

An introduction to the exciting world of Records Retention.....



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## CHAPTER LVII.

### PUBLIC WRITINGS.

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SECTION 902. Every citizen has a right to inspect and take a copy of any public writing of this Territory, except as otherwise expressly provided by statute.

SEC. 903. Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor.

SEC. 904. Statutes are public or private. A private statute is one which concerns only certain designated individuals, and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations.

*1881 Idaho Session Laws*

You might say the public records act in Idaho extends back to 1881, before statehood, although it didn't take its modern form until the 1990s.

## Provisions from the current Idaho Public Records law:

### PUBLIC WRITINGS

9-338. Public records -- Right to examine. (1) Every person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.

...

9-337. Definitions. As used in sections [9-337](#) through [9-347](#), Idaho Code:

...

(11) "Public agency" means any state or local agency as defined in this section.

(12) "Public official" means any state, county, local district, independent public body corporate and politic or governmental official or employee, whether elected, appointed or hired.

(13) "Public record" includes, but is not limited to, any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics.

...

(15) "State agency" means every state officer, department, division, bureau, commission and board or any committee of a state agency **including those in the legislative or judicial branch**, except the state militia and the Idaho state historical society library and archives.

(16) "Writing" includes, but is not limited to, handwriting, typewriting, printing, photostating, photographing and every means of recording, including letters, words, pictures, sounds or symbols or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums or other documents.<sup>1</sup>

9-328. Photographic or digital retention of records -- Disposition of originals. Any state officer may receive or retain documents filed or recorded in his office on media other than paper, provided that the media comply with the standards set forth in this section. The originals of paper documents may be disposed of in accordance with the provisions of this section.

(1) A state officer may receive, file or record documents in his office in paper form. When permitted by law or administrative rule, a state officer may alternatively receive, file or record documents which are transmitted on other media or by electronic means, provided that the

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<sup>1</sup> Note that the Legislature has not specified e-mails in this list, but the Idaho Supreme Court has held that emails are included as public records. *Cowles Publishing Co. v. The Kootenai County Bd of Comm'rs*, 159 P.3d 896 (Idaho 2007).

medium or means of transmittal is secure against undetected additions, deletions or alterations of documents during transmittal. Such media and electronic means include, but are not limited to, facsimile transmissions (FAX), magnetic tape or disk, photographic film, optical disk and an electronically transmitted data stream.

(2) A state officer may retain a document in a different form or medium from that in which it is received, provided that the form or medium in which the document is retained results in a permanent record which may be accurately reproduced during the period for which the document must be retained. . . .

9-334. Copies of records to be in duplicate -- One copy for display purposes, the other placed in fireproof vault. Whenever any record or document is copied or reproduced by microphotographic or microfilm, or other mechanical process as herein provided it shall be made in duplicate, and the custodian thereof shall place one copy in a fireproof vault or fireproof storage place, and he shall retain the other copy in his office with suitable equipment for displaying such record by projection to not less than its original size or for preparing, for persons entitled thereto, to copies of the record.

#### EXEMPTIONS

9-340F. Records exempt from disclosure -- **Draft legislation and supporting materials**, tax commission, unclaimed property, petroleum clean water trust fund. The following records are exempt from disclosure:

(1) Records consisting of draft legislation and documents specifically related to such draft legislation or research requests submitted to the legislative services office by a member of the Idaho legislature for the purpose of placing such draft legislation into a form suitable for introduction as official proposed legislation of the legislature of the state of Idaho, unless the individual legislator having submitted or requested such records or research agrees to waive the provisions of confidentiality provided by this subsection.

(2) All papers, physical and electronic records and correspondence or other supporting materials comprising the work papers in the possession of the legislative services office or the director of legislative performance evaluations prior to release of the related final audit and all other records or materials in the possession of the legislative services office or the director of legislative performance evaluations that would otherwise be confidential or exempt from disclosure.

