

Biennial Report
of the
Public Records Advisory Council

November 2018



I. Introduction

This report is submitted to Governor Kate Brown and the Legislative Assembly by the Public Records Advisory Council, per the requirements of Section 10, Chapter 728, Oregon Laws 2017. Appendix A. The report summarizes the work of the Council and the work of the Office of the Public Records Advocate since the Council's inception in 2017.

II. Work of the Public Records Advisory Council

Hiring of the Public Records Advocate

In October 2017, the Council embarked on the process of hiring a Public Records Advocate. The Council announced the vacancy for the position, drafted interview questions, reviewed applications, and selected six candidates to interview. On October 23, 2017, the Council interviewed six candidates for 45 minutes each. From that pool, the Council selected three candidates to forward to the Governor's Office for further consideration.

The candidates were interviewed by the Governor's office and Ginger McCall was selected and appointed as Oregon's first Public Records Advocate. Ms. McCall was confirmed by the Oregon Senate in February 2018. After successfully applying for membership in the Oregon State Bar, Ms. McCall opened the Office of the Public Records Advocate on April 25, 2018.

Upcoming Survey

In keeping with the Public Records Advisory Council's responsibilities under Section 10, to "survey state agencies and other public body practices and procedures for receiving public records requests, identifying the existence of records responsive to the requests and gathering and disclosing responsive records; (B) determining fee estimates and imposing or waiving fees...; (C) and determining and applying exemptions for required disclosure of public records", the Council drafted questions for an inaugural survey of state and select local public bodies. The questions include:

1. Please provide the name, job title, and contact information of the person completing this survey.
2. Please provide the name(s), job title(s), and contact information of the official(s) within your agency to whom public records requests may be sent, per ORS 192.324(7).
3. Please provide a URL link or a copy of your publicly posted public records policy, per ORS 192.324(7).
4. As of the date of your response to this survey, how many requests has your agency received in the calendar year 2018?
5. How many of those requests were not completed within the fifteen day business day deadline prescribed in ORS 192.329?
6. How many of those requests were not completed within 60 days of the date the request was received by your organization?
7. As of the date of your response to this survey, how many requests for a fee waiver/reduction has your organization granted? How many requests for a fee waiver/reduction has your organization denied?

8. As of the date of your response to this survey, what is the total approximate amount of fees that your agency collected related to the fulfillment of public records requests in the calendar year 2018?
9. Do you track the costs incurred in processing public records requests? Please explain how.
10. Have members of your organization received training on public records laws during 2018? If so, from whom?

These questions will be distributed to a variety of state agencies and other public bodies (as contemplated in the statute). It will include all state agencies, the top ten most populous cities, and a random selection of other cities, counties, school districts, and special districts.

The completed surveys will be reviewed by the Office of the Public Records Advocate and the Council. They will also be disclosed in full and in a summary compilation (drafted by the Office) to the public.

This survey will advance several important goals. First, it is a useful information-gathering mechanism for the Council and the Office. There is currently a dearth of actual data regarding public records request practices in the State of Oregon. Once the data is obtained, it will be used to determine what future legislative and policy initiatives and corrections may be necessary, to inform the Office about what public bodies and substantive areas of law it should focus on in its trainings, and inform the public about the public records performance of various public bodies. Moreover, transparency regarding public records processes and performance of public bodies will create accountability, which will then encourage better performance.

The survey is also designed to gather data on public records policies and public records officers (questions 2 & 3). Though ORS 192.324(7) requires that each agency make this information publicly available, many state agencies and most other public bodies do not, in fact, have this information visible on public-facing websites. This survey will remind public bodies of that requirement and will gather this information, which can then be posted by the Office of the Public Records Advocate on its own website, as a central repository of information that will benefit the public.

The Council recognizes that not all public bodies will initially have the data on-hand to answer all of the survey questions. This survey, then, also functions to encourage public agencies to practice collecting this data, much of which is already required under law or will be required under the Council's current legislative proposals.

Legislative Proposals

The Council has two proposed pieces of legislation, LC 590 and LC 592, attached as Appendices B and C.

LC 590 would make the Council permanent, with staggered terms and the same statutorily set composition.

