



**Welcome to the
2021 Virtual Fall Conference!**
October 19th & 20th, 2021

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Virtual Conference Tips

Thank you for joining WAPRO for our first virtual conference! Below you will find some helpful tips.

- Each presentation will have its OWN webinar link. Like you would be moving rooms in person, we will “move virtual rooms” between each session. Each of the links are listed below on the WAPRO Fall Schedule.
 - Once the link is clicked, you will have entered as an **ATTENDEE** and thus...
 - Will be **muted** upon entering and your web camera is off.
 - Chat will be disabled in order to fully engage in the content.
 - Please use the **Q&A Box** to ask questions during the webinar.
 - Attendance will be monitored via your name. Please update your name on Zoom to reflect. To change your own name that is displayed, hover over your name in the participants list and click Rename. This change only applies to the current webinar.
- All program materials, including agenda, links and the program booklet will live on the Meeting Hub.
 - <https://wa-pro.org/meeting-hub/>
- **Are you experiencing audio difficulty?**
 - On the conference schedule below, each session has call in numbers for audio
- If you need any support throughout the conference, please email both katie@aminc.org , amy@aminc.org & office@wa-pro.org for live support.

DAY ONE: Tuesday, October 19th, 2021

8:00 – 9:30am Opening Remarks & PRA as a Prelude to Litigation

- Please click this URL to join.
<https://us06web.zoom.us/j/85059144781?pwd=UytibEhsYjNjN1VFdEs1cnY3NVVBdz09>
 - Passcode: 915501
- Or One tap mobile:
 - +12532158782,,85059144781#,,,,*915501# US (Tacoma)
 - +16699006833,,85059144781#,,,,*915501# US (San Jose)
- Or join by phone:
 - Dial(for higher quality, dial a number based on your current location):
 - US: +1 253 215 8782 or +1 669 900 6833 or +1 346 248 7799 or +1 929 205 6099 or +1 301 715 8592 or +1 312 626 6799
- Webinar ID: 850 5914 4781
- Passcode: 915501
- International numbers available: <https://us06web.zoom.us/j/85059144781?pwd=UytibEhsYjNjN1VFdEs1cnY3NVVBdz09>

9:45 – 11:30am Case Law/Legal Update

- Please click this URL to join.
<https://us06web.zoom.us/j/81197483947?pwd=ZVpwUHdTTjVqcFlhWTZpTWRLem1vUT09>
 - Passcode: 835749
- Or One tap mobile:
 - +12532158782,,81197483947#,,,,*835749# US (Tacoma)
 - +16699006833,,81197483947#,,,,*835749# US (San Jose)
- Or join by phone:
 - Dial(for higher quality, dial a number based on your current location):
 - US: +1 253 215 8782 or +1 669 900 6833 or +1 346 248 7799 or +1 929 205 6099 or +1 301 715 8592 or +1 312 626 6799
- Webinar ID: 811 9748 3947
- Passcode: 835749
- International numbers available: <https://us06web.zoom.us/j/81197483947?pwd=ZVpwUHdTTjVqcFlhWTZpTWRLem1vUT09>

11:30 – 12:00pm Annual WAPRO Business Meeting

- Please click this URL to join.
<https://us06web.zoom.us/j/88511169390?pwd=L3lOb0RGaWw1RllyTHR4S1JkZVFuZz09>
 - Passcode: 340566
- Or One tap mobile:
 - +12532158782,,88511169390#,,,,*340566# US (Tacoma)
 - +13462487799,,88511169390#,,,,*340566# US (Houston)
- Or join by phone:
 - Dial(for higher quality, dial a number based on your current location):
 - US: +1 253 215 8782 or +1 346 248 7799 or +1 669 900 6833 or +1 301 715 8592 or +1 312 626 6799 or +1 929 205 6099
- Webinar ID: 885 1116 9390
- Passcode: 340566
- International numbers available: <https://us06web.zoom.us/j/88511169390?pwd=L3lOb0RGaWw1RllyTHR4S1JkZVFuZz09>

DAY TWO: Wednesday, October 20th, 2021

8:00 - 9:00am Developing and Keeping a Public Records Policy

- Please click this URL to join.
<https://us06web.zoom.us/j/82909538119?pwd=dUJkaXpndnAxa0xldWgvVXpRaS9SZz09>
 - Passcode: 975657
- Or One tap mobile:
 - +12532158782,,82909538119#,,, *975657# US (Tacoma)
 - +16699006833,,82909538119#,,, *975657# US (San Jose)
- Or join by phone:
 - Dial(for higher quality, dial a number based on your current location):
 - US: +1 253 215 8782 or +1 669 900 6833 or +1 346 248 7799 or +1 929 205 6099 or +1 301 715 8592 or +1 312 626 6799
- Webinar ID: 829 0953 8119
- Passcode: 975657
- International numbers available: <https://us06web.zoom.us/j/82909538119?pwd=dUJkaXpndnAxa0xldWgvVXpRaS9SZz09>

9:15 – 10:15am Tech Tools for Public Disclosure

- Please click this URL to join.
<https://us06web.zoom.us/j/85298211466?pwd=M1pUYjZ6WTMxNW5tQVNXbWlxWTJTQT09>
 - Passcode: 177857
- Or One tap mobile:
 - +12532158782,,85298211466#,,, *177857# US (Tacoma)
 - +13462487799,,85298211466#,,, *177857# US (Houston)
- Or join by phone:
 - Dial(for higher quality, dial a number based on your current location):
 - US: +1 253 215 8782 or +1 346 248 7799 or +1 669 900 6833 or +1 929 205 6099 or +1 301 715 8592 or +1 312 626 6799
- Webinar ID: 852 9821 1466
- Passcode: 177857
- International numbers available: <https://us06web.zoom.us/j/85298211466?pwd=M1pUYjZ6WTMxNW5tQVNXbWlxWTJTQT09>

10:30 – 11:30am 10 Years of Yousoufian: PRA Penalties

- Please click this URL to join.
<https://us06web.zoom.us/j/88510403499?pwd=dVZCSDBEbk5hY1MzcldUeijlVkdodz09>
 - Passcode: 527416
- Or One tap mobile:
 - +12532158782,,88510403499#,,, *527416# US (Tacoma)
 - +16699006833,,88510403499#,,, *527416# US (San Jose)
- Or join by phone:
 - Dial(for higher quality, dial a number based on your current location):
 - US: +1 253 215 8782 or +1 669 900 6833 or +1 346 248 7799 or +1 301 715 8592 or +1 312 626 6799 or +1 929 205 6099
- Webinar ID: 885 1040 3499
- Passcode: 527416
- International numbers available: <https://us06web.zoom.us/j/88510403499?pwd=dVZCSDBEbk5hY1MzcldUeijlVkdodz09>

11:45 – 12:45pm Managed Records Are Accessible Records

- Please click this URL to join.
<https://us06web.zoom.us/j/83245569904?pwd=Tk5PK0E1VHFUbFg2TGtoVkVzNkRWdz09>
 - Passcode: 771223
- Or One tap mobile:
 - +12532158782,,83245569904#,,,,*771223# US (Tacoma)
 - +13462487799,,83245569904#,,,,*771223# US (Houston)
- Or join by phone:
 - Dial(for higher quality, dial a number based on your current location):
 - US: +1 253 215 8782 or +1 346 248 7799 or +1 669 900 6833 or +1 929 205 6099 or +1 301 715 8592 or +1 312 626 6799
- Webinar ID: 832 4556 9904
- Passcode: 771223
- International numbers available: <https://us06web.zoom.us/u/keiebn0HKj>



WAPRO 2021 Virtual Fall Conference

Continuing Education Credits

CLE Credits (MCLE from Washington State Bar Association):

To receive CLE Credits (MCLE from Washington State Bar Association), attendees must complete this survey: <https://lp.constantcontactpages.com/sv/5c4wvt4>

- This live videoconference is approved for a maximum of 7.00
 - 7.00 Law & Legal Credits
- Attendance will be submitted based off of registration emails logging into each zoom session

CMC/MMC Credits (Certified Municipal Clerk & Master Municipal Clerk):

To receive a continuing education certificate from WAPRO, attendees must complete this survey: <https://lp.constantcontactpages.com/sv/hlwMAiw/2021fallconference>

The WAPRO program held on 10/19-20/2021 has been approved for 1 CMC Education or 1 MMC Advanced Education point per 4 hours as follows:

- PRA as a Prelude to Litigation – **1.25 hours**
- Case Law/Legal Update – **2.25 hours**
- Developing and Keeping a Public Records Policy – **1 hour (CMC ONLY)**
- 10 Years of Yousoufian: PRA Penalties – **1 hour**
- Managed Records Are Accessible Records – **1 hour (CMC ONLY)**

Total CMC hours possible = 6.5 hours

Total CMC points possible = 1.63 CMC Education points with completed learning assessment

Total MMC hours possible = 4.5 hours

Total MMC points possible = 1.13 MMC Advanced Education points with completed learning assessment



WAPRO 2021 VIRTUAL FALL CONFERENCE
CPRO Information

Attendance will be verified from registration emails and zoom session attendance reports.

Tuesday, October 19th, 2021

8:15 – 9:30 am **PRA as a Prelude to Litigation**
Certification Category A, 1.25 hours

9:45 – 12:00 pm **Case Law/Legal Update**
Certification Category C, 1.75 hours

Wednesday, October 20th, 2021

8:00 – 9:00 am **Developing and Keeping a Public Records Policy**
Certification Category A, 1 hour

9:15 – 10:15 am **Tech Tools for Public Disclosure**
Certification Category D, 1 hour

10:30 – 11:30 am **10 Years of Yousoufian: PRA Penalties**
Certification Category B, 1 hour

11:45 – 12:45 pm **Managed Records Are Accessible Records**
Certification Category E, 1 hour



Session 1A

PRA as a Prelude to Litigation

Ramsey Ramerman, City of Everett

Michele Earl Hubbard, Allied Law Group

Shannon Ragonesi, Keating, Bucklin & McCormack, Inc., P.S.

[illegible]



Session 1B

Case Law/Legal Update

Ramsey Ramerman, City of Everett
Morgan Damerow, Attorney General's Office
Sara Di Vittorio, Snohomish County PUD

Case Law Update

WAPRO Conference - Fall 2021



Ramsey Ramerman, City of Everett
Sara Di Vittorio, Snohomish County PUD
Morgan Damerow, Attorney General's Office

We have organized and attempted to group this case law discussion by selected significant issue addressed in each case. This is not a perfect science as cases commonly address more than one issue.

The case law discussion includes decision issued in 2021 through October 13, 2021.

Several unpublished appellate decisions are summarized for this presentation. While they may not be cited as precedent they are none the less instructive.

DISCLAIMER

This presentation is educational only and is not legal advice or a legal opinion. The PRA changes over time. Later court decisions or changes in statutes can impact these decisions and an agency's obligations.

2021 - Case Law Update



West v. Office of the Governor

Unpublished (March 15, 2021)

- West sought records of (1) requests for a declaration of emergency or use of emergency powers by the governor to address homelessness and (2) any responses thereto or communications concerning the requests. The search located and provided items for the first half but omitted the search for responsive records to the second half providing records approximately a month after the request. A week later, West filed suit at which time they realized the oversight regarding the second half, completed an additional search identifying and producing 176 additional responsive records. Included in the second batch was redacted AGO legal advice indicating they had been shared within the AGO. In total, the delay of records for the second installment was 14 days.
- The Court of Appeals affirmed that the search was reasonable based on the reasonably detailed, non-conclusory affidavits, submitted in good faith, that included information on the search terms, types of searches conducted, and locations that establishes places likely to contain responsive records were searched. The Office was not required to obtain records from the AGO. The trial court did not abuse its discretion when it limited West's discovery to matters related to the second search for records. The trial court's \$14.00 penalty although at the low-end of the range, was appropriate based on the violation.

O'Dea v. City of Tacoma

__ Wn. App.2d __, 493 P.3d 1245 (2021) (Published in part)
(Motion for reconsideration pending.)

- In March 2017 requesters attorney sent two PRA request to the city via US. Mail. They were never received. The city learned of the requests when they were attached to a lawsuit filed in November 2017 alleging failure to respond. The city answered the lawsuit but did forward a copy of the requests to the PRO and not start responding to the PRA requests until nine month later. The trial court held that the city had an obligation to start responding when they were received as part of the law suit. In August 2018, when they were sent to the PRO by the city's attorney, the PRO responded within 5 days providing dates for records productions in both requests closing one in a couple of moths and the other approximately six month later.

O'Dea v. City of Tacoma

Continued

- ***Request Submission:*** Two attachments to the lawsuit put the city on fair notice that it had received a request for records which is comprised of two elements each of which has three subparts as follows:

Element 1 - Characteristics of the request:

- 1(a) - The language.
- 1(b) - The format.
- 1(c) - The receipt.

Element 2 – Characteristics of requested records:

- 2(a) – Whether it is a request for records vs information contained in records.
- 2(b) - Whether the records were actual public records.
- 2(c) - Whether it was reasonable for the agency to believe the requester was requesting under an independent non-PRA authority.

In this case all of the factors relating to the characteristic of the request favor the requestor. “No authority limits the context under which a PRA request may be received, so long as the request provides fair notice.” Other records requested as part of the disciplinary process did not put the city on fair notice that they were PRA requests.

O'Dea v. City of Tacoma

Continued

- ***Penalties:*** The COA reversed the trial court \$2.6 M penalty, not including attorney fees, as an abuse of discretion because the overall amount was manifestly unreasonable. In remanding the matter the COA commented that “we cannot lose sight of the fact that public records penalty awards are ultimately paid with taxpayer dollars.” The trial court decision had only five sentences mentioning three aggravating factors; no discussion of why mitigating factors did not apply or any discussion of why this response was particularly egregious. The requester’s failure to pursue a show cause motion or respond to the request for clarification should be a significant mitigating factor. Even if there was an unreasonable initial delay for records production, once it begins production, it is entitled to a reasonable amount of time to process the request; the court can set penalties at \$0 per day. \$63,360 in additional penalties for 12 responsive records found after closing the request reversed.
- ***Records Search:*** The city demonstrated its initial search was reasonable. Unsupported allegations of additional responsive records insufficient, additional records search not required.

Banks v. City of Tacoma

Unpublished (June 2, 2021)

- Requester sought records regarding the City’s use of cell site simulators, aka “stingray,” including acquisition use or lease records, all communication regarding stingray with other government personnel, warrant applications and outcome records. Through discovery and by comparing records from non-City sources requesters challenged the adequacy of the search. Requesters also challenged the City’s redactions and withholding of records. Requester awarded penalties based on categories of records between \$50 - \$80 per day for 324 days.

Banks v. City of Tacoma

Continued

- **Records Search:** The failure to locate and disclose a record is not a per se PRA violation. The standard is the adequacy of the agency’s search. The search must be “reasonably calculated to uncover all relevant documents” but an agency is not required to “search every possible place a record may conceivably be stored.” Testimony about the PRO’s general process was not sufficient. The COA negatively comments on the lack of a contemporaneous details for this search. Records from similar prior requests responses are locations where records were reasonably likely to be found. The COA faults the City for not using a request index, tracking spreadsheet or at least offering the other responses in total to the requester even if they would have been overbroad. If the search was burdensome, the City could have provided a reasonable estimate based on the burden and used installments. There was a question of whether the City was in possession of the Stingray “Users Manual.” Paper copies had been destroyed or returned but based on testimony there was a question of whether an electronic copy was transmitted to the City as part of a software update. The City was not required to conduct additional requested searches including records alleged held by South Sound 911 which maintained some records for the City under contract. The requester’s rationale for the search was speculative and the City’s testimony supported that there was no reason for responsive records to be held by South Sound 911.

Banks v. City of Tacoma

Continued

- ***Request Interpretation and Processing:*** The city ‘s general policy of not providing blank templates to requesters unless specifically requested violated the PRA. A warrant template in this case was clearly within the scope of the records request.
- ***Records Production:*** While some responsive records were available on the city’s website, availability alone is insufficient. The City violated the PRA in not providing a link to the requester.
- ***Exemption: Specific intelligence information (RCW 42.56.240(1))*** The make, model, and pricing information about the city’s cell site simulators constituted specific intelligence information was properly withheld as specific intelligence information under RCW 42.56.240(1). The city and requesters experts provided evidence not provided in *West v. City of Tacoma* allowing the court to conclude how criminals could determine and use information about the capabilities of various cell site simulators to thwart their effectiveness and evade law enforcement detection.
- ***Penalties:*** The trial court’s award of penalties between \$50 - \$80 per day was generally upheld. The awarded was overturned for one group of records. The fact that 3 citizen review reports were available on the agency website should have been a mitigating factor not aggravating factor. The lack of production was an oversight, \$80 per record is excessive and therefor an abuse of discretion.

