Testimony & Recommendations

Of Pete Shepherd

SB 106

My views about desirable and effective reforms of the Public Records Law are rooted in three premises. In this submission I explain each premise in detail -- even my friends will say *too much* detail -- because together they affect the substance of many of my recommendations.

The first premise is the most significant and requires least explanation. The Public Records Law is one of the most important laws to have been adopted by the Legislative Assembly in nearly half a century. The principle of open government that the law affirms lies at the heart of our experiment in self-governance. Its importance is reflected in the fact that elected officials politically accountable for the quality of their decision-making on public records matters are assigned the duty of ruling on petitions for disclosure of records that public bodies have initially withheld.[1] The fundamental principle is that the law is a law of disclosure; the public interests in non-disclosure are, by the explicit text of the law, exceptions. The importance of this principle well-warrants the attention that so many have given, and are giving, to the means by which the Public Records Law may be improved.

I applaud Attorney General Rosenblum and Governor Brown for having turned their attention to the issue. I believe the opportunity to significantly improve the Public Records Law has been presented to the Legislative Assembly. I hope that the Assembly will follow with similar energy.

The second premise is that the Public Records Law has stood the test of time remarkably well. It isn't "broken." The hundreds of public officials who execute it today, as well as the thousands who have done so in the past, do not collectively deserve a failing grade. This premise is addressed in Section I.

The third premise, described in Section II, is that every legislative decision concerning the disclosure of public records, as well as nearly all decisions public bodies must make in applying the legislative judgments, requires consideration of public interests in non-disclosure ***and*** public interests in disclosure. The root-level distinction between the three classes of records established by the Legislative Assembly is the extent to which the Legislature completed or delegated to others the work of balancing these competing public interests.

I make recommendations on the basis of my third premise in Section III. Among other things, I recommend adoption of statutory definitions of the competing public interests and enactment of a comprehensive system of ensuring that existing exemptions are measured against the new definitions. The system I propose also ensures that that future exemptions are created only after explicit consideration by the Assembly. My proposal would begin operation immediately upon adjournment of the present Session.

Section IV counsels against measuring Legislative success in terms of the "simplicity" of the result. Precisely because the underlying tension between public interests in disclosure and public interests in non-disclosure is immensely complex and frequently context-specific, simplicity eluded the original drafters of the statute. It will prove just as elusive today.

Section V describes a series of measures the Assembly could pass to clarify the Public Records Law for the benefit of requesters and respondents alike. These recommendations are intended to eliminate unnecessary ambiguity from the administration of the Public Records Law.

Section VI makes recommendations about the thorny challenge of allocating the cost of compliance with the law between taxpayers and requesters. In other words, Section V makes recommendations concerning the fees current law permits public bodies to assess requesters as a condition of disclosure.

In Section VII I recommend that the Assembly invest funds in pursuit of what the Attorney General's Public Records Task Force called "Transparency by Design." I describe in Section VII my recommendation for the creation of a state-funded grant program to demonstrate the feasibility and cost of improving public access to the public records compiled by local governments.

My experience as a former Deputy Attorney General, as a lawyer representing state and local agencies coping with public records requests, private-party public records requesters, and, briefly, as a state agency chief executive, informs my submission. I make this submission as a private individual and not as a representative of any of my former public and private clients or of any of my former public or private employers. I do not represent any client as a lawyer or a lobbyist. I am not engaged in lobbying for any client.

Section I.

The Public Records Law Is Not Humpty-Dumpty. The Members of the Assembly Are Not The King's Men.

Secretary of State Adkins' Audit Report Number 2015-27 (Public Records Law/State agencies) objectively examined the performance of nine state agencies. The staff[2] and members of the Joint Committee on Professional Responsibility that produced the Reporter Shield Law, Open Meetings Law, and Public Records Law in 1973 would, I think, be gratified by her findings.

The Secretary of State's auditors concluded that state agencies surveyed "responded well" to "routine" requests. The auditors ascribed 90 percent of public records requests they examined to this category.[3] According to the audit:

> Oregon state agencies are successfully complying with the public records law in responding to routine requests for information. These requests are common and can be fulfilled within a few days at little or no cost.[4]

Auditors also noted:

> In the selected files we reviewed, we found no evidence to suggest that agencies were taking an unreasonable time, or charging unreasonably high fees, to respond to public records requests.[5]

Secretary Adkins' conclusions on these points are consistent with what I have generally observed of the performance of state and local officials and of the operation of the Public Records Law. I believe her conclusions are as applicable to political subdivisions of the state as they are as to state agencies.

I hope the Assembly will seize the current opportunity to make meaningful improvements in the Public Records Law. To be successful, policy-makers must focus attention of the class of requests that the Secretary identified as problematic.

For example, I support, subject to some modification, significant elements of SB 106 (2017) and HB 2455 (2017) because those elements have the potential to make easier the resolution of the non-routine, relatively complex public records request that the Secretary identified as problematic. The elements, and modifications, include:

- SB 106, Section 1(1): Office of the Public Records Advocate. Governor Brown and Attorney General Rosenblum have each championed the public interest in disclosure. Their advocacy might not be matched by their successors. The most important effect of creating the Office of the Public Records Advocate and the related Public Records Advisory Council would be to create an institutional footing for continuous improvement in public records law and practice that is not wholly dependent on the priorities of the then-current Governor or Attorney General. I would modify the nature of the proposed office to increase its independence. The Office of Long Term Care Ombudsman, ORS 441.402 - 441.409, provides an “off-the-shelf” model worthy, in my opinion, of consideration for the Office of the Public Records Advocate. In the case of the Long Term Care Ombudsman, an advisory committee nominates candidates for the Governor’s consideration. Cause is required for removal. The “Public Records Advisory Council” created by Section 10 of SB 106 could serve as the advisory committee.

- SB 106, Section 2(1): Mediation Services. Mediators can help parties to a complex dispute find common ground. The parties to such a dispute may find it extremely difficult to speak frankly and directly to one another about their interests, fears, and hopes related to the controversy. Mediation can provide a protected forum in which the core concerns of the parties emerge. I would modify the bill to prevent the Public Records Advocate from personally serving as the mediator. Neutrality is an essential attribute of an effective mediator. The Public Records Advocate is unlikely to be viewed by either party as a neutral. The Advocate should arrange for mediation, but should not conduct the mediation him or herself. Changing the role of the Public Records Advocate in this way also avoids the necessity of creating (in Section 4) a new exemption and of affirming the existing

evidentiary privilege for mediation communications. The need for Section 4 of SB 106 is avoided by my proposed modification because elaborate rules already exist by which public bodies accommodate the public interest in non-disclosure of mediation communications and the public interest in disclosure during mediations in which the public body is a party.[6]

- HB 2455, Section 3(3): Periodic Progress Reports. Uncertainty about what the agency is doing to address a request is part of what makes non-routine requests problematic. Section 3(3) of HB 2455 requires the public body to provide weekly reports to the requester about the work that the public body is doing to fulfill the report, until the request is either fulfilled or the public body decides to assert one or more expressly identified exemptions to disclosure of any records that had not yet been disclosed. Section 3(3) of HB 2455 would improve existing law.

In addition to focusing on the part of the administration of the Public Records Law that most needs attention, I believe that the Assembly should not rely on allegations of deficiencies that are not supported by fact.

One such illusory deficiency arises from attempts to infer something significant from the number of Attorney General Public Records Orders granting petitions to compel agencies to release records. For example, at its first meeting Attorney General Rosenblum's Task Force received an oral report to the effect that Public Records Orders directing a state agency to disclose requested records notwithstanding the agency's initial denial are few and sometimes far between.

What should a policy maker conclude, if anything, of reports about the rate at which Attorneys General order disclosure? Is the paucity of Attorney General orders granting petitions -- or even their complete absence for stretches of time -- evidence that something is systemically wrong as to the administration of law in the review process? Or do the same facts support the opposite conclusion: If agencies challenged by a petition rarely must be compelled to produce records, couldn't one infer that agencies usually apply the law correctly in the first instance?

In my opinion, the correct answer is "none of the above." The number or rate of orders granting petitions and ordering state agencies to disclose records reveals little or nothing useful to the Assembly, about the extent of any Attorney General's commitment to the public interest in disclosure, or about the depth of commitment of state agencies to the public interest in disclosure. The reasons are embedded in the duties and powers of the Attorney General.

With some exceptions, the Attorney General (most often through her subordinates) is the only lawyer from whom state agencies and most officials may obtain professional legal services.[7] The Attorney General is barred from representing anyone else, with very limited exceptions.[8] When the Attorney General advises a state agency to disclose records, or when he or she issues a Public Records Order, the Attorney General is interpreting the applicable law and telling his or her own client to follow that law as interpreted.

This stands in contrast to the relationship of most District Attorneys to most local public bodies.[9] When a District Attorney orders a local public body to disclose a contested record, the District Attorney is rarely one and the same as the local public body's legal counsel.

The fact that the Attorney General is the lawyer for most state agencies creates powerful legal and political incentives for those agencies to follow the legal advice of the Attorney General about the application of the Public Records Law. That dynamic does not exist to the same extent, in most instances, between a District Attorney and a local public body that initially declined to disclose the records.

Any state official who follows the advice of the Attorney General may thereafter interpose the defense of "advice of counsel" against subsequent claims of liability.[10] Good faith reliance on advice of counsel may even help the agency/client avoid or mitigate the consequences of breaching certain federal confidentiality laws.

If disclosure of requested information yields a lawsuit against the releasing public body, the state agency reasonably should expect its lawyer subsequently to defend the claim, provided the agency has followed the advice it received. For example, if an agency is a "covered agency" for purposes of HIPAA's privacy protections, the agency may be confronted with the tension between a request for public records rooted in the Public Records Law and its obligations under federal law to protect "Protected Health Information."[11] Even in the HIPAA context, good faith reliance on advice of one's counsel may mitigate the consequences on the covered agency and its officers if the decision to release information ultimately is found to have been unlawful. On the other hand, a state agency that does not seek the Attorney General's advice or that does not follow advice that is received (including advice about the law in the form of a Public Records Order) cannot thereafter assert the defense of "advice of counsel" to liability that may later be alleged.

