HB 3505

The Problem:

While stonewalling public records requests is a problem at every level of government, the recent abuse of the process was clearly highlighted by the issues surrounding Governor Kitzhaber's resignation. Nearly a year after the first requests were placed, there are still outstanding requests by the media and others for Governor Kitzhaber's emails. I appreciate that Governor Brown released 94,000 emails transacted by Governor Kitzhaber's fiancé Cylvia Hayes, but that certainly doesn't cover all of the requests that have been made.

This issue happens at all levels of government, from water boards and city councils, to county commissions and state agencies. Of note, the exemption from public records requests while legislators are in session is problematic as well.

Time is not the only barrier a records requestor faces. "Reasonable fees" that a governing body can charge are inconsistent across the board, and sometimes fees are used as a weapon to stop a records request. If for example, a local government assesses the "reasonable fee" of $1300 for a records request, there's nothing reasonable about that and depending on who is asking for the record, $1300 can be so prohibitive that the record request goes unmet.

Further, in today's digital environment, we're losing the public record as records are being created on personal devices and on social media platforms.

The Solution:

HB3505 is designed to increase transparency, and end the practice of stonewalling the public with time delays or outrageous fees associated with public records requests. It will provide consistency for the public, and ensure that we work to preserve the digital record.

What the bill does:

First, HB 3505 requires a minimum three-year retention schedule for all public bodies, including the legislature. Some agencies are doing this already, and I believe the executive branch has a permanent retention schedule for the Governor's office. However, no place is this more egregious than in our own legislative body. House Rules provide that we only have to retain for one-year, and what is retained is based on the individual preferences of each legislator. Given that we on the House side are elected in two-year terms, and voters voted us annual sessions in 2010, it makes no sense that our retention schedule is only a year. Three years attempts to get us through an entire biennium, and covers the "cooling off" period we have following an exit from the legislature where we have a year before being eligible to be a lobbyist. It would stand to reason that our records should be available after a transition from this building particularly if a legislator is going to move on to other agency or political work.

Next, the bill addresses the response time. Currently, many records requestors make a request and the request is seemingly ignored. I've talked to members of the press and the public who've shared that when they make a request, they can go weeks before the request is acknowledged by the public body. HB3505 requires that an initial response of receipt of request be made within seven days. That starts the clock on the request. If the initial response doesn't include the return of the public records to the requestor, then the public body is required to give status reports every seven days until the records

have been turned over to the requestor. If there are exemptions that the public body is going to claim, then the response shall include the rational for those exemptions so that it's clear to the requestor what they are going to receive in response to their request.

If after three weeks, the request has not been fulfilled to the requestor, HB3505 requires that the public body forgo any materials costs associated with the request. If after six weeks the request has still not been met, then the public body's inability to produce the documents requested shall be presumed to be a denial of the request. There is already a process for when a petitioner believes their public record request has been denied. That process is outlined under ORS 192.450, 192.460 and 192.480.

In the current statutes, a public body may request reasonable fees. As written, the current language is where the fees actually become unreasonable because reasonable fees allow for staff time, not just materials costs. Nothing in our current laws elsewhere would require that we charge the public at all for these requests, so while I personally question charging the public at all, HB3505 allows for an agency to charge materials costs, and the -1 amendment aggregates a cap on those costs of $100.

HB3505 sets in statute the fees that a public body can charge. By standardizing the costs to current market prices and capping the aggregate request, we can make sure that those who request records have a consistent fee structure from one public body to the next. HB3505 removes from practice that a requestor is charged for the attorney time levied as part of the fee for simply analyzing the request, but still allows for some time for redactions. My personal preference would be to do away with that completely, but this compromise language recognizes that some of the smaller bodies don't have inside counsel on staff and have to hire this function to outside counsel.

HB3505 also provides a mechanism for a requestor to have notice of a fee greater than $25 made in writing. While some agencies do this now, which is how we know the estimates back are outside of the range of affordability, this would give every record requestor the assurance of what the cost will be for the records they seek.

HB 3505 also modernizes our statutes to acknowledge the unique ways records are being created and retained, and not always, inside the public purview. Section 5 of the bill addresses records created on personal devices through the use of an email, text message, or social media platform whose domain is not owned by the public body and requires the person who created the record to move the record onto a server owned by the public body within 30 days.

