



Association of
Oregon Counties

Written Testimony of Rob Bovett, AOC Legal Counsel
before the
Senate Committee on General Government and Accountability
regarding
Senate Bill 106

Monday, February 6, 2016

Chair Riley, Vice-Chair DeBoer, and Senators Hass, Prozanski, and Thatcher,

Thank you for the opportunity to share a few thoughts with you about reform of our public records law, and [Senate Bill 106](#) particular.

The basic structure of Oregon’s public records law has not changed since the early 1970s. However, the nature of public records, and how they are generated and stored, has changed dramatically since then. Decades of efforts to significantly reform or modernize the public records law have all met with failure, largely due to a lack of consensus among the key stakeholders.

A couple years ago, Oregon Attorney General Ellen Rosenblum decided to give it another try, and formed the [Attorney General's Public Records Law Reform Task Force](#). I serve on that Task Force as the representative from the [Association of Oregon Counties \(AOC\)](#). The Attorney General has made it clear that she wants to tackle three big issues, namely timelines, fees, and exemptions. She also wisely indicated that she seeks consensus among the key stakeholders.

The Task Force has extensively discussed the issues at its meetings, and also conducted a series of meetings around the state to solicit public input. Recently, the Attorney General has prepared draft legislation to address timing issues, which has become [Senate Bill 481](#).

Governor Kate Brown has also taken an active part in a separate piece of the public records law reform puzzle, namely the possibility of having a public records advocate, similar to what is being done successfully in a number of other states. This has become [Senate Bill 106](#), and also includes provisions that essentially make the Task Force a permanent statutory body, although it notably is missing some key stakeholders as members.

Both of these bills have valuable concepts, but both are in serious need of amendments in order to achieve consensus.¹ With the assistance of my colleagues from other local government associations, I have crafted the attached proposed amendments for both bills. As you will note, there are a number of alternative policy choices baked into the proposed amendments, so I encourage your careful review and consideration.

In any event, I remain cautiously optimistic that we can find consensus to move forward on each of the four critical public records law reform issues: (1) Timelines, (2) fees; (3) exemptions; and (4) review and appeal process (including an advocate). It is also important to note that this work is quite extensive, and may take multiple legislative sessions to accomplish. Thank you again for the opportunity to share my thoughts this afternoon.

¹ I refer to the critical need for “consensus” cautiously, and in two senses, as the last time I did so at a Task Force meeting some in the media [ran with a story and editorials](#) that were both misleading and inaccurate.

REB (2/5/2017)

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**PROPOSED AMENDMENTS TO
SENATE BILLS 106 AND 481
(WITH EXPLANATIONS)
RELATING TO PUBLIC RECORDS**

Senate Bill 106

SECTION 2. Public Records Mediation Services.

This is not a well-crafted section. In some parts, this section appears to apply only to state agencies. In other parts, it appears to apply more broadly, or is confusing at best. This needs to be cleared up, one way or the other, to either make it applicable only to state agencies, or not.

OPTION 1: The following amendment would clarify that it is only applicable to state agencies, as appears to be the intent:

On page 1, line 22, after “of” add “state agency”.

OPTION 2: The following amendments would make it applicable to all public entities, if that is what is desired:

On page 1, line 19, delete “state agency” and insert “public body”.

On page 2, line 6, delete “state agency” and insert “public body”.

On page 2, line 12, delete “state agency” and insert “public body”.

On page 2, line 17, delete “state agency” and insert “public body”.

On page 2, line 19, delete “state agency” and insert “public body”.

On page 2, line 31, delete “state agency” and insert “public body”.

On page 2, line 33, delete “state agency” and insert “public body”.

On page 2, line 35, delete “state agency” and insert “public body”.

On page 2, line 38, delete “state agency” and insert “public body”.