Under the current statute, the Council expires on January 1, 2021. The continued existence of the Council, however, is important for several reasons. First, the Council, which is tasked under Section 10(1)(d) with “[m]ak[ing] recommendations on changes in law, policy or practice that could enhance transparency in public process and government, and facilitate rapid dissemination of public records to requesters,” is the best possible vehicle to make policy and legislative recommendations to the Legislative Assembly related to public records law. The Council is uniquely positioned to make insightful recommendations because it is composed of a variety of government and requester stakeholders. This allows the Council to make balanced proposals based on a broad array of experiences.

The Council is also an important oversight and guidance mechanism for the Public Records Advocate. Under ORS 192.461(4), the Public Records Advocate can only be “removed for cause by the Governor or upon motion of the Public Records Advisory Council with the consent of the Governor.” The Council is, therefore, one of only two parties who can remove the Advocate. The Advocate regularly reports to the Council on the activities of her office and receives the Council’s advice and feedback on those activities. Councilmembers have provided valuable feedback about budgetary concerns, efficiencies, and training practices. The Council’s varied composition makes it a particularly valuable provider of feedback, and because of this Section 10(1)(e) specifically tasks the Council with “[m]ak[ing] recommendations on the role of the Public Records Advocate as facilitator in disputes between custodians of public records and public record requesters.”

The Council is also responsible for “adopt[ing] rules governing the operations of the office of the Public Records Advocate.” Section 10(4). This important responsibility is core to the function of the Office. Again, the Council’s composition makes it uniquely well-positioned to create balanced and thoughtful rules.

The Council’s second proposed piece of legislation, LC 592, creates four basic annual reporting requirements for state agencies. By March 1 of each year, every state agency would have to submit to the Attorney General, the Public Records Advocate and the public records subcommittee of the Legislative Counsel Committee:

1. The number of requests for records received by the agency in accordance with the public records policy applicable to the agency;
2. The number of requests for records received by the agency as reported in paragraph (a) of this subsection for which the agency had not completed its response by the date prescribed under ORS 192.329;
3. The number of requests for records received by the agency as reported in paragraph (a) of this subsection that had not been completed under ORS 192.329 within 60 days of the date the requests were received by the agency in accordance with the agency’s public records policy; and
4. The number of requests for a fee waiver or reduction that the agency has granted and the number of requests for a fee waiver or reduction that the agency has denied.

These mirror several questions in the Council’s survey. As discussed earlier in this report, this was a purposeful calculation on the part of the Council. The survey is designed to encourage agencies to begin tracking data points which may later be required in legislation.

Tracking this data will serve several purposes. First, as discussed in the survey section, it will inform the Council and the Office about what legislative and policy changes are needed. It will also give the Office important information regarding what agencies and legal provisions should be the focus of training.

Additionally, this data will inform the public about agencies’ public records processes and performance and will create accountability for state agencies. Transparency regarding public records performance will incentivize agencies to perform more efficiently and effectively, reducing costs for the agencies and improving customer service.

III. The Work of the Office of the Public Records Advocate

Requests for Assistance – 90 Requests for Assistance since April 2018

Since its inception on April 25, 2018, the Office of the Public Records Advocate has handled 90 requests for assistance. These requests, detailed in Appendix D, include calls, emails, and form submissions from members of the public, media representatives, and state and local agency officials. They often involved issues related to fees, timeliness of responses, or application of exemptions. There was a substantial uptick in requests for assistance from August onward, often averaging five requests per week.

The Office worked to resolve these requests by conducting research regarding ORS 192, facilitating communication and problem-solving between parties, and engaging in outreach to relevant public bodies.

Trainings – Nearly 1300 People Trained Since April 2018

To date, the Office of the Public Records Advocate has conducted 38 in-person trainings, reaching nearly 1,300 government officials and members of the public. These trainings, detailed in Appendix E, were conducted across the state of Oregon, as far north as Portland and as far south as Medford, west to Newport and east to Vale. Nearly all of these trainings were conducted in coordination with records management trainings conducted by the State Archivist’s staff. This ensures that both related areas of law are covered and also helps to make efficient use of travel funds by sharing car rental and fuel expenses.

Additionally, the Office has made both government and public trainings available online in an easy-to-use streaming format. These videos have nearly 250 total views to date.