Political/public relations consequences may be even more significant in terms of inducing state agencies to follow their attorney's advice. Requesters who buy printer's ink by the billions of bytes have extraordinary leverage. A state agency official must also consider the potential effect on the agency and its mission in political forums, such as the Legislature's Ways & Means process, when weighing whether to resist the Attorney General's advise to disclose a record to the requester. Failing to follow the Attorney General's advice serves as a political force multiplier in the direction of disclosure. In those circumstances, the withholding official must not only withstand cries of alleged unjustified "secrecy" but also explain why he or she is not following the Attorney General's advice to disclose the record.

The Public Records Law permits a state agency to continue to resist the Attorney General even after having been ordered to disclose records.[12] That course can add political and fiscal fuel to the fire. The agency is, appropriately, required to proceed promptly and publicly with the courage of its convictions. The dispute will thus play out publicly as an ongoing story. Further, the "special counsel" that the agency will need to hire certainly will be expensive — a point that rarely is overlooked by the agency's critics.

The point of the foregoing discussion is that any Attorney General holds levers capable of exerting compelling pressure in the direction of the public interest in disclosure. Rulings on petitions for Public Records Orders are the most visible, but arguably least important, of those levers.

The *first* and arguably most important opportunity occurs within the lawyer-client relationship described above and long before any order is issued. The lawyer-client relationship, rather than the power to order disclosure, is the greater opportunity for any Attorney General to enforce the Public Records Law. Once the Attorney General has advised his or her client that record "X" must be disclosed, the pressures are such that only in the rarest circumstances will the client/agency resist.

The effect of this dynamic is capable of proof. The proof exists in the text of Public Records Orders issued by each of the past four Attorneys General — especially in orders denying petitions in whole or in part as "moot" or "unnecessary to decide." The reasoning of such orders almost always is that after the agency's initial denial and the requester's subsequent petition, the agency relented and decided to disclose, or began to disclose, to the petitioner/requester the records to which access had previously been denied. Such orders do not invariably arise as a result of consultation between the Attorney General and agency personnel.[13] The structural relationship between the Attorney General and state agencies nevertheless provides a strong foundation for the conclusion that the disclosures made by the agencies in "moot" or "unnecessary to decide" orders are most often attributable to consultation about the Public Records Law between the Attorney General and his or her client.

Orders denying a petition as moot or unnecessary to decide are typically ignored in tallies of Public Records Orders issued. This is a significant error, because nearly all "moot" orders are markers for matters in which the public interest in disclosure has been well-served by reversal of the agency's initial decision between the filing of the petition and the issuance of the order.

The number of petitions denied as moot or unnecessary is just the tip of the iceberg in terms of instances in which state agencies and their legal counsel in the Attorney General's office serve the public interests in disclosure through the lawyer-client consultation process. State agencies represented by the Attorney General have continuous access to assigned legal counsel. On a daily basis, Department of Justice lawyers advise agencies about the application of the Public Records Law to specific requests. Given the clear policy of the Public Records Law (see my first premise) and the requirement of explicit law that exemptions be treated as exceptions rather than the rule, that advice — appropriately — will nearly always be to disclose the requested records. For the reasons described above, agencies usually follow that advice. Since no petition can be filed except in the wake of a denial, this process, like the issuance of a "moot" order, reduces the number of orders compelling disclosure and serves the public interests in disclosure.

The relatively small number of Public Records Orders compelling state agencies to disclose records is, therefore, fully consistent with the Secretary of State's findings. I

respectfully submit that the fact is of little or no utility in assessing the effectiveness of the Public Records Law or of any public official charged with executing that law.

Section II.

Legislative Judgments About The Competing Public Interests Have Been Rendered As To Every Public Record.

The Public Records Law emphatically affirms public interests in disclosure: "Every person has a right to inspect any public record of a public body in this state, except as otherwise provided by ORS 192.501 to 192.505." ORS 192.420(1). Too often, discussions of the Public Records Law begin and end with the explicit or silent proposition that public interests in disclosure are the *only* public interests that should be considered by policy makers or, in some cases, by the court. That proposition ignores the plain text of the second half of the statute. It is dangerously simplistic as a foundational principle for new policy as to public records. If the Assembly accepts it as the jumping-off point for its work, disappointment and poor policy are likely to follow.

My third premise is that the original statute and all of the amendments since which create or eliminate exemptions functionally divide all public records into three classes. The first class consists of records "exempt from disclosure under [the Public Records Law] unless the public interest requires disclosure in the particular instance." ORS 192.501. Records in the second group are "exempt from disclosure under [the Public Records Law]" according to the terms of each specific listed exemption. ORS 192.502. The third class — by far the most numerous by volume of requests — is established by operation of ORS 192.420(1). It consists of the universe of records to which no exemption stated in the Public Records Law applies.

As to all three classes, the Legislative Assembly has considered public interests in non-disclosure as well as public interests in disclosure. All three classes of records, and every proposal for reclassification of subsets of those records rejected or adopted since, have required or will require Legislative judgments about the public interests in non-disclosure every bit as much as they require judgments about the public interests in disclosure. Take the classes in reverse order.

As to records in the third class (those not subject to any exemption), the Legislature conclusively determined that public interests in disclosure are paramount regardless of public interests in non-disclosure, if any. Agencies have no discretion as to these records. If a public record is not exempted as "provided by ORS 192.501 to 192.505," then the record must be disclosed. The Legislature has fully completed its policy judgment as to such records. By Legislative fiat, the public interests in disclosure trump any imaginable public interest in non-disclosure.

The Assembly concluded that public interests in non-disclosure *may, at the discretion of the public body,* prevail over public interests in disclosure as to the second class of records.

Records in the second class are listed in ORS 192.502. Consistently with that conclusion, the Legislature delegated to public servants the authority, subject to judicial review, to determine whether to subordinate public interests in disclosure to public interests in non-disclosure according to the conditions set out in each successive exemption exist. The Assembly did not require public servants to keep records in this class confidential, but it did authorize those servants to do so.

Finally, in the third class, the Assembly determined that the public interests in non-disclosure of records described in ORS 192.501 predominate "unless the public interest requires disclosure in the particular instance." Once again, the Assembly did not order public servants to keep any record in this class confidential. It required the public body to disclose the document notwithstanding the existence of a public interest in non-disclosure, if the "public interest requires disclosure in the particular instance. . . ." If that condition is not met, then then public body has the Assembly's authority to withhold the document from disclosure.

The 1973 Joint Committee on Professional Responsibility of the Oregon State Legislature well-knew that the Public Records Law it drafted was grounded in judgments about competing public interests. Watergate, the Pentagon Papers, and a reporter's resistance to a subpoena for his sources were the immediate and common predicates for the Legislature's action on what would become Oregon's Reporter Shield, Open Meetings, and Public Records Laws. These events happened between the adjournment on June 11, 1971, of the Oregon Legislative Assembly and January, 8, 1973, when the next session convened.

These developments deserve brief review because they expressly dealt with the tension between public interests in disclosure and public interests in non-disclosure and because they were actually considered during the Assembly's deliberations on the bill. National developments repeatedly were referenced in the Legislature's deliberations in 1973. The shadows cast by these developments continue to reinforce the proposition that the Legislature cannot consider the question of how to advance public interests in disclosure without also considering public interests in non-disclosure.

Two days after the Oregon Legislature adjourned in 1971, the New York Times began publishing excerpts from the government's damning internal analysis of our foreign and military policy before and during the Vietnam war. The United States objected to any further publication the "Pentagon Papers" that Daniel Ellsberg had unlawfully photocopied and unlawfully delivered to the newspaper. The newspaper voluntarily suspended further publication to allow time for the United States to file and argue its application to the trial court for an order enjoining further publication. The government's attempt to restrain further publication rocketed from the trial court to the Supreme Court in just 27 days.

New York Times Co. v. The United States, 403 U.S. 713 (1971), was expressly framed by the litigants and contemporaneously reported by the media as a case requiring the Court to consider assertions of public interests in non-disclosure side-by-side with the public interests in disclosure affirmed by the First Amendment to the United States Constitution. In his concurring

opinion, Justice Black described the basis for the government's claim of authority to enjoin publication despite the absolute command of the First Amendment because:

> [t]he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief.

Justices Black and Douglas expressed, in their respective concurring opinions, the view that the First Amendment is absolute and that no imaginable public interest could ever justify an injunction against publication of news. The other members of the court, in contrast, all decided the case according to the comparative weight they assigned to the public interests in disclosure and the public interests in non-disclosure.

The Chief Justice, writing for himself and three dissenters, expressed the central issue as a "collision" between constitutional imperatives:

> So clear are the constitutional limitations on prior restraint against expression that, from the time of *Near v. Minnesota* we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make these cases simple. In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government, and, specifically, the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances -- a view I respect, but reject -- can find such cases as these to be simple or easy.

The botched attempt by employees of the Committee to Re-Elect President Nixon to plant a bug in the Democratic party headquarters was the second development of consequence to the formation of Oregon's 1973 open government reforms. Nationally televised daily hearings of the Senate Select Committee on Watergate kept the tension between alleged public interests in non-disclosure and the public interests in disclosure on the front pages of newspapers throughout the interim between the 1971 and 1973 Legislative Assemblies. The existence of incriminating tape recordings of the President's conversations was not revealed until a week after the Oregon Legislature adjourned in July, 1973, but questions of executive privilege and government secrecy were nevertheless an explicit sub-text of the Senate's Watergate hearings long before the recordings were discovered by the Special Watergate Committee. Watergate and the related attempts by the administration to conceal materials bearing on the various investigations dominated the news throughout the Legislative Session that eventually produced the 1973 edition of the Public Records Law, Open Meetings Law, and Reporter Shield Law.

A third high-profile issue pitting public interests in disclosure against other public interests came to a head in the United States Supreme Court just a few months before the Oregon Legislative Assembly convened in 1973. In that case, *Branzburg v. Hayes*, the Court considered "newsmens' " claims to a First Amendment Privilege to withhold from a grand jury the identity of the reporter's confidential sources. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

The Court understood the case to require consideration of public interests in disclosure — namely, "the significance of free speech, press, or assembly to the country's welfare." The "newsmen" asserted that this public interest ought to trump the public interests in effective law enforcement through the grand jury process. This time the public interests in disclosure of information were found insufficient to overcome the public interests served by denying the claim of privilege:

> We are asked to create another (constitutional testimonial privilege) by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. [Footnote omitted] Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

Branzburg v. Hayes, 408 U.S. 665, 681-682 (1972).

