



# 2017-19 Governor's Budget Presentation: Board of Nursing

- Presentation to the Joint Ways and Means Subcommittee on Human Services Regarding HB 5024
- Executive Director Ruby Jason, RN, MSN, NEA-BC

# Mission and Goals

## **Our Mission:**

Established in 1911, the Oregon State Board of Nursing safeguards the public's health and wellbeing by providing guidance for, and regulation of, entry into the profession, nursing education, and continuing safe practice.

## **Strategic Goals:**

- Focus on customer service.
- Effective, high-quality leadership and governance.

# Board Members



*Kathleen Chinn, FNP*



*Adrienne Enghouse, RN*



*Beverly Epeneter, RN, EdD*



*Barbara Gibbs, LPN*



*Colin Hunter, JD*



*Bonnie Kostelecky, RN*



*Bobbie Turnipseed, RN*



*Ryan Wayman*



*William Youngren, CNA*

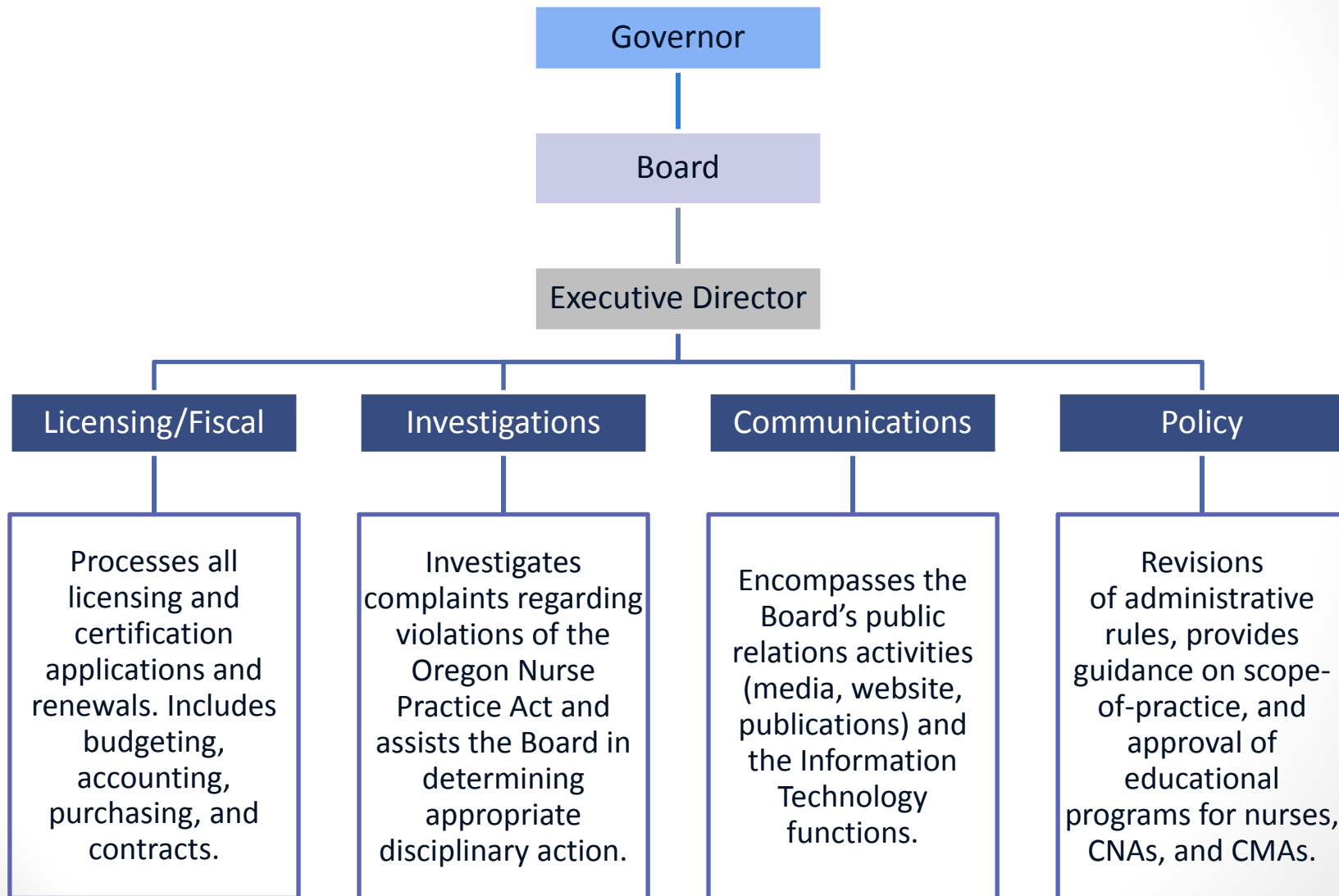
- Board members serve three-year terms and are appointed by the Governor and confirmed by the Senate.
- Nine members comprised of 2 public members, 1 LPN, 1 CNA, 1 NP, and 4 RNs (2 staff nurses, 1 nurse administrator, 1 nurse educator).

# Key Performance Measures

KPM Title	Description	FY2014	FY2015	FY2016
Timely Resolution of Complaints	% of complaints referred to the Board within 120 days of receipt.	✓	✓	
Reduction of Recidivism	% of disciplined cases w/ new complaint within three years of closing the original case.	✓	✓	✓
Customer Service	% of customers rating their overall satisfaction with the agency's customer service as "good" or "excellent".	✓	✓	✓
Online Transactions	% of business transactions completed online.		✓	✓
Timely Licensing	% of licensing applications processed within 5 business days.		✓	✓
Effective Governance	% of total best practices met by Board.			✓

✓ Target met or exceeded

# Agency Overview



# Number of Agency FTE

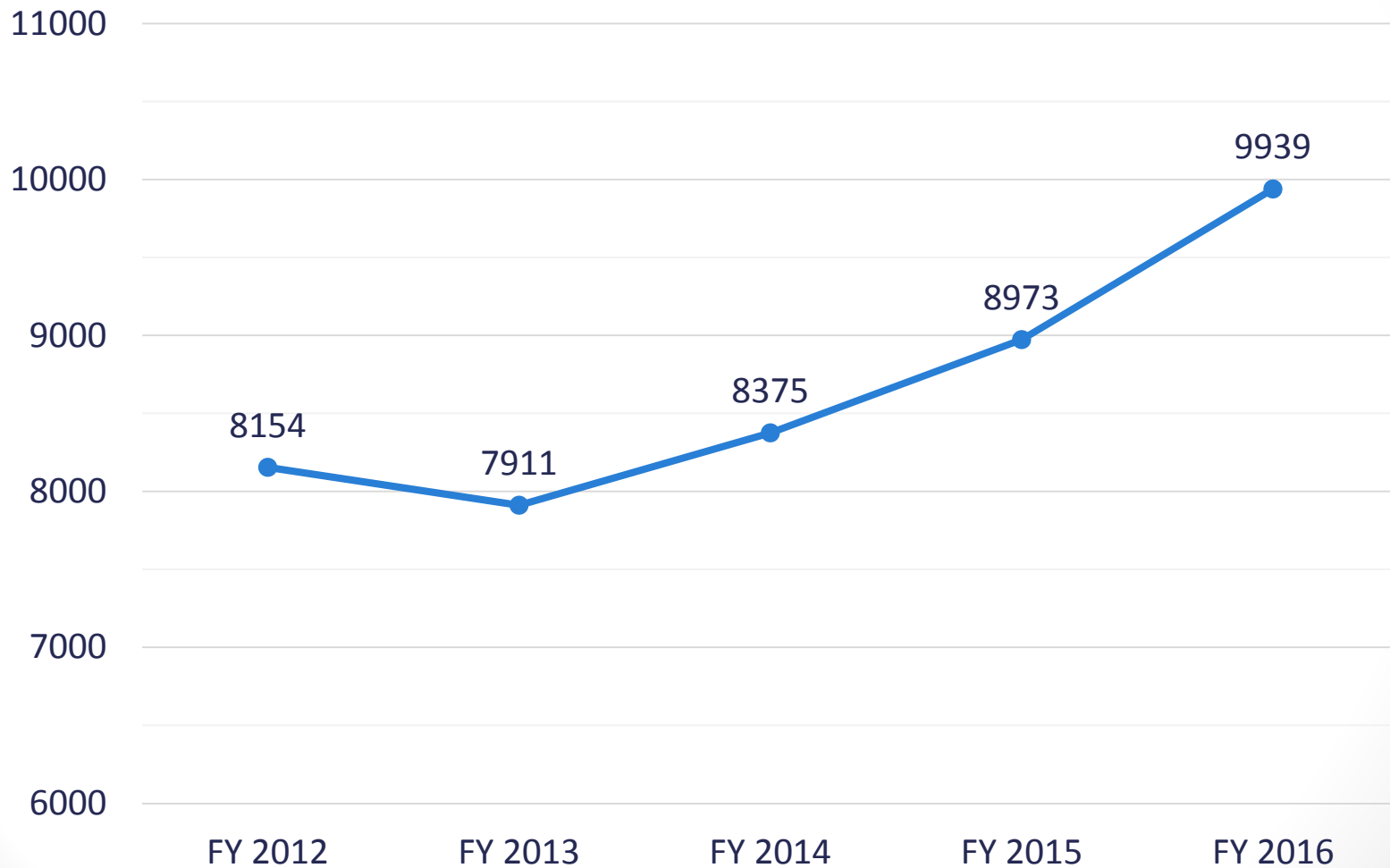
	FTEs Reported	Positions
<b>2009-2011</b>	47.75	49
<b>2011-2013</b>	46.75	47
<b>2013-2015</b>	47.8	48
<b>2015-2017</b>	47.8	48
<b>2017-2019</b>	48.9	49

# Number of Licensees

• Registered Nurses	57,982
• Licensed Practical Nurses	5,156
• Certified Nursing Assistants	18,648
• Certified Medication Aides	1,020
• Nurse Practitioners	3,857
• Clinical Nurse Specialists	199
• Certified Registered Nurse Anesthetists	645

