Testimony of Nathan Sykes, Deputy Metro Attorney
In Opposition to House Bill 3505
House Committee On Rules
April 27, 2015

Metro
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Chair Hoyle and Members of the Committee:

As you know, Metro is the regional government of the Portland metropolitan area. We provide a range of regional services including land use and transportation planning, solid waste and recycling policy and operations, management of parks and natural areas, and operation of visitor venues including the Oregon Convention Center and the Oregon Zoo.

Metro strongly supports the overall intent of Oregon's public records laws. We believe the public has a right to information about our operations and policies, and we are rigorous and diligent in responding to requests in a timely fashion. We abhor the isolated but frequently high-profile instances where government bodies have deliberately obstructed public access to public records in order to conceal wrongdoing or thwart citizen involvement.

However, Metro opposes HB 3505 because of the costly and unworkable requirements it would impose on Metro and on public bodies throughout the state. These include:

- A mandatory three-week timeline that is unreasonable based upon the complexity of many public records requests, with a fee waiver penalty if this timeline is not met.
- Additional response requirements every seven days during the three-week period that are overly burdensome.
- Obligations on governments to retain text, social media and email on non-government servers that are nearly impossible to meet, with draconian civil penalties on public employees if the governments do not comply.
- Statutorily mandated fee structures for providing access to public records that are not related to the actual costs of producing documents and that prohibit recovery of administrative staff costs.
- New one-size-fits-all public record retention requirements that will force governments to redo their retention schedules and may have significant environmental impacts.

I have attached a walk-through of the bill that details our concerns with section, page and line numbers for ease of reference.

I understand that state government has been under fire recently related to the timely production of public records, but this bill is not the solution. Its unreasonable deadlines, unnecessary new process, and unworkable and unduly burdensome retention requirements are too broad and are frankly unachievable by local governments. It then gives the Attorney General the power to fine public employees for not complying with an almost impossible burden in regard to texts, social media and personal email.

For all of these reasons, Metro urges you to reject HB 3505. Thank you very much for your consideration of these comments.

Metro's Concerns with HB 3505

1. Adds New Three-Year Records Retention Requirement (Section 1, page 1, lines 10-12).

HB 3505 adds an arbitrary three-year retention requirement for all public records for any public body. This will require Metro and local governments to update their retention schedules that currently follow the Secretary of State, Archives Division's guidance and require retention of many types of documents for fewer than three years. This should be left in the hands of the state archivist and local governments.

For example, Metro's retention schedule is currently two years for all budget preparation records, Councilor and Chief Operating Officer calendars and scheduling records and one year for employee calendars and scheduling records. Requiring a three-year retention schedule for these records serves no public purpose and has a significant impact on storage capacity as well as the environment.[1] This is just the tip of the iceberg in regard to increased storage required if every record has a minimum three-year retention requirement.

2. Creates Three-Week Deadline To Complete Disposition of the Request With Fee Waiver Penalty (Section 3, page 3, lines 2-22).

HB 3505 requires an initial response within seven days. This is reasonable. It is not reasonable, however, to require completion of the public records request within three weeks. This extremely compressed timeline will require governmental entities to prioritize public records requests above any other work, effectively setting a new policy in Oregon that responding to public records requests is the most important work of government. This bill requires all staff to put aside whatever they are working on to complete a request in their work subject area within three weeks.

Some public records requests are so large that this timeline is impossible to meet. Other issues may create multiple public records requests due to their high-profile nature or media attention to a particular issue. Combined with the requirement to continue corresponding every seven days and the fee waiver, this bill places unreasonable, unfunded mandates on local and regional governments.

For example, last year the Oregon Zoo, which Metro owns and operates, received 54 public records requests. One recent request required the review of over 1000 emails by one staff member. This staff member not only handles the public records requests but also has many other duties at the Zoo. So adding an unreasonable timeline, reporting requirements, waiver of fees for documents and staff time set forth in this bill is simply unreasonable and extreme.

Section 3 requires the government to determine whether its response constitutes a "complete disposition of the request." The bill does not define what this means, which will lead to problems in determining whether a government has made a "complete disposition of the request."

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[1] Much of what government does is electronic, and the energy footprint of technology is mind boggling. One author points out: "One data center can use enough energy in a day to power 65,000 homes, and there are tens of thousands of data centers spread across the world, many running full tilt 24/7 regardless of demand. Last year, in America alone, data centers used 91 billion kilowatt-hours of electricity, producing 97 million metric tons of CO2. Shockingly, only 6 to 12 percent of their energy draw may be used on computations. The rest goes to maintaining the vast buildings at a cool temperature, and to keeping backup servers idling in case of a crash." Reuben Yonatan, "The Incredible Environmental Impact of Cloud Technology," http://getvoip.com/blog/2015/01/19/environmental-impact-of-cloud, January 19, 2015.

