

DECISION MEMORANDUM

TO: COMMISSIONER KJELLANDER
COMMISSIONER REDFORD
COMMISSIONER SMITH
COMMISSION SECRETARY
COMMISSION STAFF

FROM: DON HOWELL
DEPUTY ATTORNEY GENERAL

DATE: JULY 18, 2014

SUBJECT: ADOPTION OF PUBLIC RECORDS ACT “GUIDELINES” AND
DELETION OF THE COMMISSION’S PUBLIC RECORDS ACT
“RULES,” IDAPA 31.02.01

The Idaho Legislature enacted the Idaho Public Records law in 1990. *Idaho Code* § 9-347 provides that every state agency “shall adopt guidelines that identify the general subject matter of all public records kept or maintained” by the Commission, the custodian, and the physical location of such documents. (Emphasis added.) Pursuant to this section, the Commission promulgated its Public Records Rules found at IDAPA 31.02.01. Given the time and expense at maintaining official rules under the APA, Staff is recommending that the Commission adopt Public Records Guidelines – consistent with the statute – and repeal its Public Records Rules. Attached for your consideration, review and approval are the proposed Public Records Guidelines which are substantially the same as the Commission’s existing Public Records Rules.

Adoption of “Guidelines” would substantially reduce the cost of maintaining and promulgating amendments to the Commission’s public records procedures. Currently, the Office of Administrative Rules charges each state agency for maintaining administrative rules. In addition, as the Commission is well aware, amending rules is a time-consuming and expensive process. Converting the Commission’s existing Public Records Rules to Guidelines will save expenses and allow the Commission to implement changes in a more efficient manner.

COMMISSION DECISION

1. Does the Commission wish to approve the draft Public Records Guidelines contained in the attachment? Does the Commission have any changes or comments?
2. Does the Commission wish to repeal its Public Records Rules contained at IDAPA 31.02.01?



Don Howell
Deputy Attorney General

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**PUBLIC RECORDS ACT GUIDELINES OF THE
IDAHO PUBLIC UTILITIES COMMISSION**

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INTRODUCTION

000. LEGAL AUTHORITY.

These guidelines are adopted pursuant to *Idaho Code* §§ 9-337 through 9-349 (commonly known as the Public Records Act) and in particular *Idaho Code* § 9-347. Every request for copies of records maintained by the Commission will be processed under these guidelines.

001. STATEMENT OF POLICY.

It is the Commission's expectation that the overwhelming majority of requests to inspect, examine or copy public records will be routinely and informally granted. Ordinarily, the Commission anticipates that records made subject to inspection, examination and copying by statute may be requested orally in person, by telephone or by e-mail and the request will be promptly granted. In addition, public records from formal proceedings may be examined and copied from the Commission's website: www.puc.idaho.gov. However, when the request implicates records made exempt from disclosure by statute or involves voluminous material (more than one hundred (100) pages total), the request for inspection, examination and copying may be asked to be reduced to writing.

002. WRITTEN INTERPRETATIONS--AGENCY GUIDELINES.

Before July 1, 2015, the Commission issued administrative rules for requests to review and copy public records. Explanatory comments accompanying the notice of proposed rulemaking and was published into the issues of the Idaho Administrative Bulletin. The Commission orders adopting public records rules prior to 1993 are maintained in the files of the Secretary of the Commission. The Commission Secretary may be contacted in writing at the Commission, PO Box 83720, Boise, Idaho 83720-0074, or may be reached by telephone at (208) 334-0300 [secretary@puc.idaho.gov].

003. ADMINISTRATIVE APPEALS.

There is no provision for administrative appeals within the Idaho Public Utilities Commission from a decision that a record cannot be inspected, examined or copied. Judicial review is available under *Idaho Code* § 9-343.

004. PUBLIC RECORDS ACT COMPLIANCE.

Written requests to inspect, examine or copy public records are themselves public records. The Commission's written responses to requests to inspect, examine or copy public records are themselves public records.

005. DEFINITIONS.

The following definitions are used in these guidelines:

- 01. Commission.** "Commission" means the Idaho Public Utilities Commission and its staff.

02. Copy. “Copy” means transcription by handwriting, photocopy, duplicating machine or reproduction by any other means that does not alter or damage a public record. See *Idaho Code* § 9-337(2).

