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## Improving Public Engagement and Public Records Management at the Oregon Department of Environmental Quality

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# Improving Public Engagement and Public Records Management at the Oregon Department of Environmental Quality

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## EXECUTIVE SUMMARY

In August 2016 the Center for Public Service (CPS) was retained by the Oregon Department of Environmental Quality (DEQ) through an Intergovernmental Agreement to engage in a two-track evaluation of certain processes relating to public records and how DEQ might improve its processes.

The DEQ is responsible for protecting Oregon's air and water quality, for cleaning spills and releases of hazardous materials, for managing the proper disposal of hazardous and solid waste, and for enforcing environmental laws. Dramatic strides have been made in the past forty-five years, and Oregon's environment is cleaner as a result. Many complex and difficult issues remain to be solved. CPS was asked to help DEQ enhance their opportunity for success.

Track I tasked CPS with reviewing and providing recommendations to DEQ about the description of duties for a new position with the working title of "Public Records Disclosure and Engagement Manager." Track II is a more comprehensive analysis of DEQ's handling of public records requests and public engagement and potential reforms to the same. This report serves as the first and second deliverable of the project and satisfies CPS' obligations under Track I as well as providing the report called for under Track II.

After reviewing multiple sources on best practices related to public records requests, materials on current public records creation and production processes, conducting extensive interviews with DEQ staff, EQC members, employees of other state agencies, members of the media and representatives of stakeholder groups, CPS is prepared to make several recommendations. Specifically, CPS endorses the proposed creation of a Public Records Disclosure and Engagement Manager, who will oversee DEQ's public affairs staff, public records officer, EQC liaison and web content staff. CPS further proposes the creation of a position of a Public Records Request Coordinator who would report directly to the new Public Records Disclosure and Engagement Manager. The latter position is envisioned as being created at an Operations and Policy Analyst 3 level, although this is subject to adjustment. The envisioned result is a team that deals with all aspect of public engagement and communication from public and media inquiries to social media and web-based communications.

At one level, both positions are necessary to address the most pressing issue identified with DEQ's current system for responding to public records requests. In particular, although there is awareness that requests can create issues for the agency -- in particular requests for e-mails -- the actual process of responding to requests and ensuring performance is not prioritized throughout the organization. While current DEQ leadership has recently sought to clarify the importance of this task, at present it is not the primary responsibility for any employee. Emphasizing the value of the process and clarifying responsibilities regarding requests is a necessary first step -- though hardly a sufficient one -- to ensuring success in the future.

At another level, the two positions address slightly different concerns. For several years, public affairs or public information officers have been assigned to various administrative units within DEQ. Moreover, DEQ has encouraged a practice of treating program staff as the direct point of contact for media and public engagement. While some incumbent public information officers report that they feel valued by staff, others suggest that there is a perception that communications efforts are unnecessary or at odds with the agency's core mission. The role of public information officers ends up being largely reactive and driven by managerial direction below executive leadership. This has created a tendency for communications and outreach efforts to be somewhat isolated and ad hoc rather than being part of a comprehensive approach.

At times issues relating to communications and public engagement have failed to gain the attention of senior management in part because there has been no direct path for such concerns to be raised. In this regard, having a centralized structure headed by a member of the executive staff would ameliorate these issues and allow DEQ to be much more proactive in its efforts to engage and educate the public.

It is important to align public engagement with communications, messaging and how the agency responds to public records requests. Providing public records in a timely fashion is part of an approach to public engagement that emphasizes treating the public as valuable constituents and partners in accomplishing the mission of DEQ.

The creation of a formal Public Records Request Coordinator has the potential to help streamline the response process while creating consistency and quality. Currently DEQ employs a complex process for reviewing and assigning requests that requires a broad swath of personnel be involved at various stages. Although this has meant that no

individual feels overburdened by the tasks, it has also created a number of potential vulnerabilities, both internally and in terms of external communication. This leaves the agency open to criticism for a lack of accountability and slow response times. By creating a point person for addressing requests, DEQ will create accountability and greater responsiveness. We found that it could frequently permit the reduction or elimination of several steps that currently can delay responses in non-routine requests. This would improve customer service.

DEQ is confronting challenges that are especially difficult and are of great interest due to the combination of public health and environmental issues. These challenges have become even more acute in the recent months with the public concerns about toxics air pollution.

Almost all agencies of government are under pressure to become more open to two-way communication. This expectation extends to public agencies without consideration of the constraints such agencies are under in terms of making materials available. Moreover, customers expect this information to be readily understandable and easy to obtain.

In addition to creating the two new positions, DEQ should embark on systemic organizational reforms. This will be necessary to create a culture where the agency embraces an open approach to public records and a proactive approach with public engagement. This effort will involve the reorientation of the agency in several ways, and require increased investments in organizational infrastructure in terms of both equipment and human capital.

The path forward for DEQ will not be a simple or easy one. The Department has a long history of groundbreaking leadership in environmental matters that has been hampered in recent years by a lack of resources and a lack of focus. This has been painfully revealed during the recent stream of air toxics records requests and media coverage. Our recommendations for setting a course to regain its footing and being a national leader in protecting the environment and public health include:

1. Embark on an organizational development effort that will infuse the culture of the agency with a fervent commitment to improvement of public records response in a meaningful and timely way.
2. Clarify and raise the profile of communications and engagement with the public on the importance of protecting the environment and public health.

Become much more proactive in explaining the issues and what the DEQ can do and where it needs the cooperation and help of business, other agencies of state government and the public to be successful.

3. Seek approval to make significant investments in technology which will improve efficiency and provide more timely service for the public seeking information from the agency. This should also involve finding and supporting staff that are excited about digital governance.
4. Provide training at more frequent intervals for all staff on the public records process, and include ways of underscoring the importance of developing a model for all agencies of state government to follow.
5. Tell the story frankly and openly about the challenges facing the DEQ and ask for public and legislative support for the investments that will be needed to achieve the vision for an open, accessible agency that is working to protect the environment and public health.

## Background Information and Context

Oregon's Public Records Law -- primarily found in ORS Chapter 192 -- is broadly written to default in favor of public access to records and disclosure by a public agency. DEQ also has a statutory charge not only to preserve and enhance environmental quality but to educate the public about its efforts in this regard. In 2015, a Secretary of State audit suggested that responding to complex public records requests posed difficulties for DEQ and other state agencies. This in turn led to the initiation of a series of state wide initiatives around public records reform, including the issuance in July/August of 2016 of new model policies by the Department of Administrative Services (DAS). During the same time, there have been several task forces -- including one appointed by Attorney General Ellen Rosenblum, whose office administers public records law -- examining potential legal and process reforms.

The disclosure in February 2016 that researchers from the U.S. Forest Service had detected dangerous levels of toxic air pollution in moss samples adjacent to several businesses in Portland -- most notably Bullseye Glass - began a series of events that soon highlighted both the significance of public records requests and the difficulty DEQ has in responding to complex requests such as those that span multiple divisions or programs and/or seek e-mail records. Once released in late February, these e-mails indicated DEQ staff were aware of potential issues at Bullseye several months before it had provided the public with this information, and that the timeline of DEQ's awareness that its leadership had provided to the press was wrong. On March 1, 2016, DEQ's long-time director, Dick Pedersen, announced his resignation.

In the immediate aftermath of the Bullseye Glass story, the media and other interested parties began seeking a wide array of additional public records from DEQ. DEQ struggled to respond to many of these requests. For example, there was a series of apparent breakdowns in internal communications regarding a request for information on "credit generator" applications that led to a critical Oregonian editorial about DEQ's responsiveness on public records. The ongoing interest in issues related to air toxics pollution in particular put strain on the capacity of the agency to respond in a timely fashion to a number of requests from news

organizations as well as citizens groups. In addition to requesting specific documents -- e.g., permits and inspection reports -- these requests also involved DEQ databases (and specific queries to those databases) as well as broad requests for all DEQ e-mails involving particular companies and/or specific key words.

In the aftermath of these events, DEQ leadership identified potential reforms to its public records request handling. The changes it has since adopted include new policies and processes, especially with regard to requests related to air toxics; the placement on its website of a log showing all public record request and their status; and employee training, led by interim DEQ Director Pete Shepherd, on the history and significance of the Oregon Public Record Law. On September 13, 2016, a new policy was announced to signal that while fees will still be calculated for responding to requests by news organizations and citizens for public records, such fees will then likely be waived by DEQ if the requests are deemed to be in the public interest. DEQ staff have also been actively engaged in a variety of groups studying potential reforms at the departmental and state level. They have been monitoring the Attorney General's task force that is slated to make recommendation to the 2017 Oregon Legislature on changes to public record law. They have been participating in the task force being run by DAS. In addition, DEQ leadership identified a potential need for modifications to personnel and an overall review of its processes for handling public records requests and public engagement.