These developments framed a set of related issues involving "open government" for the Legislative Assembly that convened in January 1973. The Assembly's deliberations — and the testimony of witnesses who came before the committee — treated proposals for public records, public meetings, and reporter shield ("privilege") laws as related parts of a comprehensive effort to achieve open government. For example, the bill that ultimately became the Public Records Law, HB 2157, started as a measure addressing public records and public meetings. Logs of the proceedings before Joint Committee on Professional Responsibility reflect the fact that all three concepts were contemporaneously swirled into a single legislative subject: Open government.

True to the way in which the national debate was framed, witness after witness challenged state legislators to consider public interests in non-disclosure in the balance with public interests in disclosure. Just as their successors in interest repeatedly have done in the decades since, proponents and opponents of the proposed reporter shield law, open meetings law, and public records law all presented arguments based on the tension between public interests in disclosure and competing public interests.

Here are some excerpts representative of those written arguments.

In April, 1973, the ACLU of Oregon expressed its support for HB 2157:

> The intent of this proposed legislation is to guarantee public access to government information where such information does not unduly interfere with legitimate public body activity or invade personal privacy.

* * *

> Finding the proper balance between disclosure and non-disclosure of public records is a difficult task . . .

The Superintendent of Banks testified in opposition to HB 2157 because:

> * * * the public revelation of these particulars [including results of bank examinations] would not be in the best interests of the public and would be disastrous to the administration of our law . . .

Less apocalyptically but no less forcefully, the City of Salem submitted testimony on February 26, 1973, urging the addition of an exemption for "legal and management employees" to discuss with governing bodies "matters relating to pending or impending litigation * * * " The exemption the City sought would:

> * * * enable a legislative body to discuss positions, strategies and approaches to such items as purchase of land, condemnation proceedings, etc. which are matters that cannot be discussed in public if the public agency is to perform in the interests of the public it serves.

The Department of Revenue offered a final example. It asserted:

> Appraisal records of commercial and industrial properties in the assessor's office frequently contain income data obtained in confidence. The appraisal will include valuation estimates using the income approach. Such income data should not be made available to the public, and if it is, the assessor's own ability to obtain it will become impossible in the future.

The Legislature responded with a series of judgments reflected in amendments referencing the competing public interests. The ACLU's concern about invasion of personal privacy was addressed by stating the conditions under which public interests in non-disclosure would prevail over public interests in disclosure. The Legislature adopted amendments to the bill responsive to arguments in support of the public interests in non-disclosure expressed by the Superintendent of Banks, the City of Salem, and the Department of Revenue. The legislature also responded affirmatively to the testimony of witnesses asserting public interests in non-disclosure of agricultural crop records, criminal investigative records, birth and death records,

accident reports maintained by the Department of Motor Vehicles, collective bargaining certification and de-certification petitions, investigative reports compiled by insurers, and State Accident and Insurance Fund records compiled from submissions by insured employers.

Over the decades since 1973, the Legislature has added exemptions incorporating into the Public Records Law state and federal statutes expressing public interests in non-disclosure. It has also expressed the public interest in non-disclosure of scores of other specifically identified public records.

In the case of statutes incorporated by the so-called "catch-all" provisions of ORS 192.502(8) (federal law or regulation) and ORS 192.502(9) (state law), the public interests in non-disclosure are expressed in legislation outside the four corners of the Public Records Law. Some of the exemptions added to the Public Records Law expressly identify the public interests in non-disclosure the Legislature concluded could predominate as to the described records. Others leave the reader to infer the public interests served by non-disclosure. Explicit or not, every one of the hundreds of exemptions is a legislative judgment about the public interest in non-disclosure.

The reality that the evaluation of every proposed creation, repeal or modification of an exemption necessarily requires consideration of the public interests in non-disclosure as well as the public interests in disclosure has several important implications for the Assembly's work and for the recommendations I make in this submission.

III.

Recommendation: Institutionalize the Consideration of Competing Public Interests.

New exemptions inevitably will be proposed — usually for good reason from the perspective of their proponents. Several already are pending before the current Session. I'll mention a few of them.

HB 2002 (2017) aims, in part, to preserve the value of public funds previously invested in housing projects in time-limited deals. Under Section 6(1), the public investors are to be given an opportunity to purchase property that otherwise might be sold for purposes that would reduce public housing stocks. To facilitate the fulfillment of the public interest in ensuring that our representatives know what they are buying when they spend our money to purchase real estate, the bill requires the private owner to reveal private financial information to the government. Section 6(5). In implicit recognition of the fact that the information Section 6(5) requires to be disclosed is of a kind that many private parties would resist disclosing, the bill proposes the creation of a new exemption applicable to the information required to be submitted. Section 6(6).

The play of competing public interests is starkly illustrated in a second example. SB 65 (2017) authorizes the Psychiatric Security Review Board to develop a "restorative justice"

program to assist the recovery of crime victims. The implicit assumption from the framing of the bill as introduced is that the public interests served by such a program would not be fully realized unless the participants are assured of the confidentiality of all of their written and oral submissions. To protect the public interest in non-disclosure, Section 1(2)(b) of the bill proposes a new evidentiary privilege and Section 1(2)(c) excludes documents created, submitted or provided for use in the new program from the definition of "public records" for purposes of the Public Records Law.

A comprehensive, forward-looking response to reform of the Public Records Law should include a means of carefully scrutinizing every proposal. The question of the weight to be assigned the competing public interests should in each case be expressly raised and explicitly answered by the Assembly.

We are also heirs to hundreds of previously-created exemptions. I have no doubt that some claims of a public interest in non-disclosure were weak even at the time exemptions were originally constructed upon them. I'm equally sure that the public interests in non-disclosure of other records, though persuasive at their inception, have subsequently waned. A comprehensive reform of the Public Records Law must also address the probability that the rationale for some existing exemptions has outlived its original merit.

A. Limitations of Current Proposals

SB 106 does not expressly propose a means of ensuring that new exemptions are justified or that existing exemptions are reviewed. Section 2(3)(e) of SB 481 contains a partial response. HB 2101 (2017) is the only proposal that attempts to create a comprehensive response. I do not believe, however, that any proposal yet introduced is the best that Oregon can do.

Section 2 of HB 2101 (2017) requires "a committee" of the Assembly to begin reviewing exemptions. Sections 3, 4, and 5 invoke a series of"sunset" clauses to give impetus to the committee review process and to limit the scope of new exemptions.

Examination of the text of HB 2101 in the context of even a few examples reveals that sunset clauses are just as likely to undermine the public interest in disclosure as they are to enhance it. They are also nearly certain to undermine various public interests in non-disclosure.

Section 1 of HB 2101 becomes operative on January 1, 2018. It is one illustration of the inadequacy of difficulty inherent in rooting a review process in sunset clauses.

The existing exemption based on federal "law or regulations" (ORS 192.502(8)) would be wholly affirmed by Section 1. The existing exemption based on state confidentiality or privilege (ORS 192.502(9)) would be *partially* affirmed by Section 1. Under the bill, both ORS 192.502(8) and ORS 192.502(9) would be repealed as part of the repeal of all of ORS 192.502, operative January 2, 2028. Section 4 (repealer); Section 7(2) (operative date).

The lawyer-client privilege stated in ORS 40.225 is a state law establishing "confidentiality or privilege." Lawyers, including lawyers for public bodies, sometimes collect, organize, use, and report to their clients on facts as an integral part of the process of providing professional legal services to their clients. Sometimes lawyers employ investigators to conduct such investigations. Under such circumstances, the privilege extends to the embedded facts as well as to the lawyer's communications about the law on which the facts bear.

If the collected facts concern an allegation of misconduct by a public servant, then the public interest in disclosure plainly is heightened. The public interest in disclosure becomes acute if the holder of the privilege then asserts that the contents of undisclosed factual report supports its decision to have acted, or to have refrained from acting, on the alleged misconduct. "Trust me" is precisely the claim that the framers of the Public Records Law intended to subject to public verification — or debunking.

ORS 192.502(9)(b) and ORS 192.423 work together under existing law to serve the public interest in disclosure notwithstanding the lawyer-client privilege. Under these provisions, a public body that publicly justifies its action or inaction in reference to its attorney's investigative findings must disclose the investigative findings, or a summary of them. Without ORS 192.502(9)(b), the privilege would apply full-bore and the factual foundation for the public body's action could remain shrouded from public examination.

Section 1(2) of HB 2101 enacts into law a duplicate of ORS 192.502(9)(a). The bill does not, however, treat ORS 192.502(9)(b) in the same way. Under Sections 4 and 7(2) of the bill, Subsection (b) of the state confidentiality or privilege exemption would, upon the sunset of ORS 192.502 in 2028, cease to be part of Oregon law.

The evident assumption of HB 2101 is that the repeal of an exemption automatically enhances the public interest in disclosure. That is not universally the case. The bill's universal repeal of all exemptions save for two will sweep away elements, including ORS 192.502(9)(b), that limit the scope of the exemptions just as it repeals the exemptions themselves. In the example of ORS 192.502(9)(b), HB 2101 would eventually rebalance, *in favor of non-disclosure*, the weight assigned by the Legislative Assembly to the competing public interests. Under Section 1 of HB 2101 and in the circumstances described above, the public interest in disclosure would eventually be defeated unless the public body chose to waive its lawyer-client privilege.

Section 2(3)(e) of SB 481 is another proposal expressly attempting to deal with the legislative process surrounding creation of new exemptions. Section 2(3)(e) requires the Assembly to embed an explicit statement of "the interests for which the exemption is needed" in all newly-enacted exemptions. I don't believe the addition of Section 2(3)(e) to current law would do any harm. It could do some good. In my opinion, however, this part of SB 481 is both unnecessary and incomplete.