03. Custodian. “Custodian” means the person having personal possession and control of public records. Ordinarily, official documents of the Commission are in the legal custody of the Commission Secretary and in physical possession of the Secretary’s staff. In addition, certain files and documents may be in the possession or control of the Commissioners, the public information officer, the fiscal officer, or the heads of the Commission divisions, personnel of the division staffs, or available on the Commission’s website: www.puc.idaho.gov. See *Idaho Code* § 9-337(3).

04. Critical Infrastructure Information. “Critical infrastructure information” means those records described in *Idaho Code* § 9-340B(4)(b) and include, without limitation, specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

- a. Relates details about the production, generation, transportation, transmission or distribution of energy;
- b. Is exempt from public disclosure pursuant to 18 C.F.R. § 388.112-.113; and
- c. Does not simply indicate the general location of critical infrastructure.

05. Inspection. “Inspection” means the right to listen to, view and make notes of public records as long as the public record is not altered or damaged. See *Idaho Code* § 9-337(5).

06. Investigatory Record. “Investigatory record” means information with respect to an identifiable person, group of persons or entities compiled by the Commission pursuant to its statutory authority to investigate specific acts, omissions, failures to act, or other conduct over which the Commission has regulatory authority or law enforcement authority. Investigatory records before the Commission include informal complaints or inquiries concerning utilities, audits and investigations of utilities, memoranda or similar documents recommending whether audits or investigations of utilities should be initiated, or other information falling within the statutory definition of investigatory records. See *Idaho Code* §§ 9-337(6), (7); 61-701.

07. Person. “Person” means any natural person, corporation, partnership, firm, association, joint venture, state or local agency or any other recognized legal entity. See *Idaho Code* § 9-337(9).

08. Public Record. “Public record” includes, but is not limited to, any writing containing information relating to the conduct or administration of the public’s business prepared, owned, used or retained by the Commission, regardless of physical form or characteristics. See *Idaho Code* § 9-337(13).

09. Trade Secrets. “Trade secrets” mean information, including a formula, pattern, compilation, program, computer program, device, method, technique, process or research that:

a. Derives independent economic value, actual or potential, from not being generally known to or not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. See *Idaho Code* §§ 9-340D(1); 48-801(5).

10. Writing. “Writing” includes, but is not limited to, handwriting, typewriting, printing, photostating, photographing and every other means of recording, including letters, words, pictures, sounds or symbols or a combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums or other documents. See *Idaho Code* § 9-337(16).

11. Confidential Records. “Confidential records” means those documents that contain information exempt from public disclosure as set out in *Idaho Code* §§ 9-340A through 9-340H.

**KINDS OF PUBLIC RECORDS MAINTAINED--
CUSTODIAN--LOCATION OF RECORDS--INSPECTION
OR EXAMINATION OF RECORDS**

101. RECORDS OF FORMAL PROCEEDINGS.

Records of formal proceedings, which are described in the Commission’s Rules of Procedure, IDAPA 31.01.01.000 *et seq.*, include all records in the Commission Secretary’s official file as detailed in the Rules of Procedure. These records are in the custody and possession of the Commission Secretary, the Secretary’s staff, and may be available on the Commission’s website: www.puc.idaho.gov. All records of proceedings may be inspected, examined or copied by any person under the procedures of *Idaho Code* § 9-338 and these guidelines, except as the Rules of Procedure recognize statutory exemptions from disclosure of certain discoverable material, or unless exempted from disclosure under *Idaho Code* §§ 9-340A through 9-340H.

102. TARIFFS--PRICE LISTS--CERTIFICATES--PERMITS.

Proposed, current and past tariffs and/or price lists showing utilities’ rates and charges for service, service offerings, conditions for service, rules for providing service, etc., are in the custody and possession of the Commission Secretary and the Secretary’s staff or the clerical staff of the Utilities Division, or may be available on the Commission’s website: www.puc.idaho.gov. Ordinarily, records pertaining to utilities are in the document room in the Commission’s Administration Division or in the Utilities Division, except that dated records may be in rented storage. These records may be inspected, examined or copied by any person under the procedures of *Idaho Code* § 9-338 and these guidelines.

103. STATUTORY REPORTING--REPORTS SUBMITTED PURSUANT TO ORDER OR RULE.

Reports submitted under *Idaho Code* §§ 61-401 through 61-406, 61-517, 61-531 through 61-537, 61-902, 61-1003, 62-611, 62-1302 or other statutes, and reports submitted pursuant to order or rule are in the custody and possession of the Commission Secretary and the Secretary's staff or the clerical staffs of the Utilities Division or Fiscal section. All those reports may be inspected, examined or copied by any person under the procedures of *Idaho Code* § 9-338, and of these guidelines, unless exempted from disclosure under *Idaho Code* §§ 9-340A through 9-340H.