In August 2016, DEQ retained PSU's Center for Public Service (CPS) under an Intergovernmental Agreement ("IGA") to provide an outside evaluation of its efforts to improve the handling of future public records requests. The IGA specifically tasked CPS with the following two major deliverables:

Track I: The Center (CPS) would make recommendations to DEQ as to whether the agency should create a new management position, which was given the working title of "Public Records Disclosure and Engagement Manager." The review would include (but not be limited to) the benefits and risks of creating and filling such a position, as well as its prospective duties should it be created. The agreement also made clear that CPS might recommend a different approach, and/or other changes that it might determine were needed to help DEQ meet its statutory obligations for full and timely public records disclosure.

Track II: To help inform its Track I recommendations, CPS was asked to analyze DEQ's then-existing and relevant administrative rules, policies and practices relating to public records requests, retention and public engagement. DEQ asked that CPS's Track II work include a preliminary assessment of the extent to which any "gaps" or undesirable variances exist between administrative rules, policies and practices – including the requirements imposed by statute and DAS -- and best practices with respect to public records. It was also contemplated the preliminary assessment would also include a detailed work plan prepared by PSU regarding the steps required to complete a fuller review of DEQ's administrative rules, policies and procedures in comparison with best practices with respect to public records.

## About the Center for Public Service (CPS)

CPS, affiliated with Portland State University's Mark O. Hatfield School of Government, has a broad mandate to connect Portland State University's expertise and public service mission with real world challenges in the public and nonprofit sectors, while forging productive and sustainable relationships with leaders at the local, state, federal and international levels. CPS seeks to harness both academic and practical experiences and approaches to address these matters.

The CPS team for this project includes a number of individuals with applicable experience. Phil Keisling, CPS director, is a former Oregon Secretary of State. During his term in office he had responsibility over the state's Archives Division, and from 1991-93 headed a special task force created by the 1991 Oregon legislature to recommend changes to the 1993 session. Dr. Marcus Ingle is Professor of Public Administration at PSU with expertise in organizational change and leadership. Dean Marriott is a Senior Fellow at PSU and has extensive experience in executive management of environmental quality agencies at the state and local level. Sara Saltzberg is the Assistant Director of CPS with experience in project management and human resources policy. Andrew Dzeguze is a Ph.D. candidate in the field of Public Administration and Policy, holds a JD as well and has experience in investigating and reviewing issues relating to document requests and production.

### CPS' Approach and Activities to Date

Throughout this engagement CPS has sought to engage with DEQ leadership and staff to develop a clear understanding of

the issues confronting DEQ with regards to public records requests and public engagement. CPS has also investigated practices and ongoing reform efforts in other agencies, sought the perspective of other groups and individuals that interact with DEQ, and reviewed materials relating to best practices for public records requests and the concept of open government generally.

The CPS team approached the work by undertaking these key tasks, roughly in the order listed below. The team:

1. Met with DEQ leadership to clarify the nature of the perceived issues and the scope of the engagement;
2. Reviewed publications on open data in government and best practices for responding to public records requests at the local, state and Federal level;
3. Reviewed a binder of materials provided by DEQ on public records requests and DEQ's website-based log of public records and open database requested pages, creating a narrative summary of the latter;
4. Based on these reviews and DEQ suggestions, created an extensive interview schedule and protocol that included five key groups: 1) DEQ leadership and key staff; 2) members of the Environmental Quality Commission (EQC); 3) other state agency leaders who oversee and/or are responsible for public records requests; 4) a sampling of journalists who've worked extensively with DEQ leaders and staff;; and 5) citizens and representatives of interest groups that interact with DEQ and representatives of other agencies;
5. The interviews with DEQ managers and staff professionals were conducted using a semi-structured interview process, with sets of questions developed relating to public records requests and public engagement to serve as a framework for discussions. The interviews with other, non-DEQ personnel were conducted using conversational interview techniques, and summaries were then prepared as appropriate. More than 40 interviews of 30-90 minutes' length were conducted, with approximately 60% of these involving DEQ employees and the remainder split among the other four groups. A list of those interviewed can be found at Appendix A.

## Track I – Key Findings

It should be noted at the outset that CPS operated without any constraint from DEQ on the scope of our inquiry, who we should talk to, or what documents we should review. We found DEQ personnel to be universally open to engaging in the review process. Employees provided invaluable insights into the public records and public engagement processes at DEQ, and many articulated a desire for positive change. These attitudes suggest DEQ has a foundation on which to create positive organizational change with regards to public records in particular, and more generally, document management and public engagement. Moreover, it is worth noting that many members of the media and outside document requestors spoke positively about the efforts DEQ has made recently with regards to public records requests. Overall, DEQ seems to possess a reservoir of goodwill with most key public stakeholders.

It is also worth noting that, as will be detailed below, CPS did not find major deviations from existing law or policy in DEQ's rules, procedures and practices. There are some minor gaps between DEQ's current policies and DAS' model policy. However, they are not directly related to public records requests but to the treatment of instant and text messaging as public records. If proposed reforms posited by the Attorney General are passed through legislation, DEQ's policies would have to be revised with regards to record request compliance timing and training. While these and other potential changes might underscore the need for DEQ to focus on public records requests to a greater degree than it has historically, it's fair to note that this is a widespread issue in Oregon and would pose challenges unique to DEQ.

One key finding that quickly emerged from CPS's review is that critical gaps remain in DEQ's public records processes -- both as a matter of internal structure and best practice. DEQ's current process was largely built to handle routine, rather than complex, public records requests. The default assumption appears to have long been that requestors would seek limited information and understand the internal records processes of DEQ. This led to creation of a de-centralized system that can readily handle routine requests for discrete identifiable documents -- e.g. title-related searches of a particular address -- but struggles with more complex requests. The system also falls short of current best

practices in a variety of ways, including the lack of consistent centralized oversight, failures to abide by stated policies; and the opaque nature of the process from the perspective of the public.

This lack of focus at DEQ relating to public records requests and public engagement is the result of a combination of factors including historic organizational trends towards more a diffuse organization of staff; personnel issues leading to limited capacity to evaluate or modify the system in a meaningful way; and an organizational culture that views public records requests as a secondary task to the agency's core mission of "restoring, maintaining and enhancing the quality of Oregon's air, water and land." This lack of attention and capacity has harmed DEQ's ability to respond quickly and fully to public records requests, which in turn has led to criticism of the agency as a whole by members of the media and public interest groups. The lack of attention to these issues at a systemic and strategic level has also rendered DEQ largely reactive rather than proactive on issues related to public engagement and education.

CPS's review has led to the following findings which individually and collectively support the creation of a Public Records Disclosure and Engagement Manager as well as a second position -- one we've dubbed a Public Records Request Coordinator. These findings also suggest a need for broader organizational review. They are:

- I. DEQ's Current Public Records Request Process Is Not Well Suited to Complex, High Profile Requests
- II. DEQ's Practices and Processes Largely Comport With Legal Obligations but Deviate from Best Practices
- III. DEQ Currently has a Largely Reactive Approach to Both Public Records Requests and Public Engagement

Each finding is discussed in further detail below. Please note that our findings focus on what we observed during our August/September 2016 interviews.

## DEQ's Current Public Records System Is Not Well Suited to Complex, High Profile Requests

DEQ currently uses a set of protocols for public records requests that are not adequate to address complex requests in general and in particular to requests coming from members of the news media in context of breaking news stories and relatively tight deadlines. The process functions well when taken at a distance and considered globally, with the vast number of requests fulfilled in a timely manner. However, this overall success masks critical flaws in the system. The system relies on such a diffuse process involving so many people that over time breakdowns are to some degree inevitable. Moreover, the system appears to have been designed to facilitate ordinary requests rather than bearing in mind that extraordinary requests are apt to generate media interest and public critique as well as to present unique logistic challenges.

As part of CPS's review, DEQ provided two process flow charts that were largely confirmed through interviews with people responsible for fulfilling public records requests as well as a set of policies specific to "air toxics requests." Although one of the charts states the difference between the two is between those with and without requests for e-mails, it would be more accurate to say the second is for "complicated" or "potentially problematic" requests. The simpler chart and interviews suggest that at a minimum a request for records involves the following steps:

1. A requestor for a public record is required to go to the DEQ website and fill out a form. The form itself is designed to narrow the inquiry; it limits requests to a single location, and also asks requestors to identify a particular program or regulation at issue (if known). The website also contains links to public databases maintained by DEQ, including GIS data, its Facility Profiler program and a static log of public records requests. There is also a link to an FAQ page with information about fees and the process DEQ has for considering possible fee waivers.
2. The request is then converted into an e-mail within the DEQ Outlook system. The DEQ site immediately acknowledges the request. However, it does not provide the requestor with

any information to track the request or direct contact information for following up.