West v. Clark County

Unpublished (January 20, 2021)

- West requested posts from council member's personal Facebook page. The page existed before and after the council member's service. The County confirmed it did not maintain the account and sought records from the council member who submitted an affidavit indicating that the account did not contain public records
- Personal Facebook account posts may be public records if they are within the individuals "scope of employment." Individuals are responsible for searching their personal accounts and devices for public records and if an employee claims information on a personal account or device is not a public record, must submit an affidavit or declaration. In this case the posts discussed the council member's personal opinions on various issues, there was no evidence that that the post's further the County's interests, did not contain details regarding Council discussion, decision or other actions. The Court of Appeals agreed that if anything the posts advanced the council member's own interests by establishing his views on particular policies and inviting discussion among constituents. The Trial court properly excluded the screen shots under ER 201 which allows the court to take judicial notice of adjudicate facts not in dispute. In this case, West sought admission of the posts to prove the issue at hand, that the posts were in fact public records.

Strand v. Spokane County

Unpublished (June 15, 2021)

- Strand appealed the County’s 2018 assessment for her property. Strand then submitted a PRA request for records showing the basis for the assessment. The day after the request, the County acknowledged receipt and provided the first installment. Strand submitted clarification and the County proceeded to produce records in installments over the next few months. During this time, she provided the County examples of records she believed were responsive to her request; records provided in prior PRA responses. Almost a year after the County closed the request, Strand filed suit.
- The COA affirmed the trial court’s granting summary judgement to the County. The County provided a reasonable estimate of time, fullest assistance and timely action on Strand’s request through its initial response and by providing and meeting projected installment dates even with business interruptions caused by COVID-19. The County conducted an adequate search for records supported by facts, not conclusions, in the County’s affidavits. Strand’s conclusions on why the search efforts were insufficient and lacked explanation. The records she attached from prior requests with different “scopes” did not support a violation in this case. Records printed from a database after the request were responsive. Failure to produce them would likely have been a PRA violation.

Hood v. City of Nooksak

Unpublished (August 2, 2021)

- Requester sought certain records related to an audit performed on the City. The City responded to the request by directing requester to Auditor's website but did not provide a hyperlink. Following cross motions for summary judgment, the trial court found no PRA violation.
- The COA reverses and remands. Agencies must strictly comply with PRA requirements. The City did not strictly comply with the PRA because RCW 42.56.520(1)(b) requires production of records or hyperlink to the agency's website. Substantial compliance is not enough in the determination of whether the agency has complied with the PRA's requirements. Substantial compliance and good faith may be factors in assessing penalties. Regarding the adequacy of search, the PRO's declaration shows a lack of search and the record suggests the potential existence of some records responsive to Hood's request. Thus, questions of fact remain regarding whether it was reasonable or adequate to conduct no search.

John Does v. Cowlitz County

Unpublished (March 30, 2021)

- Requester sought names, DOB, addresses, photographs, offense summary records for all level one sex offenders held by Cowlitz County. Does 1 – 15 sued to enjoin release of their level one, sex offender records arguing that the records were exempt as specific intelligence information the disclosure of which would violate their right to privacy. They also argued that the release of records was not in the public interest and release would irreparably damage them. The trial court did not enjoin release.
- The COA affirmed the trial court. The specific intelligence information exemption under RCW 42.56.240(1) is a narrow exemption confined to particular methods, procedures, gathering or analyzing secret information, information about an enemy or conclusions drawn from such information. The general biographical information and offense summaries, while the records may be intelligence information they do not reveal the secretive level of information required. There may be the potential for the invasion of Does personal lives and may frustrate the safety and rehabilitation of sex offenders, the potential use of public records for improper or criminal purposes is a matter for the legislature. The injunction standard for PRA cases is under RCW 42.56.540, not CR 65.

John Doe v. Wash. State Dep't of Corrections

E. Dist. Wash. May 17, 2021

- After a leak revealed DOC was moving transgender female prisoners from male prisons to female prisons, various requesters sought records to confirm whether this was occurring. DOC identified a variety of responsive records but provided third-party notice to an NGO that represented the interests of transgender prisoners. The transgender prisoners filed a federal lawsuit seeking an injunction. To obtain an injunction, the inmates need to show they are “likely” to prevail or that they have raised a “serious question” and disclosure would cause significant harm.
- The Court granted a preliminary injunction finding they were likely to prevail on five claimed exemptions. 1) 8th Amd. of the US Const, cruel and unusual punishment: disclosure of their transgender status would pose a substantial risk to their safety. 2) 14th Amd. of the US Const, privacy: disclosure would pose a significant risk to their safety and there is no penological purpose in disclosing this information. 3) Wash. St. Const. Article 1, Section 7 – Privacy (*Caution!*); information about transgender status is considered private and disclosure under the PRA is not narrowly tailored. 4) Specific Intelligence Information (RCW 42.56.240(1)) (*Caution!*); the records are exempt because they can be used to help ferret out criminal activity. 5) Health care information (RCW 42.56.360) (*Caution!*); some of these records were created to facilitate healthcare.

Cortland v. Lewis County

Unpublished (January 20, 2021)

- Cortland requested copies of hearing transcripts prepared by court reporters and purchased by the County. The County asserted RCW 42.56.290 as an exemption concluding Cortland could not obtain copies of the transcripts that Lewis County had paid for in civil litigation. Requester asserted that the transcripts were improperly withheld public records and the superior court agreed. “Although custom and fairness may require court reporters to be paid for copies of transcripts, this custom is not embodied as an exemption to the Public Records Act. Custom and fairness are not reasons to restrict access to public records under the Public Records Act.” Cortland appealed the penalty award.
- Court of Appeals affirmed the superior court’s \$11,950 award to be split amongst the three requesters. The award was not an abuse of discretion because it was not manifestly unreasonable or based on untenable grounds or reasons. *Yousoufian* factors are highly case specific. The trial court is not required to apply a specific aggravating or mitigating factor. The trial court is not required to aggravate or mitigate. There was no evidence that the agency acted in bad faith. The court’s treatment of each transcript as a single record and set a penalty of \$10 per day per record was well within the superior court’s broad discretion.

Yakima School District v. Magee

Unpublished (March 18, 2021)

- Magee, an attorney, requested to inspect and copy records “associated or related” to the school pre-employment drug testing program. Due to the nature of this request and a high number of requests, YSD anticipated the first of 33 installments to be available in approximately three months. Magee inspected the first few installments making copies of hundreds of pages. At the same time the district sent letters to Magee indicating that records may be exempt from production first as a general statement then identifying RCW 42.56.250(2). YSD asked for responses which Magee did not provide so YSD filed in Superior Court to resolve the issue.
- Affirming the trial court, YSD had standing under the UDJA, chapter 7.24 RCW. The PRA’s requirement to produce non-exempt records places YSD with “zone of interest.” YSD faced “great peril of paying [PRA] penalties” meeting the injury in fact requirement. YSD had not waived exemptions under RCW 42.56.250(2). For the three installments, YSD expressly preserved its intent to assert an exemption, first through a general statement then providing further specific information. The COA notes that YSD should have more promptly identified the exemptions but in this case, the delay was in large part attributable to the request’s scope and that it was initially unclear. Magee’s filings at the COA did not comply with the appellate rules. Rather than striking them as requested, Magee was sanctioned \$1,000.

Green v. Pierce County

197 Wn.2d 841, 487 P.3d 499 (2021)

- Requester sought photo, birth date, rank, position, badge number, badge for all detention/jail staff and deputies hired on specific dates. RCW 42.56.250(8) applies but contains news media exception. Requester states he is news media. Following research and advice Sheriff's office withheld photographs and birth dates under RCW 42.56.259(8). Trial court found requester was news media. Direct appeal to the Washington State Supreme Court.
- Burden of proving news media exception to exemption falls on requester – requester is in better position to prove they are news media. RCW 5.68.010(5)(a) and RCW 5.68.010(5)(b) contain two part tests to determine whether entity and individual (respectively) meet definition of news media. Requester's YouTube channel does not fit into any of the categories of traditional news outlets listed in the statute, nor is it an "entity." An "entity" must be something with a legal identity separate from the individual. Requester also does not individually meet definition of news media. Supreme Court acknowledges statutory definitions might not have kept pace with social media but nods to Legislature for any such change. Trial court reversed.

Does 1-4 v. King County

Unpublished (August 24, 2021)

- Newspaper requester made records request for records related to prosecutor's office decision to decline to file sexual assault charges against several high school football players. County provided notice that it intended to release records redacting identifying information of the victim, suspects, witnesses who requested to remain anonymous. One juvenile witness and three juvenile suspects filed to enjoin disclosure. Because they were juveniles, they used pseudonyms in pleadings. A TRO was granted and juveniles moved for a permanent injunction and to proceed in pseudonym. Trial court denied injunction, approved County's redactions, and allowed use of pseudonyms.
- Court of Appeals found RCW 13.50.050 is an "other statute" that exempts records related to the commission of juvenile offenses. But 13.50 RCW does not preclude release of adult suspect's file under argument that they "pertain to juvenile suspects." Redaction of juvenile's identity was sufficient. Claims of sexual assault against the suspects were uncharged, thus public has no legitimate interest in their identity. But there is legitimate interest in overseeing police investigation of sexual assault allegations. Only the identity is exempt. Trial court did not error in granting motion to proceed under pseudonym.

Berg v. City of Kent

Unpublished (January 19, 2021)

- As part of an ongoing land use dispute, the Berg's attorney submitted a PRA request, including metadata, for a code enforcement officer records. Following a memorialized clarification, records were produced. The third and installments included "pdf's" of emails and an exemption log. At the time, the City was unable to produce records in native format and redact protected information so metadata was not included. After the Bergs filed suit, working police forensic detective, the City was able to export metadata from the emails to a spreadsheet.
- The Court of Appeals affirmed the trial court's dismissal. The challenge centered on the production which eliminated 'the public's ability to receive both searchable emails with corresponding metadata.'" The Berg's did not present evidence to rebut the City's assertion that it was impossible to produce the metadata digitally and maintain necessary redactions. The Bergs also did not identify any information produced in the spreadsheet not previously produced. The exemption logs were sufficient to determine whether the claimed exemption applied. The log identified each email's delivery date, time, names of senders and recipients, subject line, number of pages, a code describing the basis for the exemption and a code key.

Bogen v. City of Bremerton

— Wn. App.2d —, 493 P.3d 774 (2021)

- In November 2018, Bogen submitted a public records request. On January 28, 2019, after providing two installments of responsive records, the City notified Bogen that it considered the request to be fulfilled and closed. On January 28, 2020, Bogen filed a complaint against the City alleging that the City had violated the PRA on various grounds. The City moved to dismiss the claims under CR 12(b)(6), arguing that Bogen had filed the action after the one-year statute of limitations arguing that the day the request closed counted as day 1. The trial court agreed.
- The COA reversed. RCW 42.56.550(6) provides, “Actions under this section must be filed within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.” RCW 1.12.040 provides, “The time within which an act is to be done . . . shall be computed by excluding the first day, and including the last, unless the last day is a holiday, Saturday, or Sunday, and then it is also excluded.” Similarly, under CR 6(a) “In computing any period of time prescribed or allowed by . . . any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.” Reading RCW 42.56.550(6) together with, RCW 1.12.040 and CR 6(a) establishes that the “within one year of” time period stated in RCW 42.56.550(6) must begin the day following the triggering event.

Singh v. State of Washington

Unpublished (August 16, 2021)

- As part of a lawsuit involving alleged illegal actions by the UW concerning her deceased husband's employment, Singh alleged PRA violations regarding UW's response to her records request. On January 27, 2017, Singh requested records. The UW responded producing two installments on May 3 and June 17, 2017. The second installment included a statement that "this concludes the [UW's] response to your public records request. Two years later, on June 4, 2019, Singh filed an amended complaint alleging the UW failed to conduct an adequate search for records. The original complaint was filed on September 14, 2018.
- The COA affirmed the trial court's dismissal of the PRA claims. PRA claims must be filed within one year of the agency's claim of exemption or the last production of a record. There was no dispute the PRA claim was filed more than one year after the UW closed the request. "Equitable tolling" which would allow a time barred suit to proceed was not applicable in this case. There was no evidence of "bad faith, deception, or false assurances" by the UW. Singh's argument that records produced in discovery should have been produced in response to the records request, were not sufficient extend the one-year deadline.

Does 1-10 v. University of Washington

Unpublished (849 Fed. Appx. 706 (2021) (June 11, 2021)

- This decision is the continuation of an ongoing third party injunction action in federal court. In 2016 the requester sought to inspect or obtain copies of all documents that “relate to the purchase, transfer, or procurement of human fetal tissues, human fetal organs, and/or human fetal cell products at the [UW] Birth Defects Research Laboratory from 2010 to present.” The records included names, work and personal phone numbers and email addresses. The UW provided notice of its intent to release records which resulted in the ongoing litigation.
- At issue is a preliminary injunction granted to Doe plaintiffs 1, 2 and 6. In federal court, a preliminary injunction is granted if a plaintiff seeking a preliminary injunction demonstrates they are (a) likely to succeed on, or at least have a serious question going to, the merits, (b) that they are likely to suffer irreparable harm in the absence of preliminary relief, (c) that the balance of equities tips in their favor, and (d) that an injunction is in the public interest. Only the first factor was at issue on appeal. In this case there is a particularized, personal link between Does 1, 2, and 6 and their claimed First Amendment protected activities. That finding was not “illogical, implausible, or without support in inferences that may be drawn from the record.” The district court’s reinstatement of the preliminary injunction was affirmed.

Diamond v. King County

Unpublished (August 24, 2021)

- Between 2012 and 2015 Diamond made more than 25 PRA requests. In 2015 while the county was producing records in installment, Diamond filed suit. From 2015 to 2018, while making additional requests, the county continued providing records links through its online portal which she did not access. In March 2018 the county filed for summary judgment with an April hearing date. The motion was cancelled to pursue settlement negotiations. In August, her attorney withdrew. Following further unsuccessful settlement negotiations, the county's original motion was rescheduled for October 19, to which she responded, "Thanks for letting me know." She later filed a "Notice of Unavailability" for the October hearing date as well as a continuance motion for at least 90 day. The county objected. Diamond failed schedule a hearing on her motion. On October 19, Diamond did not appear, and the court dismissed the suit "with prejudice" which she learned about when she check the online docket on November 1 filing a motion for reconsideration on November 30. The following February Diamond retained new legal counsel that filed a CR 60 motion alleging "an appearance of impropriety and an appearance of a lack of impartiality and fairness" by the trial court which was denied. Counsel also filed an appeal of the original ruling and later included the denial of the CR60 motion.

Diamond v. King County

Continued

- The appeal for the original order was untimely. RAP 5.2 requires appeals with 30 after entry of an order. A timely motion for reconsideration will extend the appeal window but these must be filed within 10 days. In this case, the reconsideration was untimely. She unsuccessfully argued that the court had to notify or serve her of the October. Judgments are deemed entered when delivered to the clerk; there is no obligation on the court to serve its orders. Her lack of diligence in monitoring her case does not amount to “extraordinary circumstances or a gross miscarriage of justice” warranting an extension of time to appeal. Establishing judicial misconduct is a high burden of proof which Diamond failed to meet. Rulings themselves almost never constitute a valid showing of bias and the record supports the court’s decisions throughout the proceedings.

May v. Spokane County

16 Wn. App.2d 505, 481 P.3d 1098 (2021) (*Petition for review granted.*)

- In 1948 the US Supreme Court declared racially discriminatory covenants unenforceable under the 14th Amendment of the US Constitution. The Comstock Park subdivision of recorded in 1953 contained racially restrictive covenants on the use and occupation of the land. 1987 W.L.A.D amendments enacted a method for property owners to strike racially discriminatory provisions from real estate property contracts. When the Mays acquired the property in 2017 the deed stated that the conveyance was subject to “covenants, conditions, restrictions and easements, if any, affecting title, which may appear in the public record...” They initiated a suit to “strike” the restrictive covenant from 1953.
- The COA held that the W.L.A.D amendment will do two things: (1) strike void provisions from the public record and (2) eliminate void provisions from the title or lease. The COA found that strike in this context means noting the expungement in the original and redaction from all future copies; the original is not redacted or altered but future copies. The amendment does not authorize entry of an order directing a public records custodian to physically alter existing records. The 1987 amendment offered an alternate method of addressing these covenants, filing of a modification document which would “strike” the illegal clause without court action.

QUESTIONS?



[illegible]



Session 1C

Annual WAPRO Business Meeting

2020 – 2021 WAPRO Board of Directors



TO: WAPRO Membership
FROM: Jenny Hallengren-Sawyer, President
RE: Documents for WAPRO's Virtual Annual Meeting on October 19, 2021

Greetings Membership:

We hope this packet finds you healthy and safe! The attached documents will be for consideration and vote by the WAPRO membership at its annual meeting on October 19, 2021. These documents are being sent in advance of the meeting to provide you with adequate time to review them before voting using raised hands on the Zoom format of the annual meeting.