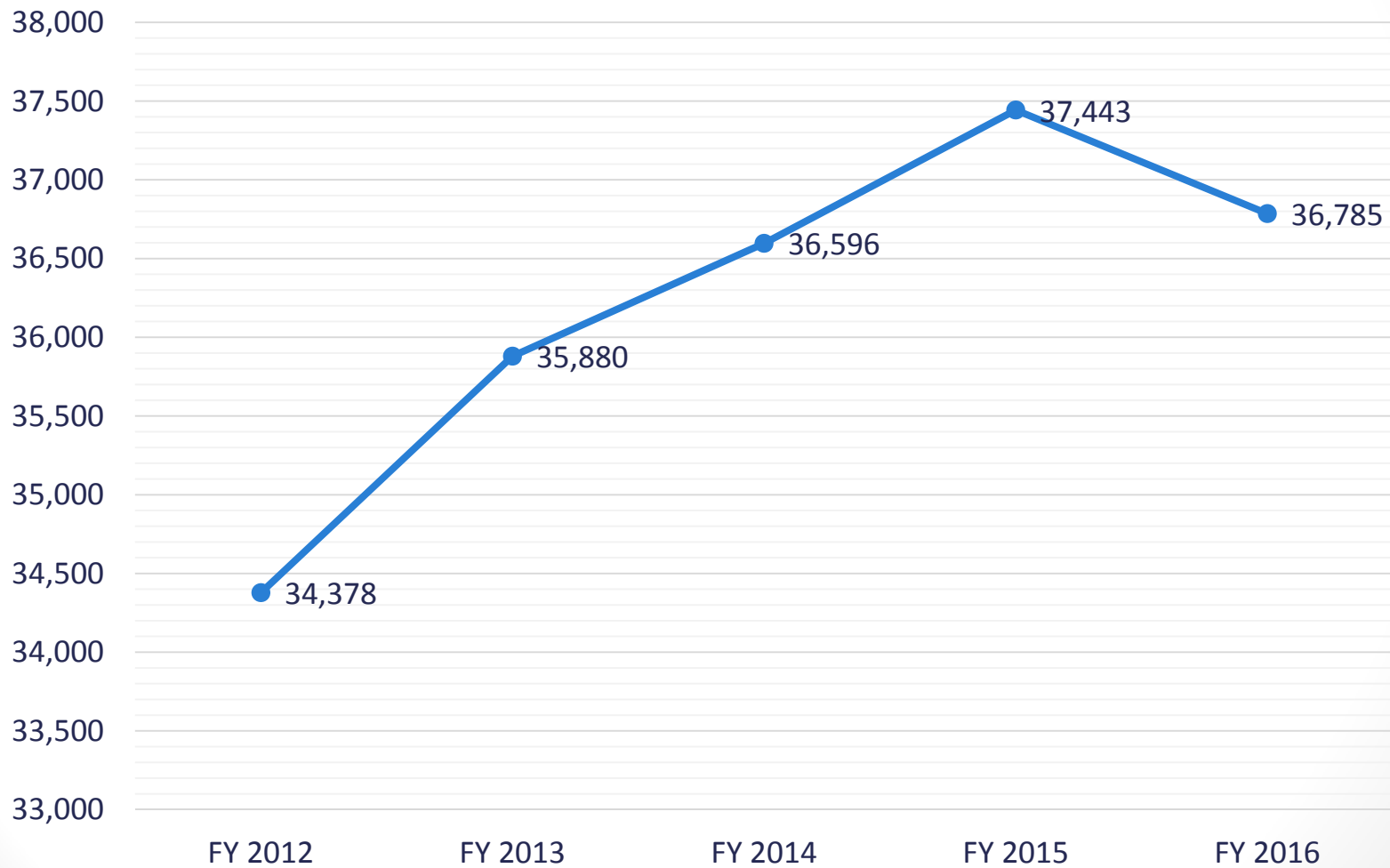
• *As of March 8, 2017*

# New Applications Processed

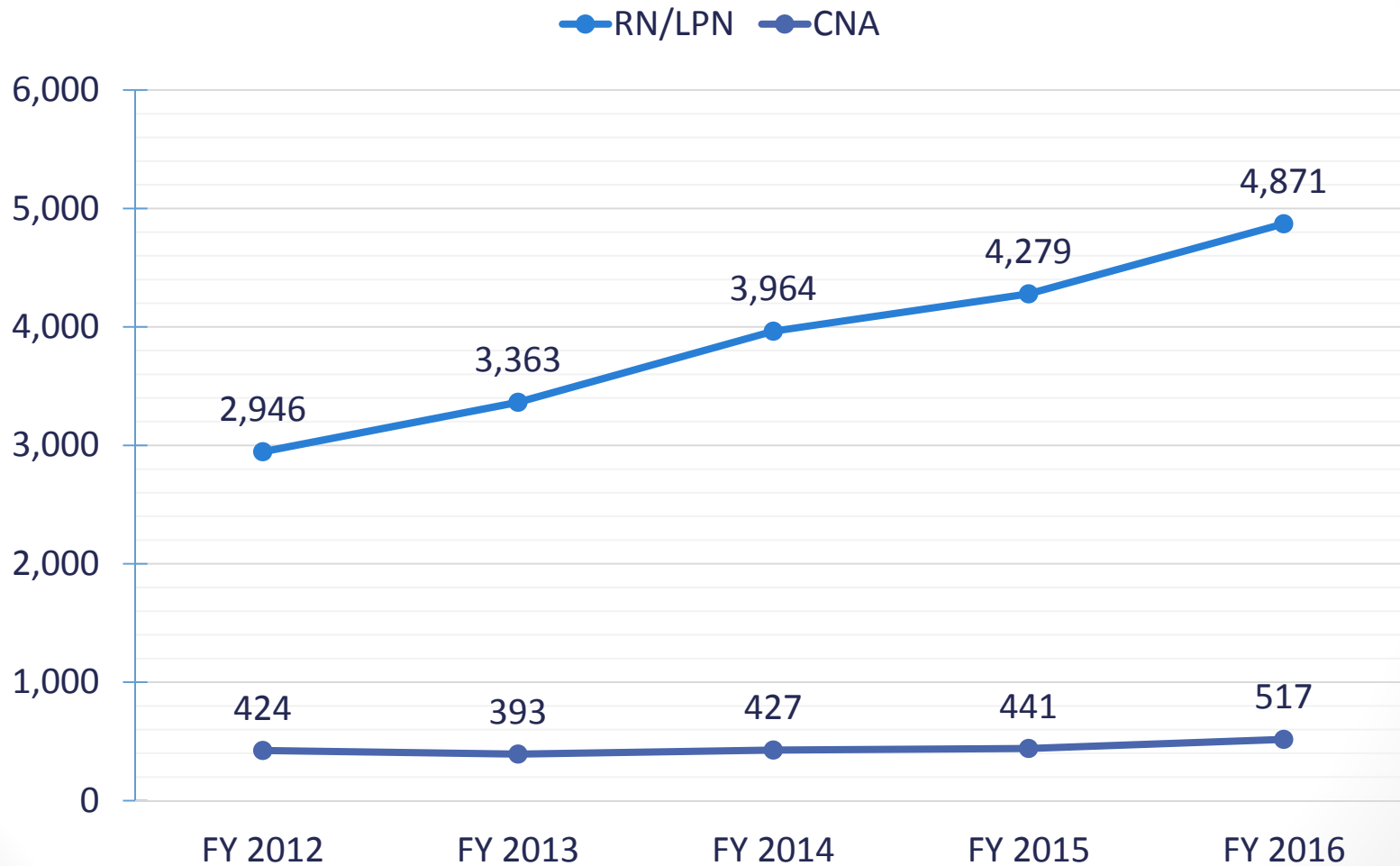




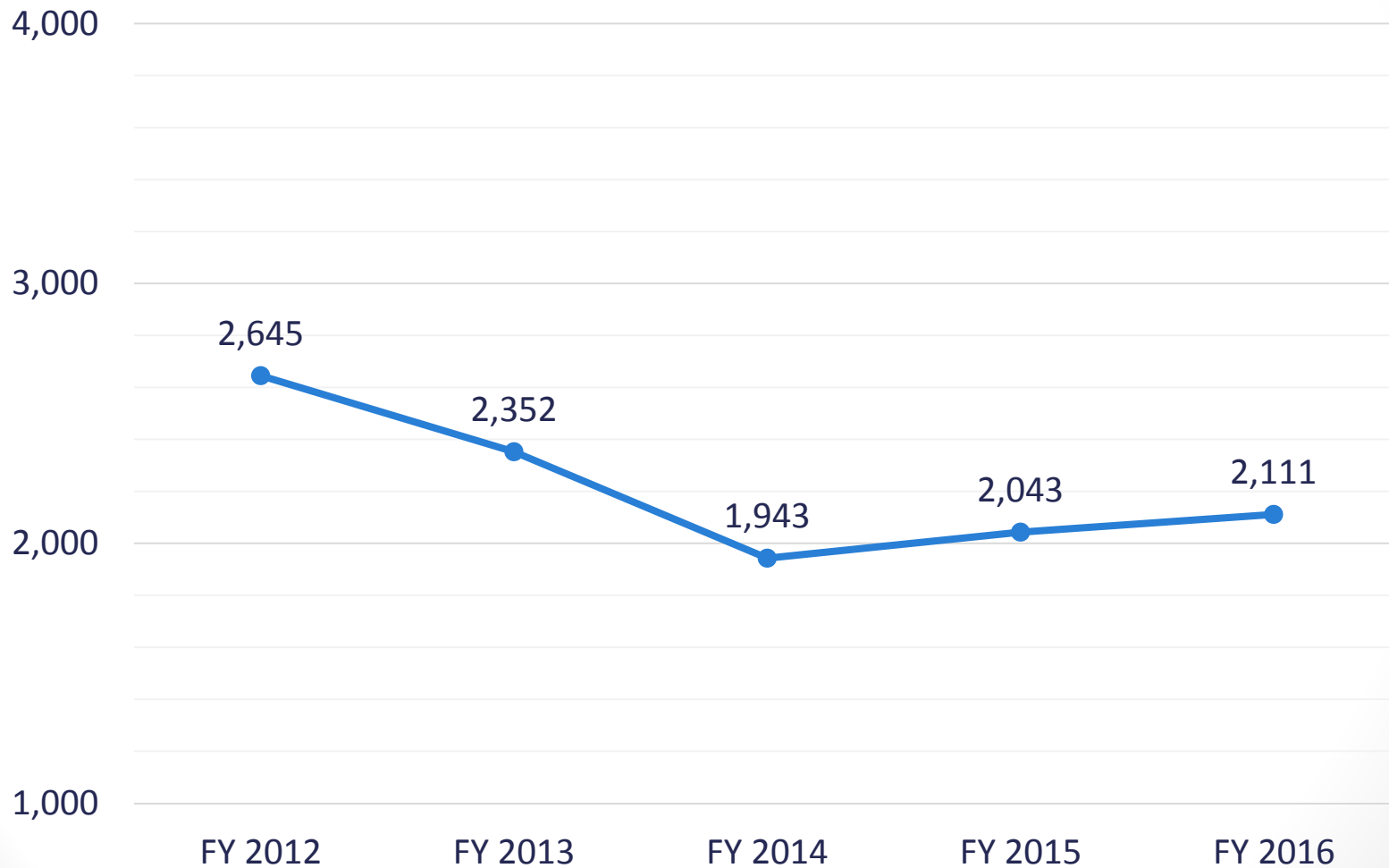
# Renewals Processed



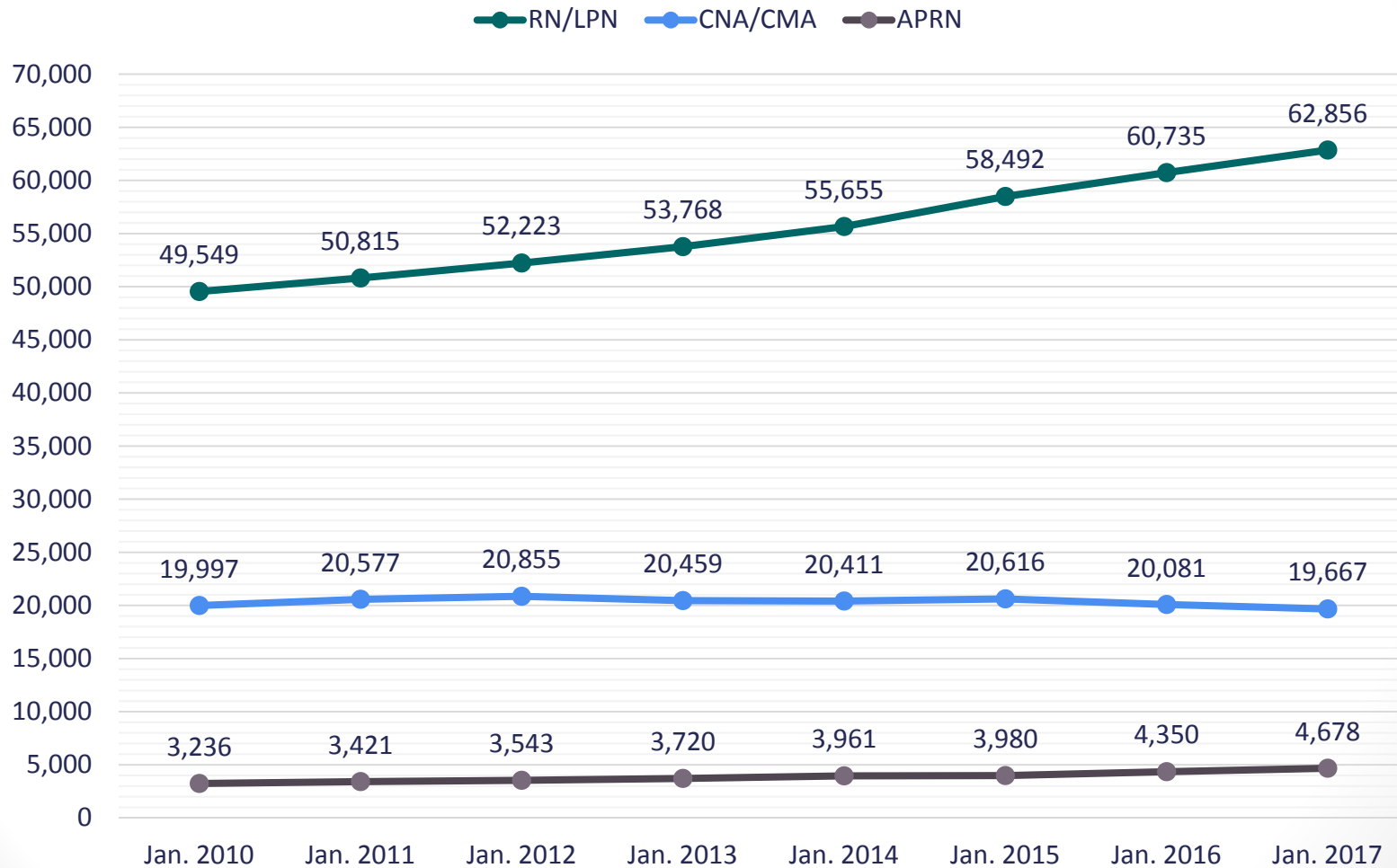
# Endorsements Received



# Complaints Investigated

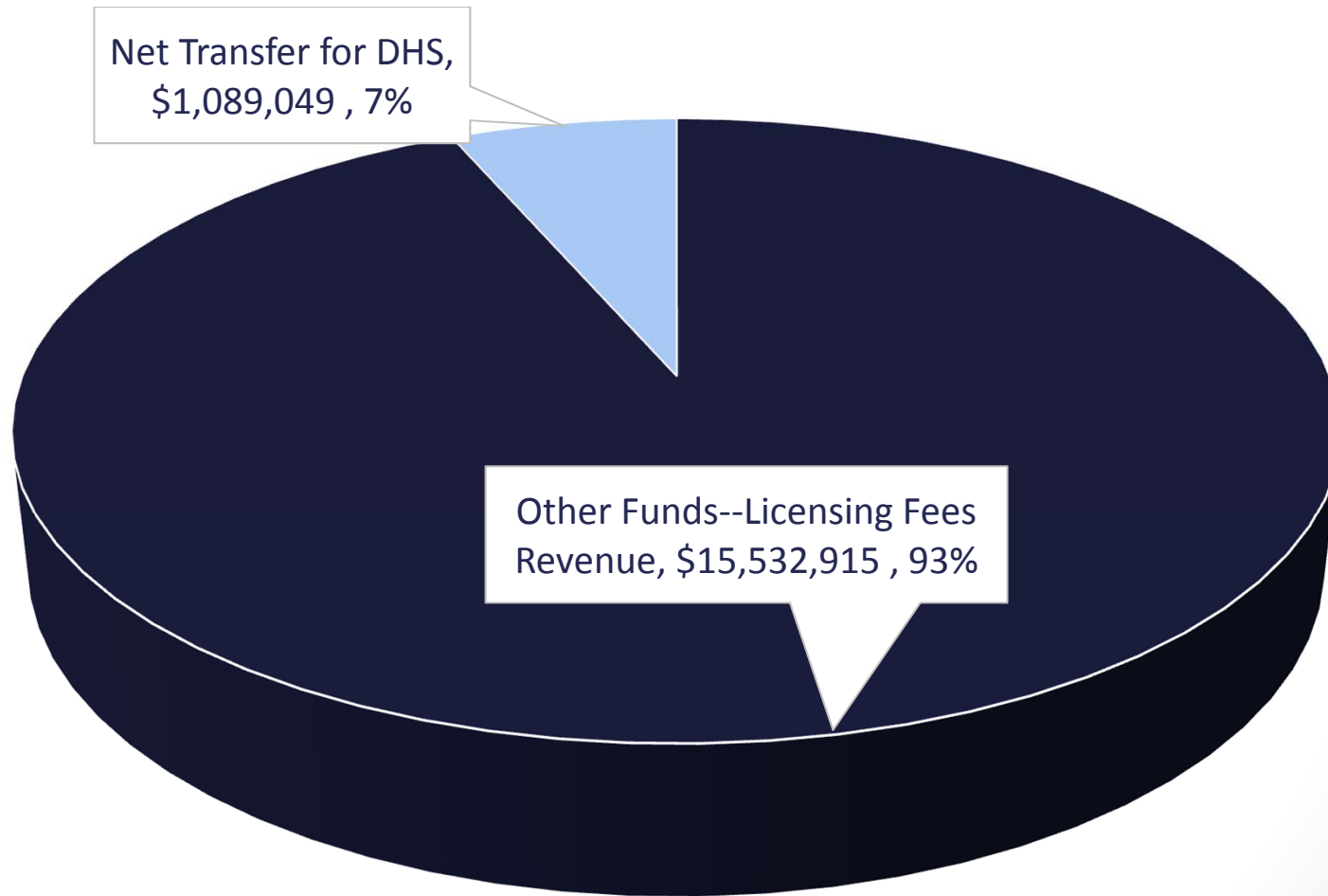


# Numbers of Licensees



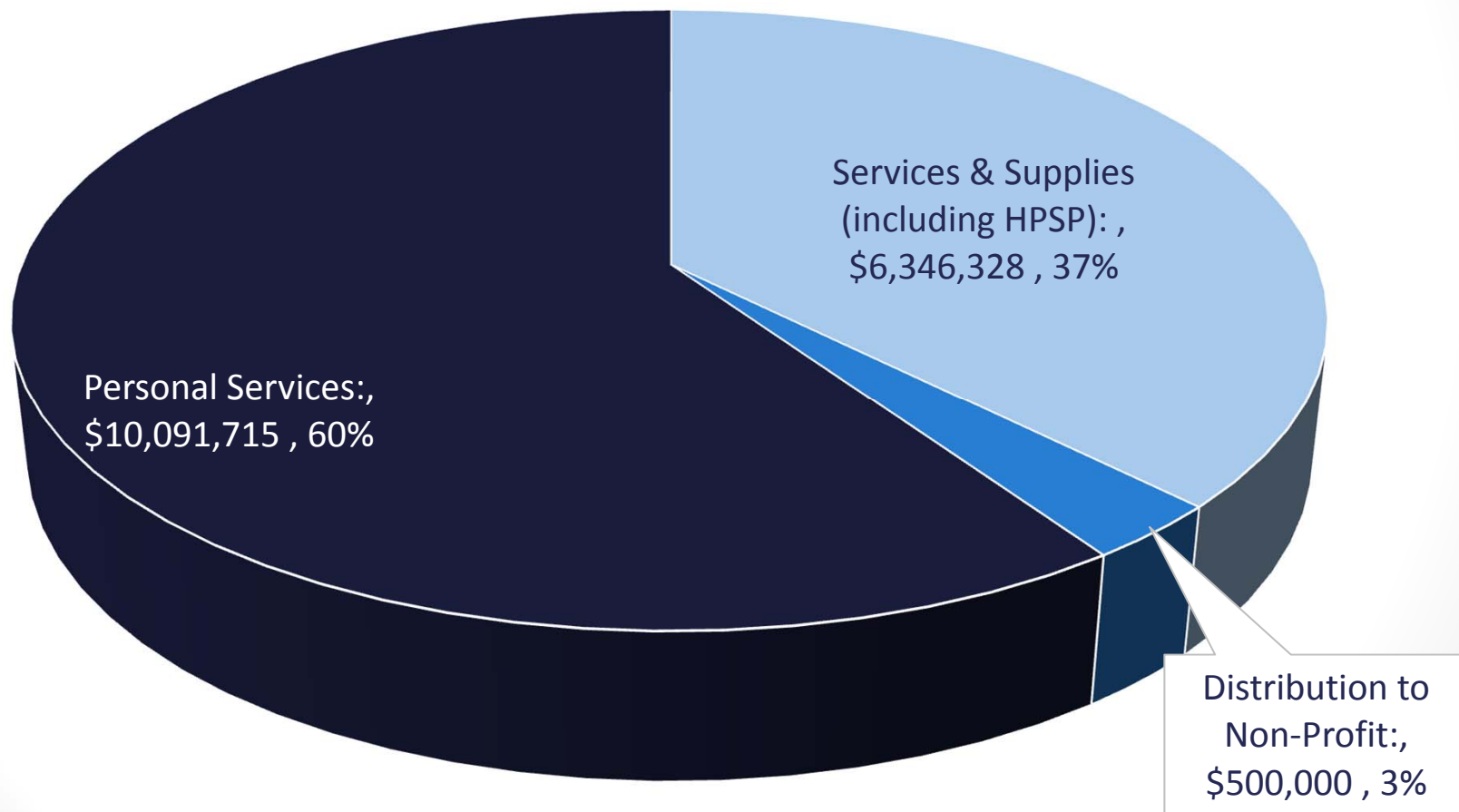
# Revenue 2017-19 GB

\$16,621,964



# Expenditures 2017-19 GB

\$16,938,043



# 2015-16 Agency Accomplishments

- Increased training opportunities for staff.
- Updated staff job classifications.
- Enhanced board member orientation program.
- Converted licensee practice policies to interpretive guidelines.
- Identifying and modernizing outdated statutory language.
- Installed new phone system.
- Implemented online status reports for license applicants and licensees undergoing investigations.
- Updated agency's public records request procedures.

# Contact Information

- Ruby Jason, RN, MSN, NEA-BC  
Executive Director  
971-673-0639
- John Etherington  
Licensing/Fiscal Manager  
971-673-0664



# Appendix

- A. Agency Overview
- B. Proposed Legislation Affecting Agency Operations
- C. 15% Reduction Options
- D. Major Agency Changes During Last Six Years
- E. Ending Balance Form
- F. Full Annual Performance Progress Report
- G. Secretary of State Public Records Audit

## **Agency Overview**

The Oregon State Board of Nursing is the agency that regulates the practice of nurses and nursing assistants to protect the public. It sets standards for nursing practice, guidelines for education programs, and minimum competency levels for entry into the professions it regulates. It also imposes discipline upon licensees who violate the nurse practice act.

The Oregon State Board of Nursing is primarily (93%) supported by Other Fund revenues generated from examination, licensing, and renewal application fees charged to registered nurses, licensed practical nurses, nurse practitioners, certified registered nurse anesthetists, clinical nurse specialists, certified nursing assistants, and certified medication aides. The Board also receives federal matching revenue (7%) through the Department of Human Services for activities regarding nursing assistants. Additional sources include sale of documents, employer subscription fees, and civil penalty fees. It is the policy of the Oregon State Board of Nursing to set fees in a manner that is as fair and equitable as is feasible. Fees shall not exceed the cost of administering the programs for which the fees are established.

