



February 6, 2017

Testimony of Jeff Merrick on SB 106

Senator Riley and committee members, thank you all for your continuing sacrifice to serve the people of Oregon.

My name is Jeff Merrick. I'm here to offer my thoughts on the role of the Public Records Advocate.

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.

Today, my concern is to help you make the best choices possible to improve public access and restore public trust within severe budget constraints.

Among other things, SB 106 creates a Public Records Advocate to:

- Mediate issues arising from public records requests;
- Train public servants on public records law, best practices and records management;
- Rule for or against public agencies in the less-populated counties when the requester and the agency disagree; and
- Chair a new Public Records Advisory Council.

Mediation provides the best bang for the buck, if done right.

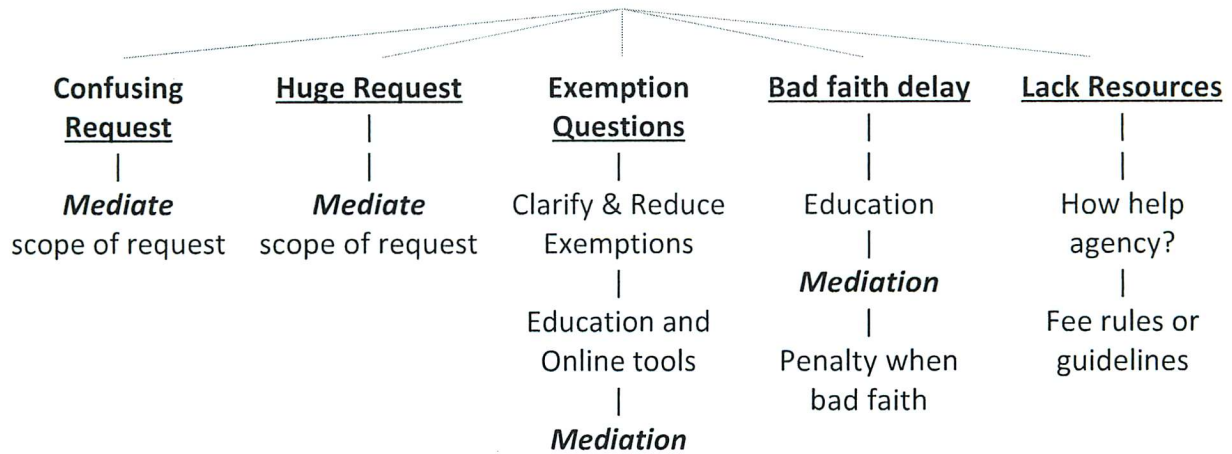
Of those functions, mediation would fill an unmet need with the greatest potential for immediate positive impact on public access and public trust.

Why? Because mediation would open up pinch points in the process and facilitate understanding between citizens and public servants.

There are only three responses when a citizen wants records. One, the records are online already. So, no problem. Two, the agency considers the request routine and has no problem providing copies fast. Or, three, the agency has a problem with the request and considers it "complex."

So, the challenge is how to address complex requests. The following table notes some of the most common challenges and suggests ways to address each.

“Complex Requests”
Impediments to Fast and Cheap Access



Prompt and informal talks are best.

Disputes over records production are not unique to public records. For decades, judges have dealt with this issue in civil litigation. The best judges invite attorneys to call them for an informal conference when a dispute arises instead of drafting 30-page motions that cost thousands to the parties and wastes the judge’s time.

Do you really need “any and all” records? Which would take three months and \$15,000?

What does the requester really want? Why is it difficult for the agency? Can we tailor the request to meet the needs of the requester faster and cheaper?

In the public records context, problems arise when the agency thinks a request is “complex” because the scope of the request is huge, confusing or includes exempt information. The problems get worse when a citizen assumes something about recordkeeping that is not true and then questions the brains or integrity of the public servant.

For example, in my own experience as a requester, I spent four weeks and probably four or five hours going back and forth with the City of Portland on my request. I’m sure the City spent even more time. I begged for a phone call, which its attorney finally granted. In less than 10 minutes on the phone, we understood each other and resolved my request. Preventing this type of waste should pay the cost of the mediator role of the Public Records Advocate.