Subsection (5) and (6) provide a mechanism where the mediator can find that a party has not engaged in “good faith,” the results of which can be denial of access to public records to the requester, or the imposition of attorney fees and costs on a public body. However, the subsection provides no mechanism for appeal or review, or for the imposition of those fees. The following amendments would make it reviewable in a circuit court, and allow the circuit court to impose those costs and attorney fees:

On page 2, line 21 after “fees” insert “by a circuit court”

1 **On page 2, line 26, after the period insert “A determination by the Public Records Advocate**
2 **that a party has failed to engage in good faith as described in subsection (5) of this section is subject**
3 **to review by the circuit court.”**

4 SECTION 10. Public Records Advisory Council

5 This looks like an effort to make the [Attorney General's Public Records Law Reform Task Force](#)
6 into a permanent Advisory Council. However, proposed new Council is missing some key stakeholders.
7 First, it lacks any representative from any public body other than the state. The Task Force currently has
8 representatives from the Association of Oregon Counties (AOC), the League of Oregon Cities (LOC), and
9 the Special Districts Association of Oregon (SDAO). In addition, the Task Force currently has more than
10 one member of the news media. That is vital, in light of the development of what is commonly now
11 referred to as “new media.” Finally, the Task Force membership also currently includes legislators. That
12 should be retained, especially in light of the duties described in Section 12 of the bill. This all needs to be
13 remedied.

14 **OPTION 1:** Remove the Advisory Council from the bill, and allow the [Attorney General's](#)
15 [Public Records Law Reform Task Force](#) to continue its work instead:

16 **On page 5, delete lines 21 through 45, and delete**

17 **On page 6, delete lines 1 through 45.**

18 **On page 7, delete lines 1 and 2.**

19 **On page 7, line 3, delete “16” and insert “10”.**

20 **On page 7, line 5, delete “17” and insert “11”.**

21 **OPTION 2:** Add the above described local government, media, and legislative representatives to
22 the Advisory Council:

23 **On page 5, delete line 27 and insert:**

24 **“(d) Two representatives of the news media who are appointed by the Governor.”**

25 **On page 5, line 28, delete “and”.**

26 **On page 5, after line 28, insert:**

27 **“(f) A representative of counties who is appointed by the governor;**

28 **“(g) A representative of cities who is appointed by the governor;”**

29 **“(h) A representative of special districts who is appointed by the governor;”**

30 **“(i) The President of the Senate shall appoint one member from among members of the**
31 **Senate;”**

32 **“(j) The Senate Minority Leader shall appoint one member from among members of the**
33 **Senate;”**

1 “(k) The Speaker of the House shall appoint one members from among members of the
2 House of Representatives;”

3 “(L) The House Minority Leader shall appoint one member from among members of the
4 House of Representatives; and”

5 On page 5, line 29, delete “(f)” and insert “(m)”.

6 On page 5, line 30, delete “or (d)” and insert “through (h)”.

7 On page 5, line 34, delete “or (d)” and insert “through (h)”.

8 On page 5, line 37, delete “or (d)” and insert “through (h)”.

9 On page 6, line 8, delete “The” and insert “One”.

10 On page 6, line 10, delete “member” and insert “members” and after “(2)(e)” add “and
11 (h)”.

12 **OPTION 3:** Option 2, but with a sunset on the Advisory Committee after four years:

13 *Make all of the changes from OPTION 2 above, plus:*

14 On page 7, line 1, after “are” delete the rest of the line and insert “repealed on January 1,
15 2020.”

16 On page 7, delete line 2.

17 Senate Bill 481

18 SECTION 2. Legislative Findings.

19 This section compounds various policy statements and directives. It should be amended to make
20 its language internally consistent. It also fails entirely to reflect the vital importance of individual
21 personal privacy of citizens in a modern world that can be highly intrusive by way of government. That
22 should be spelled out clearly. Simply because someone has contact with government does not mean their
23 personally private information, sometimes highly sensitive, should not be protected in the strongest terms.
24 Suggested amendments:

25 **On page 1, after line 11, insert:**

26 “(3) Protecting the personal privacy of all Oregonians is vital, and personally sensitive
27 information about a citizen should not be released simply because that citizen has contact with their
28 government.”

29 On page 1, line 12, delete “(3)” and insert “(4)”.

30 On page 1, line 14, delete “must” and insert “should”.

31 On page 1, line 15, before the semicolon add a comma and “subject to ensuring the purpose
32 of an exemption and the personal privacy of citizens”.