Article IV, Section 11, of the Oregon Constitution empowers each house of the Legislative Assembly to "determine its own rules of proceeding . . . ." The Assembly has

exercised this power, in part, through the creation of the Office of Legislative Counsel. That office publishes the Form and Style Manual for Legislative Measures. The Preface to the Manual explains its authority:

> The Oregon Legislative Assembly follows a uniform system of form and style for legislative measures. This system is not set forth in full in the rules of either chamber; rather, it is set forth in this Form and Style Manual for Legislative Measures, which has been adopted by reference in the rules of both chambers.[14]

The Assembly has established requirements for the content of bills. For example, the Manual explains that neither house "will accept a measure for introduction unless it is accompanied by an impartial summary of the measure's content."[15]

The Assembly need not pass a bill to impose on itself the requirement, proposed in Section 2(3)(e) of SB 481, that every bill creating a new exemption include an explicit statement of "the interests for which the exemption is needed." The Assembly already has all the power it needs to accomplish that objective without legislation. It could, for example, direct the Office of Legislative Counsel to apply that requirement to bills that Legislative Counsel drafts at the request of members. That is why I assert that Section 2(3)(e) of SB 481 is unnecessary.

Section 2(3)(e) of SB 481 is also incomplete. It only addresses the justification for newly-created exemptions. Section 8 of SB 481 directs the Attorney General to create and publish a "catalog" of exemptions and related material. Like the proposal set out in Section 2(3)(e), Section 8 would do no harm and could do some good. Section 8, also, however, falls short of the better alternative proposed below.

Section 8 of SB 481 requires the Attorney General to compile a "comprehensive" catalog of exemptions. "To help ensure that the catalog" is as "comprehensive as possible", the bill requires the Office of Legislative Counsel to send to the Attorney General copies of Acts creating exemptions. All 36 District Attorneys are required to submit copies of their Public Records Orders. Interpretations of exemptions rendered by the Oregon Supreme Court or Court of Appeals are also to be cited in the catalog.

Any means of systematically examining existing exemptions necessarily will begin with a list of those exemptions. The "catalog" proposed in Section 8 of SB 481 could be the first step in a process of systematically testing whether the public interests in non-disclosure underlying still have merit. I support it for that reason. But the bill itself is incomplete because it creates no mandate and no procedure for the next and following steps. It begins, and ends, with the first step.

B. A Better Approach

I propose that the Assembly take action to ensure the systematic review of existing exemptions and to evaluate proposals for new exemptions. Under the proposal, the Assembly

would adopt new law defining the public interests in disclosure and the public interests in non-disclosure. The statutory definitions would provide a framework for a review process that the Assembly would impose on itself through the exercise of its constitutional authority to "determine its own rules of proceeding . . . . " The statutory definitions would also serve as a standard by which the courts could better evaluate the exercise of discretion in the application of exemptions that require the agency to weigh the competing public interests.

1.

A Better Approach: Define The Competing Interests

I listened carefully to the Attorney General's Task Force early discussions of the terms of a potential new "policy statement." ORS 192.420(1) is plainly a statement of the Legislature's policy. It declares that "Every person has a right to inspect any public record of a public body in this state . . . . ". The Attorney General has characterized ORS 192.420(1) as a "policy statement." She is correct.

I respectfully suggest that the addition of a new "policy" statement to the statute will have little utility to requesters, public bodies, or the courts. ORS 192.420(1) already serves as a clear and unambiguous affirmation of the Legislative intent.

The Task Force's discussion of the proposed "policy" nevertheless suggested the foundation for a much more productive reform: establishing statutory definitions of the public interests at the heart of the Public Records Law.

a.

The "public interests in non-disclosure."

Defining public interests in non-disclosure will clarify the statute by reconnecting it to the central policy challenge its original drafters addressed: namely, the tension between competing policy interests. Adding a definition of the public interests in non-disclosure would make explicit to requesters, public servants, and the courts the reality that public interests in non-disclosure can be relevant to the performance of duties imposed by the Public Records Law and in the interpretation of that law. The statutory definition also creates a statute-based principle by which the electorate can test the performance of Legislators on proposals for new exemptions, or repeal of previously-adopted exemptions.

I began the creation of this definition by reviewing in detail all of the exemptions stated in ORS 192.501 and ORS 192.502. I also considered many of the confidentiality provisions that have entered the picture through ORS 192.502(8) (federal law or regulation) and ORS 192.502(9) (state law). I also reviewed legislative findings concerning open government that are codified in chapters other than Chapter 192. For example, ORS 357.001(1) affirms that "An informed citizenry is indispensable to the proper functioning of a democratic society."

I aimed to create a list of public interests in non-disclosure that collectively reflect a rationale for every extant and for every imaginable exemption. In other words, I aimed for list that would place an extreme political burden on the proponent of an exemption that does not serve at least one of the listed public interests in non-disclosure. Here is my proposed definition of the term "public interests in non-disclosure":

> The public interests in non-disclosure include:
>
> (a) Protections of the privacy and safety of individuals in their private affairs;
>
> (b) Protecting private economic activity from the public disclosure of information gained by the government;
>
> (c) Protection of public safety; and,
>
> (d) Maximizing the intended public benefits of public programs, governmental activity, and public decision-making.

b.

The "public interests in disclosure."

In the heat of specific disputes, advocates for disclosure and advocates for non disclosure tend to be loath to concede the reality that tension between the public interests in disclosure and public interests in non disclosure is the central quality of the legislative intent behind the Public Records Law. Defining public interests in disclosure would help litigants, public officials, and requesters frame their disputes in a common language.

Any lawyer who has advised state agencies or local public bodies will have had the experience of fielding questions about the meaning of the phrase "public interest" as that phrase is used in several places in the statute. Expressing the interests in disclosure in the text of the law would also go a long way toward enabling public servants to apply the law without necessity of consulting legal counsel.

The definition I suggest would have the further benefit of expressly articulating the crucial connection between the Public Records Law and two of the important public interests in disclosure that it serves.

The first restored connection deals with the public interest in securing public records for the purpose of individual pecuniary or professional gain. In a case predating by 12 years the adoption of the Public Records Law and yet recently characterized by the Attorney General as "the leading case in terms of the approach the Oregon courts take with respect to the public's 'right to know,' " the Oregon Supreme Court wrote that:

> * * * the public interest in making [writings relating to official functions] accessible extends beyond the concern for the honest and efficient operation of public agencies. * * * [It] may be sought by persons who propose to use it for their own personal gain."

The current text of the Public Records Law does not expressly affirm its breadth as described by the Court. My suggested definition would make explicit this strand of the currently implicit public interest in disclosure.

A second aspect of the recommended definition reconnects the law to the importance of access to records as a fuel for the exercise of constitutionally-protected free speech. As described above, the Public Records Law in Oregon was born at a time when the First Amendment and the important public interests served by the exercise of the right of free expression dominated the daily news. Facilitating the exercise of that freedom was unquestionably one of the purposes of the original legislation. It should be expressly identified as one — but not the only — public interests in disclosure. Surprisingly, that connection is nowhere explicitly drawn in the current statute. It ought to be.

In 1973, the Oregon Supreme Court's opinions interpreting Article I, Section 8 (the free expression clause of the Oregon constitution) independently of the First Amendment were a decade or more in the future. The legislative history therefore discusses the connection between the open government measures (records, meetings, and reporter shield law) in relation to the First Amendment. Today most free speech issues arising under state law today are decided on the basis of the state constitution, not the First Amendment. In my draft, I substitute the Oregon Constitution for the First Amendment.

Here is my proposed definition of the phrase “public interests in disclosure”:

> The public interests in disclosure include:
>
> (a) Helping the public meaningfully participate in the proper functioning of a democratic society;
>
> (b) Helping the public ensure that public servants perform honestly, faithfully, and competently;
>
> (c) Informing the public about the activities of their governments;
>
> (d) Permitting the public to benefit from information developed at public expense; and,
>
> (e) Facilitating the exercise of constitutionally-protected rights to speak, write, or print freely on any subject whatever.

2.

A Better Approach: Use the Assembly's Self-Governance Authority to Institutionalize Consideration Of the Competing Interests In a Rolling Review of Existing Exemptions and A Rigorous Review Of Proposals For New Exemptions.

I propose next that the Assembly commit itself by rule (or by statute, if it prefers) to a system under which the Office of Legislative Counsel is charged with the duty of preparing an "Open Government Impact Statement" for each bill referred by any committee that could implicate the public interests in disclosure as defined in the new definition of that term set out above. The statutory definitions I've recommended above would serve as a statutory scaffold upon which legislative staff could display for members the competing interests that the members must weigh when confronted with a bill proposing a new exemption. The first subsection of the draft rule I've set out below describes the Open Government Impact Statement process I propose.

Models for such evaluations already exist. For example, every bill recommended for passage is assessed for its fiscal impact. Fiscal Impact Statements create the opportunity for members to judge whether the substantive objectives of the measure merit its cost. The proposed Open Government Impact Statement similarly would expressly flag proposals that would elevate public interests in non-disclosure above public interests in disclosure. The Statements would help members frame their debate about the balance struck in the bill. The existence of an Open Government Impact Statement in the record of proceedings on the bill would also allow Oregonians to hold their elected representatives accountable for the quality of their judgments concerning these important public interests.

The same rule ought to establish a means of beginning and sustaining a systematic review of existing exemptions for the purpose of rooting out those whose rationale the Legislature no longer accepts as persuasive. To accomplish this, subsection (2) of the proposed rule directs Legislative Counsel to create a plan for review of exemptions that had not been the subject of an Open Government Impact Statement at the time of passage into law. Under the rule, Legislative Counsel would be required to submit an annual report the results of the interim review to the Assembly at the commencement of each session.

