

# Merrick Mediation

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## **Testimony of Jeff Merrick on SB 106**

Senator Riley and committee members my name is Jeff Merrick.<sup>1</sup>

### **1. Snatching Defeat from the Jaws of Victory**

Mediation could grease the wheels of public records production. Mediation could save money for public bodies and requesters. Mediation could move us all toward trust. Unfortunately, as written, SB 106 will not accomplish the promise of mediation.

### **2. Mediators are not decision makers.**

Mediators facilitate the resolution of conflicts. Mediators are not decision makers. One of our prime ethical directives is “self-determination,” which means the parties must make informed decisions for themselves. The mediator is not to impose solutions or make judgments.

Mediation succeeds when both sides trust the mediator and the process. Confidentiality encourages a zone of safety, in which the parties can explore and disclose their true interests. People and agencies will not achieve efficient resolutions if participants must be cagey because they fear the Public Records Advocate may declare them in bad faith.

Also, SB 106 diminishes the mediator’s tools by assigning him or her the District Attorney’s role in counties with fewer than 75,000 people. When the mediator must issue opinions, people will learn of the opinions and not communicate openly. Without free and open communication, mediation is less likely to succeed.

### **3. Is The Public Records Advisory Council the best option?**

The Public Records Advisory Council may not be the best use of limited resources.

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<sup>1</sup> I have been an attorney in Oregon since 1984 and a mediator since 2012. Over those 32 1/2 years, I have been on all sides of public records law. In 1985, I responded to requests during my one-year stint as an honors attorney with Attorney General Dave Frohnmayer. As a civil litigator, I’ve sought records to help my clients. As a concerned citizen, I have sought records on a variety of issues, from school budgets to homelessness.

**A. First, the subject has been studied sufficiently.**

- Attorney General Rosenblum convened a Public Records Law and Reform Task Force. Interested parties participated. They identified the issues, and their work is available for all to study online.<sup>2</sup>
- Secretary of State Atkins audited practices. The audit concluded, “State agencies respond well to routine public records requests, but struggle with complex requests and emerging technologies.”<sup>3</sup>

We know what the problems are and where the resources should go: Deal with complex requests and follow best practices for electronically stored information.

**B. Second, there are already too many cooks in the kitchen.**

Oregon does not need another public authority to manage public records law. The following summarizes some of the current authorities

Governor	Secretary of State
<p>Gov. is “The chief [sic] executive power of the State, shall be vested in a Governor” Or. Const. Art 5, §1.</p> <p>“He shall take care that the Laws be faithfully executed.” Or. Const. Art 5, §10</p>	<p>SOS “shall keep a fair record of the official acts of the Legislative Assembly, and Executive Branch.” Or. Const. Art 6, §2</p>
<p>Gov. appoints State Chief Information Officer. ORS 291.039(2). SCIO to develop protocols for executive department agencies for searching for and identifying requested public records. ORS 291.039(4)(a)(O)(2016).</p>	<p>SOS is public records administrator. Responsible to obtain and maintain uniformity in application, operation and interpretation of public records law. ORS 192.015.</p>
<p>Dept. of Administrative Services shall coordinate efforts of executive dept. agencies in fulfilling public records requests made of the agency and provide technical assistance to the agency. 2016 Or. Laws Ch. 48. §2. DAS may establish rules for electronic storage of Executive Dept. Agencies. <i>Id.</i> §4.</p>	<p>State agencies shall submit their written policies to the State Archivist for approval. ORS 192.018.</p> <p>State Archivist may grant to public officials specific or continuing authority for retention or disposition of public records in their custody. ORS 192.105(1).</p>

<sup>2</sup> [http://www.doj.state.or.us/public\\_records/Pages/task\\_force.aspx](http://www.doj.state.or.us/public_records/Pages/task_force.aspx)

<sup>3</sup> <http://sos.oregon.gov/audits/Documents/2015-27.pdf>

State Archivist shall require periodic reports from records officers about records management programs. ORS 192.105(2).