33 On page 1, line 16, delete “is” and insert “be”.

34 On page 1, line 18, delete “may” and insert “should”.

1 **On page 1, line 20, delete “must” and insert “should”.**

2 SECTION 3. Initial Response.

3 The bill does not define “business day.” That will leave it open to interpretation and application.
4 As done in other statutes, that should be spelled out:

5 **On page 2, line 24, after the period insert “As used in this section, business days mean days
6 other than Saturdays, Sundays and legal holidays.”**

7 SECTION 4. Response.

8 Paragraph (b) of subsection (2) refers to exemptions from disclosure “under ORS 192.501 or
9 192.502.” That is too narrow, and leaves other exemptions in ORS chapter 192 not addressed, although
10 arguably they are bootstrapped under ORS 192.802(8). For example, what about exemptions under
11 192.496 or arguable exemptions under ORS 192.445, 192.447 or 192.448. That should be clarified:

12 **On page 3, line 32, delete “ORS 192.501 or 192.502” and insert “ORS 192.410 to ORS
13 192.505”.**

14 The language in paragraph (c) of subsection (2) is different than that found in ORS 192.505,
15 leaving an ambiguity as to whether its application in Section 4 is different than that in ORS 192.505. This
16 should be clarified and simplified:

17 **On page 3, delete lines 36 and 37 and insert:**

18 **“(c) Provide records as required by ORS 192.505.”**

19 Paragraph (f) of subsection (2) requires an affirmative statement regarding how appeals of denials
20 may be filed. This is fraught with danger, and should either be stricken or, alternatively, specific required
21 language should be spelled out in the statute, so there is no room for error or misinterpretation. This
22 would strike it:

23 **On page 3, delete line 45.**

24 **On page 4, delete lines 1 and 2.**

25 Subsections (3) and (4) put requests in abeyance while waiting for decisions or actions from the
26 requester. There should be an end date, at which point the request is deemed lapsed. This amendment
27 would set that at 60 days:

28 **On page 4, line 16, after the period insert “If the requester fails to pay the fee within 60
29 days, or fails to pay the fee within 60 days of a denial of a fee waiver request, and there is no appeal
30 from the denial of a fee waiver request, the request for those public records shall lapse and be
31 deemed withdrawn.”**

32 **On page 4, line 12, after the period insert “If the requester fails to respond within 60 days to
33 a good faith request by the public body for additional information or clarification, the request for
34 those public records shall lapse and be deemed withdrawn.”**

1 Subsection (6) provides the escape clause for instances where compliance with the new timelines
2 is not realistic. That subsection needs more work, as I believe many folks on the Attorney General’s Task
3 Force have recognized. This was also a hot topic of discussion and negotiation in the 2016 legislative
4 session in the context of House Bill 4130, and ultimately negotiated language was moved into the final
5 version of the bill (the [Dash-10 Amendments](#), which died in Ways and Means at the end of the short 2016
6 session). The following would blend that negotiated language into the context of the subsection (6)
7 structure:

8 **On page 4, delete lines 20 through 29 and insert:**

9 **“(6) The time periods established in ORS 192.440 (2) and subsection (5) of this section:**

10 **“(a) In the case of a community college district, community college service district or public**
11 **university in this state, do not apply for periods that students of a school of the respective district or**
12 **university are not attending class;**

13 **“(b) In the case of a school district or education service district, do not apply during periods**
14 **that a majority of students of the district are on break for five or more consecutive days; and**

15 **“(c) Do not apply to a public body if the request would be impractical because:**

16 **“(A) The necessary staff or volunteers who are responsible to complete a response to the**
17 **public records request are unavailable;**

18 **“(B) The request would result in the impairment of the public body’s ability to perform**
19 **necessary functions; or**

20 **“(C) Of the high volume of the public records requests then being processed by the public**
21 **body.**

22 **On page 4, line 30, after “members” insert “or volunteers”.**

23 **On page 4, after line 31 insert:**

24 **“(8) A public body that is not subject to the time periods established in in ORS 192.440 (2)**
25 **and subsection (5) of this section because of the provisions of subsection (6) of this section must still,**
26 **as soon as is practicable and without unreasonable delay, acknowledge receipt of the request and**
27 **provide the requester with copies of the requested records, an opportunity to inspect requested**
28 **records or an explanation for why the requested records will not be made available to the**
29 **requester.”**

30 SECTION 5. Petition for Review.

31 It is unclear how a requester could show an “estimated completion date” is “unreasonable.” This
32 will lead to needless conflict and litigation. This should be clarified:

33 **On page 4, delete lines 39 to 45 and insert:**

1 “(c) The failure of the state agency to timely respond to the request as required by section 4
2 of this 2017 Act. A failure of the state agency to timely respond to the request shall be treated as a
3 denial of the request unless the state agency demonstrates that the estimated date by the which the
4 public body expects to complete its response has not elapsed, requires a new estimate based on
5 information available at that time, or compliance was not reasonably possible as described in
6 section 4 of this 2017 Act.”