## **Administration**

The nine Board Members are appointed by the Governor and include two public members, four registered nurses, one licensed practical nurse, one nurse practitioner, and one certified nursing assistant. The four RN members represent various areas of nursing practice as follows: one nurse educator, one nurse administrator, and two direct-care non-supervisory nurses. The Board members also represent a variety of geographic locations. Board members serve three-year terms. The Board of Nursing meets monthly, holding a mixture of in-person and teleconferenced meetings. It may hold special meetings if necessary. Board meetings are open to the public and the schedule is listed on the Board's website and published in the newsletter.

The Administration section supports the work of the Board and provides organizational leadership for the agency. Since assuming her position in February 2014, the new Executive Director has worked closely with the Oregon Health Authority and other health regulatory boards to refine the Health Professionals' Services Program (HPSP), which was instituted by the legislature in 2009 to monitor impaired health professionals. Other administrative work includes streamlining internal procedures to ensure optimum performance and identifying outdated statutes for possible legislative remedies.

## **Nursing Policy Analysts**

This section is responsible for any Board-directed revisions of administrative rules, policies and interpretive statements; a robust outreach program to provide education regarding the Nurse Practice Act; periodic consultations with investigative staff; and, the approval of educational programs for nurses and nursing assistants. The Education Policy Analyst surveyed nine RN and LPN programs in FY 2015 and six programs in FY 2016. The Nursing Assistant Program Policy Analyst approved or surveyed 34 nursing assistant or medication aide programs in FY 2016.

