

**Testimony of Pete Shepherd**  
**SB 106/SB 481**

**March 20, 2017 for March 22, 2017 Hearing and Possible Work Session**

**Additional Policy vs. Definitions of Public Interests in Disclosure/Non-Disclosure**

I understand that the attached language has been circulated in some quarters for consideration as a possible amendment to SB 106 or SB 481. In my opinion, the attachment would not be a prudent addition to the Public Records Law.

I addressed the basic issue raised by the attachment in my original “Testimony & Recommendations” on SB 106:

\* \* \* ORS 192.420(1) is plainly a statement of the Legislature’s policy. It declares that "Every person has a right to inspect any public record of a public body in this state . . . .". The Attorney General has characterized ORS 192.420(1) as a "policy statement." She is correct.

*I respectfully suggest that the addition of a new “policy” statement to the statute will have little utility to requesters, public bodies, or the courts. ORS 192.420(1) already serves as a clear and unambiguous affirmation of the Legislative intent.*

*The Task Force's discussion of the proposed "policy" nevertheless suggested the foundation for a much more productive reform: establishing statutory definitions of the public interests at the heart of the Public Records Law.*

Emphasis added to excerpt from page 16 of my submission. The foregoing is still my view. The attachment will not improve the clarity or application of the current law.

Further, the additional suggested language doesn’t adequately, in my opinion, accurately reflect all of the “policies” (I prefer the more precise term “public interest”) underlying either the parts of the Public Record Law serving the public interests in disclosure OR the parts of the law serving the public interests in non-disclosure. The definitions of public interest in disclosure and public interest in non-disclosure that I tendered in my original submission would address, I believe, all of the relevant public interests.

## Limited Utility of Non-Directive Statutes

A point of law is the starting point for me. First a disclaimer: I have no client and I'm certainly not in a position to provide anyone with legal advice. I'm expressing my own view of the law. Anyone wishing to evaluate the concerns I express below absolutely should consult with their own legal counsel.

The legal point turns on the distinction between a statute that declares rights and duties and one that does not. The former is sometimes called by the courts a "directory" statute. It is the preferred mode of legislating because it directs someone to do, or to refrain from doing, something.

One way of testing to see whether a provision is directory is to ask whether, in the context of the law in which it appears, it directs someone to do something. If it does not, then it is rhetorical, not declarative.

The attachment contains a mix of directory and non-declarative elements. In the attachment I've marked which is which.

I think all of subsections (1)-(3) and two of the sub-subsections of subsection (4) are non-directory. In my opinion, these elements of the draft are not "directory" because one must make an inference to discern an actionable command or even an actionable preference from their terms. In contrast, the remainder of the proposed language *directs* or forbids action. For example, Section 2(4)(c) commands that exemptions "be construed narrowly in favor of the public's right to know, while giving effect to statutory exemptions."

The Office of Legislative Counsel has cautioned the Legislative Assembly about generalized non-directive "policy statements." Here's an excerpt from page 73 of the 2014 edition of that office's drafting manual:

### 3. POLICY AND PURPOSE STATEMENTS.

If a statement of policy or purpose is required, a drafter may make it a section of the bill. \* \* \* In some instances a declaration of purpose may be intended as a guide for judicial construction or administrative application of a bill. The Oregon Supreme Court relied on ORS 337.110 (since repealed) in its effort to ascertain the meaning of another section in *Webb v. State*, 217 Or. 1 (1959).

Policy or purpose statements cause some misunderstanding since they are often far more ambitious than the scope of the accompanying provisions. See *Peacock v. Veneer Services*, 113 Or. App. 732 (1992). Unless requested to do so, the drafter should not include policy or purpose statements. If such a statement is requested, it should be drafted to reflect the scope of the bill. If such a statement is submitted with a proposal, check it for redundancy, conflicts with substantive provisions of the draft or use of undefined terms. A rhetorical exercise in nonlegal concepts becomes law but is not mere window dressing. Where the purpose of a section is highly specific, the phrase “For the purpose of . . .,” may be included in the section to which the specific purpose applies.

I imagine that the proponents of the parts of the attached draft I marked as non-directive hope that their inclusion will help tip the balance in close cases in favor of the policy expressed in each part. The courts will look at the language of non-declarative statutes, but I don’t think the proponents of the language will be satisfied with the results of that examination. The reason is that the specific statutory language of each exemption will continue to be applied. Here’s an example of how that would work out.

Section 2(4)(c) of the attachment affirms the policy that “Access to public records be timely.” I labeled this “non-directive.” This provision is similar to an expression of legislative policy applicable to land use matters. A litigant found that the stated policy was of little use to him in *State ex rel. Holland v. City of Cannon Beach*, 153 Or App 176 (1998):

Plaintiff also looks to general statutory policy to support his reading of this statute. He notes that ORS 197.805 declares the legislative policy that "time is of the essence in reaching final decisions in matters involving land use." *However, the legislature has implemented that policy through various provisions setting time limits for the review procedures and decisions by LUBA and this court. E.g., ORS 197.830(13); ORS 197.855. ORS 215.428(1) and ORS 227.178(1) serve to impose corresponding time limits in the local decision making process.* Although plaintiff states the proposition in a number of different ways, the thrust of his arguments is that the policy of expedited and prompt decision making underlies all phases of the process, and that it is not consistent with that policy for local governments to have an unlimited time to act on an application after a LUBA remand, but not before.