3. At any given time, there are approximately 13 administrative staff who serve on a "rotating basis" as Public Record Response (PRR) processors. These staff professionals have other primary jobs. During their tours of duty, staff monitor the DEQ e-mail account on a daily basis and enter the details of each received e-mail request. Based on their understanding of the nature of the request and using a list compiled by the Records Officer, the PRR processor will then assign each request to a person responsible to coordinate the response. Depending on the nature of the request, this "designated responder" may be a DEQ staff member within a particular program area, a DEQ staff professional at one of the agency's 3 regional offices, or the agency's Records Officer. As part of its performance management framework, DEQ has set a goal of completing this step – the assigning of responsibility to respond to each request -- within 48 hours of receipt.
4. Whenever a DEQ "designated responder" is assigned to a particular public records request, this fact is noted in the agency's SharePoint database. The responder will first review the request and determine initially if the request is appropriately assigned to them. If it is, they will then determine if it is likely to take more than 15 minutes or cost more than \$25 in fees to process. If it seems likely that it will, a fee estimate must then be generated before any materials are gathered. This estimate may be the work of one person, using an online calculator of fees, or it may require the input of several people if the request spans different programs. If there is no fee estimate required (e.g. copying a single permit) the materials will be gathered and delivered with or without a request for payment (fees are supposed to be charged uniformly but indications are they are sometimes waived).
5. In the case of a public records request where it's determined that a fee estimate will need to be calculated, the fee estimate is then delivered to the requestor. If the requestor takes no action,

the request will be considered closed after 30 days.

6. In certain cases – e.g., a request being extremely broad or confusing to the designated responder -- the requestor may be contacted to clarify or narrow the request. In either event, no materials will be gathered nor will the process continue unless the requestor agrees to the estimated fees.
7. Once the requestor has agreed to pay the estimated fee -- and in the case of significant fees has provided a written agreement on how the fees will be paid for -- the materials are gathered, reviewed for confidential, privileged or otherwise exempt materials and ultimately delivered.

DEQ adds several different screening steps in certain cases. These steps can either streamline or complicate the process depending on the issue and how it is handled.

According to a recent shift, if the PRR Processor identifies the request as originating with or being related to the media, the request is now supposed to be routed directly to DEQ's lead Public Information Officer, who then coordinates the response with the member of the media. If the previous protocol were then followed, in theory the lead PIO would then serve as the single point of contact for a requestor, and would be responsible for collection of materials, coordinating reviews as necessary and ensuring information is accurately recorded in SharePoint. However, at present, it appears that this is not consistently done. Rather, if a request is identified as originating with a member of the media, the processor is likely to handle it like any other request - - but will inform the lead PIO, either by including him/her on the SharePoint request or by completing a Media Contact Form in Outlook.

While our interviews show that DEQ's lead PIO tries to serve as a liaison between reporters and DEQ staff on certain complex requests, we found this process is not currently working optimally. In part this is because of the fact PIOs have not been trained in the public records response processes. It also is a shift from prior practice of handling all public records requests on a first in, first out basis, with no consideration of origin. This was done in part because processors were under the impression that treating media requests differently in any way from

those from the general public would violate the law in some manner.

Requests seeking e-mails can create additional steps. The Processor is supposed to send the e-mail request to DEQ's designated "Records Officer", who in turn seeks an IT estimate of costs for searching for e-mails. The estimate is developed by running a query to get a rough sense of how many hours it will take to identify and collect the e-mails, and then review them to ensure there is no confidential information whose release might expose the agency to legal or financial liability. However, at this step no e-mails are actually collected. Rather, the estimate is forwarded to the requestor, and the parameters of the search may then be discussed.

Once there is an agreement on the search parameters (e.g. key words) and the fees related to producing the records, the Records Officer has to get administrative authorization to conduct the actual search. Searches will be for keywords in the request. Then additional searches will be run to attempt to identify confidential material, such as material potentially subject to attorney-client privilege. The materials are then divided into files based on these searches, and then they are potentially subject to additional review by different executives and/or the Attorney General's staff as appropriate. No e-mails are produced until all of them have been manually reviewed. In some instances, this has led to materials being produced on a rolling basis.

Another issue that can complicate the processing of a request is if the requestor seeks a fee waiver. While fee waivers are mentioned on the DEQ website and there is a link to the waiver application, generally requestors are not proactively informed of the availability of fee waivers. Members of the media may be well aware of this option; the same cannot be said for the average citizen whose prior experience with public records law may be limited or non-existent.

Historically, fees can be waived where it is determined by the DEQ that the request is in the public interest. In recent years, a practice has evolved by which "automatic fee waivers" were given to news media organizations, but capped at \$200 per year and subject to approval on an annual basis. However, our interviews revealed some key questions that arise from such a system. Which news organizations and/or journalists were entitled to these "automatic waivers? How might it be independently assessed that DEQ granted them on a consistent and uniform basis? Would any citizen who requested a record

also receive such a waiver? Finally, do such waivers make a difference in the accessibility of records, especially since many requests (specially recently) have amounted to \$1,000 or more?

While only one person we interviewed felt that a properly made request for a fee waiver was ever denied them, we did hear of cases where an initial estimate of fees has not been transmitted, despite several months of inquiries. Once fee estimates are issued, it's also clear that they can dissuade the pursuit of public records; even in the case of a large news organization, a reporter being required to request a payment of \$1000 or more from his/her superiors is not without potential for dissuading them from pursuing a particular line of inquiry.

There was also clear unease among the journalists we interviewed about a system that required them to routinely go through a "fee waiver" process – as if the agency was doing them a favor – much less invoke the use of their "discount credit". Finally, according to our interviews, there was evidence that a lack of information regarding fee waivers both internally and externally could slow the processing of requests and lead to a perception the fees were being used to deny access.

After a thorough review of the agencies process and practices, DEQ's acting director announced on September 13, 2016, that requests from the media and citizens that were deemed to be in the public interest would, by definition, receive a fee waiver. The September directive also abolished the \$200 annual cap as it applied to the media. However, the agency would still require a fee estimate to be generated, and a waiver applied for – a process that could be streamlined by simply granting the new manager the power to do so at the front end of the request process.

DEQ has recently implemented a different set of protocols for media and citizen requests related to companies and programs which touch on certain "air toxics" (such as chromium and arsenic). In these cases,, the request is to be routed to the Executive Assistant to the Administrator of DEQ's Northwest Region.. The Executive Assistant then serves as the single point of contact for the requestor. This generally more proactive effort to engage the requestor and the public includes the acknowledgement of the request and immediately conveying information on fee waivers, the estimate process, the presumed time for completion of various stages of the request, potential sources of delay and

contact information of the person actually coordinating the request.

Another noteworthy aspect of these new air toxics procedures is posting some materials to a public website if they are requested more than once. However, the materials to be posted are limited to permits, inspections, source controls and "other public records that would be released as part of our day to day records requests." E-mails, database query results, and complaints would not be included, even if that material had been released to one or more requestors.

Looked at very broadly, it should be noted that DEQ's long-standing default system for public records has historically functioned quite well – at least according to its own metrics. Material provided by DEQ shows an agency-wide performance goal that 95 percent of public record requests should be completed in 30 days or less. A rate of 85 percent is acceptable; anything below 70 percent is unacceptable, with 71-84 in a warning stage. Quarterly reports from 2015-16 show the overall success rate against this metric varied from 89-96 percent with Q2 2016 (the last completed before this project began) reporting 91.86 % success.

Summary data also shows significant variability in how fast requests are processed. The vast majority of requests are handled the same day, and the bulk are done in less than 10 days, with a remainder that takes significantly longer. In 2Q of 2013, for example 64 percent were handled the same day, 82 percent within 10 days and 93 percent within 30 days. By the end of 60 days 99 percent had been completed. While these response times have varied some from quarter to quarter, these are fairly representative numbers (and the most recent we were provided with this level of detail).

However, the data are fundamentally skewed by the nature of the typical request. The vast majority of requests – typically about 70 percent in a given quarter – are requests for simple onsite (septic system) documentation. These requests ask for discrete documents that are readily located electronically and can be easily produced the same day. Indeed, in a typical quarter more than 90 percent of these requests were completed the same day.

An additional set of requests are for straightforward permitting documents that can also be readily identified and processed. These can occasionally cause difficulties due to processing errors or delays, but generally they are

simple to handle. Most of these requests are so simple, in fact, that it would be possible through the adoption of different data handling protocols -- such as a program like HPRM, GovQA or Xerox Work Flow Automation coupled to appropriate identification of files -- to make most of these materials available on a self-service basis. Other states such as Arkansas for example already place make all permits available online through an application similar to DEQ's Facility Profiler.

