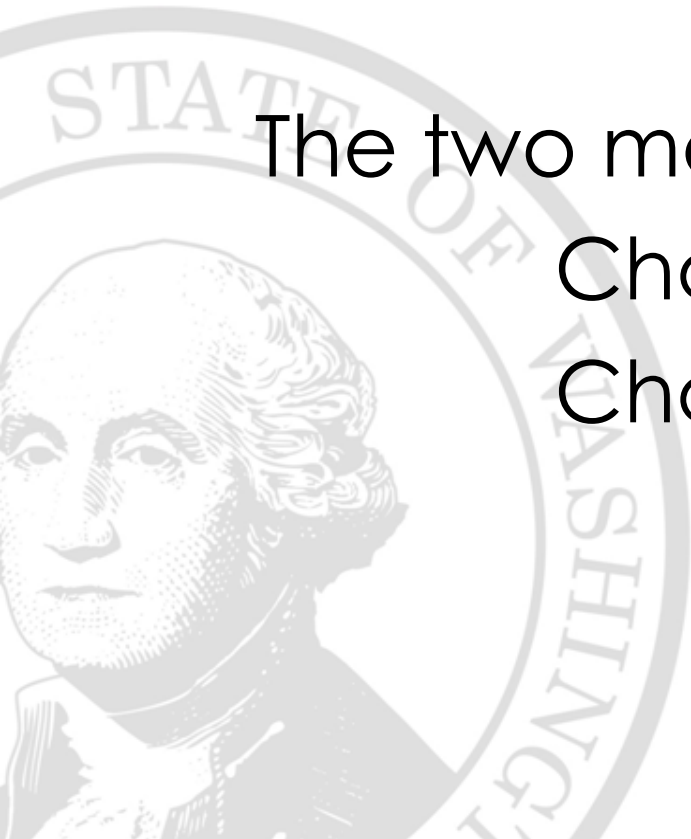
There are rules about public records

There are a number of rules and requirements surrounding public records

The two most frequently cited are:

Chapter 40.14 RCW

Chapter 42.56 RCW



There are others

Revised Code of Washington (RCW)

40.10 Essential Records

40.14 Preservation and Destruction of Public Records

40.16 Penal Provisions for the Destruction of Public Records

40.20 Reproduced Records

42.56 Public Records Act aka Public Disclosure Act

(Under the authority of the Attorney General's Office)

As well as numerous Washington State Administrative Code rules (WAC's) that also apply to public records.

What is the difference between 40.14 and 42.56?