*We might agree with the logic of that proposition; however, our task is to interpret and apply the statute that the legislature enacted, not to extend the underlying policy of the statute in ways that the legislature did not see fit to do. We said in DLCD v. Jackson County, 151 Or.App. 210, 218, 948 P.2d 731 (1997), that*

*"courts must be cautious not to make policy in the guise of [statutory] interpretation," and [153 Or.App. 181] that "broad policy considerations are not necessarily integrated into every enactment that relates generally to the subject matter that the policy underlies."*

I added the italics to highlight the reasoning that I fear will frustrate the proponents of the non-directive elements of the draft. I've found the same or similar approach applied in *Satterfield v. Satterfield*, 292 Or. 780 (1982), *Sundermier v. State*, 344 P.3d 1142 (Or. App., 2015), and *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or 476 (2014).

Specifically with respect to time limits for responding to a request, the courts will look to the parts of the Public Records Law that specifically apply — such as a “reasonable” time or to a specific number of days. Properly construed, Section 2(4)(c) wouldn't be much solace to its proponents. Like the general statutory command at issue in *Holland v. City of Cannon Beach*, Section 2(4)(c) would be little more than a speed bump to a court applying the specific time-limiting provisions of the Public Records Law. The same analysis would limit the utility of the other non-directive parts of the draft.

In contrast, the definitional approach I suggested in my original submission would be “directive.” As the context requires, the statute would command consideration of the specified public interests. In every case in which “balancing” is required, for example, the parties would be obligated to justify their respective positions in light of the provided definitions.

### **Incomplete Affirmation of the Public Interests At Stake**

The draft does not accurately capture some of the most important public interests at stake. In contrast, the definitions I suggested do completely inventory the potentially relevant public interests.

Two important public interests in disclosure are omitted from the draft. The most surprising omission is the failure to include anything reconnecting the text of the Public Records Law to the exercise of free speech rights.

Subsection (e) of my suggested definition of “public interest in disclosure” would direct consideration of the following when any balancing of the public interest in disclosure and the public interest in non-disclosure is required:

(e) Facilitating the exercise of constitutionally-protected rights to speak, write, or print freely on any subject whatever.

As described in detail at pages 7 - 10 of my original submission, the Public Records Law is deeply rooted in facilitation of the stated rights. I think the statute should expressly reflect this connection.

The draft also omits the public interest in disclosure for the purpose of allowing the public to benefit from information developed at public expense. Many people engaged in private enterprise use the Public Records Law in this way. For example, the parties to a real estate transaction may seek public records bearing on the work that the Oregon Department of Environmental Quality has done to clean up a previously contaminated site. This interest, too, would be captured by my suggested definition of “public interest in disclosure.”

From the other side of the public interest ledger, the draft omits one of the most common legislative purposes in creating exemptions. In my proposed definition of “Public interest in non-disclosure”, I characterized this public interest as:

(d) Maximizing the intended public benefits of public programs, governmental activity, and public decision-making.

Many, many exemptions reflect the foregoing consideration. Many of the exemptions the Assembly undoubtedly justified in terms of the foregoing would not be described by any of the “sometimes appropriate” exemptions in Section 2(3). For example, the “internal advisory communication” exemption cannot be justified on the basis of protection of individual privacy or safety, public safety, or to protect economic affairs from unreasonable intrusion. It represents, instead, a Legislative judgment about the conditions under which public decision-making will yield the result best serving the public.

Perhaps it is the view of proponents of Section 2(3) that every exemption, including the internal advisory communication exemption, rooted in any other purpose than those listed in the section should be repealed. That view, however, ought to enter the statute through the front door — dare I say “transparently” — not by implication in an incomplete statement of the reasons underlying many existing legislative choices.

Attachment: Draft “Section 2”, marked by interlineation to show “Non-directive” and “Directive” elements.

Respectfully submitted,

Pete Shepherd (for himself only)

## **Testimony of Pete Shepherd**

### **SB 106/SB 481/HB 2101**

**March 20, 2017 for March 22, 2017 Hearing and Possible Work Session**

#### **Possible Amendments To SB 106/SB 481/HB 2101**

I am not privy to the text of any proposed amendments submitted to the office of Legislative Counsel for drafting and possible consideration by the Committee. This testimony addresses eleven amendments which I understand *may* have been made the subject of drafting requests. In a separate submission I address a potential amendment to Section 2 of SB 481 by which the proponent of the amendment would add Legislative findings and declarations. For the reasons explained in that separate submission, I believe the approach represented by the following proposals — particularly Amendment #1 — would be the better policy option for the Assembly.

The following represent amendments that I believe merit the Committee’s careful consideration. I believe the best outcome in this Session is represented by drawing on the content of three bills — SB 481, SB 106, and HB 2101. It matters to me less that the amendments set out below be attached to any specific bill than that they end up in law in this Session by some means. Accordingly, I have not attempted to select in this submission any particular bill to which they necessarily must attach.