Ultimately, the current public records request process creates several potential points of failure or delay, especially with regards to complex records requests. Based on interviews and our material reviews we have identified the following problem areas:

1. The form itself is not user friendly and in many cases does not capture relevant information fully and appropriately. DEQ has recently shifted from a PDF form to a web form to try and address this issue, but it is unclear if this change will result in significant improvement.
2. Inputting requests from the website into SharePoint is time consuming and creates the potential for mis-assignment of tasks. Notably, the protocols for handling requests were recently streamlined -- but again this has not had time to be evaluated.
3. The rotating of the processing duty and the identification of this task as a secondary or additional job function rather than as a core job function can cause requests to sit in the queue for extended periods of time. Currently, there is no one with formal responsibility for ensuring requests are timely assigned although the Records Officer informally seeks to ensure this takes place.
4. Similarly, compiling estimates, gathering documents and interfacing with requestors are all seen as secondary job tasks in most cases. The people conducting these functions do not possess the authority to insist on action by others in most cases. This difficulty is multiplied where requests cover multiple regions or programs and hence require the coordination of multiple issues.
5. Delays in assignment, estimates and communication with the requestor currently are only captured if the request has been pending 25 days or longer. Previously, they were only seen in retrospect when DEQ ran quarterly reviews of the requests. This is especially problematic as there is proposed legislation to make the default expectation production within 10 days.
6. Identifying confidential and otherwise exempt materials often triggers a need to involve attorneys from the Attorney General's office leading to further delays. This is compounded by the fact that records coordinators typically are not specifically trained in these issues and have to first obtain management approval to seek such review.
7. Currently only 2 staff are permitted to authorize e-mail searches, and neither of them is primarily tasked with handling public records requests. Only 2 members of the IT staff are trained in conducting searches using the Barracuda system, although interviews suggest it is not a particularly onerous system to learn.
8. E-mail requests routinely generate tens of thousands of documents, which currently are being reviewed individually by senior members of management and staff. Large portions of these files are also being subjected to review by counsel. This tends to lead to significant delays in final production due to the capacity constraints of these individuals
9. SharePoint itself is suboptimal as tracking software, as it has proven to have a number of features that can cause confusion or cause a request to either appear complete when it is not or appear to be open when it is complete.
10. The system is opaque to requestors. While they are provided an acknowledgement e-mail (which does not appear by itself satisfy ORS 192.440(2) as a agency response, but at most demonstrates partial compliance) outside of air toxics issues the requestor may have no contact with the staff attempting to fulfill the request until they receive the fee estimate or materials. Additionally the estimates themselves can appear arbitrary, inconsistent or exorbitant, and staff have been perceived by some requestors as difficult to work with.

11. The addition of air toxic specific protocols initially led to confusion, as they did not fully comport with default procedures. Moreover, in an effort to be proactive, at times materials were provided to requestors without informing management of what had been produced, which is counterproductive to the overall task. It is worth noting, however, that requestors appreciated having a single point of contact with the agency.

Certain of these shortcomings are based on the technology employed by DEQ. Some are a result of the current processes. Limiting the potential negative consequences of these issues, though, will require a greater appreciation throughout the organization for the value of public records requests.

The proposed position of Public Records Disclosure and Engagement Manager would be bring a far higher level of organizational focus to these functions and create an internal champion with outright authority (or at least significant influence) to resolve such issues more expeditiously. The proposed companion position of Public Records Response Coordinator would also significantly reduce the risk of requests being neglected at various stages in development. With the right qualifications – discussed more thoroughly in the Recommendations section that follows – this person could also limit the need for DEQ to be so heavily dependent on other agencies (e.g. DOJ) for assistance with document review.

## DEQ's Practices and Processes Comport with Legal Obligations but Deviate from Best Practices

In accordance with Track II of the IGA, CPS has undertaken an analysis and preliminary assessment of DEQ's current policies, procedures and practices regarding public records requests, with an eye to two questions in particular. Do they satisfy DEQ's legal obligations? And even if they do, how do they compare with identifiable best practices?

As to the first question, our analysis and interviews confirm that DEQ is generally in legal compliance with Oregon law -- although it's important to note that a flurry of recent changes and likely reforms in the near

future relating to Oregon public records law will create a climate of some uncertainty for all state agencies. A review of best practices, on the other hand, indicates a number of shortcomings. More specifically, our analysis and interviews found that throughout the organization, DEQ is still far from embracing an "open data" mode, and would need to embrace significant changes to its system – as well as its organizational culture -- to approach that level of transparency. To achieve near open data as envisioned by the Sunlight Foundation would, for example, require that all materials potentially subject to public records requests be available to the public essentially simultaneously with their receipt or creation by DEQ, thereby largely mooted the need for public records requests.

### DEQ is Compliant with its Legal Obligations

With regards to legal obligations, CPS' review indicates that on the whole DEQ is compliant with current state law and policies. While there weresome gaps between DEQ's policies and DAS' new model policies that were finalized in July 2016, the differences were generally non-substantive. Those gaps were not directly related to the processing of public records requests, but rather to such items as the treatment of instant and text messaging as public records. We have been informed that DAS has approved some further revisions to DEQ's policies that close those gaps.

On a separate track, a task force set up by Oregon's Attorney General will soon finalize a set of proposed reforms to the 2017 Legislature. If enacted by the Legislature, some DEQ policies and practices would have to be revised.

For example, the AG's draft recommendations a call for a 10-day default window for processing all public records requests, subject to extension for good cause. The vast majority of DEQ records requests now are processed within 10 days; those which aren't seem likely to be subject to individualized extensions. It's also likely that relatively minor shifts in emphasis and personnel management could result in near complete compliance in terms of written policy. However, DEQ's internal goals are still currently based on a 30-day window for fulfillment of a records request, regardless of its nature, and the agency currently makes no effort to verify completion of a request within the 10-day time period.

One area in which a proposed reform might have significant impact is training. Currently DEQ has some web-based trainings on public records creation and

document management, and employees report having engaged in a variety of trainings offered by agency personnel, the Secretary of State's office and the Attorney General's office. However, it is unclear how often or how consistently trainings are offered agency wide, and it appears there is no set schedule. Another proposed reform from the AG's task force is to require all agency employees to undergo public records training every two years. While the exact scope of that training is not yet defined, it likely will embrace topics including document creation and management, and best practice and legal requirements for handling public records and public records requests.

There is a distinct possibility that a number of other key policy reforms will emerge from the Attorney General task force, as well as several other working groups currently in progress. Fee reform is one area that has been specifically suggested as an area for reform, although the focus is currently on normalizing and harmonizing fees across agencies rather than wholesale elimination of fees or something similarly radical. It is also possible one or more task forces will assess existing exceptions and exemptions from public records disclosure, but to date we are not aware of a proposal to do so. However, at present it would be speculation to comment on how those policies might impact DEQ.

### DEQ's Performance Relative to Best Practices is Inconsistent

While the agency has performed well in many ways over its history, and has recently improved a number of its practices and processes, DEQ's current policies and practices still fall short when it comes to a number of important standards and best practices that can be found at other organizations, both at the state and Federal levels. Specifically, DEQ's current practices and processes fall short in a these ways:

- Requests are often handled through a diffuse rather than centralized process, which allows for confusion and creates the opportunity for significant slippage in response times when no single employee is tasked with tracking the progress of requests from initiation to completion in real time.
- DEQ's interactions with requestors are largely reactive rather than proactive, placing the burden on the requestor to act at several stages.

- DEQ's internal decision-making process and actions are also largely opaque to the requestor rather than transparent, which can lead to misperceptions about the agency's actions or intentions.
- The methodology for calculating fee estimates – and the decision-making process for whether and when to waive all or part of them – can seem haphazard and even suggestive to some of a strategy to use fees as a means to limit access to documents. Even where DEQ has recently sought to create more transparency and/or move towards a more proactive policy – e.g., with air toxics-related requests made in the wake of the Bullseye glass stories – the fact that complaints, e-mails and similar materials are excluded from the resulting websites may fail to assuage the doubts of those already predisposed to skepticism or even hostility that the agency is still attempting to conceal embarrassing information.

#### 1. Summary of Best Practices

For guidance on best practices, our team consulted a wide range of information sources. They included:

- Best practice statements on public records requests from Tennessee, Florida, Ohio and Arizona.
- "Best Practices for Agency Freedom of Information Act Regulations" a December 2013 report from the Center for Effective Government.
- A memo and other materials relating to public records requests from the City of Portland Bureau of Environmental Services (BES).
- The website of Washington's MRSC (local government) organization.
- "The People's Business: A Guide to the California Public Records Act" from the League of California Cities.

- Materials from the Sunlight Foundation on “open data” in government, which is a related but more global concept than public records.
- DEQ Public Records Information binder compiled by DEQ for CPS.
- Interviews with several DEQ staff, including administrators and management who have experience with various dimensions of DEQ public records practices.
- Interviews with staff at other agencies in Oregon, including administrators and management who have experience with various approaches to public records practices.
- Interviews with members of the media and other requestors of public records.