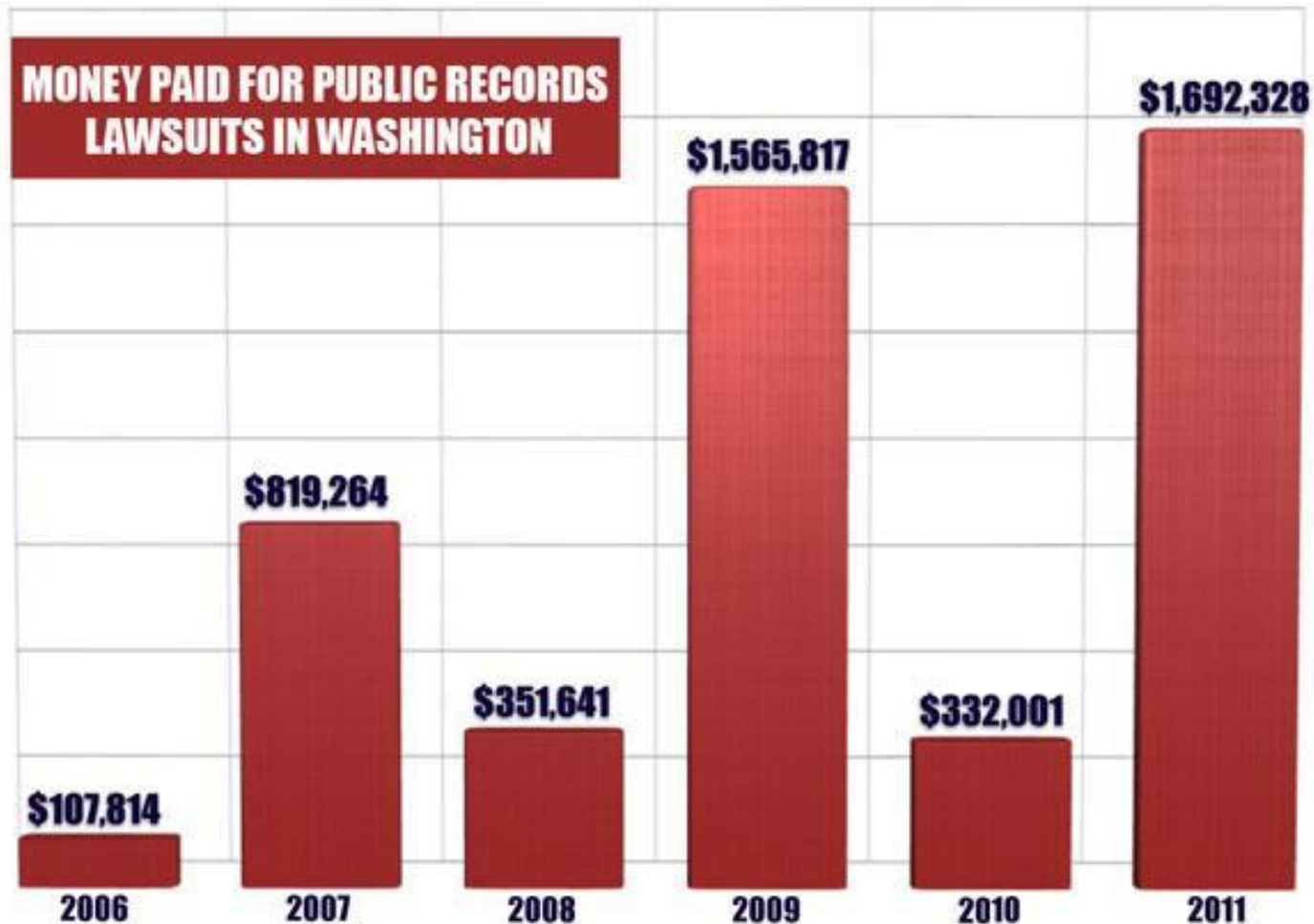
- Effective in **1957, chapter 40.14 RCW** contains the statutory requirements for the **retention, preservation and lawful destruction or transfer of public records**
- Under the authority of the Washington State Archives, a division of the Office of the Secretary of State

Chapter 42.56 RCW

- Voted on and effective in **1972, chapter 42.56 RCW** contains the statutory requirements in support of an open and transparent government and the **rules surrounding disclosure and public records requests**
- Under the authority of the Washington State Office of the Attorney General

<http://www.atg.wa.gov/OpenGovernment.aspx>

Non-compliance can cost you: Chapter 42.56 RCW



SOURCE: KING 5 ANALYSIS OF PUBLIC RECORDS



It happened to:

June 2013 – City of Shoreline
\$ 538,555

August 2013 – Tahuya Fire District
\$120,000

September 2013 – City of Marysville
\$ 143,000

Again, NOT including agency's own attorney,
production and court costs

RCW 40.16.020 – Injury to and Misappropriation of Record

- Every officer who shall mutilate, destroy, conceal, erase, obliterate, or falsify any record or paper appertaining to the officer's office...is guilty of a **class B felony** and shall be punished by **imprisonment in a state correctional facility** for not more than ten years, or by a fine of not more than **five thousand dollars**, or by both

Busted!

- It can happen!
 - Former Skamania County Auditor (2012) *(pleaded guilty to lesser charge of attempted destruction)*
 - Former Mayor of Pacific (2012) *(Allegedly destroyed public records among other things, ongoing lawsuits)*
 - Former Selah City Supervisor (2014) *(Entered Alford plea on one charge, ordered to pay \$65,474 in restitution)*

Why should you care?