As I previously affirmed to the Committee, I offer these recommendations for myself alone. I represent no one.

#### **Amendment #1**

##### **Institutionalize Critical Scrutiny of Legacy Exemptions and of Proposals For New Exemptions**

**Concept:** Assign the Office of Legislative Counsel the duty of helping a joint committee of the Assembly to undertake a systematic, multi-year review of hundreds of “legacy” exemptions and to prepare, during any given session, an “Open Governments Impact Statement” for measures proposed with implications for the public interest in disclosure that is the core of the Public Records Law. Amendment #1 creates the Assembly’s first-ever system of ensuring explicit consideration of the competing public policies of newly-proposed exemptions.

**How:**

- Remove the sunset concept from HB 2101.
- By statute, assign duties, described below, to a joint Committee of the Assembly. My nominee would be the Legislative Counsel Committee. Alternatively, the proposal could advance by requiring the Assembly to choose a Committee by exercise of the Assembly’s constitutional power of self-governance.
- By statute, require the designated Committee:
  - ➔ To establish, and thereafter adjust as needed, a work plan whereby all existing exemptions from the general rule of compulsory disclosure on demand will have been reviewed by the Legislative on or before the end of the 2021-2023 biennium.
  - ➔ To consult with the Attorney General in creating and adjusting the work plan in view of the catalog of exemptions prepared by the Attorney General, *if SB 481 becomes law*.
  - ➔ To give an annual report to the full Assembly, and to pre-session file bills recommending repeal or narrowing of existing exemptions, by November 1 of each year or by whatever other date the Assembly establishes by rule.
  - ➔ To receive recommendations from the Public Records Advisory Council and from the Public Records Advocate, *if SB 106 becomes law*.
- By statute, require the houses of the Legislative Assembly to exercise their constitutional power to make rules for their own operation by creating an “Open Governments Impact Statement” process to aid the Assembly in evaluating the public interests in disclosure *and* the public interests in non-disclosure underlying proposals for new or enlarged exemptions.
- Further amend SB 106, if SB 106 becomes law, as follows:
  - ➔ Require the Public Records Advocate to report to the designated Committee at each interim legislative days, or on such other schedule as the Committee establishes, to give updates, progress reports, and challenges faced by the office of Public Records Advocate.

**Shepherd Submission Reference:** Pages 15, 19 - 20 (“Open Government Impact Statement”).

**Comment:** (a) Amendment #1 deals with the intersections between House Bill 2101 and Senate Bills 106 and 481 by “conflict” sections that are contingent on SB 106 or SB 481 becoming law. In some instances the intersection is managed by further amendments to SB 106 or SB 481. (b)



*Amendment #1 establishes a statutory relationship between the designated Committee, the Public Records Advocate, and the Public Records Advisory Council (also created by SB 106). If SB 106 becomes law, the Council will be making legislative recommendations and the Public Records Advocate and Council will be making reports. It makes sense for the designated Committee to be directed to receive reports from the Public Records Advocate and to receive law improvement recommendations from the Public Records Advisory Council. (c) Once the sunset mechanism proposed in HB 2101 is eliminated, there would be no need to prejudge which exemptions are connected to federal and/or privacy requirements and therefore should remain permanently exempt. Under Amendment #1, such exemptions would not be threatened by repeal pursuant to a sunset clause. They would be grist for the legacy exemption review plan. The Committee would be a forum in which all such exemptions could be identified. The Committee presumably would not recommend repeal of “consensus” exemptions. The Committee might choose to recommend adjustments to improve the clarity of exemptions that everyone agrees should not be repealed. (d) I would leave the details of the “Open Governments Impact Statement” process entirely to the Assembly itself. I would also give the Assembly the power to alter various deadlines/scheduled reports specified in Amendment #1. The first iteration of any review system is bound to contain unworkable, inefficient, or unnecessarily expensive features. It will probably create unintended consequences. The schedule and deadlines may not work out in relation to the Assembly’s other work or schedule. It will be harder for the Assembly to correct such glitches if the new process is written into statute. Better to state the mandate and presumptive schedules/deadlines, but leave the details or potential variances to be adjusted through the Assembly’s constitutional rule-making authority. Amendment #1 grants requires the exercise of the the Assembly’s constitutional rule-making authority but does not specify the details of how that authority is to be exercised. (e) It would be desirable, but not essential, for the review process proposed in Amendment #1 to have reference to statutory definitions of the public interests in disclosure and in non-disclosure. I’d like to think that my proposed definitions will be agreed to in a New York minute by all concerned — but I suspect that won’t be the case. The definitions should be advanced in a separate amendment, in part to avoid burdening Amendment #1 with that potential controversy.*

## **Amendment #2**

### **Add Definitions of Public Interests**

**Concept:** Define the “public interest in disclosure” and the “public interest in non-disclosure.”

**How:** Amend the Public Records Law by adding definitions of the “public interest in disclosure” and the “public interest in non-disclosure.” The text of the definitions would be as set out on pages 17 and 18 of my written submission.