There is a tremendous breadth in terms of what various documents identify as best practices. Some, such as Arizona’s, are a single sheet with a fairly minimal set of practices that primarily address how to conduct individual transactions. At the other end of the spectrum, the Center for Effective Government (CEG) report on FOIA best practices is over forty pages long and addresses everything from releasing material without a request and using the internet to engage requestors through creating transparency in fee structures. As a whole, there seems to be a fairly high degree of consensus on the following core best practices with regards to public records:

1. Creation of and following established, consistent procedures;
2. Clarity of process, in terms of requests, responses and fees;
3. Centralization of requests/points of contact between the agency and requestor;
4. Using technology to reduce the number of requests and simplify the process for requestors;
5. Maintaining records and tracking requests;
6. Minimizing the use of exemptions and exclusions

Taken as a whole, these practices focus on ways of maintaining a pro-active rather than reactive relationship between the custodian of public records and requestors, as well as the public generally. Each practice is elaborated briefly below to provide a sense of its scope.

1. Creation of and following established, consistent procedures

This may seem like an obvious concept, but both Tennessee and Florida specify the need for developing written procedures, and the CEG report seems to take it as a given. The key advantage of a written procedure is that it helps ensure uniformity. Of course, the potential downside is rigidity and/or a lack of resiliency in the face of situations not specified in the procedure. Thus, while establishing clear and consistent procedures are a significant best practice, it is important that they do not interfere with the central goal of any public records request system, which is designed to ensure the public’s access to public records.

Along with having the procedures is a practice of training responsible parties in their obligations under the public records law generally and in responding to public records requests in particular. Otherwise the written procedures will be of limited value in predicting how requests are actually handled.

2. Clarity of process, in terms of requests, responses and fees

A point that is raised in the Ohio, Florida, Tennessee and CEG materials is that the point of public records is to assist the public, a core concept that can get lost if the system appears too confusing or frustrating. One way to assist with this is to be clear about the process involved with requestors. This can include providing clear directions on how to make a request; being direct with requestors about the burdens, time and cost required to satisfy a request; and making the fee structure uniform and consistent while clarifying its components.

Clarity also embraces the concept of proactive communication with requestors. Instead of simply receiving and processing the request without interim communication, there are several stages at which agency personnel can and should contact the requestor, especially for requests that may be complex and time-consuming. Examples of such proactive outreach might include working with requestors to clarify and/or focus

the scope of a request; advising them of potential fees and timelines for fulfilling a request; and suggesting ways to modify a request to make it more readily producible and satisfactory. If a request involves some material that can be produced promptly and other material that will take time, the possibility of a rolling or prioritized response can be raised with the requestor. All of these steps are intended to ensure the requestor understands the request is being taken seriously, and that the agency is not attempting to thwart the request.

### 3. Centralization of requests/points of contact between the agency and requestor

One of the potential pitfalls of public records requests lies in top agency managers either not being aware a potentially high profile request has been made, or failing to view it as a priority. The CEG review, for example, discusses the advantage of having a single portal for requests to be made. Tennessee, Ohio and Florida all recommend having a centralized process for receipt of requests and designating a single individual who is the designated point of contact on requests. (PK: Arguably, doesn't the CURRENT DEQ process meet this standard – it's just that it's then put at a very staffing level, assigned to people who then may not give it the attention it deserves?) For example, the City of Portland Bureau of Environmental Services' process reveals both a single portal (GovQA site) for collecting requests, and a single named individual who serves as the agency's point person throughout the entire process of reviewing, clarifying and coordinating public records requests.

Centralization of the request process does not mean that the central point of contact has to fulfill all the requests themselves; they can delegate and rely on other individuals to locate materials, for example. But by having a single point of contact for the entirety of the process, requestors know whom they can contact with questions about their request. This approach also helps ensure consistency in communications and a person inside the organization with responsibility for ensuring compliance with all statutory or procedural obligations.

### 4. Maintaining records of and tracking requests

Most of the best practices materials address the need for maintaining a full record of requests and then tracking them appropriately. This includes Ohio suggesting the creation of a public records log; Florida suggesting a system for tracking all requests by date and number; and the CEG suggesting not only creating tracking numbers

but supplying them to the requestor for direct tracking. The question about this best practice is not whether it should be done- but rather, in what manner and to what degree.

### 5. Using technology to reduce the number of requests and simplify the process for requestors

As noted, the CEG materials discuss creating a single source request portal. Portland and many other cities have this through GovQA. Having such a system creates an opportunity to centralize requests, assign tracking numbers for both internal and external use, and automate processes like sending acknowledgements to requestors.

However, technology can be used to go much further towards an "open data" stance for an agency. As the Sunlight Foundation has documented, several agencies and cities have begun placing requests, responses and the actual responsive materials on public records portals. CEG suggests as a best practice not only publishing materials that have been disclosed in response to FOIA requests but proactively identifying materials that can be disclosed and doing so in as user friendly a manner possible. Similarly Ohio recommends posting materials on an agency or entity's website to the extent possible, especially materials like minutes or public meeting notices that might otherwise necessitate a request to obtain. In practice, this can involve steps such as making agency information as well as underlying documents publicly accessible without ever having to make a public records request.

### 6. Minimizing the use of exemptions and exclusions from production

States and the Federal government differ in terms of how many exemptions and exclusions that they can exercise to shield materials from production. However, almost all of the materials reviewed emphasize the idea that given the nature of public records laws, agencies should default in favor of disclosure. CEG for example notes that under guidance from the Obama Administration, agencies are to presume disclosure and only withhold material 1) where doing so would pose "foreseeable harm" to an interest that an exemption protects or 2) "disclosure is prohibited by law." This same document also recommends adopting a position that to the extent businesses claim material submitted for agency review is confidential and therefore exempt from exclusion, that the burden be placed on the

business to justify the exemption at the time the material is submitted. The Sunlight Foundation's Guidelines for Open Data Policies similarly asserts most materials generated by government should be available, and should be made available proactively.

### Ways in Which DEQ Complies with Best Practices

Most of our interviews and observations confirmed that it's widely perceived that DEQ has a long-standing reputation as an agency that takes its public records obligations seriously. But after the stumbles of early 2016, DEQ leadership has felt the need to devote considerable time and energy to identifying shortcomings in its practices and developing new policies and training materials to improve its responsiveness to public records requests. DEQ's current management has also stressed to employees that Oregon's public records law should be seen as a law favoring disclosure – a sentiment also strongly echoed in the recent Executive Order from Governor Brown. DEQ has also taken recent steps to consolidate the public records process to ensure consistency and create more capacity to monitor public record requests.

In these respects and others, DEQ is clearly attempting to follow best practices. Moreover, interviews with other representatives of the media and other state agencies suggest that the issues confronting DEQ are not unique to it.

A recent Secretary of State audit found that DEQ's policies and practices were largely in compliance with existing doctrine, and the new DAS Model Policy on Public Records on its face does not impose significant new burdens on DEQ. However, there are some areas – primarily related to instant and text messaging – where changes will be necessary. Additionally if currently proposed legislation is passed, the timeline for complying with public records requests would be changed and DEQ's policies and practices would have to be adjusted.

Based on the materials provided for review, DEQ has created an extensive set of training materials on public records creation and retention that includes a discussion of public records requests. However, the material received dates to 2011, and it is unclear how frequently this training has been offered over the years. While a short ad hoc training -- on the history of Oregon's public records law and how to handle public records requests -- was recently provided to top DEQ managers by its acting Director, it's unclear whether such training will become a

regular and consistent part of DEQ's efforts, or how far it will extend to other employees within the organization.

Another aspect of DEQ's handling of public records requests demonstrating partial compliance with best practices is its use of technology. Public records requests at DEQ are all entered from a common portal on the DEQ website, which also contains information resources about fees and processes at an FAQ page. The request form is designed to narrow requests; requestors must limit their requests to a single location and are asked to identify the particular program(s) or regulation(s) at issue, if known. The DEQ site immediately acknowledges the request, and a request processor subsequently assigns it a unique identifier in the DEQ SharePoint system to track its progress.

As noted earlier, a DEQ staff person (often at the administrative assistant level) is assigned responsibility for each request, and is expected to monitor activity in SharePoint to determine whether and when requests are satisfied. Recently, DEQ added a link to a log of its public records requests for the last 30 days to its website as well. This log shows the name of the requestor, the nature of the request, the date of the request, date of acknowledgement, status and date of completion. (It does not, however, list the name of the DEQ staff professional assigned to be "on point" for the request).

With regards to certain topics and issues, DEQ has also shown a willingness to employ something approximating an open data strategy. On its website, DEQ directs potential requestors to certain materials, including a number of databases and mapping segments related to permit and cleanup efforts. For example, a member of the public can identify all regulated or permitted facilities in a particular county, city or zip code through its Facility Profiler interface. DEQ has also recently decided that for public requests relating to air toxics, it will post on its website the majority of the material it provides that's responsive to the request any time two or more requests seeking that or similar material have been made.

In particular, the area of air toxics is one where DEQ seems to be attempting to engage in best practices. A process has been set up to deal in particular with these requests that reflects a combination of streamlining, centralization of response, openness and responsiveness not embraced more generally throughout the agency.