An important function of this department is the management of the training and testing program for Certified Nursing Assistants and Certified Medication Aides. Board staff reviews each nursing assistant application, and the examinations are administered by a third-party vendor in both a written and manual form. This section also administers the Certified Medication Aide (CMA) program, including the development and administration of the CMA examination. In FY 2016, 2,670 CNA written examinations and 3,194 skills examinations were administered, as well as 175 CMA examinations. Additionally, this department maintains the Nurse Aide Registry for nursing assistants in compliance with the Federal Omnibus Reconciliation Act of 1987 (OBRA).

### **Communications**

This section includes the agency's public information and information technology efforts. Much of the Board's work in the coming biennium will center around improving customer service, both in licensing and investigations, and information technology will be key element. The agency's Microsoft CRM database allows the creation of workflows and audit trails to better track investigative, licensure, and administrative processes, and create greater efficiencies. This biennium, we will work to redesign the agency's online services (license renewals, endorsements, complaint intake, and license verification) and add exam applications. We plan to add mailing list requests and licensing statistics to the list of services as well. Concurrently, the agency's website will undergo a remodel according to the state's new web design.

The Board's Auto-Verification Service for employers continues to be a great success. Subscribers to the service receive automated updates regarding changes to licensure status, including discipline, for a prescribed list of licensees. Approximately 11,193 licensees have been entered into the system by 38 employers. Board staff also launched a well-received online service in December 2015, called the "Application Wizard," to keep applicants apprised of the status of their application as it moves through the licensure process. A similar service aimed at keeping licensees under investigation informed regarding the progress of their case launched in November 2016.

### **Licensing and Fiscal**

The Licensing/Fiscal department implements all licensing and certification activities for nurses, nursing assistants, medication aides, and advanced practice nurses. Demographic information obtained through the licensure and certification process is shared with Oregon's Office of Health Policy and Research and other state agencies to assist in workforce analysis and compliance with state law. This information is often relied upon by other states and national entities seeking to find solutions to nursing workforce issues.

Licensing technicians provide service to the public and licensees, informing them about licensure procedures and the agency. The agency licenses approximately 61,500 nurses and 19,000 nursing assistants, about a 9 percent increase since 2015. Law Enforcement Data System (LEDS) checks are performed on all initial and renewal licensure applications, and federal fingerprint checks are done on every initial application. In FY 2016, approximately 47,000 LEDS checks were performed and 9,939 new licenses requiring fingerprint background checks were issued.

The Licensing/Fiscal Manager, along with the Executive Director, leads the Board's operational infrastructure in budget, accounting, purchasing, and contracts.

## Investigations

This department investigates complaints regarding violations of the Oregon Nurse Practice Act and assists the Board in determining appropriate disciplinary action. Investigators prepare cases for hearing and monitor nurses and nursing assistants who have had disciplinary action taken against their licenses. In FY 2016, this program handled 2,130 complaints, 670 of which were conduct-related. The remaining 1,407 were generated by LEDS checks of applications.. As mentioned earlier, the Board is continuing to work with its regulatory partners to refine the Health Professionals' Services Program (HPSP) to create greater efficiencies and streamline costs.

## Proposed Legislation Affecting Agency Operations

- **Senate Bill 269:** Grants an exemption to licensure to out-of-state nurses allowing them to accompany medically fragile students into Oregon for temporary school events. There is no fiscal impact anticipated with this bill.
- **Senate Bills 69, 70, 71, 72, 73, and 74:** These are OSBN proposed bills to clean up outdated language regarding licensure examinations, the electronic transmittal of exam applications instead of relying on postmark dates, and modern healthcare and nursing standards. There is no fiscal impact anticipated with these bills.
- **House Bill 2465:** Would expand the Board's authority by permitting the OSBN to require that more than a majority of holders of class of shares entitled to vote and more than a majority of directors of a professional corporation organized to practice medicine be nurse practitioners. We are unsure if there will be a fiscal impact related to this bill.
- **House Bill 2301:** Would allow the Health Licensing Office to share investigatory information with the OSBN.
- **House Bill 2394:** Allows participating health profession licensing boards to refer licensees who have been convicted of certain alcohol- or drug-related crimes to the Health Professionals' Services Program for monitoring.
- **House Bill 2475:** Allows Oregon skilled nursing facilities to temporarily employ nurses holding a license issued by another state while the Board is still processing their application for Oregon licensure.

## 15% Reduction Options

A reduction of 15% could be obtained by a combination of program changes and staff reductions. Leaving the Health Professionals' Services Program (an alternative-to-discipline program) and offering only public discipline (probation) for impaired nurses would result in a 10% reduction. Since the Board of Nursing successfully transferred all Nurse Monitoring Program participants to HPSP in July 2010, the number of participants has steadily declined. The number of nursing participants as of February 14, 2017, is 96 (87 Board-referred and nine self-referred). Two additional compliance monitors would need to be hired at a cost of approximately \$337,000 per biennium, resulting in an overall savings of \$1,306,453. It should be noted that due to the significant contribution the OSBN makes to the operating costs of the HPSP, the program may not be able to continue under the current funding formula without participation by the OSBN.

The remaining 5% could be achieved by the reduction of three staff positions: two policy analyst 4 positions and one administrative specialist. The policy analysts provide the Board with subject matter expert advice and environmental scans about emerging trends in nursing. The information assists the Board with decisions regarding rule writing and policy. Further, the elimination of these positions would impede Investigative staff in accessing the expertise to assure investigations are adequately prepared for Board reports. The administrative specialist provides support to these two policy analyst positions and would no longer be required with elimination of the policy analyst 4 positions.

## **Major Agency Changes Within Six Years**

### **2011-13**

- Completed three-year database conversion from the rigid, proprietary L2K system to the completely customizable Microsoft CRM Dynamics in 2013.

### **2013-15**

- New Executive Director hired in February 2014. Conducted review of agency positions and transfer of vacant manager positions to staff positions in order to support the increasing work of the licensing department and investigations. Combined the Fiscal and Licensing Departments to gain efficiency and assure that the primary source of Board funds are compliant with DAS fiscal policy.
- Completed eight-year strategic plan and transitioned the agency and the Board to a two-year biennium-based strategic plan to assure the Board stays relevant to changes within the regulatory environment and to the needs of the public.

### **2015-17**

- To increase transparency and public safety, as well as expediting public record requests, the Board added Notices of proposed suspension and revocation in 2016 to the website verification page. Final disciplinary orders were already displayed.
- Enhanced the education outreach program for licensees, students and employers; staff have conducted 100 sessions with approximately 3, 400 participants to date. The agency became a continuing education provider in 2015 to encourage attendance at education sessions related to the Nurse Practice Act.
- Switched from paper fingerprint capture for national criminal background checks to electronic live-scan in September 2015.
- Implemented an electronic performance management system in 2016 that is tied directly to position descriptions. This process enables managers to hold staff accountability to the actual position description with Goals addressing agency mission and values. It is anticipated that this system will be superseded once the DAS Human Resources Information System allows for electronic performance management.



# Nursing, Board of

Annual Performance Progress Report

Reporting Year 2016

Published: 9/27/2016 9:43:29 AM

KPM #	Approved Key Performance Measures (KPMs)
1	TIMELY RESOLUTION OF COMPLAINTS - Percent of cases investigated and referred to Board within 120 days of receipt of complaint.
2	REDUCTION OF RECIDIVISM - Percent of disciplined licensees with a new complaint within three years of Board closing original case with a disciplinary action.
3	CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as good or excellent: overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.
4	ON-LINE TRANSACTIONS - Percent of business transactions completed on-line.
5	TIMELY LICENSING - Percent of licensing applications processed within target.
6	EFFECTIVE GOVERNANCE - Percent of total best practices met by the Board.

	Green	Yellow	Red
	= Target to -5%	= Target -6% to -15%	= Target > -15%
<b>Summary Stats:</b>	83.33%	16.67%	0%

KPM #1	TIMELY RESOLUTION OF COMPLAINTS - Percent of cases investigated and referred to Board within 120 days of receipt of complaint.
	Data Collection Period: Jan 01 - Jan 01

Report Year	2012	2013	2014	2015	2016
<b>Timely Resolution of Complaints</b>					
Actual	58%	78%	79%	59%	56%
Target	60%	60%	60%	60%	60%

### How Are We Doing

As of the date of this report, 56 percent of disciplinary cases in FY 2016 were presented to the Board within 120 days, which misses the agency target of 60 percent. This number includes cases that were opened in May or June 2016 (just prior to the end of the FY), with no chance of meeting the 120-day requirement within the FY. The percentage taken at the end of the actual fiscal year was 69 percent.

To ensure the board continues to process cases in a timely manner, the agency has added an additional meeting in December to the schedule; the board will now meet 12 times a year, instead of 11.

### Factors Affecting Results

The agency has worked diligently to promote the consistent use of its database to help staff manage their caseloads. Agency management has implemented additional clarifying policies regarding the use of Interim Consent Orders, which have also helped stabilize this measure.



KPM #2	REDUCTION OF RECIDIVISM - Percent of disciplined licensees with a new complaint within three years of Board closing original case with a disciplinary action.
	Data Collection Period: Jan 01 - Jan 01

Report Year	2012	2013	2014	2015	2016
<b>Reduction of Recidivism</b>					
Actual	3%	2%	1%	2%	2%
Target	3%	3%	3%	3%	3%

### How Are We Doing

The OSBN's rate of 2 percent exceeded its target of 3 percent. The number reflects the licensees who were disciplined in FY 2013, 2014, or 2015, and were reported to the Board for any offense during FY 2016.

### Factors Affecting Results

In its investigative and disciplinary process, the Board works to determine what factors led to the violation. Disciplinary action is thus based on addressing those factors to the greatest extent possible. Many situations can be resolved through additional education or monitored practice. In this manner, the root cause is fixed and a return to competent and safe practice can be achieved. In other situations that are not suitable to remediation, the Board action is more punitive in nature as a deterrent to any such future violations, or to remove that individual from practice altogether if necessary.

KPM #3	CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as good or excellent: overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.
	Data Collection Period: Jan 01 - Jan 01

Report Year	2012	2013	2014	2015	2016
<b>Accuracy</b>					
Actual	98%	93%	92%	92%	93%
Target	90%	90%	90%	90%	90%
<b>Expertise</b>					
Actual	98%	90%	91%	90%	91%
Target	90%	90%	90%	90%	90%
<b>Timeliness</b>					
Actual	95%	92%	91%	88%	90%
Target	90%	90%	90%	90%	90%
<b>Helpfulness</b>					
Actual	95%	86%	90%	87%	88%
Target	90%	90%	90%	90%	90%
<b>Availability of Information</b>					
Actual	95%	88%	89%	86%	86%

Report Year	2012	2013	2014	2015	2016
Target	90%	90%	90%	90%	90%
<b>Overall</b>					
Actual	98%	91%	93%	90%	89%
Target	90%	90%	90%	90%	90%

### How Are We Doing

The agency met all of its targets in FY 2016 except two (Helpfulness, and the Availability of Information). With continued staff training, further optimization of the Microsoft CRM database in Licensing, and refinements to our website design, we expect to achieve or exceed our targets in all categories in FY 2017.

### Factors Affecting Results

The nine person Licensing Department continues to suffer from staffing turnovers, which creates an almost non-stop knowledge deficit. Although training is ongoing, the processes are complex and new staff need time to become proficient.

KPM #4	ON-LINE TRANSACTIONS - Percent of business transactions completed on-line.
	Data Collection Period: Jan 01 - Jan 01

Report Year	2012	2013	2014	2015	2016
<b>Percent of Online Transactions</b>					
Actual	91%	92%	76%	95%	95%
Target	80%	80%	80%	80%	80%

### How Are We Doing

The stabilization of the new Microsoft CRM database in the Licensing department brought the agency back up to its usual high marks.