7 **On page 5, delete line 1.**

8 SECTION 8. Catalog of Exemptions.

9 By placing the catalog into law and giving the AG discretion on what is included, language
10 should be included that the AG’s catalog not be construed against a public body. Request Section 8(4)
11 include

12 **On page 7, line 29, after the period insert “The lack of an exemption being listed in the
13 catalog does not preclude a public body from asserting that exemption.”**

14 TWO ADDITIONAL SECTIONS NEEDED:

15 1. *Twenty-Five Year Expiration:* ORS 192.495 generally revokes public records act exemptions
16 after 25 years. However, the public records act also bootstraps in external exemptions for “records or
17 information the disclosure of which is prohibited by federal law or regulations” and “records or
18 information the disclosure of which is prohibited or restricted or otherwise made confidential or
19 privileged under Oregon law.” ORS 192.502 (8) and (9). That sets up the appearance of a potential
20 conflict between ORS 192.495 and those external federal and state statutes. Many of those external
21 statutes protect records for which exemptions should never expire, such as those covered by evidentiary
22 privileges such as the psychotherapist-patient privilege or attorney-client privilege. A case was very
23 recently litigated in Multnomah County Circuit Court over this very issue. *City of Portland v Bartlett*,
24 Multnomah County Circuit Court case 16CV01529 (decision issued December 28, 2016). Although the
25 court ultimately held in favor of the external statutes over ORS 192.495, this latent conflict should be
26 fixed:

27 **On page 8, after line 9 insert:**

28 “SECTION 11. ORS 192.495 is amended to read:

29 “192.495. (1) Notwithstanding ORS 192.501 to 192.505 and except as otherwise provided in
30 ORS 192.496, public records that are more than 25 years old shall be available for inspection.

31 **“(2) This section does not apply to records exempt from disclosure under ORS 192.502 (8)
32 or (9).”**

33 2. *Adding public officials as “Persons:”* Among other things, ORS 192.410 defines the word
34 “person” for purposes of the public records law. The import of that is to define who may make a public

1 records request. The current definition includes “any natural person, corporation, partnership, firm,
2 association or member or committee of the Legislative Assembly.” That has been recently and
3 interpreted and applies to exclude local public officials. What that means, on a practical level, is that
4 local public officials must either submit requests in their personal capacity, which has its own set of
5 issues, or simply ask someone who is a “person” to make the request for them. This can and has put third
6 parties in the middle of often challenging and uncomfortable situations, including legislators, who are
7 “persons.” This should be fixed:

8 **“SECTION 12.** ORS 192.410 is amended to read:

9 192.410. As used in ORS 192.410 to 192.505:

10 (1) “Custodian” means:

11 (a) The person described in ORS 7.110 for purposes of court records; or

12 (b) A public body mandated, directly or indirectly, to create, maintain, care for or control
13 a public record. “Custodian” does not include a public body that has custody of a public record
14 as an agent of another public body that is the custodian unless the public record is not otherwise
15 available.

16 (2) “Person” includes any natural person, corporation, partnership, firm, **local public**
17 **official**, association or member or committee of the Legislative Assembly.

18 (3) “Public body” includes every state officer, agency, department, division, bureau,
19 board and commission; every county and city governing body, school district, special district,
20 municipal corporation, and any board, department, commission, council, or agency thereof; and
21 any other public agency of this state.

22 (4)(a) “Public record” includes any writing that contains information relating to the
23 conduct of the public’s business, including but not limited to court records, mortgages, and deed
24 records, prepared, owned, used or retained by a public body regardless of physical form or
25 characteristics.

26 (b) “Public record” does not include any writing that does not relate to the conduct of the
27 public’s business and that is contained on a privately owned computer.

28 (5) “State agency” means any state officer, department, board, commission or court
29 created by the Constitution or statutes of this state but does not include the Legislative Assembly
30 or its members, committees, officers or employees insofar as they are exempt under section 9,
31 Article IV of the Oregon Constitution.

1 (6) “Writing” means handwriting, typewriting, printing, photographing and every means
2 of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and
3 all papers, maps, files, facsimiles or electronic recordings.
4