Public & Press Outreach

The Office has conducted extensive public outreach, with a special emphasis on outreach to the media. The Advocate has met with major press outlets, including Oregon Public Broadcasting, The Oregonian, The Bend Bulletin, The Grants Pass Daily Courier, The Roseburg News Review, and The Salem Reporter.

The Advocate also hosted five meet and greets (plus one virtual meet and greet). These were hosted at a variety of times, some during the workday and some on evenings and weekends, in order to maximize opportunities for public participation. These meet and greets offered an opportunity for interested members of the public, media, and government to hear about the Office's services, ask questions, and provide feedback about how the Office could be most useful.

The Advocate has conducted several public trainings, including a presentation at the Society of Professional Journalists conference, two presentations at University of Oregon journalism classes, two public presentations at Linn-Benton Community College, and a series of public trainings at Crooked River Ranch, Portland, Milwaukie, and Vale. These trainings covered both the Oregon Public Records statute and the Federal Freedom of Information Act. They gave members of the public basic information on both laws and a step-by-step tutorial on how to draft a public records request. This is essential to the Office's mission because better public records requests will result in easier processing and better outcomes.

Additionally, the Office has also engaged in purposeful outreach to stakeholders in the advocacy and media community, including the American Civil Liberties Union, the Council on American Islamic Relations, the Freedom Foundation, the Society of Professional Journalists, the Oregon Newspaper Publishers Association, and Open Oregon. These relationships have resulted in invitations for additional outreach and public education.

The Advocate has also provided expert commentary in the Oregonian, Bend Bulletin, and Malheur Enterprise, the Albany Democrat-Herald, and on Oregon Public Broadcasting's Think Out Loud. This commentary helps to raise awareness of the Office and its services and inform the public about important public records issues.

Hiring of Deputy Public Records Advocate

In September 2018, the Office of the Public Records Advocate welcomed Todd Albert as the Deputy Public Records Advocate. Mr. Albert has experience in several Oregon government offices and more than a decade of experience as a public defender at the Legal Aid Society in New York.

Mr. Albert has provided valuable expertise on Oregon government, has already begun managing requests for assistance and trainings, and will be leveraging his expertise in Indian law to work on a concentrated program of outreach to Oregon's Native American tribes.

Observations of the Office of the Public Records Advocate

The Advocate would like to thank the government employees, members of the requester community, and members of the media who contributed ideas and took the time to report their experiences regarding Oregon's public records law. The Office could not adequately accomplish its mission with their cooperation and participation. In the course of conducting trainings, meeting with stakeholders, providing assistance on public records requests, and receiving feedback from all of those involved, the Advocate has made several observations regarding the operation of public records law in the state of Oregon.

The below observations are meant to be a brief overview of issues that have been frequently presented to the Advocate. They are based purely on anecdotal evidence, which is, in itself, a problem. Currently, there is very little actual data regarding Oregon’s public records law, including data regarding how many requests agencies are receiving, how long it takes agencies to respond to those requests, what fees are being collected, how often requests for fee waiver/reduction are being granted, and what exemptions are being cited to justify withholding. This is the reason that the PRAC is conducting a survey of public bodies and has proposed basic annual reporting requirements in LC 592. Having more data will give the Advocate, the PRAC, the legislature, and the public a better sense of what aspects of the public records request system are doing well, where problems exist, and how they can be addressed.

The following observations, opinions, and comments belong to the Advocate exclusively and are not representative of the PRAC more generally.

1. Fees

Fees are a perennial source of animosity, confusion, and frustration for public bodies and requesters alike. The Advocate has observed several systemic issues with fees under Oregon’s public records law. First, the provisions regarding fee waiver/reduction are highly discretionary. ORS 192.324(5) states “The custodian of a public record may furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public.” There is no clear statewide standard regarding when to grant or deny a request for fee waiver or reduction. Some public bodies, including many state agencies, routinely grant waivers or reductions to media requesters; others have a blanket policy of never or rarely granting fee waivers or reductions in any circumstance.¹ Additionally, even if a fee reduction request is granted, there is no clear standard for what the amount or rate of reduction should be. This ambiguity leaves requesters uncertain of what to expect, which often increases animosity between government and requester. It also results in media requesters being assessed high fees, even for requests that will clearly forward legitimate public interests. A clearer standard – for instance, one more in keeping with the Freedom of Information Act’s (“FOIA”) categorical fee-related provisions – would provide more guidance to agencies and would help to manage the expectations of requesters.