### Factors Affecting Results

A number of applicants who don't meet various licensing requirements and need further evaluation are still processed via paper applications. A 100 percent score won't occur until paper forms are no longer accepted.

KPM #5	TIMELY LICENSING - Percent of licensing applications processed within target.
	Data Collection Period: Jan 01 - Jan 01

Report Year	2012	2013	2014	2015	2016
<b>Timely Licensing: Percent of licensing applications processed within target.</b>					
Actual	98%	98%	84%	99%	98%
Target	90%	90%	90%	90%	90%

**How Are We Doing**

The agency exceeded its goal of 90 percent.

**Factors Affecting Results**

The stabilization of the Licensing database was key to improving our results. We expect to maintain our high level of service.

KPM #6	EFFECTIVE GOVERNANCE - Percent of total best practices met by the Board.
	Data Collection Period: Jan 01 - Jan 01

Report Year	2012	2013	2014	2015	2016
<b>Effective Governance</b>					
Actual	100%	93%	93%	93%	100%
Target	100%	100%	100%	100%	100%

**How Are We Doing**

The agency met its goal of 100 percent compliance.

**Factors Affecting Results**

The agency’s current board members, executive director, and management staff work well together. The agency updated its board member orientation process in 2015 to strengthen the board’s knowledge of public meeting requirements and best practices.

# Secretary of State Audit Report

Jeanne P. Atkins, Secretary of State

Gary Blackmer, Director, Audits Division



## State Agencies Respond Well to Routine Public Records Requests, but Struggle with Complex Requests and Emerging Technologies

### Executive Summary

Oregon state agencies respond well to most public records requests for routine information, but the infrequent complex requests produce challenges. As a result, some requesters believe that agencies deliberately discourage, delay, or block the release of public information.

The Department of Administrative Services should provide guidance and training to help agencies develop procedures, and agencies should create timeliness goals for responding to requests. Better monitoring, consistent fees, use of technology, and third-party mediation could also help with the retention and disclosure of public records and improve trust in Oregon's government.

Oregon's public records law was enacted in 1973. Known primarily as a law of disclosure, the law grants all citizens within the state of Oregon the right to inspect all records – with some exceptions.

When the law first passed, it included 16 classes of records that could be exempt from disclosure for a total of 55 exemptions. Changes and revisions since that time have raised the total number of exemptions in Oregon law to more than 400. The intent, however, remains the same: that Oregon's government is accessible and transparent to its people.

For our audit, we examined nine agencies of varying sizes and missions to capture a fuller picture of public records in Oregon state agencies. The nine agencies were:

- The Department of Human Services
- The Oregon Employment Department
- The Department of Environmental Quality
- The Public Employees Retirement System
- The Oregon Liquor Control Commission
- The Oregon Department of Education
- The Oregon Real Estate Agency
- The Oregon State Board of Nursing
- The Board of Parole and Post-Prison Supervision

### ***Agencies handle routine requests well, struggle with complex ones***

We found that public records requests generally fall into one of two categories. The first is routine requests, or common requests for information that agencies have easy and ready access to. These requests, which generally make up 90 percent or more of an agency's total requests, can be fulfilled at little to no cost and within a couple of weeks.

The other category is non-routine or complex requests. These are voluminous in scope, ask for "any and all" information, or are otherwise complicated for an agency to complete. These are the requests that can take weeks or months to fulfill and often at a high cost.

In the selected files we reviewed, we found no evidence to suggest that agencies were regularly taking an unreasonably long time, or charging unreasonably high fees, to respond to records requests. But when agencies struggle to respond to complex, non-routine requests, it can foster suspicion and distrust, which in turn can undermine the credibility and transparency of both the agency and Oregon government.

To address this distrust, some states and provinces have established a neutral, third-party entity that helps mediate disagreements between requesters and agencies. An ombudsman or commission can help determine when a request is too broad or when an agency is taking an unreasonably long time to respond. Oregon has no such mechanism. The Attorney General's role is limited to denials based on exemptions and fee waivers.

### ***Agencies retain public records longer than required***

It is important that agencies properly retain and manage their public records so they can be efficiently located and disclosed in response to a records request. To do this, agencies must follow their retention schedules – guidelines, created and authorized by the Archives Division, that determine how long certain records must be kept before they are destroyed or transferred to the State Archives for permanent retention.

But we found that agencies are keeping too many records for too long, resulting in a large volume of information. Some employees are too cautious about accidentally deleting or losing track of a public record, and so have a tendency to "keep everything."

We found that better management tools and specific training on the issue of record retention may help state employees better manage records. This can reduce the volume of public information statewide and assist agencies to more efficiently respond to public records requests.

### ***Exemptions remain an issue and may require a closer look***

Exemptions – those instances in which a record may be exempt from disclosure – make up a major portion of Oregon's public records law.



Agencies generally understand which exemptions most commonly apply to the records in their care. But due to the sheer number of exemptions in the law, including how they are worded and where in statute they are located, staff sometimes must consult with experts or the Department of Justice.

There is a perception among some requesters that agencies inappropriately use exemptions to block the release of public information. Most of Oregon's exemptions are applied at the agency's discretion. After weighing the public interest, these records may be disclosed *even if* an exemption applies. The exception is confidential information, which is legally prohibited from release.

These issues regarding exemptions are not new. After a national report gave Oregon a failing grade in government transparency eight years ago, state officials closely examined the law and accepted feedback from requesters and public officials. Their findings, published in 2010 as the Attorney General's Government Transparency Report, found that "Any meaningful overhaul of Oregon's public records law must reorganize and make coherent sense of the numerous exemptions."

A bill was subsequently introduced in the 2011 legislative session to address some of these recommendations, but it failed to pass. A task force was recently convened by the Attorney General to examine in greater detail the issues of exemptions in Oregon law.

### ***Variations in responses frustrate some requesters***

Requesters expect their government will be transparent and open, that fees charged for requests will be reasonable and records will be made available as quickly as possible. They expect agencies that fail to do so will be held accountable.

But variation among agencies' responses to records requests – in both fees and timeliness – can lead to confusion and frustration among requesters when they are not sure what kind of response to expect.

Agencies charge differing fees to provide public information. This variation extends to both the fees for copying costs and the charge for staff time to respond to a request. Agencies charge anywhere from \$0.05 to \$0.25 per page in copying costs, and from \$15 to \$40 per hour for staff time.

We also found a time variation among agencies in responding to requests, due largely to the differences between routine and non-routine requests. First, agencies have varying internal guidelines for what it means to be timely, if they have any internal guidelines at all. Second, timeliness depends largely on the type of request an agency receives. We found that routine requests were fulfilled within 14 days, while non-routine requests could take upwards of 265 days to fulfill.

We saw no evidence to suggest that adding a specific deadline in law would positively affect agencies' abilities to respond to requests in a timely fashion. But agencies that set internal guidelines or goals to respond to

requests hold themselves accountable to requesters while maintaining the flexibility provided in Oregon law.

### ***Agencies are not keeping up with changing technologies***

Oregon's public records law was updated in 2011 to extend the definition of a public record to electronic or digital messages. Agencies have taken a longer time to update their own policies to include emerging technologies such as email, text, and instant messages.

More than half of the agencies we examined had policies to address email as it relates to public records. But only one agency had specific language to address the use of a personal or private email account in conducting the public's business. Only one agency had a policy to address the use of instant messages, and no agencies had policies regarding text messages, as public records.

A few agencies have adopted policies to address social media, which appear to draw language from the Social Networking Media guide provided by the Department of Administrative Services.

Technologies like those mentioned above have changed how government and its agencies communicate with the public. Technology can also help agencies improve transparency by being proactive and making information available online. Several agencies have done so with commonly requested information, which can help reduce the overall number of public records requests.

## **Recommendations**

Our recommendations are addressed to three groups: the Department of Administrative Services (DAS), all state agencies, and the Oregon Legislature.

We recommend the Department of Administrative Services create statewide, standard rates for copying and rates for employee labor, to resolve some of the inconsistency in public records requests fees statewide. We also recommend they provide guidance to agencies regarding communication technologies as they relate to public records, including personal email, text and instant messages, and social media.

For agencies, we recommend they create policies and procedures to clearly address communication technologies under the guidance of DAS. We also recommend they adopt tools to help manage both record retention and public records requests.

For the Legislature, we recommend they consider creating a neutral third-party, such as an ombudsman, to mediate disputes between requesters and agencies. We also encourage them to consider the forthcoming results from the Attorney General's task force for any recommended changes regarding the public records law.

For a complete list of our recommendations, see page 24 in this report.

## **Agency Response**

The response from the Department of Administrative Services is attached at the end of the report.

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## Background

### The origin of public records in Oregon

#### ***The passage of Oregon's public records law***

The right to inspect public records in Oregon dates back to the early 1900s, when the Legislature first enacted the statute granting citizens the right to inspect public records. This right was subjected to three limitations:

- The inspection of records is to be for a lawful purpose.
- Inspection is to be conducted during business hours.
- Inspection should not interfere with the regular duties of the officer who possessed the records.

But in putting the statute into practice, officials realized there were circumstances that warranted certain limitations. This led to the Legislature passing the 1973 Public Records Act.

The 1973 law gave citizens the right to inspect all records, with some exceptions. Sixteen classes of records were exempted from disclosure for a total of 55 exemptions, covering records such as accident reports, student records, and personal information in which disclosure would result in an invasion of privacy.

Passage of the 1973 law also gave citizens an avenue to obtain records they believed belonged to the public. Anyone who is denied access to records can petition the Attorney General or a district attorney for an order requiring the public body to allow inspection.

The public records laws governing retention and disposition were originally enacted in 1961. The 1973 law established the right of the public to access those records.

The current public records law includes changes and additions made since 1973, but the intent of the law remains the same: that Oregon's government is accessible and transparent to its people.

#### ***Current laws regarding record retention, fees, timeliness, and exemptions***

The current public records law includes an overview of how state agencies should retain their records and how to respond to public records requests. The law allows agencies to charge fees and set guidelines for turnaround time. The law also identifies which records may be exempt from disclosure.

Agencies are required to maintain public records according to retention schedules. Schedules are set based on the content of the record and not the format in which it is recorded.

An agency is allowed to charge fees to recoup the actual cost of making public records available. Fees may include the cost for summarizing,

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The definition of a public record regarding disclosure:

*Any writing that contains information relating to the conduct of the public's business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics. ORS 192.410*

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compiling or tailoring the public records (either in organization or format) to meet a person's request. Fees may also cover the cost of time spent by an attorney in reviewing and redacting requested records or identifying exempt and non-exempt records. Agencies also have the ability to waive or reduce these fees.

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The definition of a public record regarding retention:

*Any information that is prepared, owned, used or retained by a state agency or political subdivision; relates to an activity, transaction or function of the state agency or political subdivision; and is necessary to satisfy the fiscal, legal, administrative or historical policies, requirements or needs of the state agency or political subdivision.* ORS 192.005

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After an agency receives a public records request, it is required to respond "as soon as practicable and without unreasonable delay." Agencies must acknowledge the receipt of the request.

The law lists records that are currently exempt from disclosure. These include, but are not limited to, trade secrets, information relating to the appraisal of real estate prior to its acquisition, and investigatory information compiled for criminal law purposes. Other public records exempt from disclosure include information of a personal nature such as medical files or employee or volunteer Social Security numbers.

Most of these exemptions are considered conditional, meaning that a public body is free to disclose a record or information even if an exemption applies to the record. Agencies must consider the public interest when determining if an exempt record should be disclosed.

Other records are always considered confidential, meaning that agencies are legally prohibited from releasing that information. For example, agencies are prohibited from releasing a public employee's photo I.D. badge or card without that employee's written consent.

### ***Overview of the process for requesting public records***

A public records request can vary in formality, from a simple telephone call to ask for a document to a composed letter that cites the public records law. For the purposes of this audit, we refer to public records requests as those that were documented as such by each agency.

Anyone can request public records by submitting a written request or contacting the agency via telephone or in person. The request usually includes a description of the information, the type of records, subject matter, approximate dates the records were created, names of any people involved, and contact information for the requester.