As a spur to Legislative action, this proposal falls somewhere in the middle on a spectrum defined by leaving it to individual members to self-start on examination of an existing exemption and attaching a statutory sunset clause to every exemption. Though occupying a middle ground, I believe the system proposed would have the potential to create real incentives for ongoing examination of existing exemptions. It is not difficult to imagine, for example, that publishers would give editorial attention annually to the staff's final report on exemptions. Incumbents preparing for visits with editorial boards might be well counseled to study the most recent report and be prepared to answer why he or she did not take action to repeal or modify exemptions that the interim review suggests may no longer be supported by a compelling rationale. Legislative leaders and budget-writers would need to consider how to respond to questions about the extent to which they'd committed resources to fuel the ongoing review process. Here is the text of my proposed rule:

(1) The Legislative Counsel shall prepare an Open Government Impact Statement on each measure reported out of a committee of the Legislative Assembly that diminishes or reasonably could diminish the public interest in disclosure of public records. The Legislative Counsel shall:

(a) State whether the measure conforms to any standards adopted by the Office of Legislative Counsel for drafting measures establishing exemptions;[16]

(b) Identify the public interest in disclosure, if any, addressed in the measure; and,

(c) Identify the public interest in non-disclosure, if any, addressed in the measure.

(2) Upon approval of the Legislative Counsel Committee, in consideration of the resources appropriated for the purpose, and after consultation with the Office of Public Records Advocate and the Public Records Council created under SB 106 (2017), the Legislative Counsel shall establish a schedule for review, during each interim between regular sessions, of exemptions previously enacted into law which were not previously the subject of an Open Government Impact Statement. The Legislative Counsel shall review each exemption scheduled for review as though the existing exemption were being proposed as a bill creating a new exemption.

(3) On or before the first Monday of each November, the Legislative Counsel shall deliver to the Legislative Counsel Committee the results of the exemption review required by subsection (2).

IV.

Simplicity; No.

No significant improvement in the public's access to public records will be "simple."

This shouldn't be alarming or surprising. Some of the values we most cherish are clearly expressed in law and yet immensely complex in execution. The Fourteenth Amendment to the United States Constitution could hardly be clearer: No State shall "deny to any person within its jurisdiction the equal protection of the laws." And yet fulfilling this promise in law, in governance, and in our society has never been "simple." It remains after 148 years of trying one of the most complex challenges we face.

So it is with the Public Records Law. Each choice between disclosure and non-disclosure presents a fresh opportunity for collision between the public interests in disclosure and the public interests in non-disclosure. My proposal is not "simple." No "simple" rule can effectively manage such collisions.

One need look no further than last session for an example. HB 4087 would have created a procedure whereby a police officer could petition a court for an order temporarily baring

disclosure of the officer's name. News reports about the measure predictably characterized it in terms of "secrecy."[17] Proponents argued that the measure was necessary to fulfill the public interest in protecting police officers and their families from physical harm. The bill became very complex as legislators struggled to make a judgment as respectful of the public interest in disclosure as it was of the public interest in the physical safety of public servants and their families.[18]

The Assembly undoubtedly has the constitutional authority to impose superficially "simple" solutions. Simplicity of that type can come in one of two forms. One is illusory. The other inflexibly undermines either the public interests in disclosure or the public interests in non-disclosure.

- Illusory simplicity. The Legislature could "simply" state that every record must be disclosed unless public interests in non-disclosure require otherwise. This superficially simple change does not reduce complexity. The complex task of balancing public interests in disclosure and public interests in non-disclosure would not be avoided. Instead, the complexity would be shuffled out of the legislative branch, onto the Executive branch (or local governments) in which the law is first applied, and finally to the judicial branch on judicial review.

- Simplicity at the expense of the public interest in non-disclosure or at the expense of the public interest in disclosure. The Assembly could "simply" draw a bright line between records that *always* must be disclosed and those that *always* could be withheld at the custodian's option. Some of the exceptions listed in ORS 192.501 and 192.502 exhibit the characteristics of both ends of such bright-line treatment. *E.g.*, ORS 192.502(14)(records of certain investments of public funds always may be withheld); ORS 192.501(1)(Records of *concluded* litigation are never within the stated exemption). Rules exhibiting this form of "simplicity" always have a corresponding cost. As applied to the example from the public contracting code set out above, the "simplicity" of an invariable rule exalting the public interests in disclosure would have a literal, dollars-and-cents cost in the form of the higher price taxpayers would pay in property transactions where the seller is clever enough to have learned the public buyer's "bottom line" in advance of the commencement of negotiations. At the other end of the spectrum, a bright-line rule "simply" exempting all records regarding a public real estate transaction would undermine the public interest in ensuring that pubic officials are held accountable for running a fair and efficient acquisition system using public funds.

The understandable yearning for simple answers gives credence to a framing of the problem that is both inaccurate and, worse for the prospects for real reform, misleading. The sheer number of exemptions seems at a superficial level to be a self-sustaining indictment crying for swift repeal of scores of exemptions. The number of exemptions is evidence of the complexity that has been inherent in the structure of the Public Records Law since its birth in response to events on the national stage. It is not, in and of itself, the problem to be solved.

V.

Clarity, yes.

Clarity is a different target than simplicity. Clarity is both desirable and attainable. Ambiguity opens the door for requesters to argue for disclosure of records that public interests in non-disclosure allow public servants to protect. On the other side of the same door, ill-motivated public servants may seize on ambiguity to resist the conclusion that public interests compel disclosure.[19]

In the relatively infrequent and relatively complex cases that the Secretary of State identified as the field in which frustrations with the public Records Law are most likely to arise, ambiguities may spawn litigation where none would otherwise have occurred. Even if clarification of law doesn't avoid litigation altogether, avoidable ambiguities may unnecessary increase the cost of litigation to both sides. Ambiguity may also contribute to unnecessary delay in disclosure of the contested records.

I recommend that the Assembly make a concerted effort to avoid ambiguity in newly-adopted measures with implications on the public interest in disclosure of public records. The Open Government Impact Statement I recommend above would aid the Assembly in scrubbing ambiguity from proposed amendments.

Such review will certainly be fruitful. By way of illustration only, here are a few examples of provisions that have the potential — at least as introduced — for unnecessary friction about the treatment of the records addressed:

- HB 2002, Section 6: The bill deals, in part, with publicly supported housing. Section 6(5) allows the Housing and Community Services Department or a local government to require the private-party owner of the subsidized housing to produce for inspection information that a private party might assert is confidential. Section 6(6) states that:

  "(6)(a) Notwithstanding the provisions of ORS 192.410 to 192.505 relating to public records, the documents provided by the property owner to the department or the department's designee, or to a local government, under subsection (5) of this section are confidential and exempt from public inspection except with the written consent of the property owner *or as ordered by a court*." Emphasis added.

  With salutary clarity, the text exempts the requested records from the normal request/disclosure system established by the provisions of ORS 192.410 to 192.505. Neither OHCS nor any local government could voluntarily disclose the described records. These public bodies would be required to deny the request.

Yet is it *also* the intent to deny a requester who had been denied the records the opportunity to seek judicial review that could result in a court order compelling disclosure? The current text arguably draws a line between the public release of these sensitive records by administrative officials and their potential release by a judge after consideration of the terms of exemptions stated in the Public Records Law. The appointed agency personnel are presumably interested in making policy based on the submitted records. But perhaps the language of the bill signals the intent to allow a judge — that is, a disinterested public official — to order the release of the submitted records if the judge dispassionately concludes that no exemption from compelled disclosure applies?

- HB 2118, Section 2(2): The bill would create a system by which the Department of Consumer and Business Services would calculate insurance-related limits on medical care cost inflation. Section 2(2) specifies that all of the documents used in calculating the limit "are subject to the public records law under ORS 192.410 to 192.505 . . . ." I suspect the intent is to assign all of the documents to the class of public records that are not subject to any exemption. In this instance, the public policy in non-disclosure would predominate because DCBS needs records that it otherwise would be denied by the private parties who hold them. Yet the actual text merely subjects the documents to the Public Records Law, *including its exemptions*. The current formula therefore creates a fertile field for dispute and litigation. For example, if an insurer proposes to submit to DCBS information it considers sensitive business information and asks DCBS to receive it under the "confidential submissions exemption," — a part of "ORS 192.410 to 192.505" — would Section 2(2) as drafted allow DCBS agree to receive the submission and thereafter to withhold it from compulsory disclosure?

A.

Clarity: Affirm the authority of public bodies to release records even if those records are within the scope of an exemption that could successfully be asserted.

A member of the Task Force observed during a meeting that public officials too often confuse their authority to withhold from disclosure records that fall within one or more of the exemptions with a duty to keep the those records confidential. I agree with the observation.

I also agree with the member's suggestion that the Public Records Law be amended to make clear a custodians' authority to release records notwithstanding the applicability of one or more exemptions. I also recommend reforms reducing risks that might deter public officials from exercising this discretionary authority. These proposals are discussed in this subsection.

This objective could be achieved without grafting a universal balancing test onto every exemption. For example, the addition could make it clear that while judicial review of the accuracy of the official's judgments of law in the course of interpreting the terms of the exemption is available, the decision to release or to assert an exemption that is applicable is not subject to judicial review, or is subject to judicial review only on terms preventing the courts

from substituting judicial opinion for the good faith judgment of the official who elected to withhold from public disclosure a record as authorized by an exemption. Nor should adding such a requirement to the law increase the workload of officials already charged by their respective public bodies with responding to public records requests. For nearly two decades, Attorneys General have been advising public bodies that they should follow the very two-step process that your member suggested to the Task Force be written into law.[20]

The exercise of discretion to disclose a record to which an exemption applies may be influenced by the perception of several risks. Some of these risks could be reduced by legislative action. I recommend that the Assembly address each of them as part of its overall reform of the Public Records Law.

1.

Immunity

A public official contemplating the discretionary release of exempt public records may be highly sensitized to the potential of civil liability stemming from that release. In my judgment, a carefully crafted immunity provision could increase the incentive to exercise that authority.

I support Section 9(1) of SB 481. It immunizes public bodies and their employees from liability for good faith disclosure if the release occurs in "good faith" compliance, or attempted compliance, with "*the disclosure requirements* of ORS 192.410 to 192.505." Emphasis added. The proposal does not go far enough.

Exemptions do not establish any "disclosure requirement." They are, by definition, *exceptions to such requirements*. Neither are they commandments to withhold the records to which the apply from public disclosure. The immunity extended to public officials by Section 9(1) of SB 481 does not apply, in my opinion, to cases in which the official decides that an exemption *does* apply and yet exercises his or her discretion to release the record. And that is the class of cases in which fear of liability serves as the greatest deterrent to the public release of records.

There are at least two reasons to be cautious about the beneficial effects on the public interest in disclosure to be gained by an immunity statute.