Proposed Amendment to Section 2 of SB 106

To maximize this savings, amend the law to require agencies to flag a request as “complex” or very expensive as soon as possible and invite the requester to talk about it, either one-on-one or with facilitation from the Public Records Advocate.

- Require the agency to (a) Designate ASAP whether it perceives a request as “complex,” (b) Why it seems complex, and (c) Offer mediation over that designation.
- Do not require a formal denial as set forth in SB 106 Section 2, (2).
- Do not require a 21-day waiting period. (SB 106 Section 2, (4)).

Ensure the Integrity of the Public Records Advocate

Well-designed and well-executed mediation programs achieve excellent results in many situations.

However, mediation with a Public Records Advocate will only restore the public trust if:

- The mediation process speeds and not delays resolution of disputes, and
- The mediator is perceived as an honest and ethical facilitator.

An ethical mediator will guarantee confidentiality to encourage open communications. An ethical mediator will ensure the parties engage voluntarily and make their own decisions. A skilled mediator will help the parties identify their true interests to avoid missing opportunities presented by mediation.

In my opinion, SB 106 contains flaws that could harm the perception of mediator integrity and cause ethical dilemmas for mediators.

Involuntary mediation is unethical.

SB 106 compels mediation and requires the mediator to rule on the good faith or bad faith of the participants. (Sections 2(5) & (6)). However, ethical codes consider compulsion incompatible with mediation. In practice, when I remind parties they are free to quit and leave, often, that will trigger the opposite response: they decide they have nothing to lose and much to gain by continuing to talk.

After how many rulings in favor or against an agency will the mediator lose the perception of neutrality?

Better proposals would include: (1) Offer mediation without compulsion, or (2) Upon the request for mediation by one party, require the other party to discuss with the mediator what is the mediation process and its potential benefits. Option (2) tracks the approach used by small claims courts in Multnomah and Clackamas Counties. People must show up to learn about mediation, but they are free to leave if they do not want to mediate. In small claims court, the vast majority stay, and most people settle their disputes.

Make sure the Public Records Advocate Possesses the Skills and Ethics of a Mediator.

SB 106 requires only that the Public Records Advocate be an attorney. (Section 1, (3)). A good attorney or judge is not necessarily a skilled mediator. Mediation requires an additional skill set. Also, additional ethical codes apply to mediators. Consider requiring the advocate to possess:

“training and experience as a mediator and subscribe to the code of conduct for mediators promulgated by the Oregon Mediation Association or the American Bar Association, American Arbitration Association and Association for Conflict Resolution.”

Incorporate Mediation Laws.

SB 106, Section 4 makes certain mediation records exempt from disclosure. There is another way to protect interest of open communications without adding to the list of ~550 exemptions,

Consider designating the records as “mediation communications,” already defined by ORS 36.110(7). Then, they would be confidential under ORS 36.220. Also consider incorporating mediator liability limitation of ORS 36.210.

Public Records Advocate takes over District Attorneys’ Job?

Under current law, requesters may petition their county’s District Attorney when a local agency denies a request for records or fee waiver. SB 106 §6 takes away that job from DAs of small counties and gives it to the Public Records Advocate. (Counties with a population fewer than 75,000 people).

My concerns with this provision include:

- The decider role conflicts with the mediator role. When people do not like the ruling, they might question the neutrality of the Public Records Advocate.
- Given budget constraints, removing this duty from the Public Records Advocate should shrink the Advocate’s budget footprint.
- Some DAs want to keep this duty.
- Citizens might prefer a local authority.

Conclusion

Other proposals have been offered to improve public access and trust, on which I have thoughts. Please contact me if you want my thoughts.

Today, I have limited my discussion to one critical and unmet need:

A skilled, knowledgeable, ethical facilitator can help citizens and public servants speed the process of public access, save money, and help restore understanding and trust.