



Oregon

Kate Brown, Governor

Department of Administrative Services
Office of the Chief Operating Officer
155 Cottage Street NE
Salem, OR 97301
PHONE: 503-378-3106
FAX: 503-373-7643

April 27, 2015

The Honorable Val Hoyle
Members of the House Rules Committee
900 Court St. NE
H-178 State Capitol
Salem, OR 97301

Re: HB 3505 Testimony

Dear Chair Hoyle and Members of the House Rules Committee:

On behalf of executive branch state agencies, I appreciate the opportunity to provide testimony regarding HB 3505, which imposes immediate changes to public records laws. As drafted, there are a number of provisions that would have a substantial financial and administrative impact on state agencies.

First, Section 1 of HB 3505 requires a minimum three-year retention schedule for all public records, "without regard to the technology or medium used to create or communicate the record." While retention schedules vary, most agencies operate under timeframes shorter than three years. For example, for Oregon Information Systems (OIS), the shared service provider for Oregon Health Authority and the Department of Human Services, non-client, non-policy OIS record retention is generally twelve months for messaging, emails, and shared drives. Tripling the current retention period would substantially increase agencies' paper and electronic storage costs. These financial issues are exacerbated for agencies that conduct large amounts of video surveillance. Oregon State Hospital, for example, continuously streams 1,100 cameras on its campus. Under a retention schedule set by State Archives, footage is currently preserved for 28 days. Retaining video recordings for each camera for three years – in addition to performing the costly process of redacting patients' faces from recordings – would be extremely costly. Other agencies that conduct video surveillance, including the Oregon Youth Authority and Department of Corrections, would face similar issues. The inclusion of an emergency clause also means that agencies would need to review their current practices across divisions, hire additional staff, and obtain additional storage in very short order.

Second, Section 3 of HB 3505 requires public bodies to follow a set schedule for responding to public records requests and allows fees to be waived if a request is not fulfilled within three weeks. This timeline is very short for extensive, complex records

requests, particularly ones with protected information that require review by the Department of Justice. Most agencies would either need to hire additional staff to respond to public records requests, or be regularly subject to the fee waiver. In fact, Section 3 provides an incentive for requestors to make their requests as large and complex as possible in order to ensure waiver of fees, placing an enormous fiscal burden on agencies.

In addition to the financial costs, there are also potential legal issues with waiving fees after three weeks. The Department of State Land's funding source, the Common School Fund, is a dedicated fund which prohibits the agency from waiving fees. Similarly, the Oregon Constitution mandates that State Highway Trust Funds only be used for the construction, improvement, maintenance, operation and use of public highways, roads, streets, and roadside rest areas. Requiring the Oregon Department of Transportation (ODOT) to use State Highway Trust Fund money to pay for staff time and resources to respond to records requests not fulfilled within three weeks may violate this provision.

Section 3 also states that any public records request not fulfilled within six weeks shall be treated as denied; this "treated as a denial" language creates significant legal and financial exposure to the State. A wrongful denial of a public records request opens the door for requestors to file petitions to review with the Attorney General or to file lawsuits on the basis of a wrongful denial. Practically speaking, many complicated and/or sizeable requests will not be able to be fulfilled within six weeks, particularly if they involve documents that are subject to an attorney review. The bill would hold such requests as denied, even if the state agency is able and willing, and working in good faith, to fulfill them. Additionally, requestors who prevail in a wrongful denial suit "shall be awarded costs and disbursements and reasonable attorney fees at trial." HB 3505, then, creates the likelihood that public bodies will be sued for failing to produce public records within six weeks – notwithstanding every intent to do so – and will be obliged to pay the legal fees for requestors, simply because a particular request is too large to be processed within the statutory timeframe.

Third, Section 4 of HB 3505 states that agencies must charge the lesser of the actual cost to the agency to complete the request or a set schedule of fees. It is unlikely that agencies would be able to charge the actual cost for completing a request, as the schedule set in statute is minimal. Removing the ability of agencies to recover actual costs of responding to public records requests would have a substantial financial impact on agencies. Moreover, in the case of agencies with dedicated or trust funds, removing the ability to recover actual costs may pose a legal conflict.

Finally, Section 5 of HB 3505 requires the retention of public records created on social media, sent through text messaging, or use of non-state email, on a state server, within 30 days of creation. Most agencies do not currently have a method of capturing text message data, and agencies would likely need to purchase additional software to ensure compliance with retention requirements around social media content messages.

April 27, 2015

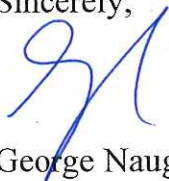
Page 3

Electronic storage costs, especially with the three-year retention period mandated under Section 1, would also increase for high-volume agencies with considerable social networking.

While there is a need to strengthen public records laws to ensure transparency and accountability in state government, I have concerns that the implementation of HB 3505 as drafted would impose substantial burdens on state agencies.

Thank you for the opportunity to provide testimony on HB 3505.

Sincerely,

A handwritten signature in blue ink, appearing to be 'GN', written over a horizontal line.

George Naughton
Acting Chief Operating Officer & DAS Director