The documents attached are as follows:

1. Draft minutes of the 2020 Annual WAPRO meeting;
2. Treasurer's Report;
3. Proposed 2022 WAPRO Budget; and
4. Election Slate of Officers and Directors.

In the next few weeks we will be sending out the conference information with the annual committee reports to provide you with information as to what each of the committees have accomplished in 2021 for its membership and their goals for 2022.

The future is an unknown as to whether we will be able to gather in person for the WAPRO Spring conference, but one way or another; we will continue to provide you with quality education in 2022.

The WAPRO Board looks forward to the fall conference on October 19, 2021.



2021 Annual Business Meeting

Held via Zoom
Tuesday, October 19, 2021

1. Call to Order – Jenny Hallengren-Sawyer, President
2. Recognition of Members – Jenny Hallengren-Sawyer, President
3. Recognition of Certified Public Records Officers – Karen Horowitz, Certifications Director
4. Approval of 2020 Annual Meeting Minutes – Jenny Hallengren-Sawyer, President
5. Treasurer's Annual Report – Tyler Entrekin, Treasurer
6. Action Items:
 - a. 2019-2020 Financial Review – Tyler Entrekin, Treasurer
 - b. 2021-2022 Proposed Budget – Jenny Hallengren-Sawyer, President
 - c. Board Elections – Jenny Hallengren-Sawyer, President
7. Adjournment

Mission: *The Washington Association of Public Records Officers (WAPRO) is a non-profit corporation founded to provide education in support of the Public Records Act and to provide a forum for public records officers and those involved in responding to public records requests.*



Annual Business Meeting
Due to COVID-19 Pandemic
the 2020 Annual Business Meeting was
Held Virtually via Zoom
Thursday, October 15, 2020
11:52 AM to 12:03 PM

1. CALL TO ORDER

President Jenny Hallengren-Sawyer called the Annual Business meeting of WAPRO to order at 11:52 a.m. on Thursday October 15, 2020.

Board Members Present:

Jenny Hallengren-Sawyer, President
Cynthia Whaley, Vice President
Tyler Entrekin, Treasurer
Tracy Becht, Secretary

Karen Horowitz, Director
Brian Lewis, Director
Bonnie Voegelé, Director
Luara Baseler, Director

2. RECONGITION OF MEMBERS

President Hallengren-Sawyer thanked all the WAPRO Members for their membership, as well as all the Committee members that have volunteered their time and efforts to WAPRO and its membership during 2019/2020.

Additionally, President Hallengren-Sawyer provided recognition of Sheila Friend Gray, President of WAPRO prior to her passing earlier in 2020. President Friend Gray was remembered for all of her hard work, integrity and dedication to education and providing opportunities for Public Records Officers in Washington. A moment of silence was observed in her honor.

3. APPROVAL OF 2019 ANNUAL MEETING MINUTES

Motion: Member Patricia Rhoades moved to approve the minutes of the WAPRO Annual Business Meeting of Thursday, October 10, 2019.
Second: Member Glenn Whitbede seconded.
Action: Motion carried unanimously

4, TREASURER'S REPORT

Treasurer Entrekin presented the Treasurer's Report.

\$217,238.85 Checking Account Balance
150.00 Undeposited Funds (such as checks)
(210.00) Total Accounts Receivable
13,640.00 Prepaid Expenses
\$235,818.85 Total Assets

Additionally, Treasurer Entrekin indicated that the prepaid expenses represent deposits at the conference locations for two of the WAPRO conferences that will be held over to 2021. Treasurer Entrekin also provided a 2019-2020 financial review.

5. ACTION ITEMS:

A. 2019-2020 FINANCIAL REVIEW

Motion: Member Don Jewett moved to approve the Treasurer's report.
Second: Member Marielena Sanchez seconded.
Action: Motion carried unanimously.

B. 2020-2021 PROPOSED BUDGET

President Hallengren-Sawyer discussed the budget being presented to the membership for approval. For the upcoming year, regional training will be returning and provision for it has been included in the 2019-2020 budget.

Motion: Member Marielena Sanchez moved to approve the 2020-2021 proposed budget.
Second: Member Kaylee Code seconded.
Action: Motion carried (Aye 99%/Nay 1%)

A member asked as to why the proposed budget total income was \$233,470 and expenditures was \$240,445. Treasurer Entrekin indicated there was an error in calculations of the expenditures and it should be \$233,470, the same as the income.

C. CERTIFICATIONS AND RECERTIFICATIONS

President Hallengren-Sawyer congratulated the 38 members that received their certifications this year, as well as the 20 members that received their recertifications.

D. BOARD ELECTIONS

Upcoming WAPRO 2019-2020 Board Members:

Officers:

Jenny Hallengren-Sawyer, President
Tracy Becht, President-Elect
Debbie Hamilton, Vice President
Tyler Entrekin, Treasurer
JamieLynn Estell, Secretary

Directors:

Karen Horowitz, Director
Brian Lewis, Director
Luara Baseler, Director
Matthew Jaeger, Director

Motion: Member Kaylee Code moved to accept the slate.
Second: Member Kirsty Jones seconded.
Action: Motion carried unanimously.

ADJOURN

President Hallengren-Sawyer adjourned the meeting at 12:03 p.m.

Respectfully Submitted by:
Tracy Becht

Mission: *The Washington Association of Public Records Officers (WAPRO) is a non-profit corporation founded to provide education in support of the Public Records Act and to provide a forum for public records officers and those involved in responding to public records requests.*



2021-2022 WAPRO Executive Board Slate

Officers:

Jenny Hallengren-Sawyer, President

Tracy Becht, President-Elect

Vacant - Vice President

Tyler Entrekin, Treasurer

JamieLynn Estell, Secretary

Directors:

Karen Horowitz, Director

Luara Baseler, Director

Matthew Jaeger, Director

Debbie Hamilton, Director



Proposed Budget for Fiscal Year 2021-22

DATE: October 19, 2021

TO: WAPRO Members

FROM: Jenny Hallengren-Sawyer, President

The 2021-22 budget is being presented to membership in accordance with Article X, Section 1 of the Washington Association of Public Records Officers (WAPRO) Bylaws, which require a budget to be established based on estimated income and expenditures for the Association in the ensuing fiscal year. A detailed budget summary is included on the following page.

WAPRO's primary expenditures and source of income will come from conferences in support of education on the Public Records Act. We have maintained dues for all members at \$25 per year. Savings realized in administrative costs are being used to offset expected increases in conference costs for next year, while maintaining registration costs at the same level as in prior years. This, in combination with our strong financial position will enable us to continue providing access to education on the Public Records Act that is affordable to our members.

In the fiscal year ahead, we will continue to focus on educational opportunities to serve more members in various ways and provide meaningful training for all members regardless of how long they have worked in the field.

Proposed Budget: Fiscal Year 2021-22:

Income

Account Interest	Unchanged	\$170
CPRO Application Fees	Based on actual income from prior year	\$3,450
Conference Registration Fees	Assumes normal attendance at conferences	\$210,000
Membership Dues	Assumes 701 members at \$25 per member	\$17,525
TOTAL INCOME		\$231,145

Expenditures

Administration	Includes costs such as credit card processing fees	\$33,230
Management Services	Based on contract with AMI	\$60,000
Conferences	Based on projected costs increases of up to 10 percent	\$137,915
TOTAL EXPENSES		\$231,145

Action Sought from Membership: Does the WAPRO membership approve the FY2021-22 as proposed?

	Board of Directors	Fall Conference	General Administration	Membership	Spring Training	Other Trainings	FY2021 Budget
Income							
4000 · Application Income	0	0	0	3,450	0	0	3,450
4050 · Dues Income	0	0	0	17,525	0	0	17,525
4075 · Interest/Investment Earnings In	0	0	170	0	0	0	170
4100 · Miscellaneous Income	0	0	0	0	0	0	0
4125 · Registration Income	0	122,500	0	0	87,500	0	210,000
4150 · Sponsorship/Partnership Contrib	0	0	0	0	0	0	0
Total Income		122,500	170	20,975	87,500	0	231,145
Gross Profit		122,500	170	20,975	87,500	0	231,145
Expense							
5000 · Advertising Expense	0	0	0	0		0	0
5025 · Audio Visual	0	14,000	0	0	4,000	0	18,000
5050 · Bank/Credit Card Processing Fee	0	0	3,000	0		0	3,000
5075 · Database Management	0	0	0	0		0	0
5100 · Dues/Subscriptions	0	0	0	0		0	0
5125 · Gifts and Awards	300	0	0	0		0	300
5150 · Graphic Design	0	0	0	0		0	0
5175 · Insurance	0	3,000	2,000	0	3,000	0	8,000
5200 · Legal/Audit/Taxes	0	0	4,300	0		0	4,300
5225 · Management Services	0	0	60,000	0		0	60,000
5250 · Meals	1,500	36,740	0	0	40,150	0	78,390
5275 · MemberClicks Transaction Fees	0	0	0	0		0	0
5300 · Miscellaneous Expense	0	0	0	0		0	0
5325 · Postage and Mailing	0	0	300	0		0	300
5350 · Printing/Duplicating	0	8,400	300	0	6,825	0	15,525
5375 · Speaker Expenses	0	100	0	0	100	0	200
5400 · Speaker Honorarium	0	0	0	0		0	0
5425 · Storage	0	0	0	0		0	0
5450 · Supplies/Signage	0	1,000	105	0	1,600	0	2,705
5475 · Telecommunications	0	0	1,700	0		0	1,700
5500 · Travel - Staff	0	2,000	0	0	2,000	0	4,000
5525 · Travel - Volunteer	0	2,000	0	0	2,000	0	4,000
5550 · Venue/Meeting Room Rental	3,000	5,500	0	0	5,500	0	14,000
5600 · Continuing Education	0	0	16,725	0	0	0	16,725
Total Expense	4,800	72,740	88,430	0	65,175	0	231,145

WAPRO-Washington Assoc. of Public Records Officers

Budget FY2021-2022

	Board of Directors	Fall Conference	General Administration	Membership	Spring Training	Other Trainings	FY2021 Budget
Income							
4000 · Application Income	0	0	0	3,450	0	0	3,450
4050 · Dues Income	0	0	0	17,525	0	0	17,525
4075 · Interest/Investment Earnings In	0	0	170	0	0	0	170
4100 · Miscellaneous Income	0	0	0	0	0	0	0
4125 · Registration Income	0	122,500	0	0	87,500	0	210,000
4150 · Sponsorship/Partnership Contrib	0	0	0	0	0	0	0
Total Income		122,500	170	20,975	87,500	0	231,145
Gross Profit		122,500	170	20,975	87,500	0	231,145
Expense							
5000 · Advertising Expense	0	0	0	0		0	0
5025 · Audio Visual	0	14,000	0	0	4,000	0	18,000
5050 · Bank/Credit Card Processing Fee	0	0	3,000	0		0	3,000
5075 · Database Management	0	0	0	0		0	0
5100 · Dues/Subscriptions	0	0	0	0		0	0
5125 · Gifts and Awards	300	0	0	0		0	300
5150 · Graphic Design	0	0	0	0		0	0
5175 · Insurance	0	3,000	2,000	0	3,000	0	8,000
5200 · Legal/Audit/Taxes	0	0	4,300	0		0	4,300
5225 · Management Services	0	0	60,000	0		0	60,000
5250 · Meals	1,500	36,740	0	0	40,150	0	78,390
5275 · MemberClicks Transaction Fees	0	0	0	0		0	0
5300 · Miscellaneous Expense	0	0	0	0		0	0
5325 · Postage and Mailing	0	0	300	0		0	300
5350 · Printing/Duplicating	0	8,400	300	0	6,825	0	15,525
5375 · Speaker Expenses	0	100	0	0	100	0	200
5400 · Speaker Honorarium	0	0	0	0		0	0
5425 · Storage	0	0	0	0		0	0
5450 · Supplies/Signage	0	1,000	105	0	1,600	0	2,705
5475 · Telecommunications	0	0	1,700	0		0	1,700
5500 · Travel - Staff	0	2,000	0	0	2,000	0	4,000
5525 · Travel - Volunteer	0	2,000	0	0	2,000	0	4,000
5550 · Venue/Meeting Room Rental	3,000	5,500	0	0	5,500	0	14,000
5600 · Continuing Education	0	0	16,725	0	0	0	16,725
Total Expense	4,800	72,740	88,430	0	65,175	0	231,145



Patti Van Patten CPA
PO Box 493
Oconto, WI 54153
360-271-0167
pattivanpatten@gmail.com

August 23, 2021

RE: Agreed Upon Procedures for WAPRO

Dear WAPRO Board;

I obtained the following information from Association Management Inc. in order to complete the agreed upon procedures for the 2019-2020 fiscal year.

1. Copies of Bank Statements and reconciliation as well electronic copies of all the checks written during the period.
2. The recap statements for each deposit and the deposit slips from December 1, 2019, through November 30, 2020.
3. Approved Budget
4. All the paid invoices and supporting documents from December 1, 2019, through November 30, 2020.

Procedures Followed:

I inspected each check written during the time period to verify that the dollar amount and the payee agree to and match the information in the QuickBooks general ledgers for WAPRO.

I traced the cancelled check to the invoice to verify payee and dollar amount agree to the invoice amount.

I traced the invoice to the general ledger to verify that it was posted to the correct general ledger account, and that they support the overall mission of the organization.

I traced the deposit recap statement amount for each deposit to the general ledger bank account to verify amounts agree.

I traced the total from the deposit to the general ledger to verify the deposits have been posted to the correct income account.

I traced the total deposit amount on the deposit recap to the monthly bank statement to verify the amount deposited agrees to the bank statement.

Compared actual expenditures and income with the annual budget.

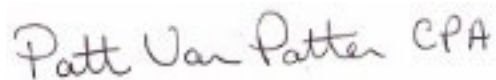
I did not audit or review your financial statements.

Findings

I did not find any discrepancies during the detail review. WAPRO systems continue to provide control over and documentation to support the overall effectiveness of their accounting records.

My engagement cannot be relied upon to disclose errors and irregularities, including fraud or defalcations that may exist. However, I will inform the appropriate level of management of any material errors, and any irregularities unless they are clearly inconsequential, that comes to my attention.

Sincerely,

A handwritten signature in dark ink that reads "Patti Van Patten CPA". The signature is written in a cursive, flowing style.

Patti Van Patten CPA



Session 2A

Developing and Keeping a Public Records Policy

Katherine Deets, Chmelik Sitkin & Davis PS

Developing and Keeping a Public Records Policy

Washington Association of Public Records Officers
Katherine Deets

October 20, 2021

Chmelik Sitkin & Davis P.S.
1500 Railroad Avenue
Bellingham, WA 98225
(360) 671-1796
www.chmelik.com

Overview

Legal Authority

- *RCW 42.56.100* requires each agency to “adopt and enforce reasonable rules and regulations” to provide “full public access to public records” and to “protect public records from damage or disorganization”
 - The rules and regulations must provide the fullest assistance possible to inquirers
 - The policy should also prevent interference with other “essential” functions of the agency

Intent of a Public Records Policy

- Policy is informational for the public and requesters
- The policy is also to guide staff internally as to how public records requests should be handled internally
- Policy should comply with all applicable laws



Contents of a Public Records Policy

General Statement

- Include a general statement outlining the intent of the policy and the applicable law relied upon in creating the policy
- Include a statement of the agency's intent with regard to public records and the public's access to these records
 - Clarify that the agency aims to provide full access to public records and assistance to inquirers, while being mindful to prevent excessive interference with other agency functions

Definitions

- Include definitions of words that are commonly used throughout the policy:
 - Public record
 - Writing
 - Agency name
 - Exempt record
 - Public records request
 - Public records officer
 - Requestor
 - Public Records Act



Public Records Officer

- Name the position that serves as the public records officer
 - If the PRO uses designees to assist in fulfilling public records request, discuss this process as well
 - This designee may at times communicate directly with the requester
- Outline what the public records officer does
 - Oversees compliance with the Act
 - Communicates with the requester
 - Compiles records
 - Coordinates with the designee and various departments

Response to Request

- Response time
- Type of response:
 - Additional time is needed
 - Clarification of request
 - Still include estimated response time
 - Procedure for notifying third parties
 - Providing records in installments
 - Denials of requests
 - Overbroad or “bot” requests



- Not obligated to create records in response to a request
- Not obligated to answer general inquiries or questions

Exemptions

- *RCW 42.56.070(2)* requires that an agency publish and maintain a list of exemptions that it believes prohibits public disclosure
- Some agencies just reference the list published by MRSC in Appendix C of its Public Records Act publication
- Common exemptions:
 - Personal information maintained for employees in personnel file
 - Attorney client privilege
 - Deliberative process
 - Applications for public employment

- Valuable formulae and drawings
- Medical records
- Records created in anticipation of litigation
- Lists of individuals for commercial purposes

Form of the Request

- Encourage requesters to utilize the agency's form in making a public records request and what information should be included on the form
- Outline a process if the requester is unwilling to fill out the form
- Outline the process for what happens to a request when it comes into the office
 - Staff should forward all requests received to the PRO to track



Response to a Request

- Outline various departments within agencies and how handled
 - Example: many police departments handle their public records requests separately
- Outline how the agency will respond:
 - Providing the records
 - Providing a link to that agency's website
 - Deny the request if the agency doesn't have the records
 - Provide notification of additional time needed

- Locating and gathering public records:
 - Outline expectations about how the records will be located
 - What are responsibilities of each department
 - How will records be searched for
 - Who in the department will be responsible for the search
 - How will the records be returned to the PRO and disclosed to the requester

- Outline the process for inspection of records
 - During agency's business hours
 - Involves an agency employee sitting in
- Outline disclosure of electronic copies
- Closure of request if the requester fails to claim an installment or schedule inspection
 - 30 days is typical
- Discussion of how exempt records will be withheld and placed on an exemption log

Fees

- Fees for disclosure of public records should be outlined in the policy
- Reference a fee schedule rather than putting it into the policy as fee schedules change
- If there are instances that the fees are waived, include this information



Review of Denial

- How the agency will review a denial of a request
- Requester may ask for review
- Timeline for internal review
- Who will participate in the internal review
- Timeline for final response to requester



Maintaining Public Records Policies

- Public Records Officer should review annually
 - Any updates to applicable statutes?
 - Any case law updates that affect the policy?
 - Any changes to internal processes that affect the policy?
- Engage legal counsel as necessary in this review
- Include a brief overview of the public records policy in public records trainings

CHMELIK SITKIN & DAVIS P.S.
ATTORNEYS AT LAW

This image shows a single page of white paper with horizontal blue ruling lines. The lines are evenly spaced and run across the width of the page, leaving small margins at the top and bottom. There are no vertical margin lines or other markings on the page.