Additionally, some public bodies have begun to charge flat rate fees, often based on internal “average” cost calculations which are not always transparent to requesters.² These standard fees are then charged regardless of the actual cost of processing a particular request. ORS 192.324(4)(a) does allow public bodies to charge fees that are “reasonably calculated to

¹ See e.g. Point 4 of the City of Molalla’s Public Records Policy, available at: https://www.cityofmolalla.com/sites/default/files/fileattachments/city_recorder/page/484/molalla_-_public_records_request_form_2018_00611195xb8084.pdf.

² See e.g. *Lawsuit Against City of Portland Challenges the High Cost of Public Records*, Rachel Monahan, Willamette Week, Sept. 26, 2018, available at: <https://www.wweek.com/news/city/2018/09/26/lawsuit-against-city-of-portland-challenges-the-high-cost-of-public-records/>; *On Hold: Crime Victims, Public Wait 6 Weeks or More for Portland Police Reports*, Bethany Barnes, The Oregonian, Oct. 21, 2018, available at: <https://www.oregonlive.com/expo/news/erry-2018/10/cd13a8f84c9704/on-hold-crime-victims-public-w.html>.

reimburse the public body’s actual cost of making public records available.” However, a reasonable and fair interpretation of this provision would be that public bodies may charge a particular requester for the actual cost of fulfilling her/his request. Charging all requesters based on an “average” cost of processing public records requests removes incentives for requesters to submit narrowed requests and is unfair to a requester who submits a properly-narrowed request.

On a related note, Oregon’s law does not provide an intermediate appeal option for requesters who feel that the fees they are being charged are unreasonable. ORS 192.324(6) states “[a] requester who believes that there has been an unreasonable denial of a fee waiver or fee reduction may petition the Attorney General or the district attorney.” There is no similar authority for the Attorney General or district attorney to review the reasonableness of fees assessed – including the reasonableness of public body flat rate fees, time estimates, or hourly rates. Nor can the Advocate intervene unless the matter involves a state agency or the parties both agree to facilitated dispute resolution. Often, the only recourse for a requester who feels he/she is being charged an unreasonable amount of fees is to go to court.³ Most requesters, though, cannot afford to take a public body to court to challenge fee reasonableness, which creates a noticeable loophole in the law, allowing public bodies to charge unreasonable fees, leaving the requester no option but to give up on the request. In conversations with both public bodies and requesters, the Advocate has observed that fees have been used to discourage requests and avoid accountability. The absence of meaningful, inexpensive interim fee-related appeal options could encourage continued use of such tactics. This problem could be remedied by empowering the Attorney General or district attorney to review fee reasonableness under ORS 192.324(6).

2. *Records of Elected Officials*

Oregon’s law admirably makes the records of elected officials subject to public records requests.⁴ However, despite their inclusion in the law, there is no right to appeal elected officials’ decisions on public records disclosure to any authority other than a court. In other words, if a records request is denied by an elected official, the only option that the requester has is to take the matter to court. Furthermore, the legislation creating the Office of the Public Records Advocate did not include the option of mediating public records disputes between requestors and elected officials. Most requesters simply do not have the resources to vindicate their rights in court. This creates a lack of accountability around the decisions of elected officials as any disputes about the disclosure of public records in their possession can only be settled in court, which is an often prohibitively costly and time-consuming undertaking for most requestors.

The problems created by a lack of intermediate appeal rights are exacerbated by the habit of some elected officials who make liberal use of ORS 192.427, which allows an elected official to claim the right to withhold disclosure of documents not only in their own custody, but also documents in the custody of any other person “to which an elected official claims the right to

³ See *In Defense of Animals v. OHSU*, 199 Or App 160, 182-83, 112 P3d 336 (2005).

⁴ Although though this clearly settled area of law has recently been questioned by at least one local jurisdiction: *Ontario Takes Cautious Stand on Officials’ Records*, Malheur Enterprise, Max Egner, Sept. 13, 2018; available at <https://www.malheurenterprise.com/posts/4739/ontario-takes-cautious-stand-on-officials-records>.

withhold disclosure”. This provision invites abuse which, like other disclosure decisions made by an elected official, can only be reviewed by a court. Potentially overbroad application of ORS 192.427 may be remedied by creating an intermediate review opportunity under ORS 192 and, additionally, by creating limits on what documents are considered to be in an elected official’s custody and reasonable limits on what documents outside of the custody of an elected officials can be withheld in their name.