Working in the public sector comes with certain responsibilities and expectations
You create, receive and work with public records daily

- Public records are public property, *agencies are the custodians*
- Public records come with legal obligations that the the agency and their employees must abide by
- Avoiding bad press is a good thing

Real reasons to keep records

- ✓ **Administrative** value
- ✓ **Audit** value
- ✓ **Fiscal** value
- ✓ **Historical** value
- ✓ **Legal** value



**Records are the
evidence of the
agency's business**

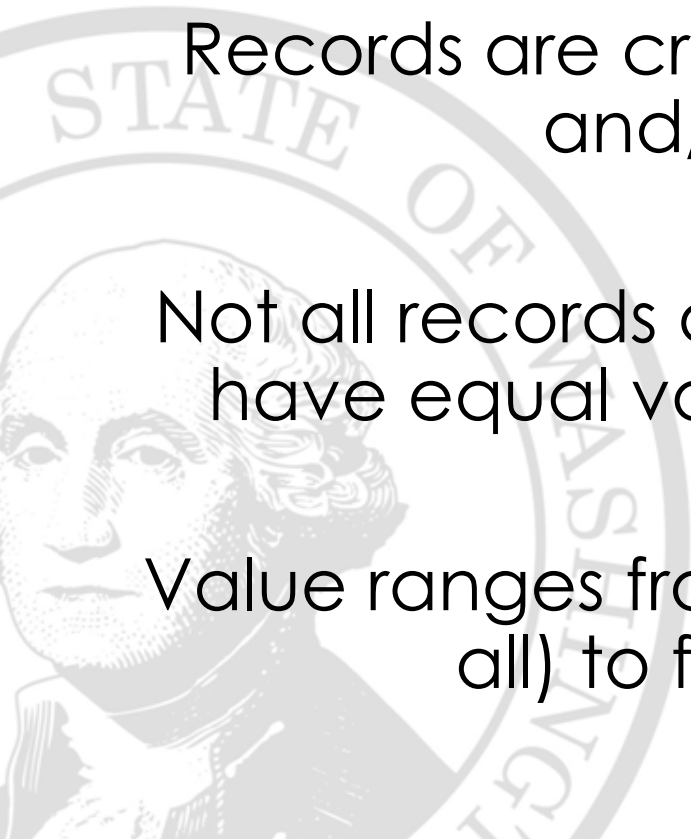
The value of public records

Records have a value and purpose within the organization

Records are created to meet business needs and/or legal obligations

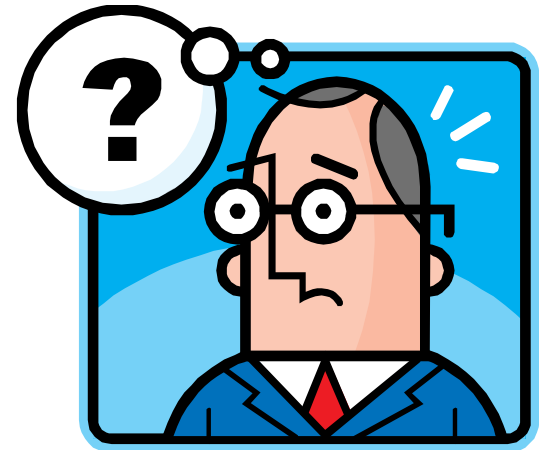
Not all records are created equal, nor do they have equal value as an informational asset

Value ranges from zero (don't need to keep at all) to forever (never destroy)



Time to bust some myths

There are a number of myths and misconceptions regarding public records



Myth # 1

Aren't only some records public records?

*It is safer to assume that **everything** created, received and used in the conduct of government is indeed a public record, whether it is a piece of paper, an email, social media post, stored in SharePoint or in the cloud, or accessed through a Smartphone*

Public records by definition

You may read for yourself in statute in RCW 40.14.010 or in RCW 42.56.010, but this pretty much sums it up:

*A writing, regardless of physical form or characteristics (and including copies)
Made by, received by, and used by any agency of the state of Washington in connection with the transaction of public business*

It doesn't matter

- Format (.pdf, .pst, .docx, .tif, .jpg)
- Location (file cabinet, drawer, cardboard box, smartphone, online file sharing, cloud)
- What technology used (iPad, Android, tablet, PC, smartphone, Google Glass)
- Copies (yes, copies/duplicates of public records are also considered public records)

None of the above negates the fact you're working with public records

By the way

That also includes emails in both your **Inbox and Sent box**, not just one or the other

Remember, it's "made by or received by any agency in the state of Washington in connection with the transaction of public business"

Myth #2

Does that mean I have to keep everything?