Session 2B

Tech Tools for Public Disclosure

Kelly McDermott, Washington State Department of Fish and Wildlife

Erin Skewis, Department of Corrections

Davis Needham, Department of Corrections

Searching in M365

Disclaimer

Following is based on our experience and current understanding

- Things change quickly with Microsoft

DOC and DFW are licensed at the E5/G5 level and are members of the Washington State Shared Tenant.

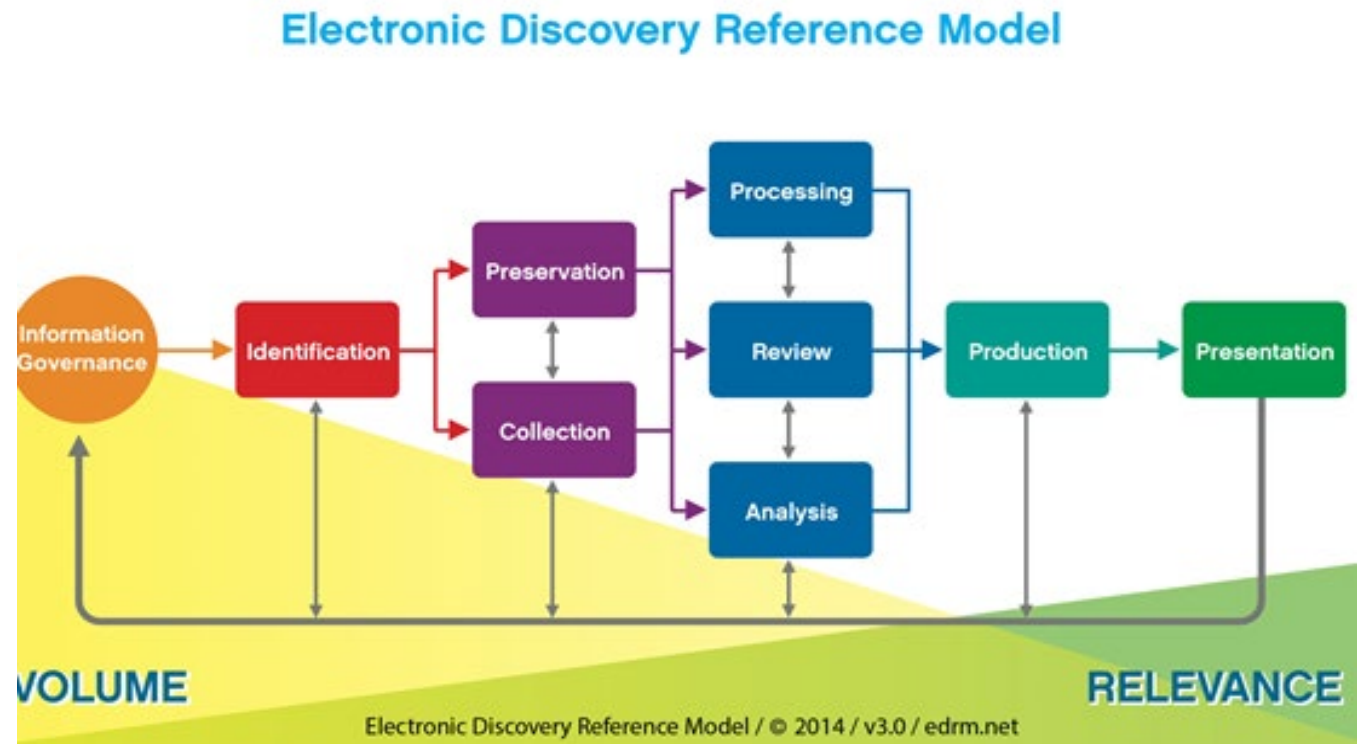
Consider your organization's current setup

- Are you in a commercial or government tenant?
- What is your license level?

What is eDiscovery?

Electronic discovery – identify and deliver electronic information/records for use in a public records request or as evidence in a legal case.

Electronic Discovery Reference Model (EDRM) –



Exchange Online (EXO)

- Emails, calendar, tasks, notes, contacts

Teams

- 1:N chat and meetings
(stored in EXO)
- Channel posts

OneDrive

- Personal – staff specific documents
- Documents shared in chat or linked in email from OneDrive
- 1:N Meeting recordings

SharePoint

- Group or project records
- Team channel Meeting recordings

What can be gathered in M365?

Three types of searches

M365 has three different types of eDiscovery searches

- DOC and DFW primarily use Advanced eDiscovery (AeD)

Content search	Core eDiscovery	Advanced eDiscovery
▪ Search for content ▪ Keyword queries and search conditions ▪ Export search results ▪ Role-based permissions 	▪ Search and export ▪ Case management ▪ Legal hold 	▪ Custodian management ▪ Legal hold notifications ▪ Advanced indexing ▪ Review set filtering ▪ Tagging ▪ Analytics ▪ Predictive coding models ▪ And more... 

Pros and Cons of Core

PRO

- Better for simple large exports
- Good if you don't need refined review
- Can be used with a lower license
- Can be used to place holds

CON

- No case management options
- More limitations on the number of items that can be previewed

Pros and Cons of Advanced

PRO

- Adds review functionality
- Conversation reconstruction (Teams chat)
- Adds export options (native & load file)
- Adds Hold notifications

CON

- More complicated than Core
- Requires a higher license
- More frequent updates

Welcome to the Microsoft 365 compliance center

[Intro](#) [Next steps](#) [Give feedback](#)

Making a new case

Microsoft Compliance -

<https://compliance.microsoft.com/homepage>

- Home page for most admin settings: Info protection, Records Management, Policies, etc.

eDiscovery > Advanced > Cases > Create a case

- Cases need a unique naming convention across your tenant
- We use agency abbreviation and searcher initials

The screenshot shows the 'Advanced eDiscovery' section of the Microsoft 365 Compliance Center. The left sidebar contains navigation links: Home, Compliance Manager, Data classification, Data connectors, Reports, Policies, Solutions (Catalog, Content search, Communication compliance, eDiscovery), Core, and Advanced (highlighted). The main content area is titled 'Advanced eDiscovery' and has two tabs: 'Overview' (selected) and 'Cases'. Under 'Overview', there is a table of 'Recent cases' and a summary of 'Your cases'.

Case name	Last modified
DOC - dan - Test hold 09.20.21	Sep 20, 2021 1:12 PM
DOC dn Soft Delete_July 2021	Aug 23, 2021 4:18 PM
DOC - DAN Exchange_All test	Apr 13, 2021 11:40 AM
DOC - DAN no custodian testing	Apr 2, 2021 12:08 PM
DOC - eks Teams Chat Search	Mar 11, 2021 7:55 AM
DOC - eks Teams Search for Training Docs	Mar 3, 2021 8:30 AM
DOC CCL AeD Testing	Dec 15, 2020 12:26 PM
CCL DOC Test Advanced eDiscovery	Jul 22, 2020 1:22 PM

Your cases

204 Cases

■ Active ■ Closed

Case settings

After creating your case you should review your settings

Add other searchers in your organization who may need access – by staff or by role group

Change case name and add a description

Delete an old case or one made in error

Set permissions based on need – pick and choose roles

Reviewer – only have access to review

eDiscovery Manager – all case management abilities

eDiscovery Admin – Can see and edit all cases across the organization

More info on permissions here:

<https://docs.microsoft.com/en-us/microsoft-365/compliance/assign-ediscovery-permissions?view=o365-worldwide>

Choose analytics settings

We use 100% de-duplication

 Case Information	 Access & permissions	 Search & analytics
Edit general information about your case, such as: • Case name • Case number • Description • Status • Delete case Select	Manage who can access your case and what they can do. • Add / remove members • Add / remove role groups Select	Configure how search will work within your organization. • Duplication identification & grouping • Near duplicates/email threading • Themes • Email threading • OCR settings • Texts to ignore Select

What are you looking for?

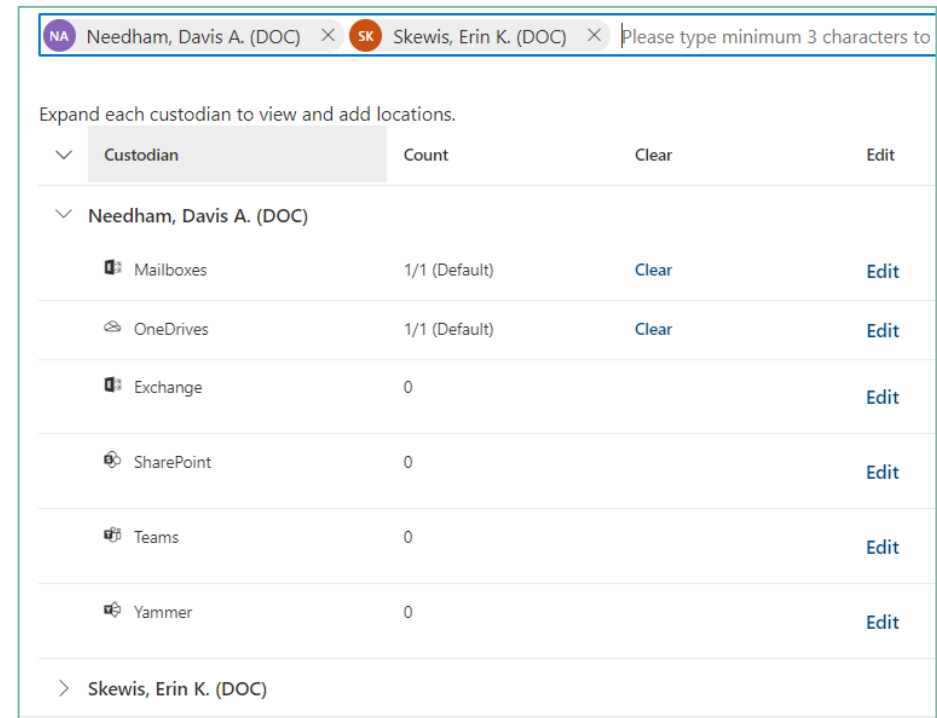
Can your search be narrowed?

You can search by specific locations or by custodian (staff)

- Find staff based on active directory
- Search mailboxes, OneDrives, 365 Groups
- You will need another tool for gathering SharePoint URLs
- You can import custodians in bulk using a template

Search terms anywhere

- Most of our searches at DOC involve agency wide search terms without custodians



The screenshot shows a search interface with two active filters: 'Needham, Davis A. (DOC)' and 'Skewis, Erin K. (DOC)'. Below the filters, a table displays search results for 'Needham, Davis A. (DOC)'. The table has columns for 'Custodian', 'Count', 'Clear', and 'Edit'. The results are categorized by location: Mailboxes, OneDrives, Exchange, SharePoint, Teams, and Yammer. Each category shows a count and links to 'Clear' and 'Edit'.

Custodian	Count	Clear	Edit
Needham, Davis A. (DOC)			
Mailboxes	1/1 (Default)	Clear	Edit
OneDrives	1/1 (Default)	Clear	Edit
Exchange	0		Edit
SharePoint	0		Edit
Teams	0		Edit
Yammer	0		Edit
Skewis, Erin K. (DOC)			

To hold or not to hold?

If you identified custodians for your case you can place them on hold

- Custodial holds affect email and OneDrive locations
- You can choose which custodians to place on hold

No custodians? You can use the Hold tab to place specific mailboxes and sites on hold

- You can lookup staff from AD
- You will need the actual site URL to place a site hold

You can use the Hold tab to place specific terms on hold

- Topic based vs user based
- Using keywords will place those terms on hold in the locations selected.
- Use a timeframe or the hold will continue to run on new records

Choose which of your new custodians to place on hold.

Name	☒ Hold
 Needham, Davis A. (DOC)	☒

Status	Location
☒ On	 Exchange mailboxes  Microsoft 365 Groups  Teams  Yammer user messages
☒ On	 SharePoint sites  OneDrive sites  Microsoft 365 Group Sites  Team Sites  Yammer Networks

Collections: Keyword searching

In Core you run searches, in Advanced you run collections

If you added custodians to your case you can quickly pick from their locations in a new collection

- In Core you can only search by location, not by custodian

There are a LOT of different ways to setup your searches

- below examples are searching for the same thing in different ways

Keywords

Pumpkin OR Spooky OR Halloween

Keywords

Spooky

Halloween

Pumpkin

Keywords

Spooky (c:s) Halloween (c:s) Pumpkin

- Keyword queries article is your friend! <https://docs.microsoft.com/en-us/microsoft-365/compliance/keyword-queries-and-search-conditions?view=o365-worldwide>

Search conditions

Date	Sender/Author	Size (in bytes)	Subject/Title
Retention label	Message Kind	Participants	Type
Received	Recipients	Sender	Sent
Subject	To	Author	Title
Created	Last Modified	File Type	

There are 19 different search conditions available in the system.

- There are more attributes you can search by, but they must be typed in as separate keywords
- More information about the conditions for different types of records can be found in in MS help documentation:

Search conditions

Spooky (c:s) Halloween (c:s) Pumpkin AND hasattachment : true

What is not discoverable?

Not all applications connected to M365 are fully discoverable!

In our tenant we cannot fully search the following:

Bookings	MyAnalytics
Delve	Planner
Flow	PowerApps
Kaizala	Power BI
Lists	Teams Voicemail Transcripts
Education	Whiteboard

Work with your architecture/ IT team to identify which apps are in use and what is on your organization's roadmap

If not in one of the big four its probably missing!

Reminders

Your agency may need a universal searcher

- More risk to have your staff search things that might be hidden from their view

Different experience in Government vs Commercial and shared vs private tenant

Dynamic platform

- Updates are regular and sometimes are not announced in advance
- Difficult to have a screen shot based training

Training is important

- Search logic – learn Boolean operators
- PowerShell – more and more functions

Search limitations

- Errors happen – refresh and restart
- No way to monitor other ongoing searches

Basic Tips for Reviewing Records in Advanced eDiscovery in O365



Some basic tips before you begin reviewing in Advanced eDiscovery

Be sure to use Microsoft Edge for review since other web browsers will not allow you to export files.

If you have access to a virtual server it is recommended to use that for review. That way it will not cause lagging on your machine with reviewing and downloading.

If you do not have a PST converter it is recommended to get one since that is the best way to download records from the system.

Lastly, be sure that all of your reviewers have the correct permissions so that they are able to Review, Tag and Export.

Reviewers will need more training and guidance.

When you first log into Advanced eDiscovery it will take you to an Overview section which will list your recent cases and how many active and closed cases you have.

You can view a list of all cases by going to the “Cases” tab.

The image displays two screenshots of the Microsoft 365 compliance Advanced eDiscovery interface. The left screenshot shows the 'Overview' tab, which provides a high-level summary of cases. The right screenshot shows the 'Cases' tab, which lists all active cases with detailed information.