First, the statute may encounter some constitutional limitations. Article 1, section 10 of the Oregon Constitution states in part that every person "shall have a remedy by due course of law for injury done him in his person, property or reputation." If a public official's release of records caused an injury remediable at common law in 1857 and the immunity purportedly barred every potential recovery for the injury, then a court might hold that the statute violated Article I, section 10.

Second, some of the feared immunity may arise under federal, not state law. The Due Process Clause of the 14th Amendment prohibits public employers from making stigmatizing statements about employees under certain circumstances. This standard of conduct is enforceable through lawsuits brought under 42 U.S.C. § 1983. It is unlikely that the proposed immunity statute would bar damages adjudged under 42 U.S.C. § 1983.

Despite these cautionary notes, I recommend passage of Section 9(1) of SB 481, provided the immunity extends to the exercise of discretionary authority as described above.

2.

No Precedent

A requester and the custodian of the record often view the request from profoundly different perspectives. From the requester's perspective, the request serves a purpose that has a discrete, finite goal, such as the publication of a story or the collection of addresses for a mailing list. The public official recipient of the same request is very likely to see the request as the latest in a series and just the first of more requests to come. The requester may not care how a different requester's similar request is treated; for the public official, that may be the most important consideration in deciding whether to release to the first requester a record that law would allow the official to withhold.

The public official will be concerned that discretionary release of the record to the first requester irrevocably commits the public body to release of records of that type in response to future requests. Why might the official wish to protect the option of deciding not to disclose the same or similar records in the future? The concern might arise where mechanical difficulty of making the discretionary release in response to the first request is slight, but the exemption would also apply to a much higher volume of material that may subsequently be requested by a different person or by the same requester in a subsequent request. The yield of the first request may be just a page or two of electronic material, and thus be very easy to accomplish. Those pages may, however, exemplify hundreds or even thousands of iterations of paper records exempt from disclosure under the same exemption applicable to the first request. When the official makes a judgement as to the first request, the second looms just over the horizon.

A public official who makes a discretionary release of records in one case should expect to be pilloried by withering editorial criticism if he or she does not exercise the same discretion in the next similar case. To avoid that storm, the official might choose not to release the record in response to the first request.

But the official might make a different judgment as to the first case presented if the law stated clearly that a discretionary choice to release exempt records has no precedential legal effect. That will not immunize the official from editorial criticism. But such a provision could provide the official with sufficient solace to cause him or her to release the requested records to the first requester.

An official's previous decision to release a record as to which the Public Records Law allows but does not compel the interposition of an exemption is not an admission that similar records, or even the identical record, must be released in response to the next or subsequent requests.[21] As long as the official's reason for exercising discretion in one case but not the next is free of constitutionally-impermissible motives, the official's previous discretionary decisions should be irrelevant to the law applicable to the next request.

I recommend that a provision be added to the Public Records Law specifying that the official is not bound, as a matter of law, to release a record simply because the same record had previously been released despite the existence of an applicable exemption. No bill introduced in this Session of which I am aware contains any such proposal. The new law I recommend would reassure public officials that the public body retains legal authority to assert the exemption in the face of a subsequent request. It would lead to disclosure of more records and would reduce friction between requesters and public bodies.

3.

No Waiver Of Lawyer-Client Privilege

Public bodies are authorized by law to assert the lawyer-client privilege. Preservation and waiver of that privilege strongly influence decision-making about the discretionary release of records that could otherwise lawfully be withheld from public disclosure.

Privileges, including the lawyer-client privilege, can be waived by voluntary disclosure of the privileged communication. ORS 40.280 (Rule 511). A disclosure compelled by law is not "voluntary." When a party to litigation is ordered to by a court to disclose information alleged to be privileged, the privilege is not waived by compliance with the court's order.

Before 2007, a public body willing to disclose a privileged communication to a requester might have felt obliged to have invited a lawsuit in order to simultaneously protect against waiver of the privilege while still disclosing the record. In 2007, the Legislature affirmed that a public record that is privileged and yet is "ordered to be disclosed" pursuant to the Public Records Petition process will retain its privilege. ORS 40.225(7) (OEC Rule 503).[22] This partially removed the incentive to withhold a record merely to protect the privilege.

The plain text of ORS 40.225(7) preserves the privilege only when the agency is "ordered" to disclose the record. A lawyer advising a public body contemplating the discretionary release of privileged records must advise his or her client of a risk that the voluntary disclosure could have the legal effect of waiving the privilege as to *all* the privileged communications on the subject -- not just the particular records disclosed.[23] The risk of rippling detrimental impacts may operate as a deterrent to fulfilling the public interest in disclosure.

For example, suppose the request seeks records about a brewing dispute between the public body and a contractor. Assume the requested records are exempt under the exemption for

records about imminent litigation and under the exemption incorporating into the Public Records Law the lawyer-client privilege. The public body may wish to release the records notwithstanding the Legislature's authorization to withhold them. Under current law, the official runs the risk that serving the public interests in disclosure will expose *all* of the public body's privileged communications on the subject. The consequence could be that in the litigation to come, the public body could not successfully assert the lawyer-client privilege to bar the contractor from discovering the intimate details of the public body's legal strategy.

The Public Meetings Law already addresses the potential drag on open government of a feared waiver of the lawyer-client privilege. The Oregon Public Meetings Law uniquely provides that a member of the media may attend executive sessions. One purpose of an executive session is to receive legal advice from the public body's legal counsel. Disclosure in the presence of a reporter ordinarily would waive the privilege because the public body is not compelled by the Public Records Law to discuss the privileged advice in the presence of the reporter. To avoid waiver, the public body could choose to rely on written advice alone. In order to prevent the risk of waiver from vitiating the public interest in open government served by the unique provision of the state's public meetings law, the portion of the Evidence Code dealing with waiver by voluntary disclosure was amended in 2003 to include what is now codified as the fourth sentence of ORS 40.225(7) (OEC Rule 503):

> Voluntary disclosure does not occur when representatives of the news media are allowed to attend executive sessions of the governing body of a public body as provided in ORS 192.660 (4), *or when representatives of the news media disclose information after the governing body has prohibited disclosure of the information under ORS 192.660 (4)*.[24]

ORS 40.280 (Rule 511) could be further amended to read:

> Voluntary disclosure does not occur when representatives of the news media are allowed to attend executive sessions of the governing body of a public body as provided in ORS 192.660 (4), *[~~or~~]* when representatives of the news media disclose information after the governing body has prohibited disclosure of the information under ORS 192.660 (4)**, or when the governing body of a public body expressly approves disclosure of all or part of a public record requested under ORS 192.410 to 192.505**.

Sections 9(2) and 10 of SB 481 frame an alternative way of addressing the privilege barrier to voluntary release of privileged material. I support enactment of those provisions, or of my alternative proposal above. Either would preserve the privilege yet reduce the risk that every part of the advice received by the public body from its attorneys would subsequently be exposed to the public body's legal adversaries. Either would lead to disclosure of more records. Either would reduce friction between requesters and public bodies.

B.

Clarity: move conditional exemptions from the list of unconditional exemptions to the list of conditional exemptions

ORS 192.501 and ORS 192.502 are lists of exemptions that commentators and courts frequently distinguish on the asserted basis that exemptions in ORS 192.501 are subject to balancing of the public interests in disclosure against public interests in non-disclosure whereas exemptions in ORS 192.502 are not. The distinction is illusory because many of the purportedly unconditional exemptions contain balancing tests. The inclusion of exemptions that contain balancing tests in a section dominated by exemptions that require no balancing create unnecessary inefficiencies in the administration of the Public Records Law.

For example, the exemption for internal advisory communications within a public body is codified in ORS 192.502, and yet it applies only if "the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure." Intricate arguments have arisen between requesters and public bodies about how to make sense of an unconditional exemption that is, in fact, conditional. Moving this and similar exemptions to ORS 192.501 would avoid some of this expensive contentiousness about how to apply or to understand such exemptions.

Collecting all the conditional exemptions in ORS 192.501 would also highlight for the Assembly potentially ambiguous provisions concerning the allocation of the burden of persuasion as to the applicability of particular exemptions. The personal privacy exemption stated in ORS 192.502(2) illustrates the issue. In full, it is stated as follows:

> (2) Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, *if* public disclosure would constitute an unreasonable invasion of privacy, *unless the public interest by clear and convincing evidence requires disclosure in the particular instance*. *The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy*.

Emphasis added.

Its placement in ORS 192.502(2) might imply that the personal privacy exemption is not subject to balancing of the public interests in disclosure against the public interests in non-disclosure. And yet its text states several elements that expressly and impliedly require weighing of the public interests in non-disclosure and in disclosure.

The classification of an exemption riven with balancing tests in a list of exemptions whose largest common denominator is the absence of any such requirement is confusing, at best, to many readers. The confusion is magnified by the allocation of the burdens of proof. ORS 192.490(1) states that if a public body denies a request and litigation ensues, "the burden is on the public body to sustain its action." That allocation of proof is consistent with the explicit

premise of the Public Records Law that every record must be disclosed "except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). The personal privacy exemption nevertheless clearly assigns *to the requester* the burden of negating the claim that disclosure would be an unreasonable invasion of privacy. ORS 192.502(2). And the public interest in disclosure will trump even the public interest in preventing an unreasonable invasion of privacy if someone — the statute does say whom — establishes by "clear and convincing evidence" that the public interest "requires disclosure. This tangle of conflicting commands is ripe for potential expense to requesters and public bodies alike.

Confusion about the allocation of the burden of persuasion arises mainly with respect to exemptions that contain an exemption-specific balancing command. The exercise of collecting those exemptions under ORS 192.501 would highlight opportunities for resolving conflicting or unnecessarily complex distribution of the burden of persuasion. Reclassifying exemptions in this way would also simplify the process of teaching the law's requirements to public servants.

C.