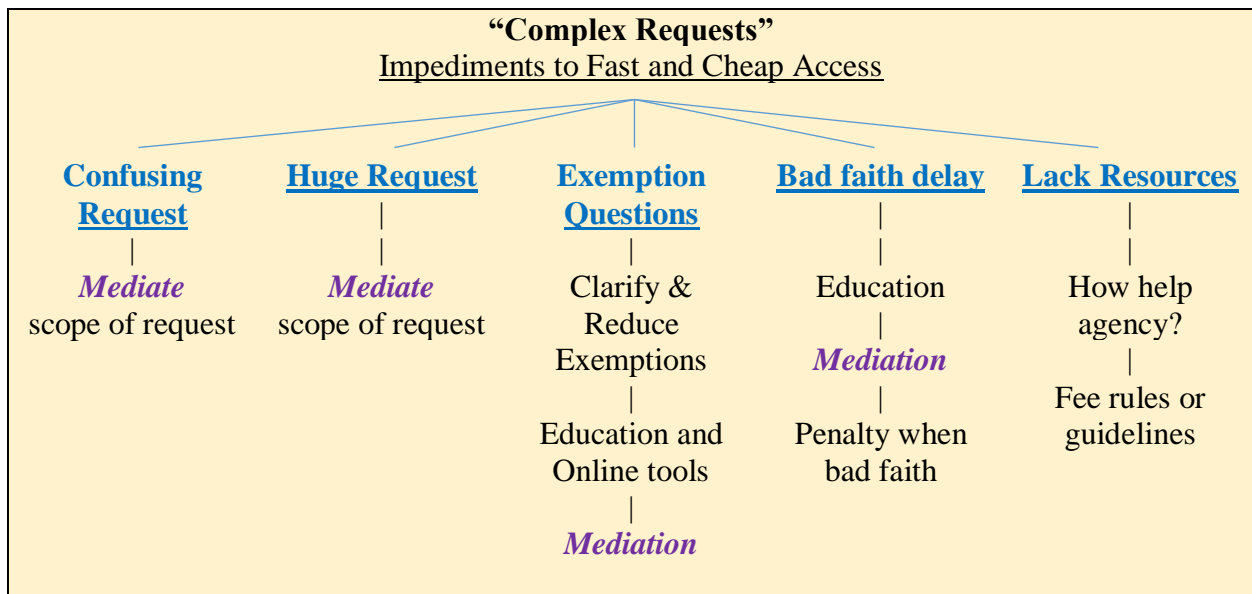
Not-important records to be destroyed pursuant to SOS rules. ORS 192.001(2).  
Archivist considers value of records for “legal administrative or research purposes” and establishes rules for retention or disposition of records. ORS 192.105.

**4. A Joint Legislative Committee May Provide a Better Approach.**

Representative Huffman informed me the House is considering a joint House-Senate Committee to address the 550+ exemptions to public records production. Such a committee is a better use of resources because members can push to enact reforms as they identify them.

**5. Don't Impose Delays. Instead, Apply Grease to the Gears Sooner.**

The problems arise from complex requests.



SB 106 throws a monkey wrench or two into the process because it (a) requires formal denials and (b) waiting periods before people may involve a mediator.

Instead, you should speed the process.

- Require public bodies to state in their initial response if they believe a request will be difficult and why.

- Offer direct discussions and mediation in that initial response to encourage understanding of:
  - What is the real need of the requester?
  - Why the Agency cannot respond faster and more cheaply.

**6. Offer Mediation to All Public Records Requesters, not just those requesting State Records.**

As of this writing, the draft amendments limit the benefits of mediation to state agency disputes. The law should authorize mediation between local agencies and people requesting records from local agencies.

If the concern is workload, then cut the other functions of the Public Records Advocate and authorize the Advocate to prioritize state requests over local requests.

**7. Mediation is a skill not held by attorneys who are not trained and experienced as mediators.**

I participated in mediations as an attorney for decades. I thought I knew mediation, but I was wrong. I did not understand the role and skills of a mediator until I studied mediation and mediated about two dozen cases. I did not achieve competence until I mediated about 50 cases.

If you want your Public Records Advocate to mediate, you ought to require that he or she be an experienced mediator and attorney.

Respectfully submitted,

*Jeff Merrick*