Overview Tab (Left Screenshot):

Recent cases

Case name	Last modified
DFW_20940_Belenski	Jul 12, 2021 2:05 PM
DFW_21006_McCartin	Aug 12, 2021 3:25 PM
DFW_20958_Johnson	Aug 11, 2021 5:18 PM
DFW_21004_Tromp	Aug 10, 2021 10:04 AM
DFW_21010_Woodberry	Aug 9, 2021 4:14 PM
DFW_21003_Voelckers	Aug 4, 2021 11:51 AM

Your cases

41 Cases

Active Closed

Cases Tab (Right Screenshot):

Use Advanced eDiscovery to manage the electronic discovery workflow for legal cases. Identify and communicate with custodians, preserve data that's relevant to the case, then add it to a review set, review it, and apply analytics to reduce the volume of data to what's most responsive to the case. You can tag, annotate, and redact documents, and then export the working set for presentation. [Learn more](#)

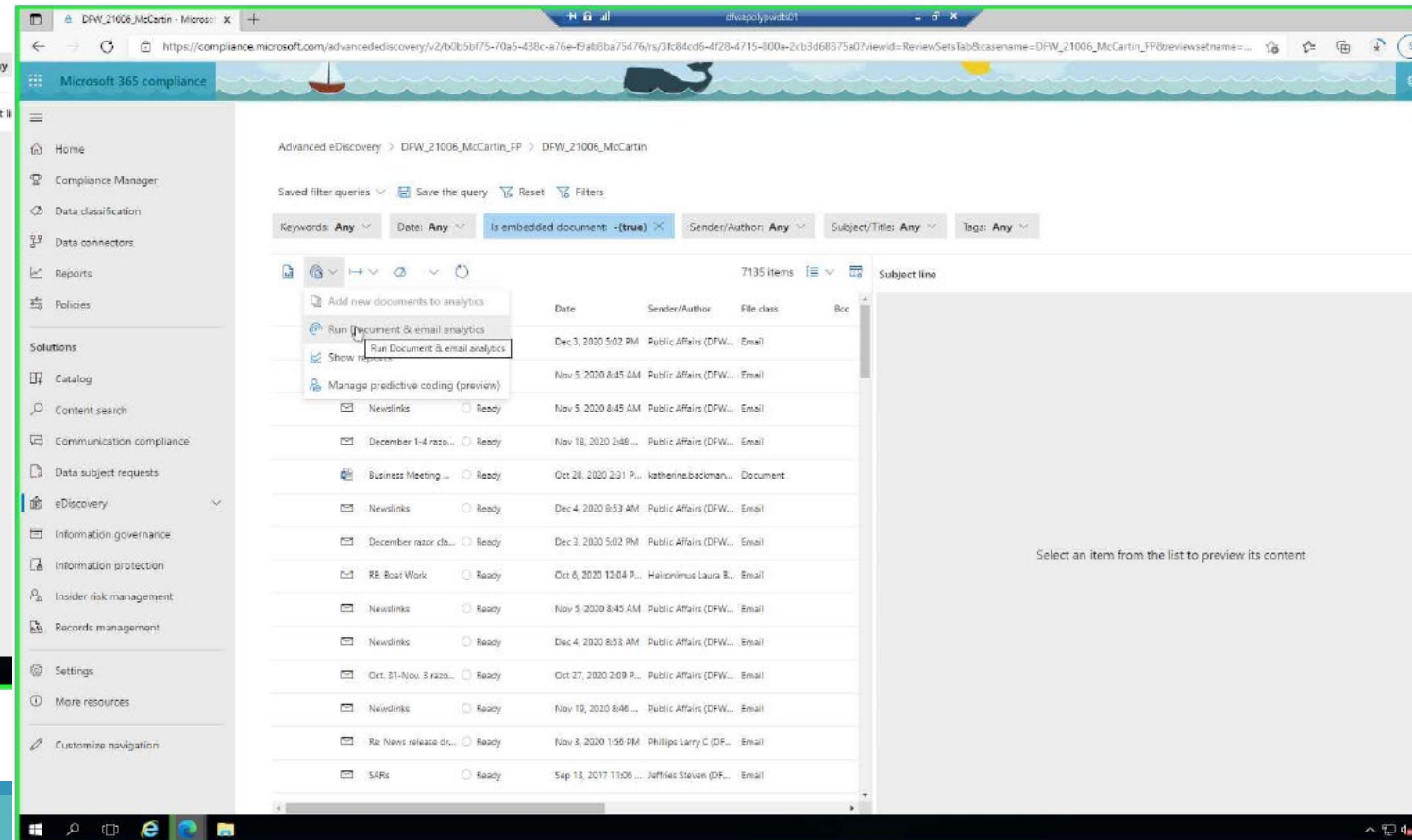
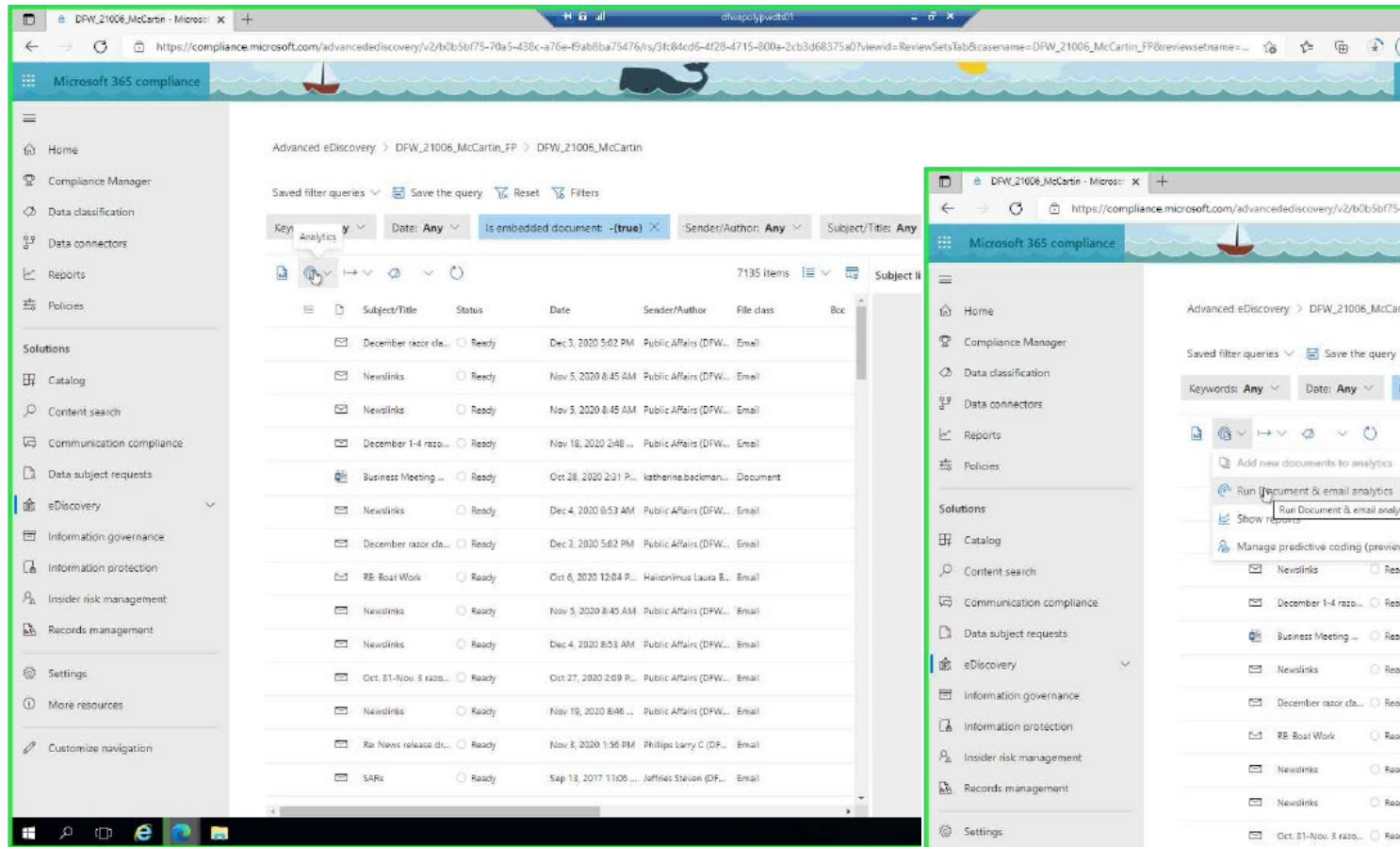
+ Create a case | Export | Refresh | Configure global analytics settings

41 items | Search | Filter | Group | Customize

Name	Status	Created date	Last modified	Last modified by	Case number	Description
DFW_20940_Belenski_ENF	Active	7/12/2021	Aug 17, 2021 9:19 AM	McDermott, Kelly E O365 Admin		
DFW_21006_McCartin_FP	Active	8/12/2021	Aug 12, 2021 5:50 PM	McDermott, Kelly E O365 Admin		
DFW_20958_Johnson_FP	Active	8/11/2021	Aug 12, 2021 2:40 PM	McDermott, Kelly E O365 Admin		
DFW_21004_Tromp	Active	8/10/2021	Aug 10, 2021 10:04 AM	McDermott, Kelly E O365 Admin		
DFW_21010_Woodberry	Active	8/9/2021	Aug 9, 2021 4:14 PM	McDermott, Kelly E O365 Admin		
DFW_21008_Unice	Active	8/2/2021	Aug 6, 2021 9:12 AM	McDermott, Kelly E O365 Admin		Searched ch
DFW_21003_Voelckers	Active	8/2/2021	Aug 4, 2021 11:51 AM	McDermott, Kelly E O365 Admin		Searched O
DFW_21030_Hansen_Chat2	Active	8/2/2021	Aug 2, 2021 5:07 PM	McDermott, Kelly E O365 Admin		
DFW_21106_Dye_Chat2	Active	8/2/2021	Aug 2, 2021 4:28 PM	McDermott, Kelly E O365 Admin		
DFW_Meyer_Requests_Chat2	Active	8/2/2021	Aug 2, 2021 4:17 PM	McDermott, Kelly E O365 Admin		
DFW Mullins chat2	Active	8/2/2021	Aug 2, 2021 4:01 PM	Lasiter, Susan E O365 Admin	2124	
DFW Loc Do	Active	8/2/2021	Aug 2, 2021 3:56 PM	Lasiter, Susan E O365 Admin	2122	
DFW_20793_Chalk_Chat2	Active	8/2/2021	Aug 2, 2021 3:42 PM	McDermott, Kelly E O365 Admin		
DFW_20855_Schick_Chat2	Active	8/2/2021	Aug 2, 2021 3:25 PM	McDermott, Kelly E O365 Admin		

If you are wanting to use analytics to review conversation threads and remove duplicates, I recommend running it before you begin your review. This does take time so be sure to check to see if it is completed in the jobs tab before you begin your review.

- Note you can change the Near duplicate threshold in Settings



Tagging

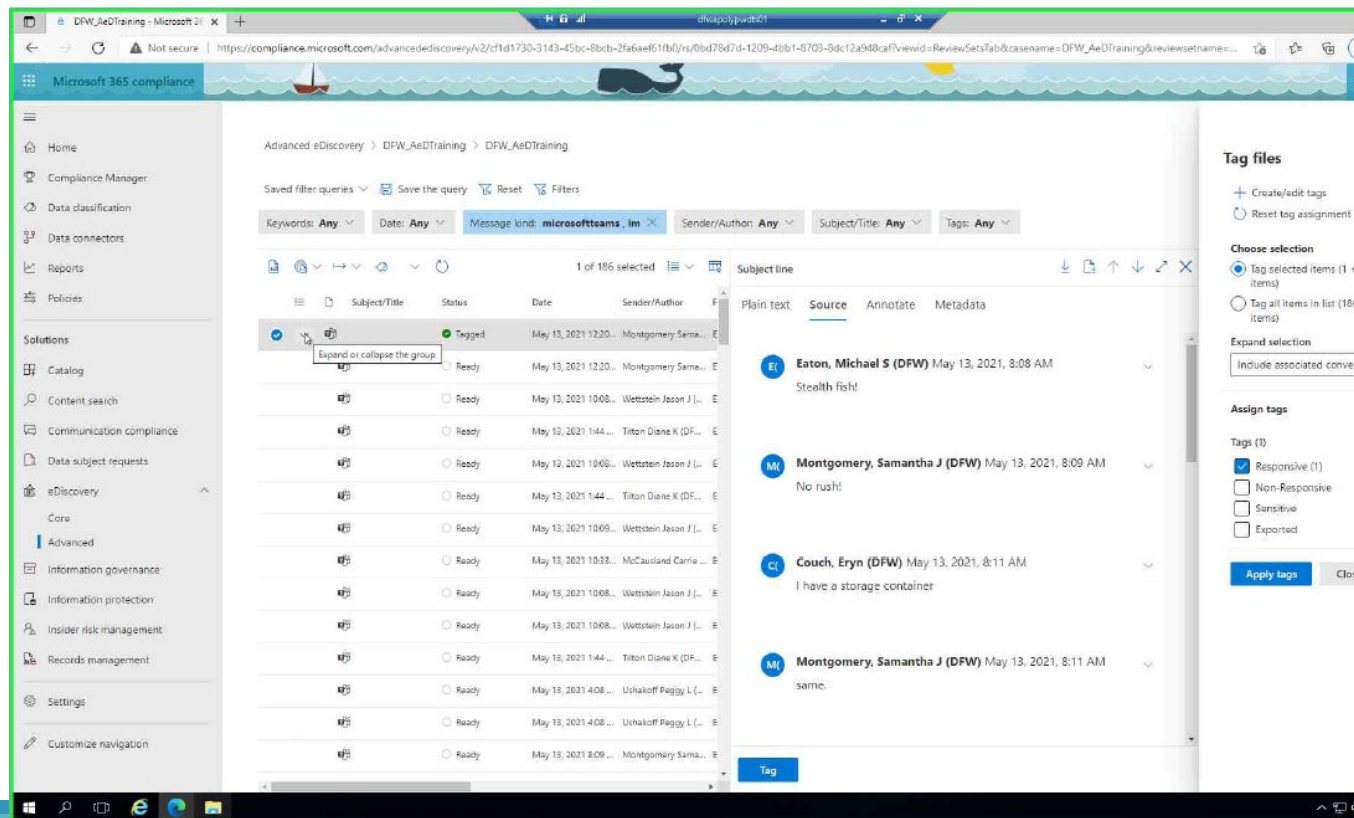
Since the Tags cannot be saved outside of a single search. I found that the best way to be consistent is to create the tags for the reviewer after the search is completed. That way each search is using the same Tags.

I also create all Tags as check boxes so that if something is accidentally tagged it is easier to change since all you need to do is uncheck that tag and click apply. If you select the “option button” you cannot unselect once it is selected.

The screenshot displays a 'Tags' management interface. At the top, there are two buttons: '+ Add section' and '+ Add smart tag group'. Below these, the 'Tag group title' is set to 'Tags', and the 'Enter description' field is empty. The interface shows two 'Option button' sections. The first section, labeled 'Responsive', has an unchecked checkbox and a description field. The second section, labeled 'Non-Responsive', also has an unchecked checkbox and a description field. On the right, a 'Preview' panel shows the resulting tags as checkboxes: '+ Add check box', 'Delete', 'Responsive', and 'Non-Responsive'. A 'Delete' button is visible next to the 'Responsive' tag in the preview.