The custodian (public body mandated to create, maintain, care for or control a public record) has the duty to make non-exempt public records available for inspection and copying. The custodian receives a request, reviews it, and retrieves the records and, if they are not exempt from disclosure, provides the records to the requester.

Generally, a request that requires payment goes through the same process. In the cases where a fee would exceed \$25, the custodian must provide a fee estimate to the requester before the information is retrieved. The requester pays for the fees before records are disclosed.

We asked nine agencies about the public records requests they received between January 2014 and when we contacted them in the summer of 2015. Their responses varied, from one agency receiving approximately 49 requests in that timeframe to another receiving more than 10,000. Some agency staff reported the number of requests for public records has increased in recent years.

Our audit objective was to examine state agency retention and disclosure practices concerning public records and the consistency among agencies in complying with Oregon's public records law. We focused on nine selected agencies of varying sizes and missions.

The nine agencies were:

- The Department of Human Services
- The Oregon Employment Department
- The Department of Environmental Quality
- The Public Employees Retirement System
- The Oregon Liquor Control Commission
- The Oregon Department of Education
- The Oregon Real Estate Agency
- The Oregon State Board of Nursing
- The Board of Parole and Post-Prison Supervision

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## Audit Results

Oregon state agencies are successfully complying with the public records law in responding to routine requests for information. These requests are common and can be fulfilled within a few days at little or no cost.

But agencies struggle to respond to the non-routine requests, which are complex or voluminous in scope. These requests can take weeks or months to fulfill, sometimes at a cost of hundreds of dollars.

We found that poor record retention management may contribute to challenges in responding to records requests. We found that agencies are keeping records for longer than the retention schedules require, resulting in a high volume of public records that are difficult to efficiently manage.

Oregon has also failed to keep up with emerging technologies, such as text and instant messages. Some agencies do not have policies in place to address these technologies, nor do they have policies to govern the use of private email accounts or devices when they are used for the public's business.

We identified a number of steps Oregon government and state agencies can take to approach public records requests with greater accountability and greater consistency.

### **How well agencies respond to requests depends on how routine or complex the request is**

#### ***Majority of requests are routine, easy to fulfill***

When it comes to the vast majority of public records requests, agencies we reviewed were successful in complying with the public records law.

The majority of the records requests agencies receive are routine. They are simple, common and narrow in scope, often asking for one or two documents. For example, more than half of the public records requests the Public Employees Retirement System receives are from members asking to see their own pension records.

The Department of Human Services considers 98 percent of its total requests to be routine. At both the Oregon State Board of Nursing and the Oregon Real Estate Agency, almost all of the total requests received are considered routine.

Our file reviews showed these routine requests did not usually invoke exemptions, if at all. They were often for records the agency had ready and easy access to. Agencies were generally able to provide these records for little or no cost and within a couple of weeks, falling well within the scope of the public records law's "as soon as practicable and without unreasonable delay" provision.

The remaining small percent of non-routine requests are challenging for agencies to fulfill, leading to a perception that agencies deliberately use methods such as high fees and lengthy delays to avoid releasing records.

***Non-routine, complex requests take longer, cost more***

Non-routine requests are those that are unusually complicated, voluminous or otherwise beyond the scope of what agencies typically see in a public records request. These requests are frequently for large amounts of information or for records spanning a lengthy period of time.

Our file reviews showed that many times, these requests begin with the phrase “any and all.” They can include any and all documentation related to a particular person or entity; often, the request is for any and all correspondence related to a particular subject, including letters, memos, and emails.

One such request was made of the Department of Human Services in April 2014, asking for an entire file related to the licensing of a nursing facility. The request included evidence of any contested case involving the licensee, transcriptions, audio records and any and all correspondence. It took the agency 118 days – nearly four months – to fulfill this request, which included removing exempted material, at a charge of \$742 (down from the initial estimate of about \$1,000).

A request may also be complex if it is unique to an agency. The Oregon Employment Department recently received a public records request that included electronic correspondence – specifically, text messages. Staff told us it was the first instance such a request had ever been made of the agency.

Requests for information that may be exempt from disclosure can also be challenging for an agency. Agency staff will sometimes consult with attorneys to ensure such exemptions are properly applied; attorneys may need to review documents for sensitive information prior to their release. This extra attention can translate into longer wait times, higher fees for more staff time, or additional attorney fees.

Because of the factors mentioned above, there is a perception among some requesters that agencies could game the system. From their perspective, silence from an agency may be suspicious. Requests for records that contain sensitive information may take weeks to be released, leaving requesters questioning the reason for the delay.

For this reason, the Attorney General has recommended that agencies keep open lines of communication with the requester:

“Upon receiving a records request, review the request to see if it is ambiguous, overly broad or misdirected. If so, contact the requester for clarification ... A brief conversation with a requester can save considerable time and expense in responding to records requests.”



Journalists we spoke to cited both delays and high costs as frequent tools they believe are used to block records requests. One journalist told us that when he sees a high cost in response to a request, it makes him wonder what the agency is hiding. Another said he was convinced agencies deliberately delayed releasing records for their own benefit, fully aware of the strict deadlines under which the media operate.

In our review of selected public records requests, we found no evidence to suggest that agencies were employing these tactics. But when agencies struggle to respond to complex, non-routine requests, it can foster suspicion and distrust, which in turn can undermine the credibility and transparency of both the agency and Oregon government.

### ***Role of Attorney General is limited in mediating timeliness, fees***

Requesters are limited in how to proceed if they are dissatisfied with an agency's response to a public records request.

In some instances, Oregon's Attorney General may be petitioned to order an agency to release public records. Beyond the Attorney General, requesters may also choose to sue in court. However, the Attorney General's role extends only as far as denials of public records requests or denials of fee waivers or reductions. Requesters who feel that an agency is violating the "unreasonable delay" provision of Oregon law, or who feel that an agency is charging prohibitively high fees, have no such avenue.

Several other jurisdictions have neutral, third-party entities that mediate such disagreements between agencies and requesters. Connecticut has a Freedom of Information Commission, which is a quasi-judicial commission of nine members and 15 supporting staff, who respond to complaints about public records. Complaints are resolved through the commission's hearing process.

In Washington, the Open Government Ombudsman assists both citizens and public agencies to comply with the state Public Disclosure Act. The ombudsman is a single individual appointed by the Attorney General.

British Columbia has an Information and Privacy Commissioner, who has the power to investigate and mediate disputes over privacy and access to information. The commissioner, with the assistance of an external six-member advisory board, provides independent oversight and enforcement of the province's freedom of information laws.

Oregon currently has no such mechanism to help mediate disputes between requesters and agencies over high fees or lengthy disclosure timelines.

## **Agencies retain public records longer than required**

Chapter 192 of Oregon law – more commonly known as the public records law – begins with the subject of retention. "The records of the state and its

political subdivisions are so interrelated and interdependent,” legislators wrote, “that the decision as to what records are retained or destroyed is a matter of statewide public policy.”

Those political subdivisions, defined in the law as “a city, county, district or any other municipal or public corporation in this state,” include state agencies.

The state and its political subdivisions, the law continues, have a responsibility to “insure orderly retention and destruction of all public records ... and to insure the preservation of public records of value for administrative, legal and research purposes.”

But the challenges of manually managing electronic records, along with a tendency to be too cautious, has led Oregon agencies to retain records for longer than necessary, resulting in too many records that complicate agency efforts to efficiently manage the public information with which they have been entrusted.

### ***Agencies must adhere to their retention schedules***

Record retention schedules specify both the minimum and maximum length of time that a public record must be kept to satisfy the administrative, legal, fiscal and historical requirements of that record.

To that end, state agencies must also *manage* their record retention processes, by doing the following:

- Ensure a reasonable level of protection for records.
- Comply with any applicable laws and policies.
- Maintain records in a manner that ensures timely, efficient and accurate retrieval of needed information.
- Provide secure and appropriate disposition or destruction for records that are no longer required to be kept.

This is achieved, in part, through the agency’s retention schedule – a document that indicates how long specific records must be kept. Retention schedules further specify what must happen to records at the end of that period, including destruction or transfer to the State Archives.

Each agency has a retention schedule created and approved by the Oregon State Archives. This schedule is the agency’s legal authorization to destroy public records.

There is a general retention schedule that applies to records common to all state agencies, plus agency-specific retention schedules that include records unique to that agency. For example, at the Department of Environmental Quality, air quality special projects records must be retained for 10 years and then be destroyed.

### ***Agencies struggle with the volume of records***

As important as retention schedules are, agency staff are not always following them. Instead, many employees are keeping far more records than necessary, complicating record management efforts.

In interviews, some employees told us they have a tendency to “hold on to everything,” instead of destroying records that reach their disposition date. In some instances, employees create duplicate copies of records by printing off electronic records and keeping both, expressing distrust with electronic storage systems.

Agency staff may worry about losing track of a public record or accidentally destroying it too soon – actions that may have consequences. They may feel it is safer to simply hold on to everything.

But it is equally important that agencies adhere to their retention schedules, which includes destroying records at the appropriate date. Without the appropriate destruction of records, agencies accumulate more information they must manage, leading to this issue of volume.

Records retention is especially important in that it precedes records disclosure. After all, agencies cannot respond to a public records request and disclose records they do not have.

But they also cannot disclose records they cannot find. These large amounts of information are challenging for agencies to manage efficiently, particularly when trying to find among them a single record in response to a records request – like a needle in a haystack.

In fact, officials at both of the agencies with key public records responsibilities – the Oregon State Archives and the Department of Justice – said this tendency to stockpile records is one of Oregon’s biggest issues in public records management.

### ***Training, technology can streamline management efforts***

Training is important for an organization’s development and success – both for new employees and as a refresher for existing employees.

Agencies reported staff understood the significance of record retention. Each agency had staff dedicated to the task of managing public records. More than half of these employees had undergone training specific to public record retention, whether it was provided internally or by the Oregon State Archives.

However, as all state employees create public records in the course of their duties, the obligation for proper record retention lies with each state employee, not just a select few. We found that training on record retention is not consistently given to all agency staff. As a result, agencies risk noncompliance with retention schedules or internal policies and procedures.

Technology can be immensely beneficial to agencies as they manage increasing amounts of public information. Digital storage can be easier and more cost-efficient for an agency than keeping piles of boxes containing thousands of papers. Computers can search more quickly for a single document than a person can. And some software programs can automatically destroy digital information or remind the user to do so when the retention period has expired. As more records are being created digitally, digital-only storage and retention solutions are necessary.

One such program is HP Records Management, or HPRM, a records management program from Hewlett-Packard. The HPRM applies automatic retention and disposition control to all records and indexes the content of those records for searching, which can be helpful for responding to public records requests.

According to the Oregon State Archivist, several agencies in Oregon already use HPRM, formerly known as TRIM, or will be adopting it shortly, including the Department of Administrative Services and the Department of Environmental Quality. By purchasing the program in conjunction with other state agencies, such as the Secretary of State, the cost to each agency is approximately \$37 per user per month.

Other agencies use other records management programs. For example, the Public Employees Retirement System uses IBM FileNet instead of HPRM to manage its records, including member and employer files.

However, agencies have differing needs for record management. A large agency that is responsible for a large volume of confidential and private information will have more records to manage than a smaller agency with fewer records. Some technologies can be expensive and unwieldy, or unable to securely store records with confidential information. Therefore, agencies should proceed with care when selecting and implementing record management programs.

In addition to helping agencies manage record retention, technology can be beneficial to agencies in tracking the public records requests they receive and how they respond to those requests.

Under a general retention schedule that applies to all state agencies, agencies are required to retain for five years any requests for disclosure of public records. They are also required to retain agency responses, including approvals, denials, Attorney General Orders, and any correspondence.

Many agencies we reviewed maintain a log to help keep track of these requests and their associated documentation. These logs vary in their appearance and level of complexity, from team collaboration software tools to simple spreadsheets. These logs can be useful in helping agencies keep track not only of how timely they were in responding to a request, but also of any documentation and correspondence associated with a request.