Not only NO, but HECK NO!

*One of the best benefits of records management is exercising the **agency's authority** to get rid of the records it is NOT required to keep*

What authority?

Agencies are granted *ongoing legal authority* to disposition (get rid of records) by a legal document called a records retention schedule

Records retention schedules are approved by committees:

- State Records Committee
- Local Records Committee

Who serves on the committees?

Committees are comprised of:

The State Archivist

AND

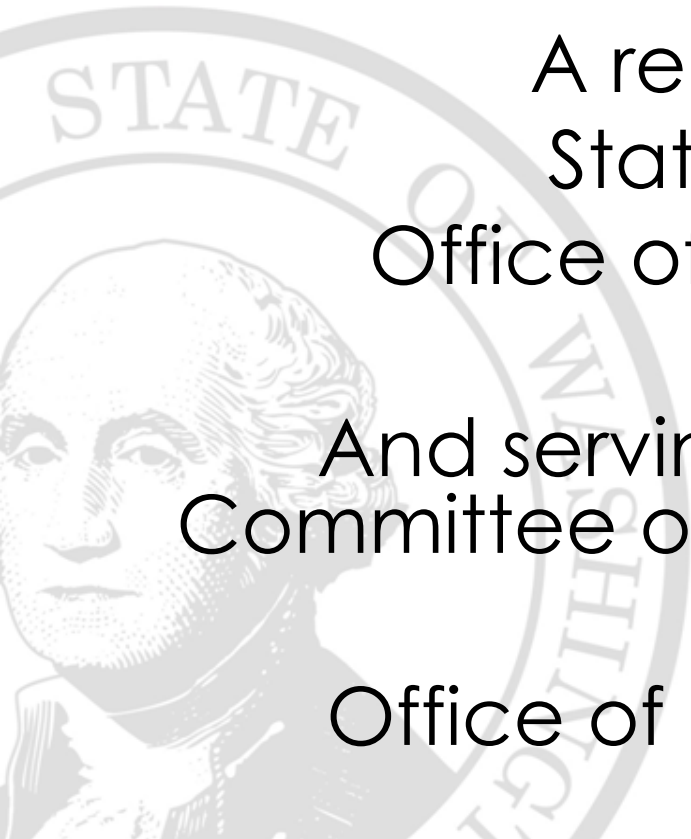
A representative from:

State Auditor's Office

Office of the Attorney General

And serving on the State Records
Committee on behalf of State Agencies:

Office of Financial Management

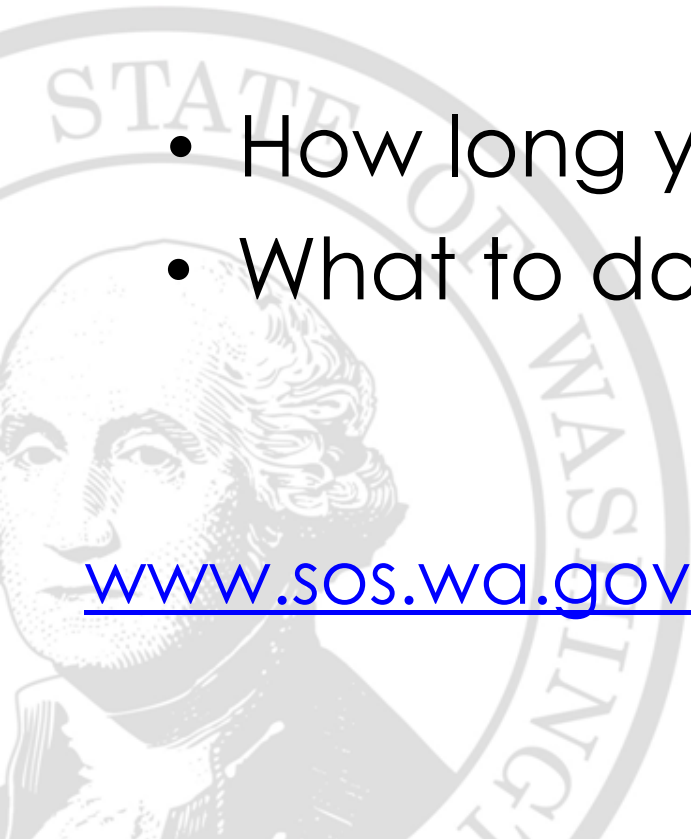


How do I know what to do?

Records retention schedules tell you what to do!

- How long you are required to keep it
- What to do when requirements have been met

www.sos.wa.gov/archives/recordsmanagement



HOLD IT!



- There are times when you must hang onto information even if records retention requirements are met:
 - Litigation holds (must keep until hold lifted)
 - Open public records requests (must keep related responsive documents until request fulfilled/closed)

Records Retention Requirements

- In a nutshell, agencies are required to keep certain types of records for a minimum required period of time
- Once retention has been met there are two choices:
 - Destruction (95%)
 - Transfer to the Archives (5%)

Retention schedules are your guide to what to keep, and what to do once retention is done and any other requirements are met

Myth #3

Why not just keep everything? It's easier and storage is cheap!

The initial outlay for digital storage *is* cheap. There are less obvious costs when you keep everything, and those **costs increase** over time:

Hardware: Regular replacement due to obsolescence/failure



Software: Maintenance and updates due to obsolescence/failure

More costs

Migration: *When it comes to data, change and time are the two constants. File formats change, media becomes obsolete (remember disks?), servers get full, and so on.....*

Staff: *Humans are still needed to maintain hardware and software*

There's no app for that!

Last, but not least

Legal: Risks and costs increase the more you keep:

Staff time and the technology required to search through gigabytes kept in numerous locations and files.

If you keep 20 gigabytes of stuff, then all 20 gigabytes are subject to the rules surrounding public disclosure and discovery, review, redaction and production

Think “needle in a haystack”

Much easier and faster to locate a needle in a single small haystack than numerous large haystacks (silos) dotted all over the farm!

One down, millions to go...

CASE IN POINT

by Tom Fishburne



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CASECENTRAL.COM/CASEinPOINT



Myth #4

Well, no one told me to keep anything and besides, this is an IT problem, not mine.

An agency must keep public records that it creates and receives for the entire length of retention period

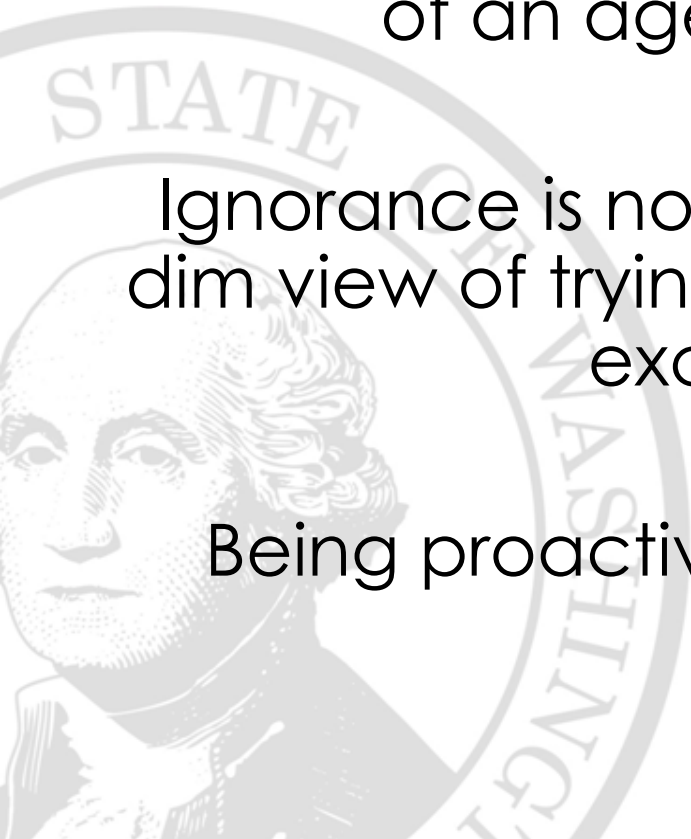
While it may not seem important - when in doubt, ask about it!