3. *Litigation and Attorney Fees*

The problems created by a lack of intermediate appeal options regarding fee reasonableness and elected officials could, perhaps, be mitigated by ORS 192.431(3), which allows requesters who prevail in court to be granted attorney fees and costs. However, some courts have interpreted this provision very narrowly, holding that attorney fees and costs may only be granted if a court order forced agency disclosure, not if the agency “voluntarily” disclosed records in response to a lawsuit.⁵ Other courts have more generously interpreted this provision to incorporate what is called the “catalyst theory,” allowing for attorney fees even if an agency “voluntarily” released records after the start of a lawsuit because the lawsuit was the “catalyst” for the release of records.⁶ This ambiguity discourages litigation under Oregon’s public records laws. If potential plaintiffs are uncertain about their ability to collect attorney fees even if they prevail, they are less likely to embark on potentially costly and time-consuming litigation. And if public bodies know that they can avoid paying fees by simply turning over documents at the institution of a lawsuit, it incentivizes public bodies to wait to disclose documents unless or until a lawsuit is filed, then to quickly disclose documents in order to undercut the requester’s ability to collect fees.

A similar problem arose in the Federal FOIA after the Supreme Court, in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001), ruled that attorney fees will only be granted if the defendant’s change in position is the result of a court order. In 2007 amendments to the FOIA, Congress added language which explicitly incorporated the “catalyst theory,” allowing plaintiffs to obtain attorney fees even if the agency’s change in position was not the result of an actual court order. Under 5 U.S.C. 552(a)(4)(E) a plaintiff can obtain attorney fees if documents were disclosed as a result of “a voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial.” Incorporating a similar clarifying provision in Oregon’s law would remedy the current legal ambiguity and allow plaintiffs to make more informed decisions regarding whether or not it is worth pursuing litigation in light of potential costs and opportunities to recoup some of those costs in the form of attorney fees.

Like the uncertainty around attorney fees, the current practice of a public body suing a requester to challenge an Attorney General or district attorney order requiring disclosure of a public record at issue also chills public records requests and accountability. Filing lawsuits against requesters

⁵ See *Clapper v. Oregon State Police*, 228 Or App 172, 178 (2009).

⁶ See *Multnomah County DA Must Pay \$16,000 in Public Records Case*, Mike Rogoway, The Oregonian, Aug. 3, 2016, available at: https://www.oregonlive.com/business/index.ssf/2016/08/multnomah_county_da_must_pay_1.html.

strongly discourages public records requests by intimidating requesters who seek to vindicate their rights under the law and saddling them with high costs of a legal battle. It also creates very negative perceptions of the public body that institutes the lawsuit.⁷ A better method may be for public bodies that disagree with an Attorney General or district attorney's opinion to sue the Attorney General or district attorney as the one who ordered the release of a public record, not the requester. ORS 192 should be clarified to ensure that requesters are not intimidated or facing needlessly high economic burdens for vindicating their rights under the public records law.

4. Exemptions

Oregon's public records law also contains a very large number of exemptions – so many, in fact, that it is difficult to pin down a firm number, but by most accounts, at least 550. New exemptions are being generated each legislative session, presently without a mechanism in place to directly inform the public and requester community that new exemptions are pending and to allow for meaningful commentary during the legislative process. Notable advancements, however, have been made in addressing the numerous exemptions in Oregon law. The 2017 amendments to the public records law created both the Sunshine Committee to review all exemptions, and the requirement that the Attorney General keep an updated publicly-available list of existing exemptions. More could be done to ensure transparency regarding exemptions, though, including creating a meaningful method for the public to track bills which create new exemptions. Currently, under ORS 192.492, the Legislative Counsel Committee and the Sunshine Committee must be notified if possible changes are introduced, but this does not necessarily ensure that the public, including the news media and requester community, will be notified in a timely manner. In order to ensure that the public has a meaningful opportunity to weigh in on potential new exemptions, timely notification to interested members of the public should be required, potentially through a public website similar to the one created by the Attorney General to list current exemptions or through a requirement that bills creating new exemptions be labeled with “confidentiality provision” or a similar designation.