For each request, a single point of contact is now identified; that person is expected to take proactive steps to fulfill the request promptly and coordinate all aspects of fulfillment. For complex requests that potentially generate fees -- including but not limited to requests for e-mails -- the DEQ point of contact is tasked with reaching out to the requestor to inform them of the process for obtaining a fee waiver. The DEQ staffer might also work with the requestor to pare down requests so as to minimize any costs. In addition, the point of contact is asked to have an eye towards anticipating future requests based on current requests and thus minimizing duplication.

Several Media members and public requestors who have engaged DEQ recently have noted these as positive steps, and this appears to have created some goodwill for DEQ. And as noted earlier, if there are multiple requests for the "same or very similar information about a facility/business," DEQ will post public information files online including "permits, inspections, source controls and other public records that would be released as part of our day to day records requests." However, it specifically exempts e-mails and complaints from public posting regardless of how frequently they have been requested.

### Ways in Which DEQ Does Not Comply with Best Practices

Despite its many laudable policy efforts, there are also a number of ways in which DEQ falls short of best practices.

While it has attempted to assign various personnel to oversee complex requests -- especially in the air toxics realm -- no one has both the responsibility and authority at the DEQ management level to effectively coordinate and respond to complex public records requests. There is a gap between policies as written on the creation and designation of confidential and exempt materials and actual practice, resulting in both over and under designation of exempt materials. (On at least one occasion, DEQ has inadvertently released confidential information to a journalist and has needed to request its return). This gap especially creates difficulties and delays in responding in a timely manner, especially to complex requests.

Long periods of silence -- especially when it takes one or more inquiries from requestors to finally be broken -- tend not to engender trust. In several instances, we interviewed requestors who felt it was their obligation to

periodically call their designated contact at DEQ to find out the status of a request, some of which were several months old. "It seemed that if I didn't ask, they'd simply consider it dropped," one observed.

As a general proposition, DEQ is seen by most of the journalists and citizen activists we interviewed as reactive when it comes to public records requests, rather than proactive in identifying the types of materials that are generally the subject of both mundane and complex requests and moving more towards an open data footing regarding these materials. From the perspective of requestors, the process at DEQ can even seem opaque, leading to frustration and even doubts about the agency's intentions. One citizen activist -- Jessica Applegate of East Portland CleanAir Coalition-- described it this way: "We found the DEQ process a series of blockades, mazes, and rabbit holes."

Below are several specific areas where the gap between DEQ's current approach and best practices is most notable.

1. No One Has Both the Responsibility and Authority to Coordinate Most Complex Requests

As noted, all public records requests come into DEQ on a common web-based portal. The requests do not themselves generate work files or begin the process of actually fulfilling the request. Instead, the request generates an e-mail to a common account and an auto-generated acknowledgement with general information -- but crucially, nothing that provides a tracking number or follow up contact for the requestor. From this point, a designated "public records request processor (PRR processor)-- chosen among one of the 13 administrative staff throughout the agency who rotate the duties -- uses the e-mail as a basis for creating a file in SharePoint. That then triggers a designation of a "PRR Coordinators" throughout the agency. Once this is done, the PRR processors have no further involvement with fulfilling requests or contacting the requestor.

The diffuse nature of request fulfillment by processors and coordinators deviates from best practices. The rotating nature of the processing task creates a potential for inconsistency. Interviews suggest that there were no centralized expectations or training for people asked to serve as coordinators on issues such as the identification of confidential or otherwise exempt materials. Rather, every unit or program can designate one or more

individuals to handle fulfilling PRRs, and that person's name is provided to the processors. For one unit, such as Enforcement, it may be an administrative staffer who knows document storage and protocols intimately, but for another it may be someone who is a subject matter expert with significant non-administrative obligations. Interviews further indicate that for both processors and coordinators the priority afforded a given public records request will depend on the current level of work in a given program area and the views of individual program managers. Such requests are often seen as a burden rather than a core obligation of DEQ to interact with the public.

Complex requests present especially acute challenges. Requests that span multiple programs in a region or multiple regions leave the nominal PRR coordinator dependent on several other people to fulfill obligations such as estimating the burdens of compliance, assembling the materials and reviewing them for confidential or otherwise exempt material. This creates two additional potential problems relative to best practices. Initially, there is no single person with both responsibility and authority to accomplish the task of compliance. At best the PRR coordinator must invoke informal delegated authority from a regional administrator, or in the case of statewide requests the agency director. This again creates a potential for requests not to be prioritized or followed through on. Moreover, it does not appear that anyone's job performance is rated based on their conduct with regards to fulfilling public records requests, although the agency does track fulfillment overall.

2. DEQ Staff do not Consistently Follow Document Handling Protocols, Resulting in Over and Under Designation of Confidential Materials and Commingling of Materials

As noted above, DEQ does have a fairly thorough set of policies on records handling. One critical policy regarding public records materials is that materials should be designated confidential as they are identified and segregated from non-confidential materials so as to ensure that exempt materials are not inadvertently disclosed. Additionally, the agency has extensive policies on file naming conventions and similar protocols that are meant to assist with the identification of relevant materials, appropriate storage, handling and disposal. However, interviews indicate that these policies are not always followed in practice.

In particular, it has also been noted by DEQ personnel that staff do not appropriately use confidential designations on materials, rendering such designations of limited use in identifying potentially exempt materials. Instead, after a request is received, the relevant materials must first be reviewed individually to try and limit the release of confidential material. This in turn delays compliance with public records requests. Moreover, it simply isn't always effective. As has been noted by media members and other recipients of documents, confidential material has been co-mingled with non-confidential information when paper records are made available for inspection. These inadvertent disclosures have included personnel information, personal identifying data and similar materials.

These difficulties are exacerbated in the context of e-mails. Requests for e-mails can routinely generate tens of thousands of records, and reviewing them individually for confidential material is time consuming. Because of a lack of consistent use of designations and labels (e.g, "confidential" or "attorney-client privilege") on a number of occasions senior management has undertaken these often time-consuming reviews. This in turn has further delayed production of the materials due to the capacity constraints of these individuals.

3. DEQ Staff are not Regularly and Consistently Trained on Public Records Protocols

Although there are extensive training materials on document management in general, specific guidance relative to public records and public records requests are only a small subpart of this material. Moreover, it appears that detailed training on how best to handle public records requests is much more limited and primarily received by people designated as PRR processors or PRR coordinators. This reinforces the perception that public records requests are not a significant aspect of DEQ's obligations, and represent a burden that should be avoided. This also can lead to difficulties in ensuring that requests are treated as priorities within the organization as most employees do not understand the importance of such a request.

4. DEQ's Processes Are Opaque and Potentially Frustrating to Requestors

When a request is made on the DEQ website, an e-mail acknowledgement is auto-generated. However, this acknowledgement does not by itself appear to satisfy ORS 192.440(2) as it does not indicate that DEQ is

uncertain about the existence of responsive records or state DEQ will search for the materials and respond “as soon as practicable.” In fact, outside of air toxics issues, no one at DEQ is tasked with reaching out to the requestor immediately. What’s more, the requestor is not given any contact information or a means to track the status of their request. Instead, the first update a requestor will often receive is the actual production of the materials (in the case of a simple request) or a fee estimate (in the case of a more complex request). Although fee waivers are available, until a recent shift in policy they were capped at \$200 per year, and the process for obtaining one was not actively communicated to all requestors.

Requestors overall have expressed a measure of frustration with DEQ’s processes, although the degree of frustration varies significantly. Some suggest DEQ seemed hostile and reluctant to comply, and then did so only grudgingly. These same requestors also have expressed frustration with what appear to be inconsistent treatment of fees depending on the request and who handles it. Others are more understanding, but still suggest that fee estimates discourage them from seeking materials and that they generally have to prod the agency to get updates on issues. In one specific area -- air toxics requests – there is a perception of a more receptive and transparent attitude, although as noted those policies did not always comport with existing administration policy and have led to some internal difficulties. In particular, protocols were bypassed in a way that led to some requests being fulfilled without a record at the agency and in others requests languished due when appropriate approvals were not sought for e-mail searches.

#### 5. DEQ Has Not Leveraged Technology to its Advantage

While there have been changes to the request processing system, the current system is largely tasked with handling on an individual basis many requests that could be fully automated. DEQ knows, for example, that the vast majority of individual requests are for discrete documents that contain no confidential information. Requests for documentation that a property had on-site wastewater treatment, for example, make up approximately two-thirds of all requests. These requests are so straightforward and routine that there is a flat fee associated with them to avoid the need for estimates. But while all these records are produced electronically, each one must be processed as an individual public

records request, which consumes staff time and effort that arguably could be better spent handling other tasks, such as reviewing documents responsive to complex requests.