**Shepherd Submission Reference:** Pages 16 - 18.

***Comment:** The Public Records Law does not currently consistently use either of the newly-defined phrases in their exact form. Compare, e.g., ORS 192.502(5) (“public interest in confidentiality”), with, ORS 192.450(5) (“public interest in disclosure outweighs other interests in nondisclosure”). This creates a drafting problem. Without some careful work, the new definitions simply wouldn’t fit the text of the existing statute. Ordinarily, one might consider replacing the variant existing text with the new phrase. For example, one could amend ORS 192.502(5) to read: “\* \* \* **public interest in non-disclosure.**” In the hyper-sensitive context of Public Records politics, such an approach is nearly certain to raise concerns that the effect is not merely editorial, but a substantive attempt to narrow or limit the disclosure mandate of the Public Records Law. To avoid this, the definitions could be set out after a statutory command that instructs use of the definitions wherever the Public Records Law requires weighing, considering, or evaluating “public interests.” In that way, the specific exemptions would be left alone, but people applying the law would no longer be disputing, as they currently do, what interests the Legislative Assembly intended might be relevant when the Assembly refers to weighing, considering, or evaluating currently undefined public interests. In the example of ORS 192.502(5) given above, the suggested approach to adding the definitions would make the new definition of “public interest in non-disclosure” relevant in applying ORS 192.502(5) even though ORS 192.502(5) itself does not use the precise phrase “public interest in non-disclosure.”*

### **Amendment #3 to HB 2101**

#### **Encourage Disclosure, Despite Applicability of An Exemption, By Immunizing Public Bodies**

**Concept:** Immunize public officials from liability for disclosure of public records, to the extent allowed by the Oregon Constitution and in a way that is consistent with existing confidentiality protections provided elsewhere in law.

**How:**

- Add a new two-part immunity provision to the Public Records Law substantially as follows:

**(1) A public body, including a public official, public employee, custodian of public records or other public body that discloses public records, is not liable for any loss or damage based on the disclosure if the public body, public official, public employee, custodian or other public body acts in good faith to comply or attempt to comply with the disclosure requirements of ORS 192.410 to 192.505.**

**(2) A public body, including a public official, public employee, custodian of public records**

**or other public body that voluntarily and intentionally discloses public records to which an exemption applies, is not liable for any loss or damage based on the voluntary and intentional disclosure if the public body, public official, public employee, custodian or other public body acts voluntarily, intentionally, and in good faith to serve the public interest in disclosure and in reliance on legal advice that the voluntary and intentional disclosure is not prohibited by law.**

**Shepherd Submission Reference:** Pages 23-25.

***Comment:** (a) Section (1) of Amendment #3 is the same as Section 9(1) of SB 481. As described on pages 24 and 25 of my submission, Section 9(1) falls short of the goal of creating incentives for public officials to release documents wherever possible. It falls short because it immunizes officials only when no exemption applies — if an exemption applies, then there is no “disclosure requirement” and there is no immunity under Section 9(1). Section 9(1) therefore does not add to the incentives for a public official to choose to release records notwithstanding the fact that the official could choose to assert a legitimate exemption from compulsory disclosure. The new subsection picks up where Section 9(1) stops by extending the immunity to records to which an exemption applies. (b) Some of those exemptions will apply pursuant to statutes or common law creating liability for breach of a duty of confidentiality. In order to avoid undermining the liability remedy for breach of such duties of confidentiality, the proposed Amendment #3, subsection 2, limits the immunity for voluntary disclosure in three ways that are not necessary to prove when immunity is claimed for a compelled disclosure: 1. A voluntary and intentional disclosure (that is, no immunity for an inadvertent or careless voluntary disclosure), 2. The “good faith” of the public official in pursuit of the public interest in disclosure, and, 3. Reliance on the officer’s lawyer’s advice that law does not forbid release of the records. (c) Article I, Section 10 (remedy in due course for injury) may limit the scope of the immunity granted. The Legislative Counsel drafter’s expertise on the constitutional limits of statutory immunity should be applied to this provision before Amendment #3 is finalized.*

#### **Amendment #4**

#### **Encourage Disclosure, Despite Applicability of An Exemption, By Eliminating Risk of Setting a Binding Legal Precedent**

**Concept:** Codify existing law holding that no *legally* binding precedent arises from a public body’s decision voluntarily to release records that are subject to an exemption and that the act of voluntary disclosure may nevertheless affect the factual basis for future claims of the same exemption as to the same or similar previously-released records.

**How:** Amend the Public Records Law by adding a new section substantially as follows:

A public body choosing to disclose a record to which an exemption applies is free as a matter of law to claim the exemption as to the same or similar records in response to any subsequent request. The previous disclosure is admissible to establish or rebut facts relevant to the public body's subsequent claim to the exemption.