Clarity: Review of

Denials by Public Bodies Other Than State Agencies

The first formal step for a requester denied an opportunity to inspect a public record is in most cases filing a Petition with the Attorney General (in the case of denial by a state agency) or the District Attorney (in all other cases). ORS 192.450(1) (AG review of state agency denial); ORS 192.460(1)(a)(DA review of other denials). ORS 192.460(1)(a) makes ORS 192.450 applicable to denials reviewed by the District Attorney, with exceptions. The interaction of these statutes with ORS 192.465(legal effect of the failure of either official to timely rule on a petition) and ORS 192.490(3)(allocation of attorney fees in various scenarios) create the opportunity for variant interpretations and, therefore, for increased expense to requesters and governments alike.

The first two ambiguities arises from ORS 192.490(3). In part, it anticipates the possibility that a state agency objecting to the terms of a public records order issued by the Attorney General fails to timely follow certain procedures to allow it to obtain independent counsel and to seek judicial review of its application of the Public Records Law. In that circumstance, the state agency is obligated to pay the requester's attorney fees even if the public body is ultimately the prevailing party.

The elements of ORS 192.490(3) that merit attention today were added after a state agency denied a request, refused to comply with the Attorney General's public records order, and then did nothing. It neither sought judicial review nor complied with the order. Attorney General Johnson felt the burden to initiate judicial review should be on a state agency that rejected his advice and contested his order, not on the requester. The legislature agreed and amended ORS 192.490(3) accordingly.

The Assembly's response differentiated between state agencies and political subdivisions.

It imposed on every public body proposing to seek a judgment from a court affirming the validity of its claimed exemption despite the contrary order of the Attorney General or District Attorney the requirement that the public body declare its intent to the Attorney General or District Attorney and to the petitioner/requester. This is the first aspect of ORS 192.490(3) that ought to be clarified.

1.

Manner of Service of Intent

The vice the notice requirement addressed was the refusal of the state agency in the instigating case to have communicated its intent to anyone in the face of Attorney General Johnson's order. That problem is cured by actual notice, however delivered. I believe the Assembly intended the requirement to be satisfied by delivery of written notice, however conveyed, of the agency's intent.

E-mail was, of course, unknown at the time. If one wished to ensure the existence of proof of delivery of a written notice, one necessarily selected a form of mail. The legislature selected the option of registered mail, intending thereby to ensure documentation of the delivery of notice but not intending to exclude the use of a different form of written delivery to accomplish actual notice.

The statute as it now exists, however, could alternatively be construed to mean that the public body *must* give notice *only* by registered mail, and that if it has not used that specific means it will be deemed to have failed to satisfy the requirement even if the District attorney or Attorney General and the requester actually received timely notice of the agency's intent.

To eliminate this ambiguity, I recommend that ORS 192.490(3) be modified by striking the specification of the form of communication of the agency's intent in favor of a requirement that the public body give written notice by any means.

2.

Consequences of Failure to Timely Serve Notice

The next ambiguity in ORS 192.490(3) arises from the distinction drawn by its terms between state agencies and other public bodies that fail to timely comply with the notice requirement just discussed. Because the Attorney General is generally also the state agency's lawyer and the Attorney General's public records order is tantamount to legal advice about the agency's obligations under law, the Assembly discourages state agencies from further pursuing disputes between the Attorney General's and his or her agency/client by enforcing strict procedural discipline on that agency/client. If a state agency fails to timely give notice, it must

pay the requester's attorney fees even if the state agency ultimately prevails on its claim of exemption.

But suppose the public body is other than a state agency and it is the District Attorney — typically not the lawyer for the public body — that has issued the order to which the public body objects. Is the penalty applicable to state agencies also applicable to tardy subdivisions? In my opinion, the answer is "no." The best evidence of the legislative intent is the text of the statute. It applies the penalty to "state agencies." On the other hand, other parts of the same statute apply equally to state agencies and to local public bodies.

The point has not been the subject of any appellate opinion. But because the attorney fees that a requester might incur — whether ultimately the winner or not — may amount to $100,000 or more, any ambiguity in the application of the ORS 192.490(3) is certain someday to be litigated.

I recommend that the legislative intent on this point be more explicitly stated. Based on my review of the record of the committee that framed this provision, and on the fact that the Attorney General is the lawyer for state agencies whereas the District Attorney is not the lawyer for most public bodies, I recommend that the penalty be maintained as to state agencies only. But any clear choice -- even one contrary to my recommendation -- would avoid the potential expense of litigation on this point.

3.

Can A District Attorney Deny A Petition By Default?

Another ambiguity arises from the incorporation of ORS 192.450 into the process by which public bodies other than state agencies initiate review of a denial by filing Petitions with District Attorneys. ORS 192.450(1) states that the Attorney General "shall issue an order denying or granting the petition . . . ." The law is clear that failure to timely issue a ruling allows the disappointed petitioner to move to the next step by filing his or her action in court.

A legitimate question could arise as to whether the District Attorney is likewise obligated by law to issue an order.

In my opinion, the correct interpretation is that the same duties, in this respect, are assigned to District Attorneys as are expressly assigned to the Attorney General. The statutory obligations to issue an order and the time within which the order must be issued apply to the Attorney General and to District Attorneys (via ORS 192.430(3)) alike.

Still, a rational argument could be framed in support of the proposition that a District Attorney has the legal authority to decline to rule on a petition whereas the Attorney General must issue an order. The argument would begin with the difference between the relationship of the Attorney General to his or her state agency/clients and the relationship of the District Attorneys to the local public bodies who would be the object of the District Attorney's order on

the requester's petition. As described previously in this submission, the Attorney General's public records orders always are addressed to his or her client. The Attorney General may therefore have consulted with his or her client long before the disappointed requester files a petition. Moreover, every lawyer has a duty to advise his or her client as to legal questions presented by the client within the scope of the lawyer-client engagement.

In contrast, political subdivisions are only rarely represented by the District Attorney. A District Attorney who receives a petition may be learning for the first time of the existence of the dispute. The District Attorney has no professional responsibility to represent or to advise most of the public bodies that will be the object of his or her public records orders. It is therefore harder to attribute to the Legislature the intent to compel District Attorneys to issue public records orders than it is to conclude that the Attorney General must do so.

The Assembly should eliminate the expense of potential litigation and provide clearer direction to District Attorneys by making an explicit policy choice on this point. I would eliminate this uncertainty by obligating District Attorneys to timely issue an order addressing every petition.

VI.

Fees

The Executive Summary published with the December 16, 2016, "Draft Report" of the Attorney General's Public Records Law Reform Task Force notes that "Of all the issues raised before the task force, the issue of cost may be the most difficult to resolve."[25] The body of the draft report reports that "prior attempts to revise the cost structure at the legislature have died quickly. As a result, the task force has focused its initial work on areas more likely to generate consensus – and more likely to result in successful legislative proposals."

I predict that the question of fees will remain an irritant. I agree that a comprehensive solution has not yet emerged despite all the thought and effort that so many have already given to the problem.

I nevertheless recommend two steps calculated to ease some of the friction. I recommend an additional step that could help develop a factual basis that would allow all of the interested parties view the question of fees from new perspectives.

The first recommendation is inspired by Section 4 of HB 2455. Section 4(1) of the bill sets maximum allowable fees for specific types of records. For example, five cents per page for physical copies of pubic records. Section 4(2)(a)(A). It allows public bodies to charge the "actual cost" of producing other records. Section 4(2)(b). It would be very difficult to apply Section 4 as drafted, but I support the concept of setting maximum fees allowable for precisely-described classes of records. Maximum allowable charges for these services would reduce the

irritation arising from variation in rates charged by public bodies for identical copying or processing of public records of the same format.

I would not, however achieve this result by fixing the maximums in law. I recommend that the Assembly empower the Secretary of State Archivist to make administrative rules setting maximum allowable fees for precisely-defined categories of documents. The rule-making process is better equipped to drill into the intricacies of record-handling than the Legislative Assembly. A rule-making agency can respond more quickly than the Assembly if the initial rates prove unnecessarily high, are erroneously set so low as to prevent recovery of actual costs, or relate to records maintained in formats that the rule-maker originally thought were the same from agency to agency but later learned impose different burdens on different custodians of records.

The second recommendation is that the Assembly add a new section to the Public Records Law affirming that the cost of compliance with that statute is an expense allowable from every "fund" or "account" established by statute. Officials responsible for the myriad of funds reserved for particular purposes sometimes feel obliged to hold those funds harmless from the expense of complying with public records requests. In some instances, law establishing the fund may support their concern. In many instances — particularly where the fund is derived from registration or licensing fees charged by the agency and paid by its regulated entities — the agency's concern may arise less from law than from anticipated objections of the regulated base.

When an official responsible for such a fund waives a fee that otherwise is allowable under the Public Records Law, the cost of compliance with the Public Records Law is functionally shifted from the requester to the fund. The official may therefore feel obliged to deny the request for waiver of the fee, regardless of its other merit.

Funds established by the Constitution might require closer analysis. I believe the Assembly has authority as to statutory funds to affirm that the costs of producing records in response to a request can be taken from the respective funds. A statute broadly affirming this authority would free the administrators of such funds to consider fee waiver requests on their merits.

The third recommendation is intended to collect data that could help inform future discussions of the thorny question of fees. We do not know how much money is spent for the purpose of complying with the Public Records Law. Our ignorance allows the proponents of eliminating or sharply curtailing fees to assert, with little fear of rebuttal, that the cost of complying with their requests is actually very small. It also allows the opponents of elimination or curtailment to assert, with the same freedom, that public bodies already are subsidizing, at great cost, private-party requesters.

The Assembly should begin to fill in this gap in our knowledge. At least two mechanisms could be invoked.

The mechanism I prefer does not require legislation. In the course of appropriating funds and controlling expenditures, the Legislative Assembly specifies the information that state agencies provide to the Assembly. The Assembly could establish a report format by which state agencies would be required to account for expenditures relating to fulfillment of public records requests. The Assembly could, for example, require state agencies to report on the value of waivers granted and the amount of fees actually received during a specified time, such as a biennium.

Over time, a better understanding of the status quo would emerge. Debates about policy options concerning fees would then become better informed. The same result could be achieved through legislation requiring state agencies to collect and report the data. That approach is less flexible than attaching the requirement to the performance of the Legislature's budget and fiscal duties.

VII.