DEQ to date has also lagged behind other jurisdictions and environmental protection agencies in using GIS and other mapping technology to help put certain public records online in a more accessible way. Earlier this year, citizen volunteers for Portland Clean Air aggregated various databases available through DEQ, the EPA, and other agencies to create a Portland-area map that allows users to click on a given facility’s location to view basic information (and in some cases, see the entity’s discharge permit and other data including inspection reports). As noted in a June 25, 2016 Oregonian article by Rob Davis, Seth Woolley and Greg Bourget spent more than 40 hours scanning paper copies of several thousand permits, for which the \$800 proposed fee was eventually waived when they threatened to sue. (DEQ said that making the same information available in electronic form would have cost even more). The website their group created as a result – which is not an official DEQ site -- can be found at <http://portlandcleanair.org/>

DEQ’s current leadership has expressed interest in making significant technology-related changes that could make public records more accessible (and perhaps obviate altogether the need to “request” them). For example, DEQ is currently in testing of HPRM records management software, which has the potential to allow for public access to non-confidential materials. Adopting the GovQA document request portal application is another short term approach to marshalling some of the available information in a more user friendly format and providing simplified production. In both cases, previously requested materials could be archived and made part of a growing database of publicly accessible information.

Moreover, there is a proposed revision to shift to completely electronic data management – the EDMS system – that would similarly allow for most of the administrative burden associated with routine requests to be eliminated. These reforms, though, are currently at different stages of development, and none are ready for immediate and complete implementation by DEQ.

#### 6. DEQ is Primarily Reactive rather than Proactive to Both Public Records Requests and Public Engagement

As a whole, DEQ's procedures are a reactive system. Requests come in, estimates go out, and requestors largely are responsible for engaging to ensure they get the materials they want. If a requestor doesn't respond to a fee estimate, the request is simply closed. Moreover, requestors are not given the means to easily identify who is tasked with handling their request or tracking the progress of the same.

In our analysis and interviews, we found little if any effort being made for staff to proactively anticipate the sorts of public records that would be the subject of future requests and review. Only recently has there even been an effort to identify materials that, having been the subject of multiple requests, should be made available for the entire public – and even these omit certain key materials.

Similarly, although DEQ has a broad array of public engagement responsibilities, these too are often handled in a reactive or ad hoc manner at present. This tendency appears to largely be a function of the way staff has been organized in recent years. Both of these suggest a need to shift to a structure that will allow for strategic thinking and approaches to these issues.

It is admittedly somewhat counterintuitive to think of proactively managing requests for public records. However, with the emergence and ubiquitous nature of electronic records and communications in everyday life, members of the general public, the media and interest groups all expect that their interactions with public agencies will be as straightforward and seamless as many of their best interactions with businesses. Additionally, there has been a renewed interest in the wake of recent revelations at the local, state and national level in investigating all aspects of government communications. Coupled with the strong language of Oregon's Public Records Law, and the state's commitment to open government, it would benefit DEQ to shift towards a more proactive position in which most materials generated by the agency are automatically available to the public, with only truly exempt materials ever being withheld.

To its credit, DEQ has put quite a large amount of information in the public domain. The DEQ website contains a number of databases – including the Facility Profiler and GIS files – that are highly useful for individuals who know how the agency operates and/or the significance of these materials (These databases

could also be even more visible and useful to a broader range of citizens by marrying them to GIS and other mapping technologies). Similarly, the air toxics web pages now allow the public access to significantly more relevant information than available in the past, although by no means all of it. However, much of this information is presented in ways that most members of the public might find it difficult or even intimidating to access – and still does not include most of the core materials generated by DEQ.

Currently, it would be difficult for DEQ to meaningfully move towards full transparency with regards to its materials. This is in part a result of the current distribution of materials in both electronic and paper form. It is also due to the fact that records have been retained somewhat haphazardly at times, with many staff tending to retain more documents than required under the records retention schedule currently in place. Another barrier is the inconsistent use of designations relating to confidential information. Without a concerted effort to identify these inconsistent practices, and work with staff throughout DEQ to remediate and eliminate these problems, DEQ will continue to struggle with a wide range of public records requests from members of the news media and the general public.

Another key theme that emerged from our review and interviews is that DEQ staff largely do not see public records requests as a critical element of public engagement. They have instead tended to treat these inquiries as a secondary, and a more clerical task – i.e., something to be endured rather than embraced. Indeed, public affairs staff typically does not get notified, much less involved, with public records requests unless the media is visibly involved -- and even then they tend to be ancillary participants. This in turn has led to interactions in which requestors feel as though DEQ is not being helpful, which is obviously not beneficial for DEQ's public standing.

Beyond public records, DEQ's overall interactions with the public tend to be issue driven and somewhat reactive as well. DEQ has a broad variety of interactive engagements with the public, including:

- Rulemaking by the EQC
- Public hearings by staff and EQC
- Public notices
- Press releases
- Press conferences and/or tours for the press
- Circulation of draft permits for comment

Enforcement and compliance actions  
Education of permit holders and the public on  
compliance with permit conditions

More generally, DEQ's mission in no small part rests on public engagement. Few state agencies are as well known and visible as DEQ. Its history is deeply intertwined with Governor Tom McCall and his and others' efforts during the 1950s and 1960s to clean up pollution in the Willamette River. The Environmental Quality Commission was created in 1969 in response to Oregonians' widespread concerns about air and water pollution – and its citizen members still retain statutory authority (rather than the Governor) to hire or fire DEQ's director. In the metropolitan area most automobile owners must still take their cars through a DEQ emissions testing station in order to renew their car registrations.

This makes it all the more important that as one of Oregon's most high profile state agencies, DEQ recognizes the importance of a proactive approach to civic education to help ensure that the public understands the role it plays, its accomplishments, the challenges it confronts, and how the public can assist with those challenges. Doing so requires a coordinated approach to communication that permits the agency to get clear, truthful information to the public in a timely manner, but also in a way that reflects a coherent perspective.

For a variety of reasons, DEQ currently has a less coordinated approach to public engagement and media relations in particular. Additionally, communications staffing has undergone a transition in the last several years. The former Office of Communications and Outreach was disbanded, and instead individual Public Information Officers were assigned to report to different managers. In particular, three were assigned to report to regional administrators, while two at DEQ headquarters report to different program managers. Also, the website team and support staff were re-assigned within central services.

Coupled with the fact that several of the 5 PIO positions were vacant until recently led to a perception in some quarters that communications assistance and guidance were no longer a priority for DEQ. Some PIOs report that staff did not seem to be aware communications staff still existed at the agency. At the very least, this has led to a potential for inconsistency in approaches to communications among the PIOs.

This shift in organization has also had a tendency for the agency not to have a strategic, agency wide approach to engagement efforts. There has been a tendency for PIOs to look to their regional management to help define roles and tasks, as well as relying on the support of the Regional Administrators to bolster their efforts and gain the support of technical staff. They work with staff to help them get ready for public meetings; they conduct workshops on writing for public audiences; they help prepare press releases; and putting together PowerPoint presentations. While significant and important, these efforts tend to lack a coherent theme or vision behind them.

Media relations is also an area where DEQ has historically taken a less coordinated approach than is typical for public agencies. The organization has tended to reflect an approach that as subject matter experts, program staff are better positioned to speak to the press than communications personnel. The press in turn has come to expect access directly to staffers. While this reflects one view of organizational transparency, it increases the odds of miscommunications in other dimensions. Recently, for example, a reporter who had requested to speak with someone about issues relating to a PCC location subsequently asked the staffer about a landfill at length. When the staffer innocently stated they didn't know anything about it, it was reported as though DEQ as an agency had no information relating to the issue. This was a situation where a centralized approach to communication would have ensured the shift in topic did not result in a perception that no one at DEQ was unaware of any issues with this particular location.

The impact of this lack of centralization has been noted by many DEQ staff at several levels. The public affairs staff has attempted to craft informal approaches for coordinating their efforts, including e-mails and conference calls to keep each other apprised. Just recently, the acting DEQ director elevated one of the 5 PIOs to act in a lead worker role – a constructive step forward. This designation permits the lead PIO to coordinate and assign work, although it does not convey managerial authority over the performance and actions of other staffers. The new position also lacks responsibility for overseeing the work of staff responsible for DEQ's website, who to date have not been actively engaged as part of the agency's larger communications function. Multiple interviews suggested that this is a deficiency worth a deeper review and

analysis, since having an inconsistent approach to web content and other communications can create problems that range from embarrassment to the appearance of duplicity.

It's also worth noting that recently DEQ's acting director has begun weekly conference calls with public affairs staff so that he can be briefed on what is going on with the media statewide. While to date these sessions have been primarily advisory and informational, they could evolve into something more strategic, especially with the addition of new personnel whose primary focus is the public records side of the outreach equation.

Overall, for some time DEQ has largely presented itself to be in a reactive and fragmented posture with regards to public engagement and communications. This reactive stance has led to difficulty in presenting a vision for the agency or a coherent voice, and led to a lack of coordination on media issues including both responding to media inquiries and public records requests. More generally, DEQ has for some time lacked the organizational capacity and resources to address complex records requests in a timely and transparent matter – much less shown the strategic inclination and ability to develop a comprehensive approach to engaging with the citizens of Oregon or the larger challenge of how best to promote open governance in an era whose technology is far different than the paper files, newspapers, and manual typewriters of the 1960s.