**Shepherd Submission Reference:** Pages 25 - 26.

**Comment:** (a) *The Attorney General's Public Records Manual (2014 edition) states at page 119 that, under certain circumstances, a public body that "selectively discloses an exempt record" does not lose its "discretionary power to claim the exemption as to other requesters." The Attorney General's Manual relies on a 1988 letter of advice in which that office advised a public body client agency that it could even withhold from a second requester the same record previously disclosed to the first requester. The proposed Amendment #4 is, therefore, a codification of existing law as interpreted by the Attorney General's office. (b) Under current law, the fact that information has already been made public may be relevant in applying the law defining various exemptions. Amendment #4 is not intended to change existing law on this point. For example, the Attorney General's Public Records Manual enumerates factors to be applied in considering the conditional exemption stated in ORS 192.501(12) for "personnel discipline" actions: "Other factors to consider in weighing the public interest in disclosure against the employee's interest in confidentiality include the employee's position, the basis for the disciplinary action, **and the extent to which the information has already been made public.**" *Emphasis added.* The second sentence of the proposed Amendment #4 is intended to make it clear that the public body's choice to disclose an exempt record in Case A may change the analysis of the same exemption as subsequently claimed in Case B. Specifically, the decision in Case A may make it factually impossible to claim the exemption in Case B.*

#### **Amendment #5**

#### **Encourage Disclosure, Despite Applicability of An Exemption, By Reducing Risk Associated with Waiver of the Lawyer-Client Privilege**

**Concept:** Ensure that a public body choosing to disclose records exempt as lawyer-client privileged materials does not, by the act of disclosure, vitiate its authority to claim the lawyer-client privilege for other purposes.

**How:** Modify the statute (ORS 40.280/OEC Rule 511) defining the circumstances under which a voluntary disclosure waives the lawyer-client privilege. Here is one way to accomplish this.

Voluntary disclosure does not occur when representatives of the news media are allowed to attend executive sessions of the governing body of a public body as provided in ORS 192.660 (4), ~~or~~ when representatives of the news media disclose information after the governing body has prohibited disclosure of the information under ORS 192.660 (4), **or when the governing body of a public body expressly or chief executive officer of a state agency approves disclosure of all or part of a public record requested under ORS 192.410 to 192.505.**

**Shepherd Submission Reference:** Pages 26 - 27.

***Comment:** Amendment #5 and Sections 9(2) and 10 of SB 481 address the same barrier to voluntary release of privileged material. Amendment #5 is more specific than SB 481 in one respect. Amendment #5 adheres to the existing language of ORS 40.280 in preserving the privilege. Under existing law, it is specifically the “governing body” that controls waiver by voluntary disclosure of privileged information during an executive session meeting. Amendment #5 follows the same formula. In contrast, the corresponding provisions of SB 481 do not limit the preservation to circumstances in which the “governing body” makes the release. I believe the governing body itself — as opposed to a an employee acting without the governing body’s authorization — is the only part of a political subdivision or special district that can waive the privilege by voluntary disclosure. As to state agencies, I believe the chief executive officer likely has that power. In my opinion, disclosure by an employee acting without the governing body’s or chief executive officer’s delegated authority does not operate as a voluntary disclosure destroying the privilege. Thus the risk to be guarded against by the new provision is the risk that the governing body or chief executive officer itself will waive the privilege by voluntarily disclosing privileged information in its response to a public records request. Amendment #5 is tailored to meet this risk.*

#### **Amendment #6**

##### **Clarity: Consolidate Conditional Exemptions Into A Single Section Of Law**

**Concept:** Eliminate the misleading codification of certain exemptions.

**How:** Divide ORS 192.501 into two subsections. The first subsection would be identical to the current text of ORS 192.501. For example, the opening command of ORS 192.501 (“The following public records are exempt from disclosure under ORS 192.410 to 192.505 unless the public interest requires disclosure in the particular instance”) would become ORS 192.501(1) and the first subsection of the existing statute would become ORS 192.501(1)(a). The second subsection of the statute as amended by Amendment #6. would contain subsections removed from ORS 192.502

which have in common an explicit requirement that public interests in disclosure *and* in public interests in non-disclosure be considered.

**Shepherd Submission Reference:** Pages 28 - 29.

**Comment:**

*(a) The issue Amendment #6 resolves is addressed on page 29 of the Attorney General's Public Records Manual:*

*Although ORS 192.502 does not contain a blanket public interest balancing test like the one in ORS 192.501, several of the exemptions described in ORS 192.502 are conditioned on the extent to which recognized governmental and private interests in confidentiality outweigh the public interest in disclosure. Others, however, are "unconditional."*

*(b) For the reasons discussed in my submission, Amendment #5 would separate expressly "conditional" exemptions from exemptions that are not subject to an explicit "balancing" of competing public interests. (c) Nothing in Amendment #5 is intended to change anything substantive in any exemption. (d) The following table lists exemptions, currently codified in ORS 192.502, which contain within their text a requirement that public interests in disclosure **and** in non-disclosure be considered. All of these would be moved to the new subsection of ORS 192.501. The remainder of ORS 192.502 would stay put.*

192.502(1)	Advisory communications
192.502(2)	Personal privacy
192.502(3)	Public body employee/volunteer information
192.502(4)	Confidential submissions to public bodies
192.502(5)	Bearing on "rehabilitation of a person in custody"
192.502(6)	DCBS information compiled under Chapters 723 and 725.