(3) Records consisting of draft congressional and legislative redistricting plans and documents specifically related to such draft redistricting plans or research requests submitted to the commission staff by a member of the commission for reapportionment for the purpose of

placing such draft redistricting plan into form suitable for presentation to the full membership of the commission, unless the individual commission member having submitted or requested such plans or research agrees to waive the provisions of confidentiality provided by this subsection.

...

9-345. Additional penalty. If the court finds that a public official has deliberately and in bad faith improperly refused a legitimate request for inspection or copying, a civil penalty shall be assessed against the public official in an amount not to exceed one thousand dollars (\$1,000), which shall be paid into the general account.

## **IDAHO PUBLIC RECORDS LAW**

### **QUESTIONS AND ANSWERS**

#### **PURPOSE**

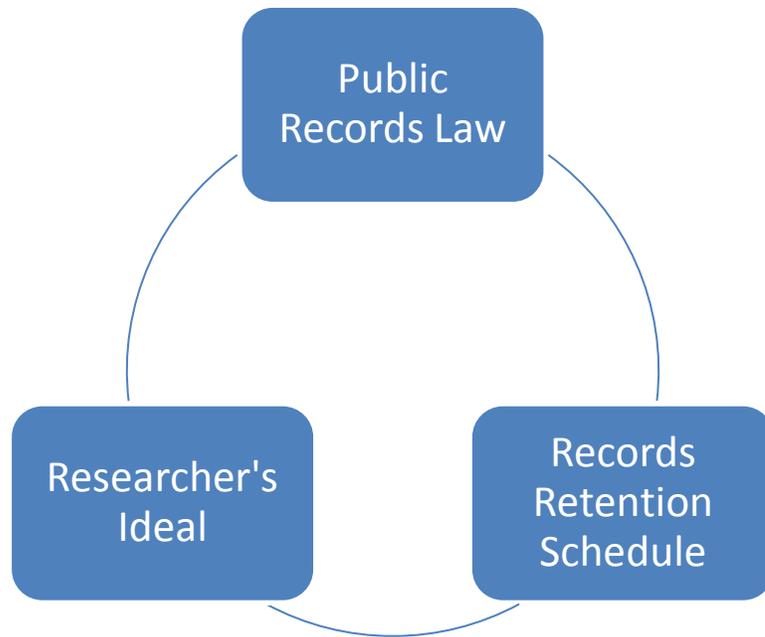
**Question No. 1: What is the Purpose of the Idaho Public Records Law?**

**Answer:** The intent of the law is that all records maintained by state and local government entities be available for public access and copying. At the same time, the Legislature recognized the need to balance this policy of openness against the equally important need for privacy of certain information provided by citizens and businesses that is necessary for the conduct of the government's business. This balance is contained in Idaho Code § 9-338, which states that "all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute."

**Question No. 10: For how long must a public record be retained?**

**Answer:** Idaho's cities and counties are governed by statutes that define how records should be classified and retained, as well as the procedure for destruction of public records. Idaho Code § 31-871 (Counties) and Idaho Code § 50-907 (Municipal Corporations). State agencies should adopt policies that are consistent with best business practices and generally accepted principles of accounting to classify and retain records. Record retention policies and procedures shall remain consistent with the principles of the Idaho Public Records Law.

The Idaho Public Records Law Manual at 7, Office of the Attorney General, Oct. 2011.



- In a researcher’s ideal world, *everything* would be kept *in perpetuity*.
- Under the Idaho public records law, records that are *created, used or maintained* must be open to the public. But what must be maintained? See the Records retention guidelines. But if a document is lost to negligence or an aggressive records retention (destruction) policy, the public records law provides no remedy. A document that no longer exists cannot be retrieved through a court action, and a fine on the government official is only authorized for a deliberate and bad faith refusal to provide a document.<sup>2</sup>
- For state agencies, there are no mandatory records retention standards. Agencies are advised to adopt policies that reflect “best business practices” and are referred to the Idaho Records Management Guide. From the viewpoint of a records retention schedule user, this is about money and how long we have to pay to store a record before we can get rid of it.

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<sup>2</sup> Idaho Code 9-345.



