



February 21, 2017

Testimony of Jeff Merrick on HB 2101

Chair Williamson and committee members, thank you all for your continuing service to the people of Oregon.

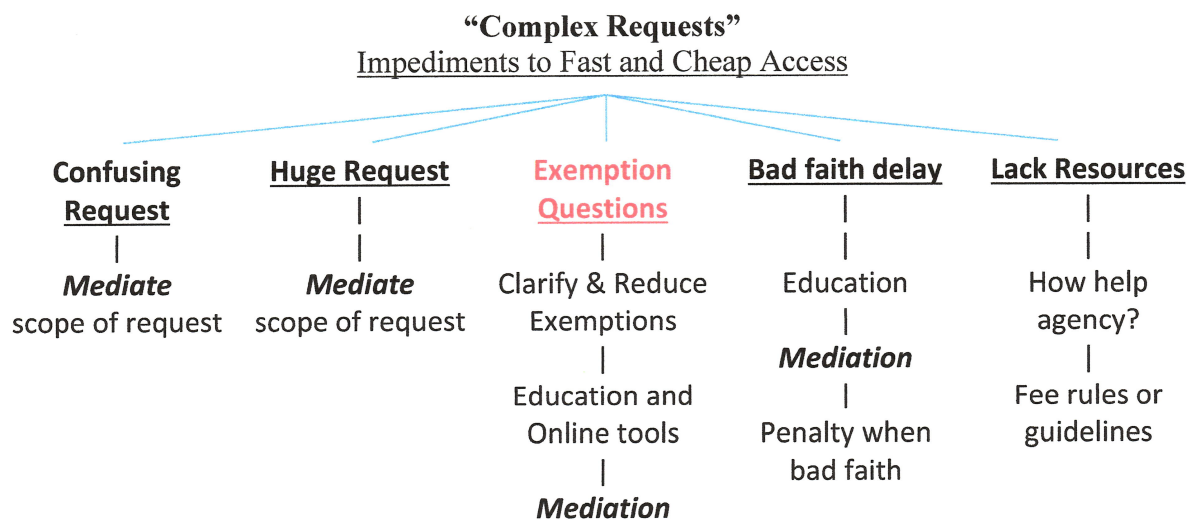
My name is Jeff Merrick. I'm here to offer my thoughts on addressing exemptions in the Public Records Law.

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.

Exemptions are among the pinch points in the process.

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



Public servants must follow the law, including more than 550 state law exemptions to disclosing records. If they do not follow the law, consequences include harm to people, harm to business, and potential liability. Consequently, prudent public officials will check for exemptions, which can take time and cost tax dollars for their time and for legal counsel.

At least three bills address exemptions, HB 2101, SB 481 and SB 106.

HB 2101

Representative Huffman deserves praise for devoting much time and effort to public records law issues including his service on the Attorney General's Task Force. In HB 2101, he proposes to repeal all exemptions that do not garner support after review by a joint legislative committee.

SB 481

SB 481 addresses exemptions as follows:

- Instructs public servants and the court to construe exemptions narrowly in favor of the public's right to know. §2(3)(b)
- Requires lawmakers to identify the interests served by any new exemption and craft exemptions narrowly. §2(3)(e) &(f)
- Orders the Attorney General to catalog exemptions. §8.
- Protects public servants and agencies from liability for inadvertently disclosing information in violation of an exemption. §9
- Protects the public agency's litigation position by declaring that disclosure of records under the public records law does not constitute a waiver of privilege. §9.

SB 106

Provides for mediation when requester and agency disagree over exemptions. §2.

Analysis

Taken together, the above ideas offer improvements.

A reliable **catalog** of exemptions will help requesters and agencies immediately. The catalogue would also help lawmakers review the continued need for individual exemptions.

Mediation should help clear the pinch point sooner. A skilled mediator will help the parties identify their interests, understand the exemptions, work around the exemptions that can be circumvented, and help the parties identify creative resolutions, such as the level of redactions,

limiting re-disclosure, confidentiality agreements, etc. (Note that many exemptions give the agency discretion to disclose.)

Limiting liability for inadvertent disclosures from liability under state law may not protect the discloser from federal law claims. Consequently, that benefit might be somewhat limited if not illusory.

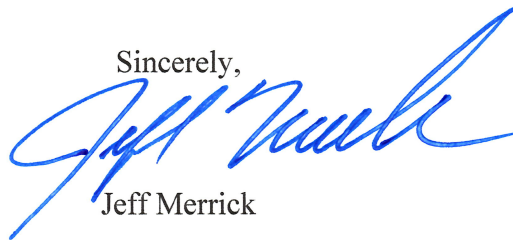
The **sunset** of all exemptions has the great benefit of forcing review. However, one wonders whether any important exemptions will slip through the cracks, allowing mischief or true harm to people, private business or the public's business.

Conclusion

Thank you for your work to increase public access and restore trust.

Thank you for the opportunity to submit my views on HB 2101.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeff Merrick", is written over the typed name.

Jeff Merrick