When tagging files a few things to note:

- If you are reviewing and tagging messages, be sure that the “Expand selection” is “Include associated conversation items” to tag all messages with the same tag.
- If you are reviewing and tagging emails and documents, be sure that the “Expand selection” is “Include associated family items” so all attachments associated with an email are also tagged the same.
- Also be sure that the “Tag selected items” is selected and not “Tag all items in list.” If you select items in list, it will tag all records at once and there is no way to stop it once that happens. However, if you are using the check box tag you can go in and unselect the check box for that tag once the job is completed.
- If you only want to Tag the one message or one email/document, you will want to select “None” in the “Expand selection”



Expand selection



- ☐ Tag selected items (1 + conversation items)
- ☒ Tag all items in list (6,403 + conversation items)

Filters

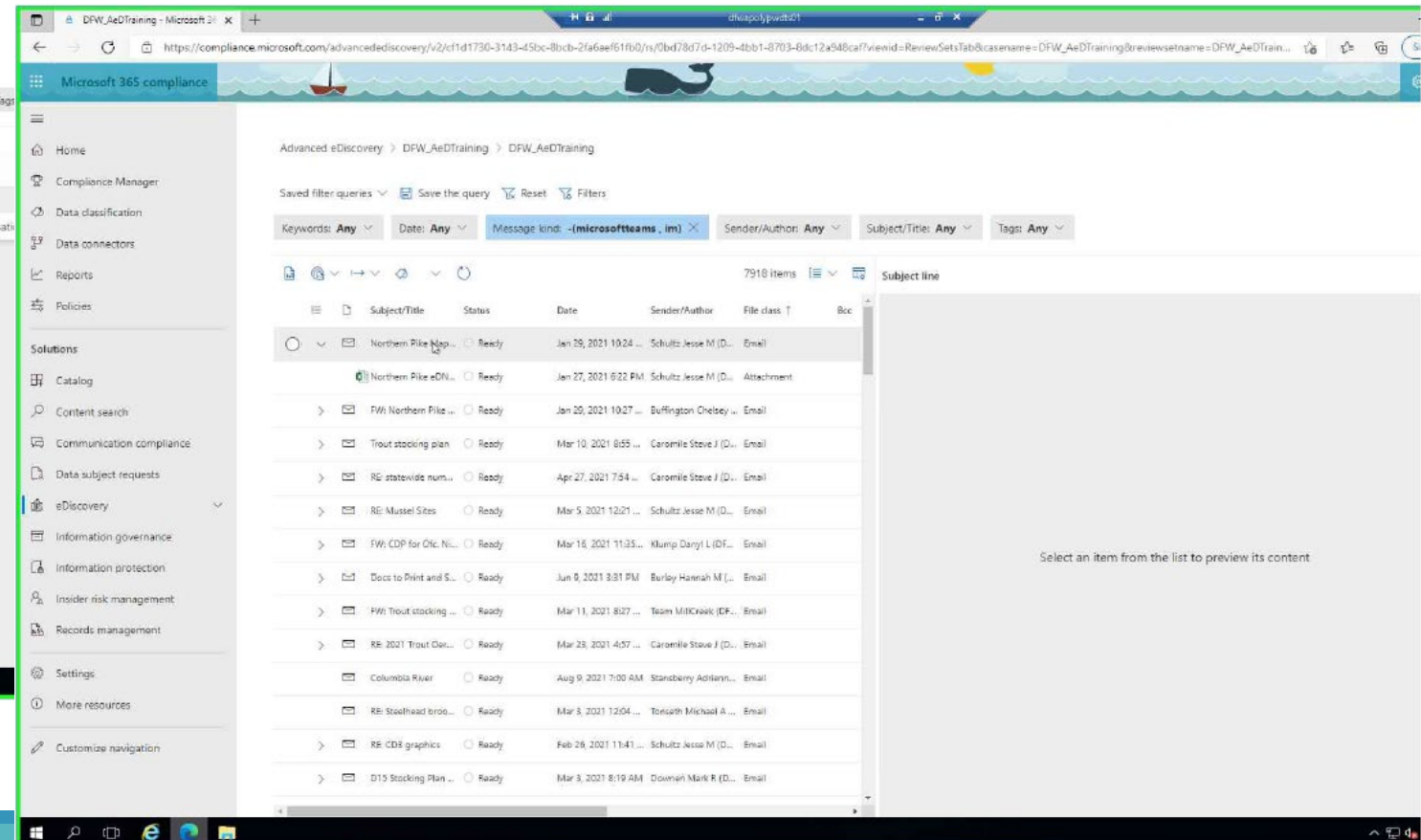
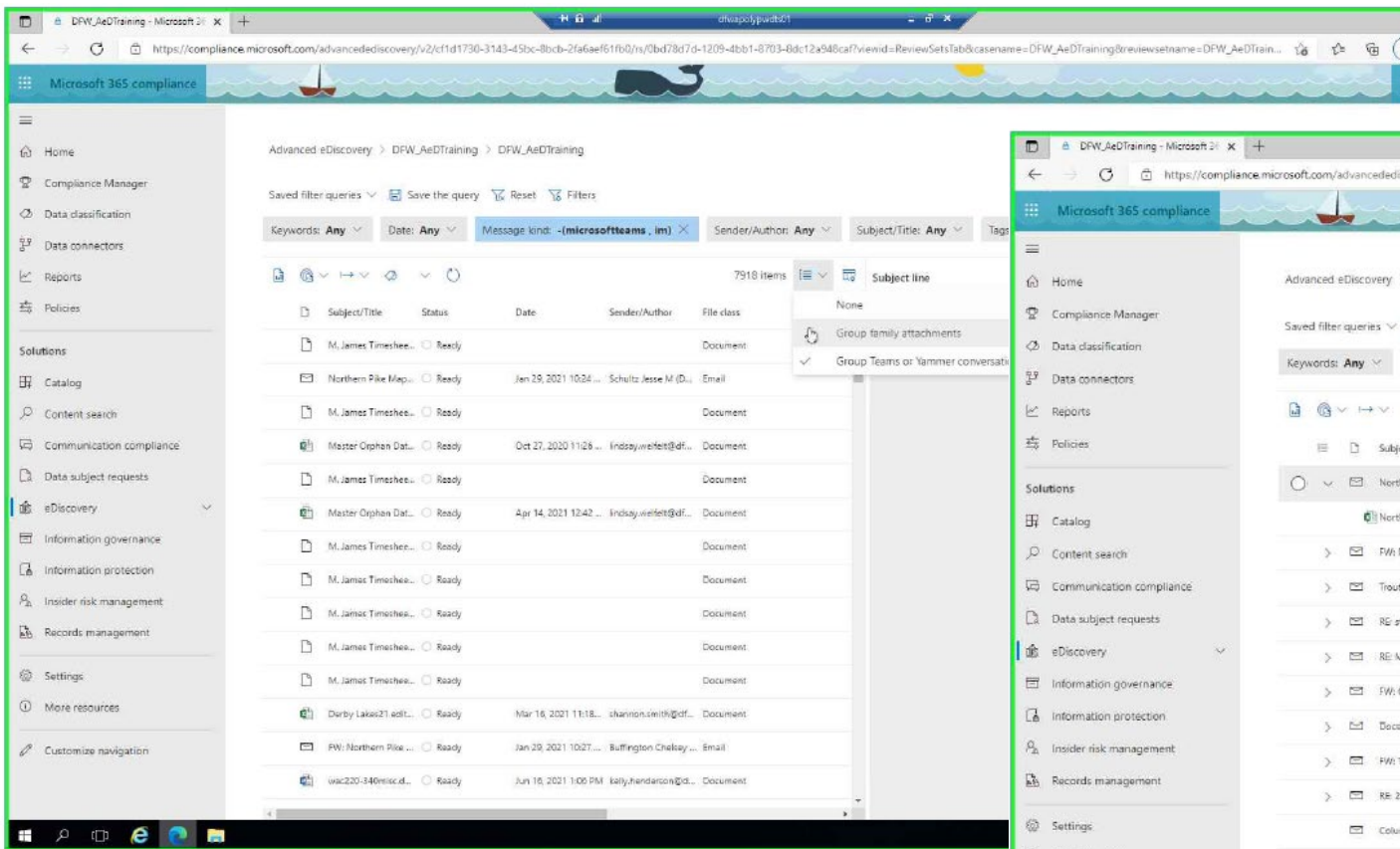
- I have found **four** filters that really work for us in reviewing records.
- To save a filter in a review set click “Save the query.”
- The **first** I have created I titled “Chat Review.” I created this by selected the “Message Kind” filter and selecting microsoftteams and IM as the filter. Also be sure that the Grouping is set to “Group Teams or Yammer conversations.” This allows you to review chat threads seamlessly and all at once.
- Another tip is to review the chat messages in an online format I recommend selecting “Source” in the Preview pane. This allows for easy scrolling through the message thread.

The image displays two screenshots of the Microsoft 365 compliance Advanced eDiscovery interface, demonstrating the 'Chat Review' filter and the 'Source' preview pane.

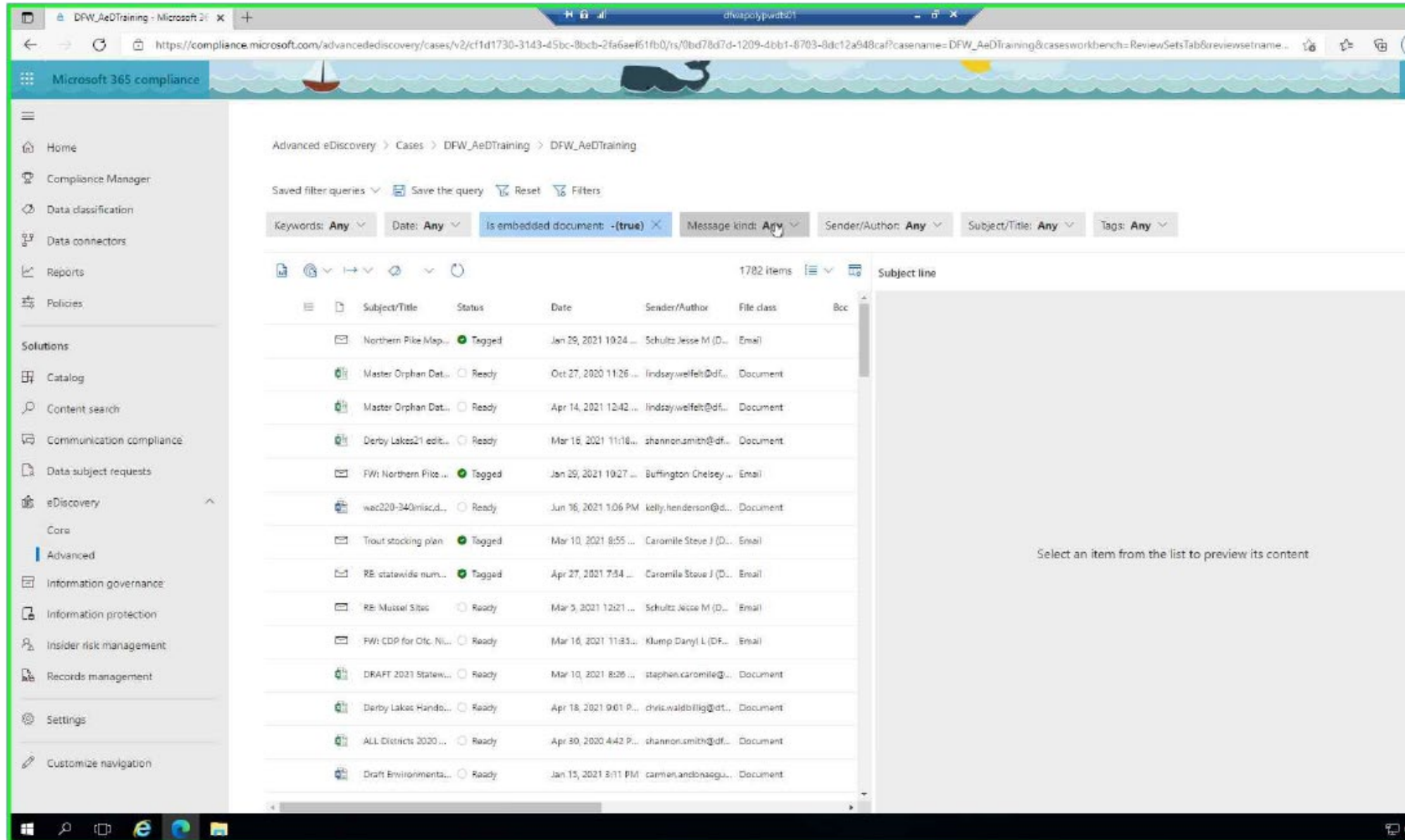
Left Screenshot: The interface shows a search results table with columns: Subject/Title, Status, Date, Sender/Author, and File class. A search filter is applied: 'Message kind: microsoftteams, im'. A search result is selected, and the preview pane shows a chat message. The 'Group family attachments' dropdown menu is open, showing options: None, Group family attachments, and Group Teams or Yammer conversations (selected). The chat message content is visible in the preview pane.

Right Screenshot: The interface shows the same search results table. The preview pane is set to 'Source' view, displaying a chat thread with messages from various users, including Eaton, Michael S (DFW), Montgomery, Samantha J (DFW), Couch, Eryn (DFW), and Montgomery, Samantha J (DFW).

- The **second** filter I have created I titled “Email and Doc Review”
- This filter was created to make it easier for Email and Document reviewing. I created this by excluding microsoftteams and IM from the review and then selecting “Group family attachments.” This allows for easy reviewing of email with attachments because it nests the attachments under the parent email.



- The **third** filter I use I have titled “Export View”
- This filter removes the email attachments from view so you can easily filter for export.
- You can do this by selecting “Is embedded document” and selecting “False”



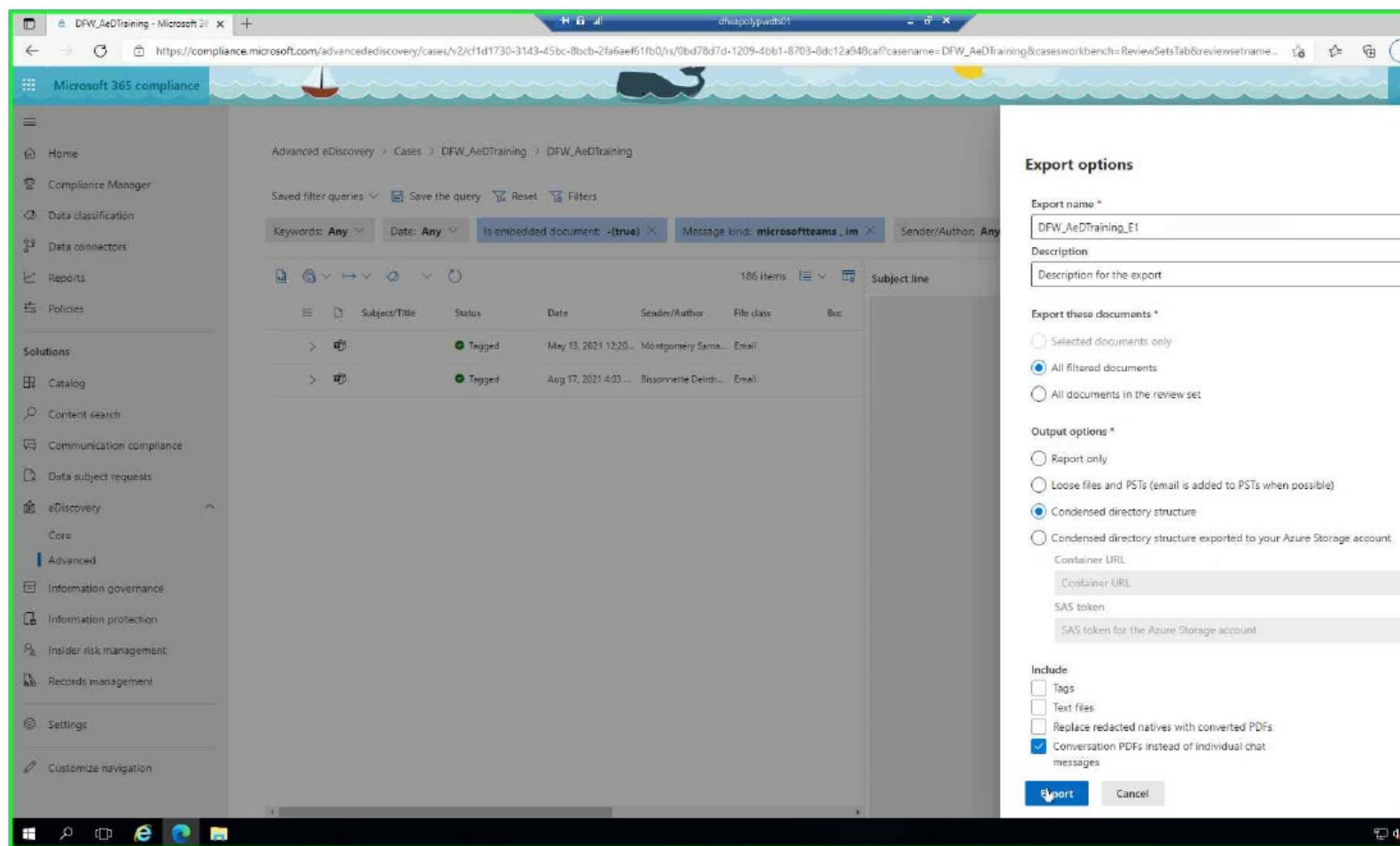
- The **fourth** filter I have created I titled “Deduping Filter.” I created this by first running analytics on the review page and then selecting the “Marked as representative” filter and selecting “Unique.”
- This excludes duplicates from view so you can review only the unique records in the review set.

The image displays two screenshots of the Microsoft 365 compliance Advanced eDiscovery interface.