Additionally, a small number of exemptions are causing an outsize amount of public distrust and animosity. The Advocate has heard frequent reports about potential overuse of exemptions related to criminal investigations(ORS 192.345(3)),⁸ personnel disciplinary records (ORS 192.345(12)),⁹ public safety employee personnel disciplinary records (ORS 181A.830(3)),¹⁰

⁷ See e.g. *Governments Turn Tables by Suing Public Records Requesters*, Ryan J. Foley, Associated Press, Sept. 17, 2017, available at: <https://www.apnews.com/7f6ed0b1bda047339f22789a10f64ac4>.

⁸ See e.g. *Why did Feds Push Out Attorney General on Kitzhaber? It's a Secret*, Rob Davis, The Oregonian, Mar. 17, 2015, available at: https://www.oregonlive.com/politics/index.ssf/2015/03/why_did_feds_push_out_attorney.html.

⁹ See e.g. *Portland Public Schools Loses Records Secrecy Lawsuit*, Betsy Hammond, The Oregonian, May 12, 2018, available at: https://www.oregonlive.com/education/index.ssf/2018/05/portland_public_schools_loses.html.

¹⁰ See e.g. *Oregon Police Misconduct: Keeping Allegations Hidden*, Carli Brosseau and Rebecca Woolington, The Oregonian, Dec. 19, 2017, available at: https://www.oregonlive.com/police-fire/index.ssf/2017/12/police_discipline_records.html; *A Controversial Portland Cop Improperly Spied on Her Former Stepdaughter*, Doug Brown, Portland Mercury, Nov. 23, 2016, available at: <https://www.portlandmercury.com/news/2016/11/23/18709089/a-controversial-portland-cop-improperly-spied-on-her-former-stepdaughter>.

trade secrets (ORS 192.345(2)),¹¹ internal advisory communications (ORS 192.355(1)),¹² and the confidentiality of Oregon Department of Human Services records (419B.035).¹³ Often public interest balancing tests are not applied consistently or correctly when withholding exempt documents from these categories and others, and the presumption of disclosure in the law is not honored. Many of these exemptions also have corollaries under the FOIA and are interpreted more narrowly in federal jurisprudence. A discussion of the impacts created and interests protected by the above exemptions is particularly urgent. It is the hope of the Advocate that the Sunshine Committee will prioritize the review of these frequently-cited exemptions and engage fully with stakeholders in the public, media, and advocacy community. In the meantime, training by the Advocate could help to ameliorate some of the issues around exemptions.

5. *Delays*

The 2017 addition of timelines to Oregon’s public records law was a very positive step to ensure efficiency and transparency. However, more could be done to ensure that these timelines are taken seriously. ORS 192.324(5) sets well-balanced deadlines. It requires that public bodies must complete a response within fifteen business days or, at very least, provide the requester with an estimated date of completion. But subsection (6) creates a very big exception to these requirements, stating that these timelines do not apply if compliance would be “impracticable” for a variety of reasons. The subsection (5) provision permitting an estimated date of completion in lieu of a full response, though, is already a meaningful enough allowance for an agency that is facing understaffing, a very broad request, a large volume of requests, or other challenges. The inclusion of subsection (6) is unnecessary and entirely undercuts the requirements in subsection (5). In practice, subsection (6) is often cited by agencies as a reason for not responding (or even provided an estimated date of completion) within the fifteen business day timeline.

These delays can have serious impacts for requesters. Delays in obtaining police reports, for example, can make it difficult for victims to obtain insurance payments, limit the damage of identity theft, pursue civil litigation, take precautions to protect their personal safety, or vindicate their rights in a variety of other venues.¹⁴

6. *Accountability for Noncompliance*

The public records law currently provides little accountability for noncompliance. As noted above in the discussion regarding data, there is currently no reporting requirement which would

¹¹ See e.g. *Editorial: Department of Justice Orders Release of Records Related to Oregon’s Super-Secret Gas Tax*, Bend Bulletin Editorial Board, Bend Bulletin, Nov. 9, 2018, available at: <https://www.bendbulletin.com/opinion/6666678-151/editorial-department-of-justice-orders-release-of-records>.