**Amendment #7**

**Eliminate Potentially Expensive Ambiguities and Uncertainties: Public Body Notice of Intent to Pursue Claim of Exemption Despite PRO Ordering Disclosure**

**Concept:** Maintain and clarify the means of fulfilling the requirement of existing law that a public body notify requester and District Attorney or Attorney General of the public body's intent to further resist disclosure.

**How:** Amend ORS 192.450(2) by eliminating potential for concluding that certified mail is the sole means of giving notice and substituting for the inflexible “certified mail” process the general standard required to perfect service of a complaint initiating a lawsuit. Here is one way that this could be done.

ORS 192.450(2) If the Attorney General grants the petition and orders the state agency to disclose the record, or if the Attorney General grants the petition in part and orders the state agency to disclose a portion of the record, the state agency shall comply with the order in full within seven days after issuance of the order, unless within the seven-day period it issues a notice of its intention to institute proceedings for injunctive or declaratory relief in the Circuit Court for Marion County or, as provided in subsection (6) of this section, in the circuit court of the county where the record is held. Copies of the notice shall be sent to the ~~Attorney General and by certified mail to the petitioner at the address shown on the petition~~ **served on the Attorney General and petitioner either within or without this state in any manner reasonably calculated under all the circumstances to apprise the Attorney General and petitioner of the intent to institute proceedings for injunctive or declaratory relief.** The state agency shall institute the proceedings within seven days after it issues its notice of intention to do so. If the Attorney General denies the petition in whole or in part, or if the state agency continues to withhold the record or a part of it notwithstanding an order to disclose by the Attorney General, the person seeking disclosure may institute such proceedings.

**Shepherd Submission Reference:** Pages 29 - 30.

***Comment:** (a) Except for a few elements not relevant to Amendment #7, all of ORS 192.450, including the requirement that notice be given, is made applicable to state agencies and local public bodies alike by ORS 192.460(1). Amendment #7 makes no change in the applicability of ORS 192.450 to cases in which a local public body decides to pursue its claim of exemption despite the District Attorney’s order. (b) Amendment #7 clarifies the manner of service of the state agency or local public body’s intent to adhere to the claim. The legislative history of the existing notice requirement suggests that the Assembly meant only to require actual notice. It specified “certified mail” with the intent of providing legislative approval of one means of conclusively proving fulfillment of the notice requirement. It did not intend to limit the means to certified mail. That underlying intent, however, is not is not plainly expressed in the current text. Amendment #7 substitutes for the current text a standard borrowed from ORCP 7D(1). ORCP 7D(1) states the general and specific standards for service of a summons initiating a civil lawsuit in the Circuit Court of Oregon. Amendment #7 does not incorporate the specific forms of service enumerated in ORCP 7D. Instead, any means of service of the state agency/local public body’s intent to continue claiming*

*the exemption that meets the new general standard borrowed from ORCP 7D(1) would be sufficient. Certified mail to the petitioner at the address shown on the petition, email to petitioner at an email address used in correspondence between the petitioner and the state agency/local public body in relation to the request or petition, and transmission to the petitioner's legal counsel for the records controversy are all examples of means of service of the intent to institute proceedings in the Circuit Court that would satisfy Amendment #7. (c) Amendment #7 differs from ORCP 7D(1) in that the rule of civil procedure also measures the adequacy of notice of commencement of a lawsuit by the extent to which service affords "a reasonable opportunity to appear and defend." Amendment #7 does not carry into the Public Records Law that part of ORCP 7D(1) because the Attorney General or District Attorney is not a party to the state agency/local public body's lawsuit seeking to maintain the exemption despite the order, and because the requester is a necessary party (and thus must be served with the complaint) to the lawsuit. Unlike a summons, service of the notice of intent to bring an action sustaining the claim of exemption is not itself the means by which the Circuit Court action is commenced. No one's right to "appear and defend" is conditioned, under existing law or under Amendment #7, on effective service of the notice of intent to bring an action sustaining the government's claim of exemption.*

#### **Amendment #8**

##### **Eliminate Potentially Expensive Ambiguities and Uncertainties: Consequences of Failure To Give Notice**

**Concept:** Maintain and clarify that the mandatory award of attorney fees for failure to timely provide notice of intent to continue asserting the claim of exemption applies only to state agencies and not to local public bodies.

**How:** Separate the parts of ORS 192.490(3) (governing the award of attorney fees) applicable to state agencies and local public bodies alike from the part of the same statute applicable only to state agencies. Here's one way of accomplishing this:

ORS 192.490(3) If a person seeking the right to inspect or to receive a copy of a public record prevails in the suit, the person shall be awarded costs and disbursements and reasonable attorney fees at trial and on appeal. If the person prevails in part, the court may in its discretion award the person costs and disbursements and reasonable attorney fees at trial and on appeal, or an appropriate portion thereof. ~~If the state agency failed to comply with the Attorney General's order in full and did not issue a notice of intention to institute proceedings pursuant to ORS 192.450 (2) within seven days after issuance of the order, or did not institute the proceedings within seven days after issuance of the notice, the petitioner~~



shall be awarded costs of suit at the trial level and reasonable attorney fees regardless of which party instituted the suit and regardless of which party prevailed therein.