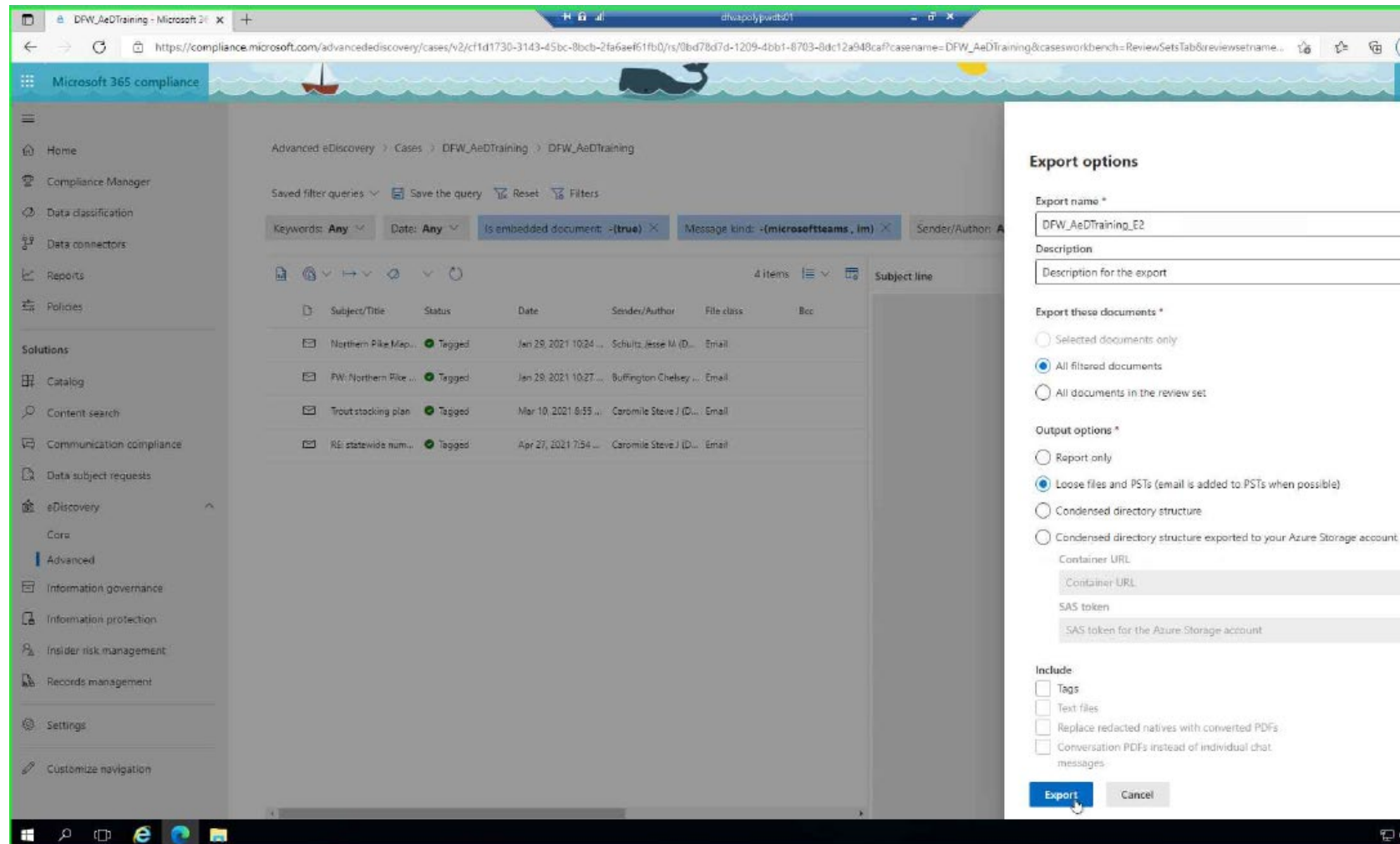
Left Screenshot: The interface shows a list of 7135 items. A context menu is open over the first item, with the option "Run Document & email analytics" highlighted. The list includes columns for Date, Sender/Author, File class, and Bcc. The first item is dated Dec 3, 2020 5:02 PM, from Public Affairs (DFW...), and is an Email.

Right Screenshot: The interface shows the results of the analytics, displaying a list of 3751 items. The list includes columns for Subject/Title, Status, Date, Sender/Author, File class, and Bcc. The first item is dated Jan 29, 2021 10:24, from Schultz Jesse M (D...), and is an Email. A "Subject line" preview pane is open on the right, showing the subject line of the selected item.

- When exporting it was recommended for us to export by message type so that you can keep the message thread together and also export the chat into a PDF if you want to keep the chat together.
- To export chat message thread into a PDF you select the Output options “Condensed directory structure” then select Include “Conversation PDF’s instead of individual chat messages.”



- To export email and documents we export by selecting Output Options “Loose Files and PST’s”
- This will export the emails into PSTs by staff member and export the documents by staff member or team.



Email, PST and MSG Converter Programs

There are a lot of options out there, but none of them seem to be “the perfect product”

Determine what features are most important to you/your agency.

For the programs on the next slide, most of them have a free demo version available on their website.

Recommended to use a demo version before purchasing

DOC is currently using Evermap Auto-Portfolio Plug-In, but is looking into new software due to issues with the Evermap software.

	Evermap Auto Portfolio (DOC Currently Uses)	Bitrecover PST to PDF Wizard PRO	Sperry Save as PDF PRO	DRS PST File Converter	Total Mail Converter Pro (DFW Currently Uses)
Converts email and Attachments to PDF	✓	✓	✗	✗	✓
Converts multiple PST files at once	✗	✓	✗	✓	✗
Converts emails into one PDF	✓	✗	✓	✗	✗
Once license can be used on multiple machines*	⚠	✓	✓	✓	✗
Converts calendar items	✗	✓	✗	✓	✓
One time payment (lifetime license)	✗	✓	✓	✓	✓

*Evermap – One license can be used on different machines, but it has caused some issues for DOC.

*Total Converter Pro – Only certain levels of licensing (at different prices) allow use of licenses on multiple machines

[illegible]



Session 2C

10 Years of Yousoufian: PRA Penalties

Ramsey Ramerman. City of Everett

Morgan Damerow, Attorney General's Office



TOP 10 LESSONS LEARNED ABOUT PRA PENALTIES SINCE *YOUSOUFIAN v. OFFICE OF RON SIMS* (2009)



WAPRO FALL 2021

BY RAMSEY RAMERMAN AND MORGAN DAMEROW



Overview of the *Yousoufian* Analysis



Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 460, 229 P.3d 735 (2010)
Court adopted a framework to help courts determine the appropriate penalties for PRA violations.

16 factors consisting of 9 aggravating factors and 7 mitigating factors

- Factors should not be applied in a rigid manner
- Factors may overlap
- Factors are offered only as guidance
- Factors may not apply equally or at all in every case
- Not an exclusive list of appropriate considerations
- “factors [do] ... not infringe upon the considerable discretion of trial courts to determine PRA penalties”



Overview of the *Yousoufian* Analysis



Aggravating Factors

1. a delayed response, especially in circumstances making time of the essence;
2. lack of strict compliance with all the PRA procedural requirements and exceptions;
3. lack of proper training and supervision of personnel and response;
4. unreasonableness of any explanation for noncompliance;
5. negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA;
6. dishonesty;
7. potential for public harm, including economic loss or loss of governmental accountability;
8. personal economic loss; and
9. a penalty amount necessary to deter future misconduct considering the size of the agency and the facts of the case.



Overview of the *Yousoufian* Analysis



Mitigating Factors

1. the lack of clarity of the PRA request;
2. an agency's prompt response or legitimate follow-up inquiry for clarification;
3. good faith, honest, timely, and strict compliance with all the PRA procedural requirements and exceptions;
4. proper training and supervision of personnel;
5. reasonableness of any explanation for noncompliance;
6. helpfulness of the agency to the requestor; and
7. the existence of systems to track and retrieve public records.





Lesson 1: As a PRO, Your Action Often Will Matter



Many of the *Yousoufian* Factors will analyze how the agency processes PRA requests

Aggravators

1. a delayed response, especially in circumstances making time of the essence;
2. lack of strict compliance with all the PRA procedural requirements and exceptions;
3. lack of proper training and supervision of personnel and response;

Mitigators

2. an agency's prompt response or legitimate follow-up inquiry for clarification;
3. ... strict compliance with all the PRA procedural requirements and exceptions;
4. proper training and supervision of personnel;
6. helpfulness of the agency to the requestor; and
7. the existence of systems to track and retrieve public records.





Lesson 1: As a PRO, Your Action Often Will Matter



Many of the *Yousoufian* Factors will analyze how the agency processes PRA requests in general

Focus on

- Whether the violation at issue resulted from issues with the agency's PRA compliance program; and
- What changes the agency has implemented in its procedures after the mistake was revealed

You will have the best chance of receiving a low penalty if you can show your agency is “wearing the white hat”

Often the best way to show you are wearing the white hat is to demonstrate that your agencies have take the tests to prevent the mistake from occurring again





Lesson 1: As a PRO, Your Action Often Will Matter



Hoffman v. Kittitas County, 194 Wn.2d 217 (2019)

Violation because the former PRO treated RCW 42.56.050 as if it was a free-standing privacy exemption

BUT violation uncovered because that PRO retired and the new PRO identified the error and corrected it, even though this exposed the county to liability.

Affirmed a relatively low penalty award of \$15,498.





Lesson 1: As a PRO, Your Action Often Will Matter



“[T]he trial court appropriately observed that the problems leading up to the County’s PRA violation were attributable solely to [the retired PRO] [and] her idiosyncratic understanding of a particular PRA provision rather than to systemic lapses in training, supervision, or work flow. Indeed, the record shows every indication that her successor, Knudson, is a model PRA responder. It also reveals ongoing internal and external training, the availability of legal counsel when needed, and a system to help employees track their PRA request responses and to remind them of upcoming deadlines.”

Hoffman, 194 Wn.2d at 232-33.



2



Lesson 2: Figure Out Why the Requestor Sued

Once you learned your agency has been sued, the first thing you should do is try to figure out why the requestor sued. Look both at:

- What the agency actually did or didn't do; and
- What is the best argument to support what the requestor thinks the agency did – “steelman” the requestor's argument.

The biggest factor for penalties will be agency culpability

- What type of mistake?
- Why did you make the mistake?
- How bad was the mistake?

Goal: determine what you can do so the mistake does not happen again

Bonus: confessing error early helps



7

2



Lesson 2: Figure Out Why the Requestor Sued

Most Common Types of Perceived Mistakes

- Failed to turn over responsive records
- Wrongly asserted exemption
- Inadequate exemption log
- Inadequate search (no stand-alone penalty unless records overlooked)
- Missed deadline (penalty only for missing 5-day response, not for missing reasonable estimate)

Where in your compliance program did the process break down?



7

2



Lesson 2: Figure Out Why the Requestor Sued

Why did you make the mistake

1. Intentional – hide record or hide mistake
e.g. *Cedar Grove v. City of Marysville*, 188 Wn. App. 695 (2015)
2. Gross Negligence – inadequate training or procedures
e.g. *Francis v. DOC*, 178 Wn. App. 42 (2013), *Adams v. DOC*, 189 Wn. App. 925 (2015)
3. Negligence – honest mistake
e.g. *Banks v. City of Tacoma*, -- Wn. App. 2d --, 2021 Wash. App. LEXIS 1347 (Aug. 20, 2021)
4. Good-faith belief that exemption applies
e.g. *Sanders v. State*, 169 Wn.2d 827 (2010)

Remember bad faith doesn't have to mean high daily penalty rates.

- *Francis v. DOC*, 178 Wn. App. 42 (2013) (setting penalty rate at \$10 despite finding of bad faith)
- *Hoffman v. Kittitas County*, 194 Wn.2d 217 (2019) (refusing to judge county by actions of one employee)



2



Lesson 2: Figure Out Why the Requestor Sued

What about if you did not make a mistake?

Cautionary Tale: Phillips v. City of Everett

- City withheld “worksheets” used for rating candidates based on RCW 42.56.250(1)
- Relied on out-of-state cases interpreting the identical exemption
- Plaintiff had filed a claims-notice alleging discrimination
- City attempted to resolve the PRA dispute by agreeing to turn over records in discovery
- Plaintiff’s theory was that the City was trying to hide evidence of its discrimination
- Did not focus on this theory because it is logically flawed
- Trial court accepted it hook, line and sinker, imposed \$50-per-day penalty



7

2



Lesson 2: Figure Out Why the Requestor Sued

Exemptions broadly speaking are intended either to protect a vital government function or a privacy right

So if you cannot explain to the Court how the exemption serves those goals, if you are wrong, you could face a higher penalty

1. No clear benefit – does exemption even apply?
2. Protect agency interest/general public good?
3. Protect interests of an “ally” – e.g. employee, business partner
4. Protect interest of “innocent” third party – e.g. crime victim

Consider “proving” good faith by seeking in camera review to ensure that court you are not trying to hide “bad” facts



7



Lesson 3: Assume that the Trial Court's Penalty Determination Will Be Upheld

Focus on the penalty stage in the trial court because appellate courts:

- almost always defer to the trial court's determination
- rarely review the application of individual factors

"We do not perform piecemeal de novo review of individual *Yousoufian* ... factors. ... an appellate court reviewing a trial court's PRA penalty assessment should review the overall penalty decision holistically, finding the trial court's assessment inadequate [or adequate] in light of the totality of relevant circumstances."

Hoffman, 194 Wn.2d at 228 (cleaned up, citations omitted).

"While we might have imposed a different penalty, we cannot say that the trial court abused its discretion by refusing to reduce the penalty further."

Zink v. City of Mesa, 4 Wn. App. 2d. 112, 132 (2018).

"In the end, the ultimate penalty selected by the trial court was not outside the broad realm of reasonableness."

Eggleston v. Asotin County, 2017 Wash. App. LEXIS 2839 (Div. 3, Dec. 14, 2017)



4

Lesson 4: Words Don't Always Mean What You Think



As a result of the directive to construe the PRA in favor of disclosure, courts have construed words in the statute to have meanings that differ from the plain meaning of those terms.

In *Francis v. DOC*, 178 Wn. App. 42 (2013) the court held that “Bad Faith” really means “gross negligence”

“The court also described the McNeil records request routing slip as ‘almost a rubber-stamp situation where you put in 15 minutes, don't tell anybody what you looked at or looked for and then send the routing slip on.’”

“Despite these findings, the trial court explicitly found no ‘recklessness or intentional noncompliance,’ no ‘intentional hiding or misrepresentation,’ and no ‘deceit’ on the part of the Department.”



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Lesson 4: Words Don't Always Mean What You Think



The term “record” really means a “page” of that record

The PRA permits a daily penalty between \$0 to \$100 per day for each day a “public record” is wrongfully withheld.

In *Wade’s Eastside Gun Shop, Inc. v. Dep’t of Labor*, 185 Wn.2d 270 (2016) the court ruled that this provision permits the court to award \$100 per day for each page of that record:

“The PRA defines ‘public record’ to include ‘any writing containing information relating to the conduct of government.’ A ‘writing’ is defined to include ‘all papers.’ A single page fits within the plain language of this broad definition.” (citations omitted)

As a result, a \$5-per-day penalty became a \$17,000 per day penalty.





Lesson 5: Per-Page & Per-Record “Multipliers” Should Only Be Used in Extreme Cases

Since *Wade’s*, Courts started awarding penalties on a per-record basis with more frequency. But we now have a couple of cases to push back on per-record awards.

O’Dea v. City of Tacoma, -- Wn. App. 2d --, 2021 Wash. App. LEXIS 2161 (Aug. 24, 2021)

After a superior court used a per-record measure to impose a \$2.6 million penalty, the Court of Appeals reversed and held that “such large per record multipliers should be reserved for the most extreme cases, for example, those involving a bad faith withholding of a record subject to intense public interest.”

“We cannot lose sight of the fact that public records penalty awards are ultimately paid with taxpayer dollars.”

Hood v. Whidbey Is. Sch. Dist., 2016 Wash. App. LEXIS 2139 at *46 (Div. 1, Feb. 29, 2016)

“The court declined to impose these multipliers [of per-record penalties] because Hood suffered no economic loss, his requests did not concern matters of public importance, and the District was ‘by no means intransigent in its responses.’”





Lesson 6: You Can Stop the Penalty Clock by Turning Over the Records

The daily penalty clock keeps running until the judgement is entered or the agency turns over the records

If the requestor obtains the records from a different source, this will not stop the penalty clock.

Eggleston v. Asotin County, 2017 Wash. App. LEXIS 2839 (Div. 3, Dec. 14, 2017)

You can turn over the records without conceding that they were wrongly withheld in the first instance – but make that clear when you disclose them.

Sanders v. State, 169 Wn.2d 827 (2010)





Lesson 6: You Can Stop the Penalty Clock by Turning Over the Records

Green v. Lewis County, 2018 Wash. App. LEXIS 1631 (Div. 1, July 16, 2018)

“The Sheriff's Office immediately admitted it had mistakenly omitted the document and violated the PRA. The Sheriff's Office sent Green the responsive document.