¹² *Portland Mayor Sued for Records on Foster-Powell Homeless Shelter*, Gordon Friedman, The Oregonian, March 26, 2018, available at: https://www.oregonlive.com/portland/index.ssf/2018/03/portland_mayor_sued_for_record.html.

¹³ See e.g. *Oregon DHS Knew of Hart Family Abuse Allegations in MN*, Gabrielle Karol, KOIN 6 News, April 23, 2018, available at: <https://www.koin.com/news/oregon/oregon-cps-knew-of-hart-family-abuse-allegations-in-mn/1136220858>.

¹⁴ *On Hold: Crime Victims, Public Wait 6 Weeks or More for Portland Police Reports*, Bethany Barnes, The Oregonian, Oct. 21, 2018, available at: <https://www.oregonlive.com/expo/news/erry-2018/10/cd13a8f84c9704/on-hold-crime-victims-public-w.html>.

create accountability for poor performance (or an incentive for good performance). The avenues for appeal – including appeals to the Attorney General or district attorney or appeals to the courts – are often expensive or time consuming, and requesters are forced to bear the burden of enforcing the law. Incorporating a provision which would require agencies that act in bad faith or knowingly violate the public records law to pay a flat rate penalty or a customized penalty designed to reimburse requesters for time spent pursuing appeals and enforcing the law would both incentivize better agency performance and ensure that requesters are not burdened by these costs. The attorney fee provision in ORS 192.431(3) was intended to do this, but, as discussed above, it is often difficult for requesters to obtain attorney fees even if they prevail in court.

Additionally, in order to incentivize good performance and ensure accountability, public bodies should include in their response letters the name and contact information of the official responsible for the decision regarding the request.

7. Public Records Policies

Though ORS 192.324(7) requires that all public bodies “shall make available to the public a written procedure for making public records requests that includes: (a) the name of one or more individuals within the public body to whom public records requests may be sent, with addresses; and (b) the amounts of and manner of calculating fees that the public body charges for responding to requests for public records,” a brief survey of public bodies has revealed that many, if not most, are not in compliance with this requirement. A publicly available public records policy (specifically one posted on the public body’s website), is important for several reasons. First, public records policies encourage agency accountability and conformity with uniform rules. Second, public records policies reduce animosity by managing requester expectations, including by informing requesters how requests may be submitted and by being upfront about the fact that they may be charged fees. Third, public records policies inform requesters of their rights under the public records law. And, lastly, public records policies facilitate meaningful communication by providing requesters with the contact information of a public official who can answer their questions, including helping them craft a narrower request that is directed to the correct public body, which ultimately saves both the public body and the requester time and money.

In order to remedy this lack of compliance, the Advocate has emphasized this requirement in trainings to government officials and has offered to work with public bodies to craft public records policies. The Advocate intends to conduct targeted outreach to noncompliant public bodies in order to help them fulfill this important requirement.

8. Resources and Funding

In conversation with the Advocate, public bodies have frequently emphasized the difficulties created by resource constraints, which limit their ability to hire staff, procure technology, and institute better public records processes. Inadequate staffing is one of the most frequently cited reasons for delays in public records responses. Similarly, technologies like e-discovery software or software to effectively track public records requests are integral to timely processing of requests. E-discovery software allows agencies to more easily and efficiently search a large

volume of documents – like emails – and would cut down on both the time spent searching for and reviewing records. But most public bodies do not have access to that technology. Nor do they have effective tools for tracking public records requests. An investment in tracking tools would help to ensure that requests don't get lost in the system and could also help agencies to identify redundant requests so they aren't expending resources re-processing the same documents multiple times. Additionally, having adequate technology would ensure that agencies can respond to requests to provide information in machine-readable or electronic form, as required by ORS 192.324(3).

Providing adequate funding also lessens the necessity to charge high fees for public records requests. When public bodies are not adequately funded, then requesters are expected to make up the difference to cover the costs of public records requests. Indeed, many public bodies cite inadequate funding as the reason for declining to ever provide public interest fee waivers/reductions.

Public bodies' ability to procure necessary technology and staff depends on buy-in from leadership. Leadership buy-in would also signal to all public body employees that public records requests are not merely an afterthought, but are, instead, a primary part of every public body's mission.