Not all agencies maintain a log; others have a log, but don't maintain it consistently. Some logs we saw were more thorough and detailed than others. And agencies that log requests differently within separate divisions are not consistently logging requests agency-wide.

## **Exemptions remain an issue and may require a closer look**

A significant portion of Oregon's public records law is devoted to exemptions – meaning those instances in which a public record may be exempt from disclosure due to the sensitive or private nature of information it contains.

When the public records law was first enacted, it included only 55 exemptions. But over the years, the Legislature has gradually added more exemptions to this list. Today, Oregon's law contains more than 400 exemptions, scattered throughout various chapters and sections.

Compared to the federal public records law – the Freedom of Information Act, or FOIA – and some other states, this number appears high. The FOIA contains nine exemptions, while other states we examined had anywhere from approximately 18 to 175 exemptions built into their laws.

Generally, agency staff told us they had a clear understanding of which exemptions applied to most of their records. We found that most records, if they were subject to an exemption, fell under one of just a few common categories. For example, multiple agencies we visited said they had some records subject to attorney-client confidentiality.

However, due to the vast number of exemptions in the law – including how they are worded and where they are located – agency staff said they would sometimes consult with internal experts or with the Department of Justice to seek guidance on applying exemptions.

This process can delay the timeliness with which an agency responds to a public records request; it can also increase the cost both to an agency and to a requester. The more confusing the exemption, the greater the risk is that a request will both take longer to fulfill and cost more.

There is a perception among some journalists that agencies already use delays and high fees to limit access to public records. In addition to the effect exemptions can have on these factors, there is also a perception among some requesters that agencies improperly use exemptions themselves to decline a request for a public record.

This perception may stem from the discretionary nature of most of Oregon's exemptions. As noted earlier, many records can be disclosed at an agency's discretion even if an exemption applies to that record.

In making that determination, agencies are required to weigh public interests favoring nondisclosure against public interests favoring

disclosure, with a presumption toward disclosure – meaning the right of the public to know what its government is doing on the job. The exception is confidential information, which is legally prohibited from release.

However, it is not clear that agencies are weighing these competing interests in determining whether or not to release a public record. In interviews with agency staff, very few discussed weighing the public interest. According to one Department of Justice official, some agencies may misunderstand this conditional aspect of some of the law’s exemptions.

These difficulties surrounding the exemptions in Oregon’s public records law are not new. In 2007, a national report that gave Oregon a failing grade in terms of its government transparency spurred officials to take a closer look at the law. Their findings, published in October 2010 as the Attorney General’s Government Transparency Report, encouraged the Legislature to make appropriate changes regarding timeliness, fees, and exemptions:

“The steady growth of exemptions is perhaps the most vexing problem with the public records law. Not only are there too many exemptions but they are haphazardly scattered throughout state law and thus difficult to find. Seemingly similar types of information may be subject to different rules depending on the particular language adopted by the legislature in a particular case. Any meaningful overhaul of Oregon’s public records law must reorganize and make coherent sense of the numerous exemptions. Some exemptions should be eliminated altogether.”

A bill was subsequently introduced during the 2011 legislative session to address some of these recommendations, but it failed to pass. An earlier bill introduced in 1993 that would have addressed exemptions also failed to pass. It appears that these issues regarding exemptions, outlined years ago, remain issues to this day.

We did not attempt to determine whether or not agencies are properly applying exemptions, due in part to the efforts of a task force that the Attorney General recently convened. Therefore, we did not draw any conclusions or make recommendations regarding exemptions. The Attorney General’s Public Records Law Reform Task Force plans to examine the issue of exemptions in Oregon law in more detail.

## **Variations in responses frustrate some requesters**

At each of the agencies we reviewed, staff expressed their appreciation for the flexibility built into Oregon’s public records law. It allows them to balance the task of responding to records requests with their regular duties to serve the public. Agencies are able to set policies and procedures that are tailor-made for their individual missions and goals.

However, this flexibility has led to inconsistencies in how agencies are responding to public records requests. Requesters have an expectation that

state government will be accountable to the public, and that public information will be made available within a reasonable time and for a reasonable fee. When requesters are not sure what kind of response to expect from an agency, it can lead to confusion and frustration.

A one-size-fits-all solution regarding cost or timeliness is problematic, given the broad array of services within state and local governments. Prior efforts by the Legislature to apply such a solution have been met with resistance from local governments and smaller public bodies with limited resources.

However, agencies can take certain steps to bring *more* consistency to the process of disclosing public information.

***Fees charged for material costs and staff time vary widely***

Under Oregon law, agencies are allowed to establish fees reasonably calculated to reimburse the agency for the actual cost of making public records available. These fees can cover both the costs of any paper or materials to provide copies of a record, as well as the staff time taken to locate, compile, and provide the records.

Agencies are also required to establish fee schedules, which specify upfront the amounts and manner of calculating fees in responding to requests for public records.

The size and type of a records request will impact the fee an agency may charge to produce it. But we found that even the manner of calculating fees for such things as materials and staff time varies widely among agencies.

For instance, some agencies are charging \$0.25 per page for copies, while other agencies are charging only \$0.05 per page.

Furthermore, some agencies provide a limited number of copies, upfront, free of charge. For example, the Department of Human Services and the Oregon Employment Department provide the first 10 pages free of charge, and then at a cost of \$0.25 for each page beyond that.

When agencies do not consistently offer these initial free copies, it can lead to confusing variations in the cost for providing public records. It may appear that agencies are arbitrarily charging or waiving fees.

But the greatest variation in costs was how much agencies are charging for staff time. Much like the cost for materials, charges for staff time vary widely – anywhere from \$15 to \$40 per hour. Some agencies charge for the first 15 or 30 minutes of work. At other agencies, staff time is charged at the individual employee's hourly rate.

These variations have resulted in frustration and confusion for both agency staff and requesters. The fees paid by a requester do not always cover the cost of an employee's time in searching for and compiling a record. Flat rates such as \$28 per hour for labor, for instance, do not take into account

the variety in salaries among staff who are responding to records requests. In some instances, agency staff expressed confusion over determining when it is or is not appropriate to charge a requester for public information.

Meanwhile, requesters may see widely different costs for similar requests made of different agencies without understanding why. Journalists told us that the fees agencies set seem arbitrary. Several journalists we spoke to said that high fees had, at least once, stopped them from moving forward with a public records request.

### ***Response times for disclosing records vary by agency***

Oregon's public records law is vague in regards to timeliness. Rather than setting a deadline for agencies to respond to a public records request, the law states only that agencies "shall respond as soon as practicable and without unreasonable delay."

The Oregon Attorney General offers more specific guidelines to ensure that public records are being released in a timely fashion:

"In the usual case, we think that it should be possible to make requested records available within ten working days. We recognize that in some cases more time – even significantly more time – may be required."

We found these 'usual case' requests – routine requests – were indeed made available within a couple of weeks. It was the infrequent complex or non-routine requests that required more time.

The flexibility in the law allows agencies to set their own goals and guidelines regarding timeliness – as some agencies have. These deadlines vary, but some of the agencies we examined have adopted the Attorney General's recommendation. For example, the Oregon Employment Department, the Oregon Liquor Control Commission, and the Board of Parole and Post-Prison Supervision all have policies or goals to respond to public records requests within 10 days.

Although Oregon's flexible timeliness provision is not unique, many other states have set stricter requirements within their laws. In Washington and Illinois, for instance, agencies must respond to requests within five business days.

However, we found no evidence, in Oregon or other states, to suggest that implementing a deadline in law would speed up an agency's response. This is due largely to the differences between routine and non-routine requests.

Generally, agencies are already able to comply with routine requests within the Attorney General's recommended timeframe. Based on interviews, available agency turnaround time calculation, and our own analysis of an agency's public records log, we found that agencies generally completed routine requests within 14 days.



It is the non-routine or complex requests that take significantly longer. During our file reviews, we found instances where these requests can take as few as 14 days or upwards of 265 days to fulfill.

To determine this information, we asked each agency to provide us a log or tracking document for each request received between January 2014, and when we contacted them in the summer of 2015.

Most agencies were able to provide us with a log. Two agencies tracked requests individually by section or division and not agency-wide. Two agencies had only recently begun keeping a log of the requests received; those logs, therefore, did not date back to 2014. One agency did not log its public records requests at all.

Only two agencies maintained or tracked in their logs enough data to allow us to calculate timeliness in how the agency responded to all public records requests: the Public Employees Retirement System and the Department of Environmental Quality.

At the latter, employees regularly compile reports on the agency's timeliness. According to a recent staff report, more than 60 percent of public records requests received from 2014 to the second quarter of 2015 were completed within seven days. These reports are useful management tools for determining whether the agency is responding to requests in a timely fashion and seeing where improvements may be needed.

For most agencies, we were unable to determine timeliness due to insufficient data included in the logs. For example, several agencies did not include any dates in their logs – such as a date when a request was received or a date when the request was fulfilled. Other agencies said they did not regularly log every single request that they received.

We also reviewed a selection of agencies' files that related to public records requests. These files generally included the initial request, any correspondence the agency had with the requester, dates the request was received, invoices showing fees charged and paid, and information about what was requested.

To select files for these reviews, we asked agencies to identify requests that took a long time to fulfill or resulted in a fee. We also reviewed a file that we selected at random, in addition to the agency's most recently completed request. The file reviews provided us with a glimpse into the requests agencies receive and how they responded.

Journalists told us they believe there is a problem with agencies taking too long to release public records. They believe that, without specific deadlines, agencies are not holding themselves accountable for responding to requests in a timely fashion.

When agencies adopt their own policies to govern the timeliness for disclosing a public record, they offer requesters a standard to which they can be held accountable. But it also provides agencies with the same

flexibility to handle complex or voluminous requests that is currently built into Oregon's public records law.

However, agencies should better monitor their own timeliness in responding to public records requests to ensure compliance with internal guidelines, hold themselves accountable to requesters, and identify areas for improvement.

### **Agencies are struggling to keep up with changing expectations and technologies**

Since the initial passage of Oregon's public records law, the Legislature over the years has made several changes to update the language or add more exemptions.

One such change, made in 2011, modified the definition of a public record to include digital or electronic records.

But while the law has been updated, agency policy hasn't necessarily followed. When it comes to addressing the use of email, text or instant messages and social media as public records, Oregon agencies have struggled to keep up.

#### ***Agencies' policies on email do not address private accounts, devices***

Email is now widely accepted as a public record when state agencies use it to conduct the public's business.

More than half of the agencies we examined have already adopted specific policies governing the retention and use of email as a public record to ensure compliance with the law.

But not all agencies have these policies, or they may be unclear. This lack of clarity may put an agency at risk of failing to retain some public information, or failing to disclose it in response to a public records request.

Written policies can help prevent confusion and potential legal problems. Policies and procedures within an agency can establish a high degree of understanding, cooperation, and efficiency among employees.

Additionally, the distinction between public and private information in emails and on private devices such as laptops, smartphones, and tablets, is not always clear. Agencies and their employees face increasing confusion over when an email is or is not a public record – and how to treat it accordingly.

The new Governor recently adopted an email policy that clears up some of this confusion:

“When the Office of the Governor receives a public records request or valid subpoena, all official e-mail accounts and systems used for official Office business are subject to search and production.”

“To the extent that Office employees use personal e-mail addresses to communicate about official matters (that is, to the extent public records are associated with such addresses), those e-mails are similarly subject to search and production. Office employees are therefore strongly encouraged to engage in communications regarding official business only on their official e-mail accounts. If private accounts must be used, it is Office policy that employees copy their official e-mail accounts on all such outgoing communications, and forward any received messages on which their official e-mail accounts are not copied.”

Of the agencies we examined, which did not include the Governor’s Office, we found only one had adopted policies to specifically address the use of private email in conducting the public’s business.

***Agencies are slower to address text, instant messages***

Beyond email, public employees may be increasingly using other technologies to communicate – namely, text and instant messages. Similar to email, these communications fall under the scope of public records law when they are used in conducting the public’s business, and would require disclosure in response to a public records request.

