



Crook County

300 NE 3rd Street • Prineville, Oregon 97754
Phone (541) 447-6555 • FAX (541) 416-3891

April 19, 2017

Hon. Senator Richard Devlin
Co-Chair, Joint Ways and Means Committee
900 Court St. NE, S-213 Salem, Oregon 97301

Hon. Representative Nancy Nathanson
Co-Chair, Joint Ways and Means Committee
900 Court St. NE H-276
Salem, Oregon 97301

Re: SB 505, unfunded mandate

Dear Senator Devlin and Representative Nathanson,

On behalf of the citizens and taxpayers of Crook County, we are writing to express grave concerns regarding the funding mechanism contained in SB 505-4.

The Legislature has heard from many concerned citizens over the need for or wisdom of this bill. Our concerns are not directed toward whether grand jury proceedings should be recorded, but rather how this bill will pay for such recordings.

As elected officials responsible for the administration and provision of County-wide services, we are writing to express our concern that as currently drafted, this bill will establish an unfunded mandate upon local taxpayers. Many of the advocates for this bill stress that the benefits they would provide are a matter of statewide concern. Similarly, those currently in opposition express concerns for the protection of crime victims or law enforcement officers throughout Oregon.

Despite the fact that both the desired benefits and the anticipated problems would affect all Oregonians, the costs incurred in furthering this program would not be borne by the State. Rather, this bill shunt the expenses onto the thirty six Oregon counties.

The result is that the counties would bear the expenses of advancing a statewide criminal justice program with no additional funding provided to offset the additional burdens.

An unfunded mandate would frustrate one of the proponents' stated goals – it would frustrate government openness and transparency. Proponents of grand jury recordation, including the American Civil Liberties Association, the Partnership For Safety and Justice, and New Approach Oregon have emphasized that the program is necessary to establish transparency in criminal justice.

A number of advocacy groups have supplied written testimony in support of a companion bill, SB 496 (which would place the costs of grand jury recordation upon the State). For instance, Kimberly McCullough of the ACLU wrote, "Secrecy reinforces the perception that the system is rigged and leaves members of the public helpless to do anything other than speculate about what actually occurred behind closed doors." Shannon Wright of PFSJ wrote, "We are supporting this bill because we believe it will protect the rights of victims, help create greater trust in our criminal justice system and provide needed transparency for all impacted by crime." Anthony Johnson of NAO wrote, "By providing greater transparency in court proceedings, SB 496 can help restore many Oregonians' faith in our criminal justice system. Secrecy breeds uncertainty and contempt."

Transparency in the administration of justice is a laudable goal, but equally so is transparency in the **costs** of government programs. Our taxpayers deserve to know how much programs cost and where the money to pay for these programs comes from. They deserve this information so that they can make knowledgeable decisions as to the costs and benefits of any individual program, whether to vote for particular ballot measures, whether there may be better ways to achieve the same ends, and to apprise whether public officials are being wise and trustworthy stewards of the common good.

SB 505 obscures the costs for the statewide recordation of grand jury proceedings by simply stating that paying for the program is the responsibility of someone else. It is the counties, who fund the local district attorneys' offices, which will be responsible for meeting the expenses the legislature would create by this bill. Rather than being able to look at the State to appraise the costs and successes of this statewide program, an individual must attempt to gather that information from thirty six separate entities.

The problems with unfunded mandates are many, but above all else they short-circuit the normal functioning of our democratic process. Ordinarily, the actions of a public body, of any size, would be scrutinized by body's constituents. The proponents of any action would have both the opportunity to take credit for any successes, and the obligation to address complaints of burdens or failures. Constituents could voice their opposition or support for any individual representative at the polls, allowing them to "vote the bums out" or reelect someone to speak on their behalf.

Unfunded mandates circumvent this normal democratic process by placing upon one public official the duty to implement the policy, and answer for any burdens or failures it may create; while another public official can take credit for any successes. This obscures the real effects of the statewide program – reducing transparency in government action and making it more difficult for interested citizens to appraise the program's successes or flaws.

The United States Supreme Court has observed the harmful effects that unfunded mandates have on the democratic process. In the context of federal unfunded mandates upon the states, they stated:

"The Government also maintains that requiring state officers to perform discrete, ministerial tasks specified by Congress does not violate the principle of *New York*

because it does not diminish the accountability of state or federal officials. This argument fails even on its own terms. By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. Under the present law, for example, it will be the [Chief Law Enforcement Officer] and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected."

US v. Printz, 521 US 898 (1997) (internal citations omitted).

The same logic applies in cases of state unfunded mandates upon local governments.

The costs to the counties would not be limited to merely purchasing a recordation system. County staff members would have to devote time and resources towards conducting procurement under ORS Chapters 279A and 279B. This would involve publication expenses, review and appraisal of proposals, and meetings by the contracts review boards. It would expose the counties to the possibility of bid protests or civil litigation under the Writ of Review statutes, including the possibility of an award of attorney's fees. Because the responsibility for generating the recordings would be placed upon the counties, under ORS Chapter 192 the counties would have the responsibility to store and maintain the recordings. Under the State Archives' adopted record retention schedule, these recordings would have to be maintained for years. The costs for storage and maintenance along would be immense. Counties would need to endure the costs for equipment repair, the administration of the contract documents, for quality assurance testing, and for periodic upgrades.

Because each county would be individually responsible for implementing this system, there would be little chance for a large-volume discount that might be obtained from a centralized, State of Oregon procurement. Further, Section Sixteen of this bill creates different timeframes for the counties to finalize the new systems – that significantly reduces the opportunities for counties to work collaboratively on a universal procurement. Counties like Lane or Marion would have several months less time to refine their procurement and contract documents than would counties like Crook, Wheeler, or Jefferson, meaning that the former group of counties would have very little opportunity to work with the latter group of counties on a joint procurement. In all likelihood, each county would be forced by the circumstances created by the bill to act independently. This would lead to the duplication of effort, the lack of any large volume discounts, and the risk of wildly divergent outcomes.


Time and again, proponents emphasize that the problems the bill are meant to address problems that exist everywhere in Oregon, and potentially affect every Oregon resident. Those expressing concerns likewise feel that the difficulties the bill creates apply statewide, whether they are the safety concerns of crime victims or the privacy concerns of law enforcement officers. Both sides seem to agree that the principles at stake are of the highest moral consequence.


If these principles really are of the highest moral consequence, and the effects of this bill will be felt by every Oregonian, then the costs of this program should in all fairness be borne by the one institution which is constituted so that justice be established, order maintained, and liberty perpetuated for every Oregonian – the State of Oregon itself.

For these reasons, we urge that SB 505-4 be revised so that the costs for implementing the grand jury recordation system are placed on the State of Oregon.

Sincerely,


Judge Seth Crawford


Commissioner Jerry
Brummer


Commissioner Brian
Barney

CC: Daina Vitolins, Crook County District Attorney
Rob Bovett, Association of Oregon Counties