Fund A Demonstration Grant Program For Local Government Model "Transparency By Design" Programs

The Attorney General's Draft Task Force Report asserts:

> Unless public bodies can find ways to efficiently deal with electronic data, public access to government will remain problematic. Under the current system, the exponentially larger volume of public records that exist in an electronic business place can be reviewed for exemptions only using the same analog method that existed in 1973: a human reader. The problem is obvious enough that, despite a relatively small amount of time spent discussing these issues, the task force believes designing electronic systems with appropriate transparency in mind is crucial to meaningfully improving access to public records.

The draft report does not recommend a specific means of improving on the situation aptly described above. I do not have a recommendation to deal with the issue system-wide. I do have a proposal that could help public bodies — particularly local public bodies — make progress on the problem described in the passage above.[26]

I suspect that both the challenges and opportunities through digital means to advance the public interests in disclosure of public records are particularly acute as local government custodians. The cost of buying a machine capable of scanning legacy paper records into digital formats — and the staff to do that — would have been a meaningful percentage of the annual operating budget for the small cities that I formerly represented.

The great diversity in the size and nature of public bodies that are not state agencies suggests that they are more likely to have workable solutions than any Salem-based initiative. I recommend that the Assembly appropriate general funds to the Secretary of State, Office of the

State Archivist. Under the proposal, the Archivist would be required to establish criteria to be satisfied by non-state agency grant applicants. Grants would be issued to local governments who believe they can demonstrate the feasibility, explore the cost, and illustrate the benefits of improving public access by digital means.

I know that the State Archivist has made progress in identifying technical means, and supportive policies, by which state agencies can use digital means to maintain public records and to improve the fluidity of public access to those records. I would assign the proposed grant program to the State Archivist because the professionals there already have a grasp of the principles likely relevant to enhancing the public interest in disclosure through digital means.

[1] Section 6(1)(a) of SB 106 would substitute, in the 22 Oregon counties with a total population of 75,000 people or less, an appointed official (the Public Records Advocate) for the elected District Attorneys upon whom the duty of ruling on certain petitions currently falls. I do not support that change to the current law.

[2] Grattan Kerans, a former editor of the Oregon Daily Emerald and future Speaker of the House, staffed the 1973 Joint Committee on Professional Responsibility. The Committee's membership included three future Attorneys General and a future Chief Justice.

[3] Audit Report Number 2015-17, p. 1 (2015)

[4] Id. At 9.

[5] Id. At 2.

[6] For a summary of the ways in which this tension is addressed, see Oregon State Agency Mediation Confidentiality, Oregon Department of Justice (May 2015),http://www.doj.state.or.us/adr/pdf/state_agency_mediation_confidentiality.pdf (Last viewed February 5, 2017).

[7] ORS 180.220(2): "No state officer, board, commission, or the head of a department or institution of the state shall employ or be represented by any other [than the Department of Justice] counsel or attorney at law."

[8] ORS 180.060(3)(a): "Except as provided in paragraph (b) of this subsection and subsection (4) of this section, the Attorney General may not render opinions or give legal advice to persons other than the state officers listed in subsection (2) of this section."

[9] Article VII, Section 17 (Original), of the Oregon Constitution establishes the office of "prosecuting attorney" in each county. It assigns to District Attorneys "such duties pertaining to the administration of law and general police" as the Legislative Assembly may direct. The Legislative Assembly directed District Attorneys to advise county officials. ORS 8.690. ORS 203.145, however, empowers county governing bodies to appoint counsel other than the District Attorney. Many have. Very few of the local public bodies whose initial refusal to disclose records comes before a District Attorney on the disappointed requester's Petition for a Public Records Order will have an attorney-client relationship with that District Attorney.

[10] *State ex rel. Moltzner v. Mott*, 163 Or 631, 640 (1940)(Stating the rule in dicta); *Creek Valley Sanitary Authority ex rel. Bashaw v. Hopkins*, 631 P.2d 808, 53 Or.App. 212 (Or. App., 1981)(Citing and quoting the rule with approval).

[11] Federal guidance as to treatment of PHI requested pursuant to a state public records request reflects the unavoidable complexity of many questions of interpretation of the Public Records Law. Here is an excerpt from the Federal Health and Human Services agency's published guidance for HIPPA practitioners:

> The Privacy Rule permits a covered entity to use and disclose protected health information as required by other law, including state law. See 45 CFR 164.512(a). Thus, where a state public records law mandates that a covered entity disclose protected health information, the covered entity is permitted by the Privacy Rule to make the disclosure, provided the disclosure complies with and is limited to the relevant requirements of the public records law.
>
> However, where a state public records law only permits, and does not mandate, the disclosure of protected health information, or where exceptions or other qualifications apply to exempt the protected health information from the state law's disclosure requirement, such disclosures are not "required by law" and thus, would not fall within § 164.512(a) of the Privacy Rule.

https://www.hhs.gov/hipaa/for-professionals/faq/506/how-does-the-hipaa-rule-relate-to-freedom-of-information-laws/index.html (Last viewed February 3, 2016).

[12] ORS 192.450(3).

[13] For example, Petitioners sometimes erroneously believe the agency has denied a request. Or the agency may have failed to clearly communicate to the requester the agency's intent to disclose the record. Those circumstances could yield a "moot" order without there having been any substantive communication between the agency and the Attorney General.

[14] The 2017 - 2018 edition of the Manual, from which the quoted passage is taken, is available at https://www.oregonlegislature.gov/lc/PDFs/form-stylemanual.pdf (Last viewed February 5, 2017).

[15] Office of Legislative Counsel, Form and Style Manual for Legislative Measures, p. 90 (2017 - 2018).

[16] For example, the Office of Legislative Counsel may decide, as I suggest in relation to SB 481, to require that measures proposing exemptions include an explicit legislative findings as to the interest or interests in non-disclosure served by the bill. This element of the Open Government Impact Statement will call out measures that do not conform to that requirement.

[17] "Bill would let Oregon State Police seek to keep secret the name of officer who killed Malheur protester," Eugene Register-Guard, February 18, 2016 (Last viewed February 22, 2016).

[18] By its fifth iteration, the bill's complexities included: (a) The petitioning officer would have been required to make his or her case by "clear and convincing evidence" as opposed to the more common civil "preponderance of the evidence" standard. HB 4087-5, Section 1(2). (b) The threat to the officer/family would have to have been found "credible." HB 4087-5, Section 1(2). (c) The threat would have had to amount to a "present danger to the life" of the officer or his or her family. HB 4087-5, Section 1(2). By constraining the petition to "present" dangers, the Assembly invited a complex evaluation of a hierarchy of threats. For example, which of the following are "present dangers"? "I'm coming after you after I get out of prison, you can bet on it"; "Nobody does this to me and gets away with it"; or, "The last guy that tried to take me down won't ever have a second chance." The bill was in committee on adjournment.

[19] HB 2101 (2017) unintentionally would sow confusion rather than clarity. Section 1 enacts into law, operative January 1, 2018, a new provision that is identical to ORS 192.502(9)(a) (exempting records made confidential or privileged under Oregon law). Another provision of the bill repeals ORS 192.502, including ORS 192.502(9)(a) *and* (b). The repeal is not operative until January 2, 2026. Thus, until January 2, 2026, a version of ORS 192.502(9) *with* subsection (b) and a version *without* subsection (b) will co-exist. What should a court conclude about the intent of the Legislature? That in enacting the new provision, it impliedly meant to repeal ORS 192.502(9)(b), operative on the date the duplicative version of ORS 192.502(9)(a) becomes operative?

[20] *See, e.g.*, Attorney General's Public Records and Meetings Manual at 25 (2008)("* * * the guiding principle is: *Exemptions do not prohibit disclosure*; they merely exempt the public body from the Public Record Law's mandate to disclose public records. * * * In view of the purposes of the Public Records Law, disclosure should be favored, if there is a choice, even when a record may be withheld from the disclosure."). Emphasis in original.

[21] The discretionary release of records in response to Request 1 of a series could render certain exemptions inapplicable in the next or subsequent requests. For example, it is difficult to understand how a claim of exemption on the basis of an unreasonable invasion of privacy would be viable if the official had previously released to the public the identical records. If the record is already public by decision of the official, how could release of another copy result in an unreasonable invasion of privacy? Even in such cases, however, the preclusive effect does not arise as a matter of law. The subsequent assertion of the exemption is barred because the discretionary act changed the facts relevant to the exemption.

[22] Chapter 513, Oregon Laws 2007, Section 3(7) (SB 671). Section 3(7) was not part of the original bill. SB 671 began as a proposal by the Oregon Newspaper Publishers Association to prohibit any public body from asserting the lawyer-client privilege as a basis for withholding any part of a privileged record except the part consisting of "legal advice, opinion or counsel" of the attorney. The lawyer-client privilege ordinarily extends to facts and information necessary to provide professional legal services. The Legislature did not accept the ONPA's proposed balance of the public interests in disclosure with the public interests in non-disclosure. It adopted instead a complicated system in which the public body may condense factual information otherwise interwoven with legal advice and then disclose the "condensation" in lieu of the original public record.

[23] The evidence code includes no self-contained answer to the scope of the waiver. The uncertainty under current law as to the legal effect of a voluntary waiver magnifies the potential deterrent effect on public officials who contemplate a voluntary disclosure of privileged information.

[24] Chapter 259 Oregon Laws 2003 (SB 39).

[25]Attorney General's Public Records Law Reform Task Force Draft Report 12/15/2016. http://www.doj.state.or.us/public_records/pdf/public_records_law_reform_task_force_12-15-16_draft_report.pdf (Last viewed February 5, 2017).

[26] I am individually responsible for all of this over-long submission and for every error in it. Candor requires, however, that I give credit for the kernel of Section VII to Chuck Sheketoff. I attended two of the regional meetings that Attorney General Kroger hosted in connection with his advocacy for changes to the Public Records Law. At the Portland session, Mr. Sheketoff offered a new (to me) way of stating the underlying problem. In remarks anticipating by years the Task Force's draft report, Chuck asked whether there might be means, particularly in view of the ever-growing digitization of public records, to use technology to increase the accessibility of records above and beyond the call-and-response format of the Public Records Law. His comments, and our conversations since, persuade me that he (and the Task Force) had identified an important question. He should not be blamed for any of the ideas expressed in Section VII, but he should get credit for having put the starting point in my head.