9. Broad Requests and Increasing Volumes of Records

One of the most frequent public records challenges cited by public bodies is the expanding volume of records and the increasing number of frequent or broad requests. Requests for "all records related to," "all communications related to," or "all emails related to" are increasingly creating delays and backlogs. Based on conversations with both public bodies and requesters, the Advocate has concluded that there are several potential remedies to address this problem:

First, public bodies should create more opportunities for communication before requests are filed and ensure that public records requesters can contact a knowledgeable official within the public body who is dedicated to working with requesters to find ways to narrow requests. Requesters have noted that if they sense recalcitrance or a lack of cooperation by public bodies, they are more likely to distrust the public bodies and file broader requests to ensure that the public body cannot leave anything out.

Second, public bodies should manage expectations and encourage narrowing of requests by advising requesters of potential fees and delays created by broad requests. This should be done as early as possible, and preferably be noted within the public body's public records policy.

Public bodies should also institute policies that incentivize narrow, well-crafted requests, including a policy (now adopted by many state agencies) to presumptively waive fees for the first thirty minutes of time. Other alternatives include fee reductions for narrow requests or fee reductions for making a reasonable effort to narrow a request.

Public bodies should also proactively reach out, via phone, to requesters who submit broad requests to suggest potential narrowing ideas. Public bodies are often in a better position to know what information they have and how it is stored and, thus, to suggest potential narrowing. The

receipt of a request, the delivery of an estimated date of completion, and the delivery of a fee estimate are all good opportunities for proactive communication. Many requesters do not realize that the request they are submitting could implicate hundreds or even thousands of pages of documents. Once they understand this, they may be willing to narrow the request to save time and money.

Lastly, the Advocate should continue to conduct public trainings with an emphasis on how to properly research and draft a narrow, well-targeted request.

10. Future Reforms

It is the hope of the Advocate that the Public Records Advisory Council will be able to tackle some of these systemic problems in the future. But the Council ability to create meaningful reform relies on the passage of LC 590. If the Council is permitted to expire, so too will the opportunity for public records reform and the gains realized by the 2017 legislative changes.

IV. Future Goals of the Public Records Advisory Council and the Office of the Public Records Advocate

The Council intends to move forward with future legislative proposals, including possibly expanding the annual reporting requirements contained in this year's proposed legislation. Additionally, the Council has identified fee-related issues as an area for potential reform. The Council may also need to address several ambiguities in the statute which created the Office of the Public Records Advocate.

The Office of the Public Records Advocate will continue to expand its training program and public outreach. The Office will set up further media resources, such as a blog, to continue to engage with the public. It will also use its website as a platform to inform the public about public records laws, including potentially hosting a central repository of agency public records contacts and policies (as provided in response to the survey).

Additionally, for public bodies that don't yet have public records policies, the Office will endeavor to work with those offices to create public records policies that promote transparency and are user-friendly.

ORS 192.475(3) also empowers the Advocate to issue written advisory opinions. The Office would like to begin issuing such opinions, providing that it has sufficient staffing and resources to issue quality opinions.

The Office of the Public Records Advocate has also requested additional funding for the hiring of two additional staff and training-related travel. The Office has seen a huge growth in requests for assistance and training over the past few months and will require additional staff to fulfill its statutory obligations if that growth trend continues, as it is expected to. As the Office continues to raise public and government awareness of its services, it can reasonably be expected that requests for assistance and training will continue to increase accordingly. The expansion of the Office would allow for more public outreach, more training, more assistance, and more research-based policy proposals.

Summary

Both the Council and the Office intend to continue the important work of improving transparency and the functioning of public records laws in the State of Oregon.

Since its first meeting in October 2017, the Public Records Advisory Council has:

1. Hired a Public Records Advocate;
2. Engaged in meaningful discussions regarding fee-related issues in Oregon Public Records Law;
3. Drafted survey questions for a statewide public records survey;
4. Provided feedback, oversight and guidance to the Public Records Advocate; and
5. Proposed two important pieces of legislation.

Since its inception in April 2018, the Office of the Public Records Advocate has:

1. Conducted 38 trainings, reaching nearly 1300 individuals;
2. Has handled 90 requests for assistance;
3. Engaged in purposeful outreach to stakeholders in government and the public; and
4. Hired a Deputy.

We look forward to continuing this work and will provide the results of the inaugural survey of state and select local public bodies as soon as they are compiled and ready for dissemination.