**(4) If the state agency failed to comply with the Attorney General's order in full and did not issue a notice of intention to institute proceedings pursuant to ORS 192.450 (2) within seven days after issuance of the order, or did not institute the proceedings within seven days after issuance of the notice, the petitioner shall be awarded costs of suit at the trial level and reasonable attorney fees regardless of which party instituted the suit and regardless of which party prevailed therein.**

**Shepherd Submission Reference:** Pages 30 - 31.

***Comment:** (a) ORS 192.460 makes ORS 192.450 (which is framed in terms of the Attorney General and state agencies) applicable, in general, to District Attorneys and local public bodies. ORS 192.450 contains the requirement that the government intending to continue claiming the exemption despite a Public Records Order to the contrary give notice, within specified times, of its intent to do so. ORS 192.460 does not make any statute other than ORS 192.450 applicable to local public bodies. (b) The last sentence of ORS 192.490(3) was added to the Public Records Law at the same time the notice requirement was added. Under the last sentence of ORS 192.490(3), state agencies that fail to timely provide notice as required by ORS 192.450(2) are required to pay the requester's attorney fees **even if the state agency's claim of exemption is upheld by the courts**. The legislative history of the last sentence of ORS 192.490(3) makes it clear that this very unusual rule was intended to apply **only** to state agencies. In contrast, the first two sentences were intended to, and do, apply to state agencies and local public bodies without any distinction. The potential for litigation on the point arises from the fact that separate sentences in ORS 192.490(3) apply differently depending on whether the government involved is a state agency or a local public body. (c) Amendment #8 will help eliminate unnecessary litigation over the applicability of the mandatory attorney fee award by separating the rules applicable to state agencies that fail to provide timely notice and the rules applicable to local public bodies that fail to provide timely notice. Amendment #8 is not intended to make any change in the substantive law.*

#### ***Amendment #9***

#### **Fees: Set Presumptive Maximum Fees By Archivist Rule**

**Concept:** Improve the uniformity of the amount of allowable fees within a flexible, rule-based framework including local public body opt-outs.

**How:** Require the Secretary of State’s Archivist to make administrative rules, in consultation with the Public Advocate and Public Records Advisory Council (if SB 106 becomes law), establishing the maximum fees any state agency or local public body may charge for specified common and recurrent functions, such as per-page copying, in response to a public records request. Allow the governing body of a local public body to opt out of the Archivist’s maximum fee schedule, or of part of it, upon specific decision of the local public body’s governing board adopting a greater maximum. Exempt the judicial branch from the Archivist’s fee schedule.

**Shepherd Submission Reference:** Pages 32 - 33.

***Comment:** (a) Oregon’s Department of Administrative Services recently has adopted a schedule of fees to which state agencies must adhere. DAS has no statutory mandate, however, to apply the schedule to local governments. Even if DAS were to “codify” its schedule as a rule, it would still be inapplicable to local governments. In contrast, the State Archivist’s existing mandate regarding retention of public records already applies to state agencies and to local governments. See, e.g., ORS 192.105(1)(The State Archivist’s authority to “grant to public officials of the state or any political subdivision specific or continuing authorization for retention or disposition of public records that are in” the political subdivision’s custody). In the interest of establishing greater uniformity in the fees confronted by requesters, Amendment #9 assigns the rule making authority to establish maximum fees to the State Archivist, rather than to DAS. (b) The State Archivist’s rule-making mandate would be limited to common and recurrent functions performed by any state agency or local public body in response to public records requests. This limitation is intended to cause the State Archivist to focus on cost elements that are most likely to be accepted by most local public bodies as an approximation of their actual costs for the specified function. (c) An opt-out for local public bodies is provided in part to avoid any claim that the State Archivist’s maximum fee schedule is unconstitutional under Article XI, Section 15 of the Oregon Constitution (unfunded mandates). (d) The Judicial branch is exempted because of the constitutional separation of powers questions that might otherwise arise.*

### **Amendment #10**

#### **Fees: Authorize Fee Waivers Even Where The Effect Would Be To Impose a Cost On a Statutory Fund**

Concept: Embolden state agencies to grant fee waiver or reduction requests.

How: Amend ORS 192.440(5) (fee waivers/reductions) by adding a new subsection affirming a state agency’s authority to furnish copies without charge or at a substantially reduced fee

notwithstanding the fact that granting a fee waiver or fee reduction would impose unreimbursed costs on a statutory fund. Here's one way of accomplishing this:

ORS 192.440(5) **(a)** The custodian of any public record may furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public.