Don't assume

Records management is not just an IT concern; there is a level of responsibility and expectation for everyone employed by or working on behalf of an agency/board/commission

Ignorance is not bliss and the judge will take a dim view of trying to use ignorance or any other excuses as a defense

Being proactive costs much less than being reactive



Myth #5

I need to keep it “just in case”

“Just in case” or “I might need it in 10 years” are not valid reasons for keeping things past their retention requirements

There comes a point with records when they have fulfilled the business needs and legal obligations of the agency and are no longer needed as an informational asset

Would you keep old surplus equipment “just in case”? Same thing with surplus records:

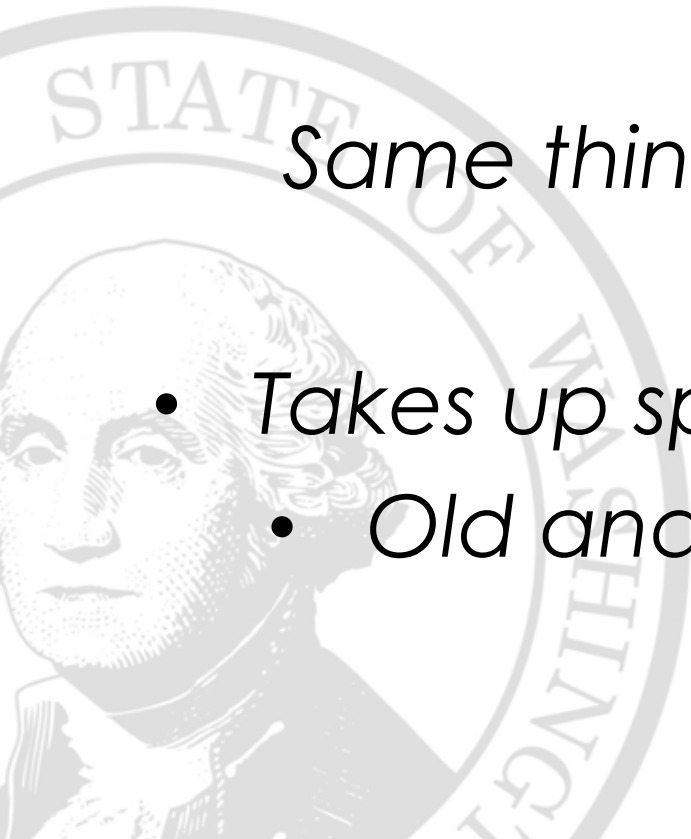
- Takes up space and increases costs*
- Old and obsolete adds clutter*

Get rid of the surplus and ROT

Old surplus equipment takes up space, adds clutter and costs more to store.

Same thing with surplus records!

- *Takes up space and increases costs*
- *Old and obsolete adds clutter*



MYTH #6

Does that mean I can't use my new cool iPad/tablet? I live for my technology!!

Heck, yeah - use the cool stuff! These tools can be great for collaboration and mobility.

But **FIRST**, ask about any policies and records/legal requirements surrounding use of devices

Analyze if implementing really does improve productivity (on a larger scale, not just one or two)

Then once clear on the ground rules, work away!

Bring Your Own Device

“BYOD”

There should be boundaries drawn between personal and business through policy or software (there are apps for that!)