104. DECISION MEETINGS--AGENDAS FOR DECISION MEETINGS.

Minutes of the Commission's decision meetings and agendas of its decision meetings are in the custody and possession of the Commission Secretary in the Secretary's office. These records may be inspected, examined or copied under *Idaho Code* § 9-338, except, when the Commission has declared an executive session pursuant to *Idaho Code* § 67-2345, minutes from the portion of the decision meeting that involve the executive session are exempt from disclosure to the extent provided by *Idaho Code* §§ 67-2344 and 67-2345.

105. COMPUTER PROGRAMS--COMPUTER MODELING--COMPUTER DATA.

The Commission maintains substantial information on computers. Computer terminals with access to the information are located throughout the Commission's offices. Copyrightable computer programs or copyrightable compilations of data purchased, leased or obtained from sources outside Idaho state government, and other programs or data the release of which would contravene federal or state laws protecting intellectual property are exempt from disclosure under *Idaho Code* § 9-340A. Unless covered by the previous sentence, or unless exempted from disclosure under *Idaho Code* §§ 9-340A through 9-340H, computer programs and data bases used or developed by the Commission and its staff may be inspected, examined or copied by any person under the procedures of *Idaho Code* § 9-338 and of these guidelines.

106. INVESTIGATORY RECORDS.

Investigatory records of the Commissioners and individual staff members are in the custody and possession of personal or divisional files in offices throughout the Commission. Investigatory records are exempt from inspection, examination or copying under *Idaho Code* § 9-340B, provided that, when investigatory records are placed in public files like the Commission Secretary's official file, they cease being exempt and they may be inspected, examined or copied by any person under the procedure of *Idaho Code* § 9-338, and of these guidelines. Investigatory records may be examined by or disclosed to the objects of the investigation pursuant to *Idaho Code* § 9-335.

107. PERSONNEL RECORDS.

Personnel records for the Commission's employees are in the custody and possession of the Administration Division of the Commission, division heads or individual personnel. Personnel records are exempt from disclosure under *Idaho Code* § 9-340C, except as made public by that section.

108. CONFIDENTIAL OR EXEMPT RECORDS.

Records that are exempt from public disclosure under *Idaho Code* §§ 9-340A through 9-340H or protected from public disclosure pursuant to Rule 67 of the Rules of Procedure, IDAPA 31.01.01.067 will not be available for public inspection and copying. Confidential or exempt records include, without limitation, critical infrastructure information under *Idaho Code* § 9-340B(4)(b) and 18 C.F.R. § 388.112 through .113, trade secrets under *Idaho Code* §§ 9-340D(1) and 48-801(5), sale and purchase documents under *Idaho Code* § 9-340D(2), and documents related to the issuance of securities under *Idaho Code* § 9-340D(5). Commission staff may refer inquiries about confidential records to the entity or individual that created the record.

109. MISCELLANEOUS RECORDS.

If records in the custody or possession of the Commission do not fit into any of the categories of Guidelines 101 through 108, they are considered miscellaneous records. Ordinarily, miscellaneous records are maintained in individual's offices or files. There will be a case-by-case determination whether miscellaneous records are open to inspection, examination and copying under *Idaho Code* § 9-338, or are exempt from disclosure under *Idaho Code* §§ 9-340A through 9-340H, except that materials protected from copying by federal copyright law are always exempt from copying.

REQUESTS TO INSPECT, EXAMINE OR COPY PUBLIC RECORDS--RESPONSES TO REQUESTS

201. TIMES FOR EXAMINATION.

Public records subject to inspection, examination and copying may be reviewed in the Commission's offices at 472 West Washington Street from 8:00 a.m. to 5:00 p.m., Monday through Friday, except state holidays or nonjudicial days. The examination may be reasonably restricted to allow the custodian of documents to retain control of the documents inspected or examined to prevent their removal, alteration, or destruction. The Commission may provide for inspection, examination or copying of public records outside normal business hours or outside the Commission's offices under appropriate circumstances. Public records maintained on the Commission's website may also be examined. See *Idaho Code* §§ 9-338(7).