**(b) A state agency responsible for administration of a fund created by statute may draw upon that fund to the extent required to pay the agency's actual costs allowable under ORS 192.440(4) and waived or reduced pursuant to this section.**

**Shepherd Submission Reference:** Page 33.

*Comment: (a) Many state agencies are authorized to expend funds established in statute. Such funds typically are created "separate and distinct from the General Fund" and are "continuously appropriated for" specified purposes. Statutes establishing such funds and specifying allowable expenditures from those funds often do not expressly authorize expenditures for the purpose of paying costs of Public Records Law compliance. Here are few examples: The Legislative Fiscal Office Operating Fund (ORS 173.465); The Plant Pest and Disease Emergency Response Fund (ORS 571.038); The Elderly Rental Assistance Fund (ORS 458.377); The Court Appointed Special Advocate Fund (ORS 458.584); The Assessment and Taxation County Account (ORS 306.125); The Oregon Land Information System Fund (ORS 306.132); and The Military Department Construction Account (ORS 396.525). The absence of explicit authority to incur unreimbursed costs resulting from a waiver or reduction in the fees that agency is allowed by the Public Records Law to charge a requester may operate as a disincentive to granting a request for waiver or reduction of fees. The agency's hesitation may arise from a belief that law governing the statutory fund forbids such expenditure, from concern about criticism from licensees or other constituencies of the agency, or both. Amendment #10 is intended to remove the disincentive, regardless of the agency's root concern. (b) Amendment #10 is not intended to apply to funds or accounts administered by local public bodies. It is limited to funds administered by state agencies. The limitation is intended to avoid any claim that the State Archivist's maximum fee schedule is unconstitutional under Article XI, Section 15 of the Oregon Constitution (unfunded mandates). The limitation is not intended to establish the proposition that a given local fund **cannot** be tapped by a local public body to cover the unreimbursed cost of a waiver or reduction in fees. Amendment #10 is not intended to be useful in determining whether a local public body can use any given fund for the purpose of funding unreimbursed costs resulting from waiver or reduction of fees agreed to by the local public body.*

#### **Amendment #11**

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**Fees: Collect Data About State Agencies' Unreimbursed Expenses Arising From Fee Waivers or Reductions**

**Concept:** Collect data about the magnitude of the unreimbursed expenses incurred by state agencies, as measured by the magnitude of fee waivers and reductions.

**How:** Add a new subsection to ORS 291.216 (specifying the content of the Governor's "budget report" aka Governor's Recommended Budget), substantially as follows:

**ORS 291.216(10) As supplemental information to the budget report, the Governor shall compile and provide to the President of the Senate, The Speaker of the House of Representatives, and the majority and minority leaders in the Senate and the House of Representatives a report on the magnitude, by state agency, of unreimbursed expenses incurred by state agencies as a result of decisions pursuant to ORS 192.440(5) by the agencies to furnish copies of requested records without charge or at a substantially reduced fee.**

**Shepherd Submission Reference:** Page 34.

***Comment:** (a) No one knows the cumulative fiscal impact of decisions by state agencies to furnish copies of requested records without charge or at a substantially reduced fee. The magnitude of the subsidy of a requester represented by a decision to waive or reduce fees currently is raised on a case-by-case basis that often suggests the impact on the agency is very slight. In one recent matter, for example, the Attorney General issued an order dismissing an agency's denial of a request for waiver of a \$2.50 fee (I was not involved in any way in the matter). I suggest that the magnitude of the fee in a particular instance may be very misleading as to the total impact at stake for the administration of public funds. A good faith interest in safeguarding public funds could be expressed even in a case involving \$2.50. The cost of fulfilling the Public Records Law's mandate — great or inconsequential — will never be transparently exposed to the public and to the Legislative Assembly until data begins to be comprehensively collected about those costs. Amendment #11 is intended to begin to collect data about some of the compliance costs. (b) Because Amendment #11 is hitched to the Governor's Requested Budget process, it does not apply to the unreimbursed costs incurred by local public bodies. Therefore, it could not be asserted that the work required to inform the new supplement to the Governor's budget report constitutes mandate imposed on local public bodies and unconstitutional under Article XI, Section 15 of the Oregon Constitution (unfunded mandates). (c) The Legislative Assembly probably could accomplish the same data collection objective through the power granted by Article IV, Section 11, of the Oregon Constitution to each house of the Legislative Assembly to "determine its own rules of proceeding . . . ."*

**Respectfully submitted, Pete Shepherd: 503-871-3787**

SECTION 2. The Legislative Assembly finds and declares that:

(1) Protecting public access to information about government and governmental actions ensures that the public is informed and able to meaningfully participate in government.

(2) Access to information enables Oregonians to ensure that their public servants perform honestly, faithfully and competently.

(3) Exemptions from public disclosure are sometimes appropriate in order to serve particular interests, including, but not limited to, the following:

- (a) To protect the privacy and safety of individuals;
- (b) To protect public safety; and
- (c) To protect private economic affairs from unreasonable intrusion.

(4) It is the policy of this state that:

(a) Public records be accessible to members of the public, with specific exemptions;

(b) Exemptions from public records disclosure requirements be construed narrowly in favor of the public's right to know, while giving effect to statutory exemptions;

(c) Access to public records be timely;

(d) Fees for access to public records may be waived or reduced to serve the public interest and should not exceed the actual cost of making the public records available;

(e) An Act enacted after the effective date of this 2017 Act that creates an exemption from mandatory disclosure should expressly identify the interests for which the exemption is needed; and

(f) All exemptions from public records disclosure requirements be written and interpreted to ensure that an exemption is no broader than necessary.

*Non-Directive*

*Directive*

*Non-Directive*

*Directive*