BEFORE you start, check with agency policy and IT, and develop a strategy for any public records to land in agency custody (on agency server)

An ounce of prevention

- Avoiding the appearance of secrecy, and prevention of any disputes goes a long way to avoiding costly lawsuits
- Keep personal and business separate
- Ensure public records are with the agency so business needs and legal obligations can be managed by agency as *part of the business process and not as an afterthought*

MYTH #7

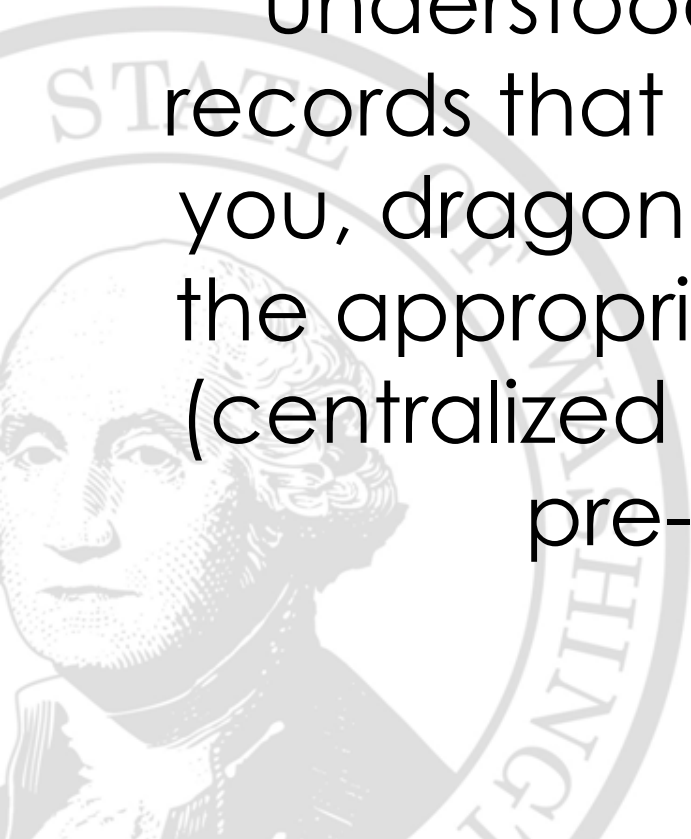
Records management is hopelessly old fashioned and only applies to paper

The term “records management” tends to give some flashbacks to the days of file cabinets and “dragon ladies”, the traditional file clerks in charge of the records. On occasion, the term causes panic and mass hysteria*

**no offense to either dragons or ladies*

Critical core process

Records management used to be part of a core business process, where users understood and handed over the records that needed to be filed (thank you, dragon lady) or were directed to the appropriate file cabinet or drawer (centralized files) and worked within a pre-defined structure



Value added

While generally unappreciated, good records management still should be a critical core process and an important aspect of an agency's operations

- Results in greater productivity
- Improves customer service
- Supports accountability/transparency
- Benefits agency in best use of resources
 - **Saves time, energy, and MONEY**

Myth #8

BUT IT'S TOO HARD!

(Not really a myth, it's more of an excuse)

And it is not exactly easy, sorry
(otherwise we wouldn't be in this mess)

It does take some work and effort!

Giving in to despair will not save you money, make it easier, make you more efficient or make a judge more sympathetic

So What Should I Be Doing?

Know the basics and know your records “going in” and up front:

- Know what kinds of records you create and use as part of your particular job functions and activities
- Know any requirements or rules about your business
 - Legal requirements (CFR's, RCW's, WAC's?)
 - Audit requirements
 - Other statutory requirements (HIPAA, FERPA)

Working with your records specialists will help you identify, plan and organize what you need to keep and what you can lawfully dispose of.

Then put it into practice!

Housekeeping duty

- It is easier to maintain a clean house than let it get messy (think hoarding)
- Incorporate housekeeping duties as part of your daily or weekly routine and processes
- Spring and fall cleaning (garage sweeping) should be a regularly scheduled as well

Don't worry, be happy (and organized!)

Keeping it tidy and organized means you don't have to worry about having unexpected guests drop in (like the auditor or a public records requestor)

- Understand your role and responsibilities for the records you create and use
- Know your business/know your records
- Practice regular housekeeping duties
- Keep your records specialists, IT , legal and risk team in the loop!

You are not alone

Questions?

recordsmanagement@sos.wa.gov

Thank you!

Washington State Archives

Partners in preservation and access