Section 3(4) states that failure to complete a record request in three weeks causes a forfeiture of all fees. This draconian provision will significantly impact governments with small staffs that do not have the capacity to track these timelines along with their other governmental duties. These smaller governments do not have designated staff dedicated to responding to public records requests. Even for larger governments, this will take staff away from other duties serving the general public to serve the single member of the public that submitted the request, lest they risk loss of funding for the work if the fees are forfeited.

This will likely lead to abuse of the public records process, as a requestor may purposefully ask for significantly more documents than needed in an effort to avoid the payment of fees. If a government does not have the resources to respond within three weeks to a request for thousands of documents, the requestor may avoid fees if the government cannot respond within this relatively short time frame. This will also stifle any reasonable discussions with requestors to narrow a request to only the necessary documents. For example, many requests ask for all documents, emails, notes, etc. regarding a particular topic, e.g., "the urban growth boundary." Metro's normal procedure is to provide an estimate of costs and then discuss narrowing the request to the documents the requestor actually needs. If a requestor can merely wait three weeks and get a waiver of the fees, this will undermine efforts to work with the public on narrowing requests to relevant documents.

3. New Requirements For Public Records Request Responses (Section 3, page 3, lines 2-5).

HB 3505 creates an entirely new requirement for governments to provide an additional response every seven days with specific, mandated information to any requestor. This includes an explanation of what the government has done for the past 7 days, providing additional records or an opportunity to inspect the records or to set forth any exemption claimed by the public body. This additional requirement adds another layer of documentation for understaffed governments and serves little purpose. Most governments are making their best efforts to provide information in a timely manner with the resources they have. These additional requirements will only increase the workloads for governments without providing any benefit to the public.

4. New Statutory Fee Structure for Public Records Requests (Section 4, page 4, lines 17-37).

Section 4(2) ensures that public bodies will never be able to recover the actual costs of responding to public records requests, including the costs of attorney review, because it only allows the lesser of copy costs versus administrative fees. See page 4, lines 20-31. The costs of copies will always be less than administrative staff costs.

This section would also codify in statute very low charges for public records that are almost certainly less than the actual cost of producing those records. Metro now charges rates that are consistent with other governmental charges. The mandatory cost limits proposed in HB 3505 are much less than many governments currently charge, apparently without any analysis of actual costs. Costs to produce public records are fluid and governments establish their charges based upon their estimates of actual costs to produce records. If HB 3505 were to pass it would take legislative action to change the cost of a copy made under a public records request. We believe codifying these costs in statute is inappropriate and unnecessary.

5. Retention of Social Media, Texts, Personal Email By Public Bodies (Section 5, page 4, line 45 through page 5, line 7).

This is one of the most problematic parts of this bill. This seems to require government to go through every employee's phone, home computer and home email and get any potential public records on a government server within 30 days. Governments, especially smaller governments, are spread very thin these days with greater demands with fewer resources. This unfunded mandate would require additional staff and staff time that is just not available. This also creates great risk for the invasion of privacy as governments would be required to search through thousands of personal texts, emails on private email accounts, Facebook pages, Twitter accounts, Instagram photos, etc. to comply with this provision. New technology and social media pose challenges to the management of public records, but this provision goes way too far, especially in light of the civil penalties in Section 6.

6. Civil Penalties Against Public Employees (Section 5, page, 5, lines 8-19).

On top of the unfunded mandate, this section allows the Attorney General to impose civil penalties against any person, which does not include governments under the definition in the statute (see lines 21-22 on page 1), for violations of Section 5 of the Act requiring storage of the records described above. The language does not make sense as Section 5 requires the government to save the record, yet punishes the person (presumably the person that created the record, though this is unclear) even though the person does not have the obligation to save it.

Presuming that the intent is to punish the public servant, this language would include everyone at the table here today as it specifically names members and committees of the Legislature. So, for example, an employee posts something on their Facebook page that discusses her job. There are 9 comments to the post. No one at the agency realizes that this post has happened. The Attorney General could potentially fine a public employee $5000 for the 10 potential violations of the statute if this is not placed on a government server within 30 days. This provision seriously infringes on the rights of government employees and will further discourage potential candidates from applying for jobs in public service if they face potential civil penalties for their tweets, texts and personal emails.

Another question is how this statute would interact with the Oregon Tort Claims Act. For example, if a public employee is assessed a civil penalty under this provision while acting in the course and scope of their employment, does the government then have an obligation to step in and request a hearing or defend the employee based upon its duty under the Tort Claims Act? This question should be considered before establishing this civil penalty in statute.