"We have given all our powers and rights to the legislature, and if you give the legislature the power to transact its business in secret, the last vestige of representative government has departed from the people . . . I am in favor of turning the electric light of publicity upon every act of the legislature, and when I vote for a senator or a representative to come here and make laws for me, I have a right to know every word that he utters and every official act of his when he is transacting his business in the manner contemplated by this article." Convention delegate A.F. Parker, as reported in the *Proceedings and Debates of the Constitutional Convention of Idaho 1889*, 1217 (I.W. Hart ed. 1912).

"Interdepartmental memoranda, advisory opinions, recommendations of subordinates, informal working papers, material in personnel files, and the like, cannot be subject to disclosure if there is to be any orderly system of government." Herbert Brownell, U.S. Attorney General, 1954.



"Secrecy necessarily breeds suspicion." Louis D. Brandeis, U.S. Supreme Court Justice. *Letter to Cyrus Adler*, Aug. 10, 1915.

"Broad public access, consonant with the right of personal privacy, should be provided to government files. Maximum security declassification must be implemented." Jimmy Carter. *Statement*, May 18, 1976.



A change in Idaho is underway: the Idaho State Historical Society and Archives is in the process of assuming the records management roles of the Department of Administration's State Records Center. Hopefully, the consolidation of the Historical Archives with the State Records Management agency will result in a simpler, more uniform way of handling state records.

## **STATE HISTORICAL SOCIETY statutes pertaining to records retention**

67-4126. Powers and duties of board. The board of trustees of the society shall have powers and duties as follows:

...

6. To facilitate the use of Idaho records for official reference and historical research.

7. To be responsible for records management services for state government. Records management services include the management, storage and retrieval of all state created records under retention. State created records shall mean any document, book, paper photograph, sound recording or other material, regardless of physical form or characteristic, made or received pursuant to law or in connection with the transaction of official state business. The board may charge reasonable amounts for records management services. The records managed pursuant to this subsection will not be subject to the exemption in public records law provided in section [9-337](#)(15), Idaho Code.

8. To accept from any state, county, or city, or any public official, any official books, records, documents, original papers, newspaper files, printed books, or portraits, not in current use. When such documents are so accepted, copies therefrom shall be made and certified under the seal of the society upon application of any person, which person shall pay for such copies reasonable fees established by the society.

9. To require that any state, county, or city, or any public official, deposit official books, records, documents, or original papers, not in current use, which are of definite historical importance, in the society for preservation and to provide methods whereby such materials, which have no significance, may be destroyed.

...

67-4131. Records Management Services -- rules, guidelines, procedures.

(1) The Idaho state historical society may develop, subject to the provisions of [chapter 52, title 67](#), Idaho Code, rules and procedures pertaining to records management services.

Rules, or if rules are not adopted, guidelines and procedures shall be established:

- (a) Pertaining to retention periods for all state created records;
- (b) Prescribing conditions and procedures for destruction of state created records;
- (c) Ensuring efficient utilization of manpower, building space and supplies with regard to paper flow and forms usage;
- (d) Pertaining to proper and efficient utilization of microfilming and imaging services; and
- (e) Pertaining to protocols for an electronic records management program.

(2) The Idaho state historical society shall develop and shall provide to all state agencies a records management manual containing all the rules and procedures developed for records management. Such manual may be provided to state agencies in an electronic format.

67-4112. Definitions. As used in this chapter:

...

(2) "Historical record" means any record, artifact, object, historical or archaeological site or structure, document, evidence or public or private writing pursuant to the provisions of [title 9](#), Idaho Code, relevant to the history of the state of Idaho.