202. REQUESTS IMPLICATING RECORDS EXEMPT FROM DISCLOSURE.

When a person requests to examine records that may be exempt from disclosure under *Idaho Code* §§ 9-340A through 9-340H, the person making the request may be asked to reduce the request to writing. Within three (3) working days after receiving this written request, the requester will be notified in writing whether or to what extent the request is granted or denied. If the request is denied in whole or in part, the written notification will be signed by a Commissioner, the Commission Secretary or one of the Secretary's deputies, or a Deputy Attorney General assigned to the Commission, and, if not signed by a Deputy Attorney General, shall indicate that a Deputy Attorney General assigned to the Commission has been consulted and believes that there is a statutory basis for the denial or partial denial of the request, listing the statutes relied upon. See *Idaho Code* § 9-339.

203. REQUESTS THAT CANNOT BE ANSWERED WITHIN THREE WORKING DAYS.

If the Commission cannot grant or deny a person's request to inspect, examine or copy public records within three (3) working days from the receipt of the request because a longer time is needed to locate or retrieve the public records or because it cannot be determined within three (3) working days whether some or all of the request involves materials exempt from disclosure under *Idaho Code* §§ 9-340A through 9-340H, the requester will be notified of the delay in writing within three (3) working days of the request. Within ten (10) working days of the request, the request will be granted or denied in whole or in part.

204. VOLUMINOUS REQUESTS.

Requests to copy voluminous documents (requests from the same person in one (1) day to copy documents exceeding one hundred (100) pages total) must be in writing.

COPYING AND COSTS

301. PHOTOCOPYING AND LABOR COSTS.

The charge for copies of papers easily reproducible by photocopy machines in the Commission's offices is five cents (\$.05) per page. Fees for copying requests totaling one hundred (100) pages or less shall be waived. The Commission may charge for the actual labor locating, copying and separating documents based upon the hourly rate of the Commission employee performing the work when the actual work exceeds two (2) hours. If materials can only be reproduced by special photocopy equipment not available in the Commission's offices, the requester may make arrangements for commercial photocopying of large or irregular documents at the requester's expense, including reasonable expense of Commission personnel to accompany documents taken from the Commission's office for photocopying.

302. COMPUTER DISCS.

The cost of providing computer discs containing copies of information on the Commission's computers will be two dollars (\$2) per disc. If the Commission incurs labor costs in excess of two (2) hours or employs or contracts for temporary labor to answer a request for information contained on the Commission's computers, the Commission may include those labor or temporary labor costs in its charges.

303. ADVANCE CHARGES FOR COPYING.

When the Commission receives a request for copying the total charge for which will exceed fifteen dollars (\$15), the Commission may request advance payment of the copying charges.

304. CHARGES FOR PAMPHLETS.

The Commission Secretary will post charges for copies of pamphlets or other material prepared for distribution to the general public.

305. MAILING, E-MAILING OR FACSIMILE TRANSMISSION (FAX).

Neither statute nor these guidelines obligate the Commission to provide postage and envelopes for mailing, facsimile transmission (FAX) or e-mailing for documents to be copied or scanned. Persons requesting that documents be copied and sent to them may be responsible for providing envelopes and postage, arrangements for overnight delivery, etc. As time permits, the Commission staff may respond to small requests for copying of documents by mailing, FAXing or e-mailing, but in those cases the requester will be charged for postage or telecommunications charges associated with the mailing or FAX transmission if the charges are not de minimus.

RELATIONSHIP TO RULES AND PRACTICES

401. RULES AND PRACTICES NOT AFFECTED.

These guidelines implementing the Public Records Act neither expand nor contract the rights of persons or parties under other statutes, rules or practices of the Commission.

402. DISTRIBUTION OF DOCUMENTS UNAFFECTED.

The Commission's historical distribution of documents to parties to formal proceedings, to other governmental agencies, and to the media are neither expanded nor contracted by these guidelines. For example, copies of orders, press releases, and staff filings that have historically been distributed without fee or that are required to be distributed by rule or statute will continue to be distributed without fee.

403. DISCOVERY IN FORMAL CASES NOT COVERED BY THESE GUIDELINES.

The right of parties in a formal proceeding governed by the Commission's Rules of Procedure to obtain information as part of that formal proceeding is governed by the Commission's Rules of Procedure, IDAPA 31.01.01.000. These guidelines neither expand nor contract any party's rights under those rules.

404. PARTIES TO FORMAL PROCEEDINGS MAY NOT USE THESE GUIDELINES.

No party to a formal proceeding may use these guidelines to supplement, augment, substitute, or supplant discovery procedures set out in the Commission's Rules of Procedure, IDAPA 31.01.01.000. See *Idaho Code* § 9-343(3).

Approved:

Paul Kjellander, President