

**Testimony of Joel Morton, Senior Attorney
On House Bill 4130
House Committee On Rules
February 5, 2016**



Chair Williamson 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, the operation of parks and natural areas, and operation of visitor venues including the Oregon Convention Center and the Oregon Zoo.

Metro strongly supports Oregon's public records laws. We believe the public's right to information about our operations and policies is fundamental to accountability and good governance, and we are rigorous and diligent in responding to records requests in a timely fashion. We condemn the isolated but high-profile cases in which individuals and other government bodies have deliberately obstructed public access to public records in order to thwart citizen involvement, avoid embarrassment, or conceal wrongdoing.

However, we are concerned that certain provisions of HB 4130, as introduced, would impose costly and unworkable requirements on Metro and other public bodies throughout the state. These provisions fail to recognize the nature and magnitude of some of the public records requests we and other governments receive on a regular basis. These onerous requirements could undermine our ability to carry out the governmental duties our citizens expect us to perform.

As we are well aware, recent events have made clear that changes may be needed in the state's public records laws to preserve the values of transparency and citizen involvement that we all share. Some of the provisions of this bill are reasonable steps to address these issues, but others are not. The attached summary describes provisions of this bill that we believe impose impractical and unproductive one-size-fits-all deadlines, as well as limitations on cost recovery that place an undue burden on governments to fund records requests that do not primarily benefit the general public.

We understand that amendments are being considered, and stand ready to work with your committee and other stakeholders to make sure the bill strikes the proper balance between transparency and responsiveness on the one hand, and efficiency and workability on the other.

Thank you very much for your consideration of these comments.

Metro's Concerns with HB 4130

- 1. *The abbreviated five-business-day deadline for acknowledging public records requests is too short. (Section 4, page 3, line 5)***

All public bodies have limited staff resources, and rarely have staff they can dedicate solely to responding to public records requests. The abbreviated five-day timeline and the 30-day timeline discussed below will require large and small governmental entities to prioritize public records requests above all other work, effectively setting a new policy in Oregon that responding to public records requests is the most important work of government. Public entities need more than five days to process requests, to obtain information about the requested records and to pull together an informed response that is calculated to expedite the production of the records. Ten business days is more reasonable and would lead to an acknowledgement that is more helpful and meaningful to the requestor.

- 2. *The creation of a presumption that public bodies are "being unreasonably slow" if they are unable to produce records within 30 days, and the right to compel the release of all records as punishment for "unreasonable slowness," is a "one-size-fits-all" presumption that does not acknowledge the time-consuming nature of many requests. (Section 5, page 4, line 42)***

A 30-day deadline to either produce records or submit to the district attorney's examination of the public body's reasons for taking longer, upon threat of an order to release all records, is unreasonable and counterproductive. This provision fails to account for the sheer volume of records that must be searched for, assembled and reviewed in response to any significant public records request. Some public records requests are so large that even a 90-day timeline is impossible to meet. Issues of public concern often generate multiple public records requests due to their high-profile nature or media attention. The amount of email alone that is generated by public bodies on issues of public interest is staggeringly voluminous. The review of thousands and tens of thousands of pages prior to production is typical. Most governments are making their best efforts to provide information in a timely manner with the resources they have in place. Requiring the public body to explain to a DA what it has been doing for the past 30 days, to defend its level of effort, and to justify its estimated date of delivery and/or the need for more time, all in seven days on threat of an order to immediately release all records, just adds another layer of documentation for understaffed governments and serves little purpose. This additional requirement will only increase the workload for district attorneys and public bodies without providing any benefit to the public. It will also result in public employees necessarily prioritizing public records requests above all of their other work, thus thwarting the good work that governments are already doing within their limited budgets.

- 3. *The \$30/hour limit on staff cost recovery for entities with 10 or more full time employees is not tied to actual cost and is therefore unreasonable and unsustainable. (Section 4, page 4, line 6)***

The \$30/hour cost recovery cap fails to appropriately account for the impacts on government services and costs to the public caused by voluminous records requests, and guarantees that most public bodies will never be able to recover the actual costs of responding to public records requests. Metro now charges rates that are consistent with other governmental charges. The

actual costs of staff time to produce public records held by Metro ranges from \$45.00 to \$100.00 per hour. Metro uses lowest-cost employees to fulfill public records requests whenever possible, but the complex nature of public records law means that attorneys are often required to review large numbers of documents. Under any scenario, Metro will suffer a cost recovery gap under this bill. Furthermore, labor costs to produce public records are fluid and frankly, ever increasing. If this provision is not eliminated it will take future legislative action to increase the reimbursable staff-cost recovery cap. We believe codifying this hourly rate in statute is inappropriate and unnecessary, and that this provision places an unreasonable, unfunded mandate on local and regional governments, especially in areas of the state where labor costs are higher.

This provision may well lead to abuse of the public records process. Any limit on cost recovery stifles 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 general topic, e.g., “the urban growth boundary” or “elephant breeding.” Metro’s normal procedure is to provide an estimate of costs and then discuss narrowing the request to the documents the requestor actually needs. This provision will undermine efforts to work with the public to conserve resources by narrowing requests to relevant documents. The end result is that employees will be diverted to comply with public records requests, instead of performing essential services, such as feeding and providing medical care for zoo animals.

Requestors already have another more reasonable way of obtaining fee (cost recovery) reductions. Nearly all requestors submit a fee-waiver request with their public records request. Under current law, they may obtain a fee reduction or even a full fee waiver if making the record available “primarily benefits the general public.” Metro often provides records free of cost this way. However, if Metro disagrees with the requestor’s assertion of benefit, the district attorney ultimately determines whether the request merits a fee waiver or reduction. In contrast, under this provision, all are entitled to a government subsidy (fee reduction), regardless of the public value of their request. This bill would require public bodies to deeply subsidize the satisfaction of the personal interests and curiosity of an ever increasing number of individuals, even though their requests have been deemed by the attorney general or the district attorney to provide no benefit to the interests of the community or society as a whole.