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## Idaho Records Center

A Program of the Idaho State Archives

### *Records Management Guide (May 2012)*



**C.L. "BUTCH" OTTER, GOVERNOR**

**Idaho State Historical Society**  
Janet Gallimore, Executive Director

The Idaho Historical Society has not promulgated administrative rules but rather has focused its efforts on the Records Management Guide, which in 1981 was 83 pages long. Today, the latest edition of the Records Management Guide is 725 pages long! (Available at [http://history.idaho.gov/sites/default/files/uploads/RecordRetentionBook\\_2.pdf](http://history.idaho.gov/sites/default/files/uploads/RecordRetentionBook_2.pdf))

Why have we existed in a state of vague standards for recordholding for so long? Why hasn't the Legislature written and rewritten the laws to fine-tune them? Probably because it's not generally considered to be a very exciting topic. But occasionally, it does make headlines. Take, for example, this news story regarding Boise's former Governor-turned-Secretary-of-the-Interior from a few years ago:

**SPOKESMANREVIEW.COM** Wednesday, July 25, 2012

Editorial

## Case closed

**Our View: Kempthorne wrong to stall on release of records**

May 10, 2008

There's a standoff in Idaho over former Gov. Dirk Kempthorne's gubernatorial records, which remain in the custody of the state Department of Administration rather than the Idaho State Historical Society.

Kempthorne, who left office in May 2006 when President Bush appointed him Interior secretary, says the society has not requested the records. Linda Morton-Keithley, administrator of public archives and the society's research library, says it has.

It doesn't much matter who's correct. Two years ago the state attorney general's office issued Kempthorne a directive to transmit the records of his 7 1/2 years as chief executive to the society, where they could be accessible to historians, journalists, lawyers and citizens at large. The records are, after all, a product of the service Kempthorne performed on the public's behalf.

The former governor's lawyer now says some of those documents might be exempt from disclosure and the past 24 months haven't been enough time to vet them to make sure that legitimately secret papers aren't released inadvertently. But Kempthorne seems to have a bias toward secrecy. His first instinct upon leaving Boise was to turn the records over to the University of Idaho to be sealed for 25 years. That's what he did with the records from his term in the U.S. Senate.

As the state attorney general's office informed him, however, Idaho law has more respect for the "public" aspect of public records than federal law does. Sealing his gubernatorial papers for a quarter of a century would be illegal.

Meanwhile, the former governor does have time to vet the records on a case-by-case basis. He decides who can see what as requests come in.

That is not what "open records" means. And although a spokeswoman in Kempthorne's current federal agency says the ex-governor's representatives are trying to negotiate a resolution, open records aren't supposed to be negotiable, either.

Idaho's Lt. Gov. Jim Risch understands that. He took over as governor during the final seven months of Kempthorne's term, serving admirably and delivering his own gubernatorial records promptly to the historical society.

That approach, Risch noted, avoids the suspicion that an official is up to something sneaky, and, even more important, it makes sure the citizens of a self-governing society can keep an eye on what elected officials and the bureaucracy do.

Kempthorne should be entitled to a reasonable amount of time to screen the records compiled during more than seven years in office, but if he shared Risch's attitude about governmental transparency, two years would have been more than enough.

Dirk Kempthorne did eventually deliver his gubernatorial records to the Historical Society. Some legislators considered whether to place a time certain in Idaho Code 67-4126(9), the statute requiring deposit of the documents, but no such change to the statute has been made. Idaho could learn from its neighbor Nevada or other states that do have more specific requirements when it comes ensuring that public officers' documents are preserved when they leave office.

Nevada and Virginia both specify that the transfer of records shall take place BEFORE the governor leaves office. And while some states apply the law specifically to their governor, more states apply the statutory requirement to governors “or any other official of the state.” Oregon specifies the “governor, secretary of state and the state treasurer.” Georgia allows the lieutenant governor and speaker of the house to deposit their records in an equivalent archive to their state archive. California allows a governor to restrict access to certain personal records until death or 50 years has passed, whichever is later.

If you are interested in reading state laws on this topic, I suggest reviewing:

- Arkansas Constitution, Schedule, Sec. 21.
- Code of Georgia, 45-13-46
- Louisiana Revised Statutes 44:417 & 420
- Nevada Revised Statutes 378.290
- Oregon Revised Statutes 357.835
- Texas Government Code 441.201
- Code of Virginia 2.2-126