Social media in this context would be records created that are not forward facing. So, if a legislator puts a position out on Facebook, it can easily be screenshotted and indexed by search engines. However, if a constituent uses the instant message feature to ask where a legislator stands on a particular bill, and that record is retained, then under HB 3505, it should be put onto a public server. A simple way to do this would be to screenshot the conversation, or copy and paste the conversation, and put it directly into an email to one's legislative account.

Since Section 5 of HB3505 is new statutory language, Section 6 prescribes civil penalties for failure to comply, and they are capped at $5,000 aggregate to any single person in a single calendar year.

It's important to note, Section 5 allows for people to still use their personal devices and social media accounts to as mediums to address the public. For example, if you're elected as a volunteer to the local water district board, it's unlikely that you'll be furnished with a phone or computer for your work paid

for by the water district. You likely have a water district email account. So HB 3505 recognizes that the volunteer elected might indeed create a record using a personal device, but provides a requirement that those records be moved onto a public server in a timely manner.

So, what are the objections to the bill?

HB 3505 takes the position that records were created with public taxpayer resources, were retained by public taxpayer resources, therefore, the public, who has already paid for these records, should have access to them in a timely manner and without excessive fees. You'll hear from government agencies that are going to be here in opposition and they'll have stories about members of the public who are prolific records requestors, and that ties up a lot of time and staff resources. However, I would maintain that responding to a public records request, even for a citizen who a governing body might deem abusive in their requests, still has a right to access the information of our government.

The real solution to making records available lies with the archivist at the Secretary of State's office. In 2010, the legislature was offered to put our records into the public square, and someone from our branch of government refused. The Secretary of State's office uses a software called TRIM to make public records accessible. It's a software as a service, redundantly backed up in Baker City, where a public records creator uses their email account to put records out into the public purview. The current cost to the Oregon Legislature, should we move this direction, would be roughly $30 per user per month. If all record creators were using this program, the cost would fall to $10 per user per month.

A records creator, using TRIM, would be easily compliant with HB3505 because the records would be searchable in a forward-facing manner by the public and only records with some degree of records protection, would need to go through the traditional records process, but, a records seeker would know the records exist.

For example, a level-one records request could be "all emails received on SB941" to which I quite literally have thousands in my inbox. If I were using TRIM, these could be searchable by the public. Other records could have a higher level of request parameters. So for me, a level-three record might be an email from someone who is a domestic violence victim. You'd know I got the email, but when the searcher looks for it, it would have a message that says contact the administrator for the record. If for example, the requestor was the violent ex-husband, I could make the decision under the current exemptions rules to make the content of the email available, but protect her email and address information. A level-four request might be something like the blueprints to the prisons. There could be a legitimate use for someone to see them, but it's illogical to put them out in the public domain.

If records are stored in such a manner, it would make HB 3505 easy to comply with, and I hope the passage of HB 3505 would move public bodies, including ours, in that direction.

So, how is HB3505 different than Governor Brown's proposal?

Governor Brown has drafted Senate Bill 9. The bill is predominantly requests a performance audit of state agencies for public records practices. It does not address local governments, or as I can see, the legislative or judicial branches of government. It does not create a mechanism where fees and time can be applied to all branches of government. It does not address records being created on personal devices

or through social media accounts. What I do like about the bill is it will seek through the audit process to look at the sheer volume of exemptions that allow for redactions in the records process, but again, only applies to state agencies and not local levels of government.

While I appreciate Governor Brown looking at this through her auditor's eye, we don't need an audit to tell us that the real problem with records requests is the stonewalling of delivery of records through fees and time delays. It does not address that the legislature be made to have their records retained for at least the length of one biennium, and not let us burn records only a year into the biennium. HB 3505 recognizes real problems we know exist right now without an audit, and allows us to fix them now, in April or May, and not make the public wait for an audit due back later this year in November, and then maybe have a piece of legislation in the short session in February, that may or may not become law sometime in the middle of next year, and still does not address the legislature, judicial branch, or local governing bodies.

Lastly, I want to address the real reason this bill is needed.

Our constitution provides that we have both free speech and a free press. I believe that was designed purposefully so that we might be able to have the press keep an eye on our government. The press has the ability to widely disseminate information about the government to the people. When the function of our constitution that allows the press to communicate the workings of our government to the people becomes relegated to a business decision based on the cost of a public records request, and if that cost is so excessive that it determines what becomes news, or in many cases, what is never reported, then we do not have a free press, and the government is in fact, blocking free speech. HB 3505 seeks to address that problem and restore democracy and freedom of information to the people.