“The case went to trial to establish the appropriate PRA violation penalty. The trial court ... imposed a significantly smaller PRA violation penalty on the Sheriff's Office than Green had requested.”

Court of appeals affirmed the low penalty award – and only awarded Green 25% of his attorney fees.



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Lesson 7: Variable Rate Penalties Can Help Reduce Extreme Penalty Awards

Even when courts have determined a high daily penalty is warranted, agencies have successfully reduced the final award by arguing that the penalty rate should be reduced for certain periods of time.

In the 2004 *Yousoufian* decision, when the Supreme Court held that the penalty period could not be reduced because of litigation delays, it also suggested that the use of a variable rate penalty could mitigate any unfairness

Wade's was the first appellate decision to use variable-rate penalties, but there the court increase the rate based on agency intransigence.

But ...





Lesson 7: Variable Rate Penalties Can Help Reduce Extreme Penalty Awards

Litigation delays not caused by the agency

In *Zink v. Mesa*, 4 Wn. App. 2d 112 (2018), the court reduced the penalty rate to \$0.50 per day for all requests from the date the trial court originally dismissed the lawsuit to the date the Court of Appeals reversed that ruling.

Accounting for a reasonable response time

In *O'Dea v. City of Tacoma* (2021), the court suggested variable-rate penalties could be used to account for the City's reasonable response time.

Penalty clock started after the City failed to recognize that it had received a request.

But once the City recognized the request several months later, it diligently responded to the request.

Trial court imposed the same penalty rate for the pre-response period and the period the city was diligently responding to the request.





Lesson 8: Factors Are Not Always Applied Consistently

Trial courts have interpreted certain *Yousoufian* factors in different ways and because of the deferential standard of review, appellate courts have upheld those differing interpretations.

Thus, it is essential to make the best argument to the trial court about how those factors should apply





Lesson 8: Factors Are Not Always Applied Consistently

If an agency asserts an exemption that does not apply, has the agency strictly complied with the PRA's procedural requirements?

Yes

Adams v. DOC, 189 Wn. App. 925 (2015)

Court of Appeals found that the agency had asserted exemption in bad faith but

It affirmed the trial court's finding that the agency had strictly complied with the procedural requirements.

"the trial court differentiated between compliance with procedural requirements in form and compliance with procedural requirements in substance."

No

Hoffman, 194 Wn.2d 217

Affirmed trial court ruling that the agency did not strictly comply with procedures because it asserted a non-existent exemption





Lesson 8: Factors Are Not Always Applied Consistently

If an agency is found to have wrongly asserted an exemption, was its response timely?

Yes

Hoffman v. Kittitas County, 4 Wn. App. 2d 489 (2019), *aff'd on different grounds* 194 Wn.2d 217

Court of Appeals rejected claim that the aggravating factor for “prompt response” should apply based on the wrongful withhold of records for 246 days

“the sheriff's office maintained prompt contact with Hoffman throughout the pendency of his PRA inquiry. It responded to each of Hoffman's PRA requests within five working days. In addition, Hayes and Kundson both acted immediately

when requested by their supervisors to contact Hoffman for follow-up.”

Delay accounted for in daily penalties.

Yes and no

Green v. Lewis County, (2018)

Affirmed “prompt response” mitigating factor applied because the agency met all of the deadlines, but also affirm finding that “delayed response” aggravating factor applied because records were wrongfully withheld

“The trial court's assessment of timeliness relates to two separate issues—promptness in response and tardiness in delivery of the record.”





Lesson 8: Factors Are Not Always Applied Consistently

Wrongfully asserting an exemption is not reasonable or unreasonable

Cortland v. Lewis County, 2021 Wash. App. LEXIS 88 (Div. 2, Jan. 20, 2021)

Neither mitigating nor aggravating:

“Lewis County's claimed exemption was intelligible, but cannot be considered reasonable because it was legally wrong.”

Exception that proves the rule: rare instance of appellate court rejecting trial court application of an aggravating factor

Banks v. City of Tacoma (2021)

“Although the trial court emphasizes that these documents were available on the City's website, it used this factor to aggravate, rather than mitigate, the penalty. ... But their availability to the public on the website during the entire penalty period should mitigate, rather than aggravate, the penalty amount.”





Lesson 9: Deterrence Can Serve as a Mitigator

Deterrence is only listed as an aggravating factor, but courts have endorsed using it as a justification for reducing penalty awards, particularly when the award involves a high number of days.

PRA penalty “is intended to ‘discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.’” *Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 429-30 (2004).

Because penalties are paid by the taxpayers, the total penalty award should not exceed an amount necessary to punish and deter future violations when the requestor has not suffered foreseeable harm



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Lesson 9: Deterrence Can Serve as a Mitigator

First recognized in the 2009 Yousoufian decision.

“The penalty needed to deter a small school district and that necessary to deter a large county may not be the same.”

Then in *Bricker v. DOL*, 164 Wn. App. 16 (2011), the Court of Appeals upheld trial court’s decision to switch from imposing a per-record penalty to a per-day penalty after determining that using the per-record rate resulted in an excessive total penalty

“Bricker argues that the amount of the final judgment should be irrelevant in assessing PRA penalties, but the total penalty clearly is a legitimate consideration.”



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Lesson 9: Deterrence Can Serve as a Mitigator

In 2018 *Zink v. City of Mesa* decision, Division III of the Court of Appeals directly addressed this issue and endorsed the trial court's 2-step method first calculating the penalty rates without consideration of the agency's size and second, stepping back to determine if the total penalty award is appropriate given the agency's size.

"With the benefit of hindsight, it was probably not possible to assess the ninth deterrence aggravator other than on a cumulative basis." *Zink*, 4 Wn. App. 2d 112

Division III again addressed this issue in *Hoffman v. Kittitas County*, endorsing the use of \$0.50 per day in part based on the county's small size. When the Supreme Court affirmed that decision, it also adopted Division III's analysis.

Not just small jurisdictions:

Division II recently vacated a \$2.6 million penalty imposed on Tacoma stressing that the penalty is paid by tax dollars. See *O'Dea v. City of Tacoma* (2021).





Lesson 10: Penalties Really are Not Mandatory

From 1992 to 2011, daily penalties were mandatory. But because the 2011 amendment now permits \$0-per-day penalties, penalties really are not mandatory

Originally, Initiative 276 that included the provisions that now make up the PRA set the daily penalty at \$0 to \$25 per day. Then in 1992, the legislature amended the penalty provision to be \$5 to \$100 per day.

In the first *Yousoufian* decision, the Supreme Court made it clear that this amendment meant that a \$5-per-day penalty was mandatory, regardless who is at fault for any delay.

But when the legislature eliminated the \$5 minimum penalty, this made penalties no longer mandatory.





Lesson 10: Penalties Really are Not Mandatory

“However, although an award of attorney fees to a prevailing party in a PRA action is mandatory, whether to award a penalty under RCW 42.56.550(4) is within the trial court's discretion.”

West v. Port of Olympia, 183 Wn. App. 306 (2014).

“The trial court on remand has discretion to impose a \$0 penalty for the days when the City was diligently working on O'Dea's request.”

O'Dea v. City of Tacoma (2021)

Wade's Eastside Gun Shop as low as \$0.01 per day

Zink and Hoffman \$0.50 per day

West v. Office of the Governor – \$1 per day

In explain the total penalty of \$14,00, “[A]lthough this penalty is at the low-end of the range, [it] is appropriate given the factual circumstances of the violation, the fact that the violation in question was the result of an oversight, the fact that the agency otherwise responded reasonably and promptly to the request, and the fact that the agency promptly cured the oversight when it was caught.”

West v. Office of the Governor





TOP 10 LESSONS LEARNED ABOUT PRA PENALTIES SINCE *YOUSOUFIAN v. OFFICE OF RON SIMS* (2009)



FINIS



WAPRO FALL 2021

BY RAMSEY RAMERMAN AND MORGAN DAMEROW



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Session 2D

Managed Records Are Accessible Records

Scott Sackett, Washington State Archives

Rachel Wilson, Washington State Archives



WASHINGTON
Secretary of State
Washington State Archives

MANAGED RECORDS ARE ACCESSIBLE RECORDS

Washington State Archives
recordsmanagement@sos.wa.gov
(360) 586-4901

BENEFITS OF MANAGING RECORDS

- ❑ Enables the agency to fulfill its mission
- ❑ Promotes cost-effective use of agency resources
- ❑ Promotes open and accountable government
- ❑ Enables continuity of service in emergencies
- ❑ Identifies and protects historically valuable records



WHAT IS A PUBLIC RECORD ?

For the purposes of **retention and destruction**, two criteria (RCW 40.14.010):

1. **Made or received in connection with the transaction of public business**
2. **Regardless of format**

For **public disclosure** (RCW 42.56.010):

1. **Any writing relating to the conduct or performance of any government function prepared, owned, used, or retained by a state or local agency**
2. **Regardless of format**



A RECORD'S LIFE CYCLE



A.M. Kendrick Photographic Collection, ca. 1890-1976, Washington State Archives



CREATE OR RECEIVE

assign responsibility,
DOCUMENT POLICIES & PROCEDURES,
train staff

*** RECOMMENDED
POLICIES &
PROCEDURES
FOR MANAGING
RECORDS**

*** MRSC'S
ELECTRONIC
RECORDS
POLICY
TOOL KIT**



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Secretary of State
Washington State Archives



USE

organize records,
INVENTORY RECORDS,

Location	Brief Description	Inclusive Dates	Volume	DAN	Archival?	Essential?	Retention Period	Transfer/ Destroy Date	Confidential or Exempt?
Main Storage Room	Office supply receipts	2004-2012	5 boxes	GS2011-184	No	No	6 yrs after EOFY	July-19	No
Main Storage Room	Office supply receipts	2013	1 box	GS2011-184	No	No	6 yrs after EOFY	July-19	No

adopt tools

*** MRSC'S PRA**
& RECORDS MANAGEMENT
TECHNOLOGY GUIDE



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STORE

UNDERSTAND RETENTION requirements,
RETAIN RECORDS in the appropriate format for the approved period of time,
and **PREPARE ESSENTIAL RECORDS** for possible disaster.

* WASHINGTON
STATE
ARCHIVES



Records of the Port of Bellingham, Photographs, 1890-1999, Washington State Archives



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Washington State Archives

HOW DO I KNOW WHAT TO KEEP ?

Agencies are granted *ongoing legal authority* to disposition (get rid of records) through legal documents called **records retention schedules**

Records retention schedules for local or state government are approved by the **Local** or **State Records Committee** (RCW 40.14.060 and 40.14.070; chapters 434-624 and 434-630 WAC)



WHICH SCHEDULE DO I USE ?

sos.wa.gov/archives

STATE AGENCIES (top navigation bar)

Records Retention Schedules (bolded link)

State General Schedule + Approved
Agency Schedule

sos.wa.gov/archives

LOCAL GOVERNMENTS (top navigation bar)

Find your *type* of local government agency

CORE + Approved Sector Schedule(s)



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RECORDS RETENTION SCHEDULE



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State Government General Records Retention Schedule

Version 6.2 (August 2021)

+

Local Government Common Records Retention Schedule (CORE)

Version 4.2 (August 2021)

5.4 PUBLIC DISCLOSURE/RECORDS REQUESTS

The activity of responding to public records requests in accordance with the Public Records Act (chapter 42.56 RCW).

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
GS 05001 Rev. 2 + GS2010-014 Rev. 3	Public Disclosure/Records Requests Records relating to requests from the general public for access to the agency's public records in accordance with chapter 42.56 RCW. Includes, but is not limited to: • Internal and external correspondence relating to the request; • Records documenting the public records provided to the requestor (copies or lists of the records provided, etc.); • Records documenting the public records (or portions) withheld (exemption logs, copies of portions redacted, etc.); • Records documenting administrative reviews relating to the request; • Public disclosure requests and appeals. Excludes: • Records that are the subject of the public records request (which must be retained in accordance with the applicable records series); • Records covered by <i>Provision of Advice, Assistance, or Information</i> (DAN GS 09022).	Retain for 2 years after public records request fulfilled <i>then</i> Destroy.	NON-ARCHIVAL NON-ESSENTIAL OPR



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KEEP **PUBLIC RECORDS** FOR
MINIMUM RETENTION

then



DESTROY



TRANSFER



WHAT CAN I DESTROY NOW ?

BLANK FORMS & PUBLICATIONS Blank forms or extra copies of reports, brochures & newsletters.	BRAINSTORMING Post-it notes, whiteboards, flipcharts, or staff notes from brainstorming sessions.	CONTACT INFORMATION Business cards, Outlook contacts, mailing lists, or mail returned as undeliverable.
DRAFTING & EDITING Drafts, edits, comments, mockups from INTERNAL staff <u>not</u> needed as evidence of EXTERNAL consultation or due diligence.	UNSIGNED DIGITAL DOCUMENT Unsigned digital documents/templates for official business.	SPAM & MAILERS Advertisements, brochures, catalogs & newsletters <u>NOT</u> created by the agency.
FYI'S & MEMO'S Cookies in the breakroom, sick notices, email read receipts, or out-of-office notices.	BROWSING HISTORY Cookies, cache, temp files, saved credentials, Google searches, or bookmarks; <u>excluding</u> internet activity logs monitored by IT.	TO-DO LISTS & TASKS Records monitoring work in progress.
RAW DATA CAPTURED ELSEWHERE Raw data or temp records (survey responses or written notes) documented by formal record.	REFERENCE INFO Materials gathered from outside sources for reference purposes.	BASIC AGENCY INFO Requests for hours of operation, contact information, web address.
SCHEDULING Invitations, checking availability, rescheduling, and venue arrangements.	SECONDARY COPIES Printouts of database records, webpages, emails, convenience copies.	UNSOLICITED INFO Information not requested or used by the agency.

* TRANSITORY RECORDS CHEAT SHEET



HOLD IT !

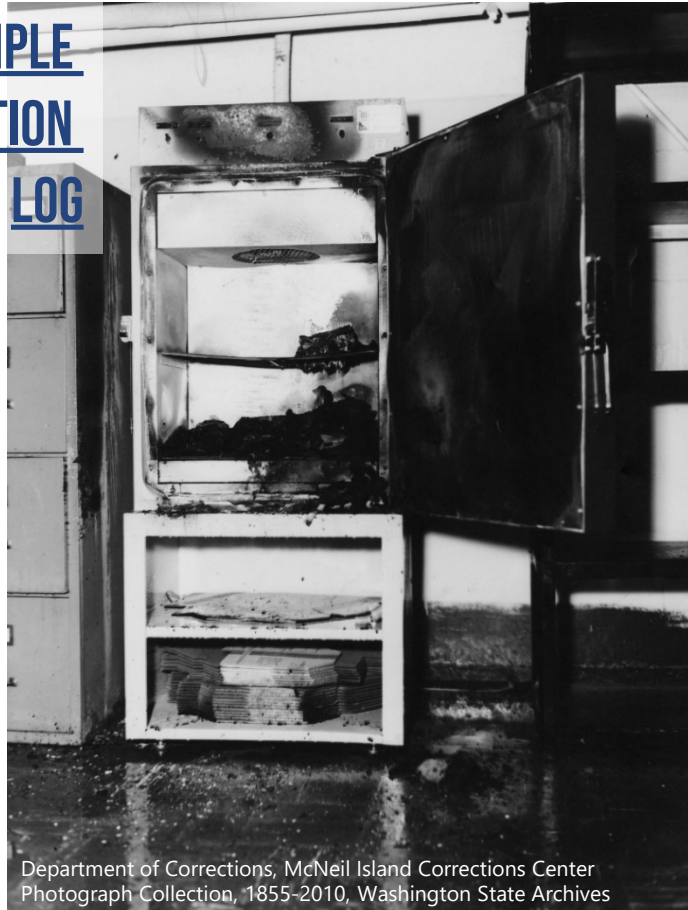
There are times when you **must** hang on to records even if their retention requirements have been met:

- ☐ Litigation holds (must keep until hold lifted)
- ☐ Open public records requests (must keep related responsive documents until request fulfilled/closed)



DESTROY OR PRESERVE

* SAMPLE DESTRUCTION LOG



Department of Corrections, McNeil Island Corrections Center
Photograph Collection, 1855-2010, Washington State Archives



Governor Daniel J. Evans, Jan. – Dec. 1975, Daniel J. Evans Scrapbooks, Washington State Archives



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ADDITIONAL RESOURCES



DON'T GET LOST IN A CAVE; THE **RECORDS
MANAGEMENT TEAM** IS HERE FOR YOU WITH FREE
CONSULTATION, TRAINING, & ADVICE.

www.sos.wa.gov/archives
recordsmanagement@sos.wa.gov
(360) 586-4901

General Subjects Photograph Collection, 1845-2005, Washington State Archives



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