

WRITTEN TESTIMONY ON HOUSE BILL 3505
HOUSE RULES COMMITTEE - APRIL 27, 2015
SUBMITTED BY: JOSHUA NASBE, OFFICE OF THE STATE COURT ADMINISTRATOR

The Oregon Judicial Department (OJD) is committed to the administration of an open court system and the corresponding duty to provide public access to court records.¹ House Bill 3505, however, would create operational and fiscal challenges in a state court system that already provides timely access to court records. I write today to describe these challenges and to provide the committee with an understanding of the context within which they arise.

Background

At any given time, OJD is in the possession of an estimated one billion pages of court records. Approximately 50 million pages are filed annually in the state court system and many of these documents must be retained for 75 years. Providing access to these records is a daily part of court operations across Oregon's 36 circuit courts and in our tax and appellate courts. In hard copies alone, we estimate that more than 3 million pages of court records are provided annually.

The vast majority of court records requests are fulfilled within one week - if not the same day they are requested. The circumstances in which more than a week is required are ordinarily limited to those requests that require work above and beyond the operation of a court's file room; they involve sophisticated queries of databases, travel to an off-site storage facility or legal review of material deemed confidential by law, as a few examples. This work often competes with other statutory and constitutional deadlines that are central to the administration of justice.

Court records obtained in the file room, however, tell only part of the story. OJD is entering the final 16 months of a multi-year, \$90 million roll-out of the Oregon eCourt Case Information system (OECI). Currently, governmental users, lawyers, and pro se litigants are provided with free electronic access to specific OECI court records and any member of the public may access court records at any courthouse public terminal. Within the next biennium, OJD anticipates providing the general public with remote electronic access to certain court records. In addition, OJD provides electronic records, by subscription or in bulk, to certain entities for commercial use, provides court forms for use by the public, and produces court-related publications.

In many of the above areas, statutes outside the Oregon Public Records Law (OPRL) authorize OJD to recoup some of the costs associated with these endeavors, placing shared financial responsibility on the users of this information, while also reducing overbroad or frivolous requests. We estimate that these user-based fees, across all platforms, will generate more than \$6 million this biennium. It is unclear whether this existing fee authority, granted to the Chief Justice of the Oregon Supreme Court, is limited by House Bill 3505.

¹ "The English common law, the American constitutional system, and the concept of the consent of the governed stress the public nature of legal principles and decision. Throughout our history, the open courtroom has been a fundamental feature of the American judicial system." *Oliner v. Kontrabecki*, 745 F.3d 1024 (9th Cir. 2014).

In the judicial branch, the task of complying with requests for records is shared by 28 local court administrators, the state court administrator, and 194 independently elected judicial officers across the state. Even without any OPRL overlay, there are multiple sources of law that apply to requests for court records; they are governed by statutes outside the OPRL, court-created rules, the common law, and the state and federal constitutions. Applied by an elected judiciary and their designated administrators, these sources of law create a strong presumption of openness, independent of the OPRL.²

House Bill 3505

In addition to the concerns raised by other governmental bodies, if House Bill 3505 is applied broadly to all types of court records, we anticipate a significant reduction in revenues for the state, a need for currently unplanned technological investments, increased court operations costs, increased litigation against public bodies, and a potential delay in court proceedings.

- Section 1 – Retention schedule: Requiring that all written and electronic public records be retained for three years may require the development of costly additional storage capacity.
- Section 3 (3) – Weekly correspondence: Requiring weekly correspondence allocates resources away from processing cases and producing records.
- Section 3 (4) – Fee waiver/Deemed denied: Waiving fees after three weeks may result in the prioritization of records requests over other core judicial functions and may reduce the willingness of requestors to limit the scope of broad, time-consuming requests. This is particularly true of deeming a request denied after six weeks, where the court-ordered remedy is an order to disclose and an award of costs, disbursements, and attorney fees. This latter provision is also likely to generate additional litigation, increasing operational costs to the court and delaying other judicial matters.
- Section 4 (2) – Fee limitations: Limiting fees without regard to costs incurred and imposing novel calculation methods (e.g., by the kilobyte) will result in a reduction of state revenues and will require a significant modification of OJD’s technology initiatives.
- Section 4 (4)(b) – Waiver of estimate: Allowing the requestor to waive an estimate of costs may lead requestors to believe that public bodies are required to expend significant resources prior to the receipt of fees (assuming that the fees are ultimately paid).

Thank you for the opportunity to describe the role of court records in the judicial branch of government and the likely impact of House Bill 3505 on court operations.

² While the precise manner in which the OPRL applies to court records is less than fully clear, it is at least arguable that one effect of applying the OPRL to court records is to make court records *less* transparent. See, e.g., ORS 192.501 and 192.502 (creating exemptions from public disclosure). Presumably, this is one reason that the federal government and at least half of the fifty states rely exclusively on the common law or state or federal constitutions to provide access to non-administrative records of the court.