The Governor’s Office mitigates this risk by specifically addressing both text and instant messages in its policy:

“Office of the Governor employees may use text messaging to communicate factual and logistical information: (a) that is not a substantive part of the Office’s work, or (b) that has been documented, or necessarily will be documented, in separate public records. In the absence of separate documentation, Office employees are not to use text messages for official purposes other than for routine communications that do not meet the definition of a “public record.” This Policy applies equally to an employee’s “official” mobile phone or computer and to an employee’s “personal” mobile phone or computer.”

We found that none of the agencies we examined had adopted clear policies to specifically address the use and retention of text messages as public records, and only the Department of Human Services (DHS) had a policy to clearly address instant messages.

Some agencies have policies in place, such as DHS, that refer to “other forms of electronic communications” as public records and may be interpreted to include text messages. However, this policy could be refined to include explicit guidance on the use and retention of text messages as public record.

Additionally, some agencies, such as the Public Employees Retirement System, told us they are in the process of trying some of these communications, like instant messaging. Should the agency choose to adopt

this form of communication, policies governing its use are anticipated to follow.

### ***Social media creates a public record gray area***

The proliferation of social media is also transforming the way state and local governments communicate with the public. Some Oregon agencies are creating Twitter accounts, and even publishing videos to YouTube.

As with any other writing that pertains to the public's business, these social media postings are included in the umbrella of public records – even if they consist only of 140 characters, as with Twitter.

Only a few agencies have established policies and procedures around social media, to ensure their use aligns with the requirements of the public records law.

Several of these policies appear to draw language from the Social Networking Media guide published by the Oregon Department of Administrative Services, which offers best practices on the use and retention of social media.

The policy also identifies a potential risk associated with a public body's use of social media. For instance, posts made to Twitter under an agency's account may not belong to the agency, but to Twitter. However, under Oregon's public records law, the agency still maintains responsibility for the information's retention.

According to the Oregon State Archivist, this is one portion of the law that has failed to keep up with emerging technologies. She noted that it is considered a best practice for agencies to post only duplicate information, so that they can maintain ownership of the original and compliance with the law.

### ***Conflicting expectations of transparency and privacy***

Emerging technologies have also impacted two conflicting interests: an increased expectation of transparency in our government, as well as an increased expectation of privacy for the individuals it serves.

Requesters who ask for any and all correspondence expect an abundance of information shedding light on conversations and decision-making that goes into the public business. But those records must also be carefully vetted to protect sensitive and confidential information – such as Social Security numbers or attorney-client communications. Disclosure of such confidential information has serious implications, even if it is done for the sake of transparency.

One way agencies can improve transparency is to use technology to be *proactive*, rather than *reactive* – that is, simply make public information available upfront, rather than waiting for the public to ask for it. This is the motivation behind Oregon's Open Data Portal, located at [data.oregon.gov](http://data.oregon.gov).

Several agencies have taken similar action. For example, the Oregon State Board of Nursing posts several types of public information online, including disciplinary actions against licensees. The Oregon Liquor Control Commission posts information about licensed businesses and new license applications it receives.

This kind of proactive accountability is beneficial both for agencies and for requesters. Requesters are able to quickly and easily locate information, eliminating the need for certain public records requests. Agencies, in turn, receive fewer requests and are able to devote more time and resources to unique requests or their other duties.

It does, however, come with its own risks. The Employment Department, for example, told us it has considered putting some information online – but certain information, due to confidentiality, simply cannot be posted. Agencies must be careful about the records they post online to avoid accidentally sharing sensitive or confidential information.

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## Recommendations

To bring more consistency to agency responses to public records requests, the Department of Administrative Services should provide statewide guidance and training on:

- procedures for handling non-routine and complex public records requests, including communicating with requesters regarding fees and timelines;
- procedures for the use and retention of electronic communication, including text and instant messaging as they relate to public records law; and
- procedures for the use of personal devices and personal email accounts, as they relate to public records law.

To address the variation in fees charged by state agencies, the Department of Administrative Services should also consider:

- creating rates to charge for the cost of copies of public records; and
- identifying rates to charge for labor for state employees working on public records requests.

To improve responses to public records requests, state agencies should create policies and procedures based on the guidance to be provided by the Department of Administrative Services, and:

- implement a record management program or process that fits the needs of each agency (e.g. HPRM or another system);
- create goals for turnaround time that fit agencies' processes based on past experiences with responding to requests;
- create and keep a tracking mechanism, such as a log, to measure adherence to turnaround time goals and to track documentation related to each request; and
- identify frequently requested information and consider proactively making the information available (e.g., posting more information on agency website or the Oregon Transparency Website).

To address concerns regarding high fees and long turnaround times for public records requests, the Oregon Legislature should:

- consider creating a third party, such as an ombudsman, to review disputes over non-routine requests; and
- take into consideration the results of the Attorney General's task force for any recommended changes to the public records law.

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## Objectives, Scope and Methodology

Our audit objective was to examine state agency retention and disclosure practices concerning public records and the consistency among agencies in complying with Oregon's public records law. We focused our reviews on nine selected agencies of varying sizes and missions.

The nine agencies were:

- The Department of Human Services
- The Oregon Employment Department
- The Department of Environmental Quality
- The Public Employees Retirement System
- The Oregon Liquor Control Commission
- The Oregon Department of Education
- The Oregon Real Estate Agency
- The Oregon State Board of Nursing
- The Board of Parole and Post-Prison Supervision

We also focused on public records requests received from January 2014 to when we contacted the agencies in the summer of 2015. Our audit work did not include reviews of local government agencies.

To address our audit objective, we reviewed Oregon's public records law and Administrative Rules, agencies' policies and procedures for record retention and disclosure, and researched other states' public records laws for disclosing public records.

We interviewed at least one employee from each selected agency who was knowledgeable about the agency's retention and disclosure processes. We also interviewed several public records requesters who are members of the media to gain an understanding of their experiences with the records request process.

We also conferred with the Oregon State Archives, which is a division of the Secretary of State's Office.

We obtained public records logs from the agencies and analyzed the logs for timeliness, frequency of requests and the types of information requested. We judgmentally selected a number of public records requests from the logs for file reviews. We reviewed files for consistency in complying with agencies' policies and public records laws.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained and reported provides a reasonable basis to achieve our audit objective.

Auditors from our office, who were not involved with the audit, reviewed our report for accuracy, checking facts and conclusions against our supporting evidence.





# Oregon

Kate Brown, Governor

## Department of Administrative Services

Office of the Chief Operating Officer

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November 13, 2015

Gary Blackmer, Director  
Audits Division  
Office of the Secretary of State  
255 Capitol Street NE, Suite 500  
Salem, OR 97310

RE: Audit Report, *State Agencies Respond Well to Routine Public Records Requests, but Struggle with Complex Requests and Emerging Technologies*

Dear Mr. Blackmer:

Thank you for providing the Department of Administrative Services (DAS) with the audit report noted above. This audit, originally requested by Governor Brown, is very important, and DAS and state agencies are ready to implement the recommendations. The report identified areas where improvement is necessary to better and more consistently respond to non-routine and complex public records requests. We appreciate the work of the Oregon Audits Division staff and agree with the recommendations set forth.

Below you will find DAS' response to the specific audit recommendations. Management generally agrees with the recommendations. While DAS was not one of the agencies surveyed in the audit, we understand we are being asked to respond because of our responsibility to provide general oversight to state agencies. In anticipation of the release of this report, DAS has already begun discussion with state agency leaders at the Enterprise Leadership Team about the need for standardization of public records policies and processes that still meet individual agency business needs.

Audits Division recommendation:

**To bring more consistency to agency responses to public records requests, the Department of Administrative Services should provide statewide guidance and training on:** *procedures for handling non-routine and complex public records requests, including communicating with requesters regarding fees and timelines; procedures for the use and retention of electronic communication, including text and instant messaging as they relate to public records law; and procedures for the use of personal devices and personal email accounts, as they relate to public records law.*

DAS' Response:

Management generally agrees with the recommendations. Development of statewide policy regarding text messages and social media is already underway in anticipation of needs

identified by a new communications contract. DAS will work with the State Archivist to create a menu of options to meet retention and disposition requirements that can be adopted based on business needs.

In addition, the Department will provide clear guidance to state agencies to help ensure accuracy and consistency in response to public records requests. DAS will convene agency public information officers (PIOs) to identify best practices and develop recommended policy and procedure guidance to help agencies resolve barriers to effective response to non-routine and complex public records requests. DAS will engage and coordinate with state agency leadership in finalizing that policy guidance.

Audits Division recommendation:

**To address the variation in fees charged by state agencies, the Department of Administrative Services should also consider:** *creating rates to charge for the cost of copies of public records; and identifying rates to charge for labor for state employees working on public records requests.*

DAS' Response:

Management generally agrees with the recommendation. As mentioned above, DAS and the Enterprise Leadership Team are ready and willing to see standardization that still accommodates agency business requirements. DAS will convene agency PIOs and business managers to identify best practices and develop recommended policy guidance regarding standardized fees and charges. DAS will work with agencies to ensure fees and charges are appropriately levied in alignment with these guidelines.

Audits Division recommendation:

**To improve responses to public records requests, state agencies should create policies and procedures based on the guidance to be provided by the Department of Administrative Services, and:** *implement a record management program or process that fits the needs of each agency (e.g. HPRM or another system); create goals for turnaround time that fit agencies' processes based on past experiences with responding to requests; create and keep a tracking mechanism, such as a log, to measure adherence to turnaround time goals and to track documentation related to each request; and identify frequently requested information and consider proactively making the information available (e.g., posting more information on agency website or the Oregon Transparency Website).*

DAS' Response:

Management generally agrees with the recommendations. While these recommendations are directed to state agencies in general, not DAS in specific, the Department will work closely with agencies to make sure the recommendations are communicated to agencies along with DAS' policy guidance.

DAS will work collaboratively with the Office of the State Chief Information Officer, the Governor's Office and the State Archivist to evaluate the feasibility of implementing a technology solution to streamline and automate appropriate records management statewide. As

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an agency, DAS is testing HPRM in the office of the COO with the intent of expanding its use, agency-wide, once testing is complete. DAS will create processes to evaluate effectiveness and monitor performance and will share that information with other state agencies. Any statewide solution will require careful planning and implementation.

**Closing:**

DAS management appreciates your audit team's efforts and for the recommendations made in the audit report. We look forward to working with the Secretary of State's Audits Division along with our statewide partners to improve responses to public records requests across the enterprise. If you have any general questions about this response, please contact Zachary Gehringer, Chief Audit Executive, at 503-378-3076.

Sincerely,

A handwritten signature in black ink, appearing to read "Clyde Saiki". The signature is fluid and cursive, with a prominent initial "C" and a long, sweeping tail.

Clyde Saiki  
DAS Director and Chief Operating Officer

Cc: Barry Pack, DAS Deputy Chief Operating Officer  
George Naughton, DAS Chief Financial Officer  
Madilyn Zike, DAS Chief Human Resources Officer  
Zachary Gehringer, DAS Chief Audit Executive

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## About the Secretary of State Audits Division

The Oregon Constitution provides that the Secretary of State shall be, by virtue of her office, Auditor of Public Accounts. The Audits Division exists to carry out this duty. The division reports to the elected Secretary of State and is independent of other agencies within the Executive, Legislative, and Judicial branches of Oregon government. The division audits all state officers, agencies, boards, and commissions and oversees audits and financial reporting for local governments.

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### Audit Team

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This report, a public record, is intended to promote the best possible management of public resources. Copies may be obtained from:

website: [sos.oregon.gov/audits](https://sos.oregon.gov/audits)

phone: 503-986-2255

mail: Oregon Audits Division  
255 Capitol Street NE, Suite 500  
Salem, Oregon 97310

The courtesies and cooperation extended by officials and employees of the Department of Human Services, Oregon Employment Department, Department of Environmental Quality, Oregon Liquor Control Commission, Public Employees Retirement System, Oregon Department of Education, Oregon Real Estate Agency, Board of Parole and Post-Prison Supervision and Oregon State Board of Nursing during the course of this audit were commendable and sincerely appreciated.