## Recommendations for Personnel, Policy and Infrastructure Changes at DEQ

In light of the foregoing findings, CPS has identified a number of changes it would recommend to the DEQ. These include the creation of two new positions, in keeping with Track I of the engagement. These also extend to recommendations relating to policy and infrastructure in light of the evaluation of gaps in DEQ's performance relative to best practices in keeping with Track II of the engagement.

One necessary but not necessarily sufficient condition for success is a more centralized leadership structure for communications and public engagement. This need extends both to having the capacity to craft and present an agency wide vision for DEQ and to ensure consistent interactions with the media and public. This latter obligation extends to having a more responsive, proactive approach to public records requests as an element of public engagement. In particular, DEQ needs to have both a valorized conception of public records and an internal party responsible for ensuring that all public records requests are handled in a timely fashion.

For these reasons, CPS endorses creating two new positions within DEQ. The first, the Public Records Disclosure and Engagement Manager, would largely possess the responsibilities discussed in the scope of work. They would be the logical successor to the manager role in a reconstituted Office of Communication and Outreach, and would directly report to the Director of DEQ. The position would specifically have managerial responsibilities as follows:

- Supervision of DEQ's public information officers assigned to the agency's headquarters (2.0 FTE) and three regions (1.0 FTE per region).
- Supervision of DEQ's Public Records Officer (1.0 FTE). Pursuant to ORS 192.105 (2)(a), DEQ must employ a Public Records Officer whose responsibilities generally relate to records retention. DEQ currently is in compliance with the command of this statute.

- Supervision of DEQ's web staff (2.0 FTE).
- Supervision of administrative support with responsibility for public interaction (front desk receptionists – 2.0 FTE).
- Supervision of the EQC support staff (1.0 FTE).
- Supervision of a Public Records Request Coordinator (1.0 FTE) – also a new position.

The Public Records Disclosure and Engagement Manager will be part of DEQ's Executive Staff. He or she would advise the Director as to how to continuously improve DEQ's administrative rules, policies, procedures, and practices to more completely fulfill the disclosure mandate of the Public Records Law. The PRDE manager would also have authority to compel actions throughout the agency necessary to comply with public records requests, though he/she could also delegate such authority as warranted to the proposed Public Records Request Coordinator. Should DEQ decide to modify further its fee waiver policy – e.g, in certain cases waive it up front, without the need to ask staff to make estimates or require requestors to specifically waive a proposed fee – the PRDE manager could be vested with this responsibility as well, subject to establishing clear criteria so as to still discourage inappropriate and/or overly broad requests. The PRDE manager would also advise the Director on strategic communications opportunities and implementing a coherent communications vision for the agency.

The second position CPS recommends is the creation of a Public Records Request Coordinator. This individual would report directly to the Public Records Disclosure and Engagement Manager, with responsibility for serving as the lead technical authority within the agency on how best to execute DEQ's fulfillment of the mandate of the Public Records Law. This would include the following responsibilities:

- Being aware of every significant public records request received by DEQ, and ensuring that every such request – regardless of its complexity -- is timely processed.
- Coordinating all activities of DEQ in relation to requests, and being the first point of contact for requesters with concerns or questions about DEQ's handling of their requests.

- Serving as the agency's subject matter expert on the Public Records Law and exemptions from compulsory disclosure, and conducting any analysis that may be required to determine whether any exemptions from compulsory disclosure apply to any of the materials to be produced to the requester. Subject to oversight by the Public Records Disclosure and Engagement Manager, the Public Records Request Coordinator could be empowered to waive exemptions that are applicable under the law, but where he or she determines that no public interest is furthered by exempting the materials in question.
- In coordination with the Records Officer, creating and conducting training in the handling of public records requests and compliance with the Public Records Law as well as creating reference materials for staff.
- Identifying and executing opportunities for DEQ to enhance the transparency of its operations in furtherance of its mandate under the Public Records Law.
- Serving as a liaison with the Enforcement Division and Attorney General's office on matters requiring the production of DEQ materials.

Because of the nature of the functions involved, it would be likely that the PRRC should have some background in the law or legal training, and ideally in Public Records Law in particular. Given the parallels and potential overlap with litigation, a candidate with a law degree and experience in discovery (whether or not actively practicing) or an experienced paralegal might be optimal. Experience in training document reviewers or coders and working on large scale discovery projects would also be beneficial, as would knowledge and familiarity with DEQ's structure and organizational culture.

A departmental organizational chart illustrating these personnel changes is included with this report as Appendix B.

Beyond creating these positions, the review of DEQ's policies and practices, as called for in Task II, suggests the potential for several other avenues for change. Initially, DEQ needs to institute and consistently provide

training on document management -- and in particular public records law and requests. It should also consider ensuring that employees who are involved in these processes are actively evaluated on these tasks and that management at the program and regional level are also evaluated on how well their employees provided accurate and timely responses.

If DEQ intends to continue to rely on an auto-generated acknowledgement of records requests, it should alter the language of the request to more clearly comply with ORS 192.440(2). Specifically it could include a statement that DEQ is not certain if it possesses responsive materials, that it will conduct a search and respond as soon as practicable. It could also shift to including tracking and direct contact information in its initial communications with record requestors.

From a technical perspective, DEQ could minimize redundant and routine requests by expanding its commitment to an "open data" approach to its operations. This could include making more materials accessible to the public through adopting HPRM or GovQA; making the actual process of requesting records much more transparent; making permanent a lift on the cap on fee waivers and/or eliminating fees for most requests; or placing all requested records into publicly accessible and searchable formats online, among other opportunities.

Assessing the relative merits of these and related options would require a more in depth scouring of best practices in other jurisdictions. Such an effort would also require a more detailed and technical assessment of DEQ's records system, and the identification of how DEQ's existing organizational culture and appetite (or lack thereof) for innovation and best practices needs to evolve in order to achieve success.

Indeed, our final recommendation is that the time is apt -- and necessary -- for DEQ as an organization, under soon-to-be new leadership, to ask important (and at times difficult) questions about how it positions itself in the future to build on a half-century legacy of public service that in recent years has been shaken by its perceived poor performance in the arena of public records.

DEQ has historically been a program and task oriented agency that prizes technical expertise -- and for that, it and its employees have much to be proud of. Unfortunately, the focus on technical expertise at times

has conveyed that DEQ managers do not value or prioritize public engagement as a key element of its mission. To shift from being perceived this way, to become an agency that sees itself as a partner of the public where every document generated should be presumed to be open to the public and where the agency proactively engages with the public to that end, is no small task. But it is a necessary step if DEQ wishes to become an exemplar among its peers as to how to craft

and then execute best practices in public records and public engagement.

Implementing these recommendations will require the investment of staff time as well as a financial commitment. Shifts in organizational culture are slow and sometimes painful. However, if the DEQ wants to succeed in its vital mission of protecting our environment and public health, it needs to find a way to achieve this change.

## Appendix A: List of Interview Subjects

1. Pete Shepherd, Acting DEQ Director
2. Leah Felden, Deputy DEQ Director
3. Nina DeConcini, NW Regional Administrator DEQ
4. Nanc Tuttle, DEQ
5. Melissa Aerne, DEQ
6. Ella Maney, DEQ
7. Katherine Benenati, DEQ Western Region
8. Greg Svelund, DEQ Eastern Region
9. Marcia Danab, DEQ NW Region
10. Clint Bollinger, DEQ
11. Matthew Vansickle, DEQ
12. Kerri Nelson, DEQ
13. Greg Aldrich, DEQ
14. Dana Huddleston, DEQ Western Region
15. Jennifer Flynt, DEQ
16. Mimi Meador, DEQ NW Region
17. Mike Kortenhof, DEQ
18. David Andrews, DEQ
19. Dick Pedersen, Former DEQ Director
20. Jane O'Keeffe, Chair of EQC
21. Morgan Rider, EQC
22. Ed Armstrong, EQC
23. Colleen Johnson, EQC
24. Melinda Eden, EQC
25. Matt Brown, Oregon Secretary of State's Office
26. Kristen Grainger, Office of the Governor
27. Emily Matasar, Office of the Governor
28. Matt Shelby, Department of Administrative Services
29. Michael Kron, Oregon Attorney General's Office
30. Joanie Stevens-Schwenger, Oregon Lottery
31. Sarah Curtiss; Stoel, Rives Law Firm
32. Chris Winter; Craig Law Center
33. Greg Bourget, Portland Clean Air
34. Doug Quirke, Oregon Clean Water Action
35. Seth Wooley and Jessica Applegate, Clean Air Coalition
36. Tony Schick, OBP
37. Sara Roth, KGW
38. Steve Duin, Oregonian
39. Brent Walth, Formerly with the Willamette Week
40. Rob Davis, Oregonian

# Appendix B: Proposed Public Records Disclosure and Engagement

## Department Organization Chart

