

# Senate Bill 106

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## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Creates Public Records Advocate and Public Records Advisory Council.

Directs Public Records Advocate to provide mediation services to facilitate resolution of disputes between requesters of public records and state agencies concerning disclosure of public records. Directs Public Records Advocate to provide training for state agencies and local government bodies on disclosure requirements, best practices for public records management and retention and best practices for processing and responding to requests to inspect public records. Authorizes Public Records Advocate, upon request, to provide guidance and advice on discrete public records issues. Requires Public Records Advocate to review denials of requests for public records if public body is located in county with population below specified threshold and public records requester petitions for review.

Directs Public Records Advisory Council to study issues that arise under the public records law and at least once each biennium to provide written recommendations to Governor and Legislative Assembly on effectiveness and fairness of public records law and public bodies' implementation of public records law requirements.

Provides that Public Record Advocate's duties become operative January 1, 2018.

Takes effect on 91st day following adjournment sine die.

## A BILL FOR AN ACT

1  
2 Relating to public accountability in administering the public records law; creating new provisions;  
3 amending ORS 192.460, 192.465, 192.470 and 192.480; and prescribing an effective date.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1. (1) The office of the Public Records Advocate is created.**

6 **(2) The Public Records Advocate shall be appointed by the Governor and confirmed by the**  
7 **Senate in the manner prescribed in ORS 171.562 and 171.565.**

8 **(3) The Public Records Advocate shall be a member in good standing of the Oregon State**  
9 **Bar.**

10 **(4) The term of office of the Public Records Advocate shall be four years, except that the**  
11 **advocate serves at the pleasure of the Governor. The advocate may be reappointed to con-**  
12 **secutive terms.**

13 **(5) The Public Records Advocate is in the unclassified service.**

14 **(6) The Public Records Advocate may hire one or more deputy advocates or other pro-**  
15 **fessional staff to assist in performing the duties assigned to the Public Records Advocate.**

16 **(7) The Oregon Department of Administrative Services shall furnish office facilities and**  
17 **provide administrative support to the Public Records Advocate.**

18 **SECTION 2. (1) The Public Records Advocate shall provide mediation services when re-**  
19 **quested by either a person described in subsection (2) of this section or a state agency under**  
20 **the conditions described in subsection (3) of this section.**

21 **(2) A person may seek mediation services under this section when seeking to inspect or**  
22 **receive copies of public records and the person:**

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

- 1 (a) Has been denied access to all or a portion of the records being sought;
- 2 (b) Has been denied a fee waiver or reduction in fees after asserting under ORS 192.440
- 3 (5) that a fee waiver or reduction of fees is in the public interest; or
- 4 (c) Received a written fee estimate under ORS 192.440 (4) that the person believes exceeds
- 5 the actual cost to be incurred by the public body in producing the requested records.
- 6 (3) A state agency may seek mediation services under this section if, in response to a
- 7 request for public records, the agency asserts:
- 8 (a) That the records being sought are not public records;
- 9 (b) That the records being sought are exempt from mandatory disclosure; or
- 10 (c) That the agency is, under ORS 192.440, entitled to the fees the agency is seeking in
- 11 order to produce the records being requested.
- 12 (4) A state agency may not seek mediation services under this section unless at least 21
- 13 days have passed since the agency received the request.
- 14 (5) Notwithstanding any other provision of ORS 192.410 to 192.505:
- 15 (a) The failure of a person seeking to inspect or receive copies of public records to engage
- 16 in good faith in the mediation process described in this section upon being authorized to do
- 17 so under subsection (2) of this section shall be grounds for the state agency to deny the re-
- 18 quest and refuse to disclose the requested records.
- 19 (b) The failure of a state agency to engage in good faith in the mediation process de-
- 20 scribed in this section after a public records requester seeks mediation services under sub-
- 21 section (2) of this section shall be grounds for the award of costs and attorney fees to the
- 22 public records requester for all costs and attorney fees incurred in pursuing the request af-
- 23 ter a good faith determination under subsection (6) of this section.
- 24 (6) Either party to the mediation may request that the Public Records Advocate make a
- 25 determination concerning whether a party is acting in good faith for purposes of applying the
- 26 remedies described in subsection (5) of this section.
- 27 (7) Mediation shall be requested by submitting a written request for mediation and such
- 28 other information as may be required by the Public Records Advocate. Mediation between
- 29 parties shall be conducted and completed within 21 days following receipt by the advocate of
- 30 the request for mediation. The mediation period may be extended by unanimous agreement
- 31 among the public records requester, the state agency and the advocate.
- 32 (8) If the mediation results in an agreement between the public records requester and
- 33 the state agency, the advocate shall prepare a written document memorializing the agree-
- 34 ment. The written agreement shall be executed by the public records requester and an au-
- 35 thorized representative of the state agency. The written agreement shall control the
- 36 resolution of the records request.
- 37 (9)(a) If the mediation fails to resolve the dispute between the public records requester
- 38 and the state agency, the Public Records Advocate may issue an advisory opinion that states
- 39 the advocate's opinion of what the legally correct resolution of the dispute is, including any
- 40 salient information that supports the advocate's conclusion.
- 41 (b) The Public Records Advocate shall publish advisory opinions on a publicly accessible
- 42 website maintained by the advocate and shall provide a copy of each advisory opinion to the
- 43 Attorney General.
- 44 **SECTION 3.** Consistent with section 2 of this 2017 Act and rules adopted thereunder, the
- 45 Public Records Advocate possesses sole discretion over the conduct of mediation sessions.

1       **SECTION 4.** (1) Written records, documents, notes or statements of any kind prepared  
 2 for or submitted to the Public Records Advocate, prepared by the advocate or exchanged  
 3 between mediating parties are exempt from disclosure under ORS 192.410 to 192.505 and are  
 4 subject to ORS 40.190.

5       (2) Subsection (1) of this section does not apply to a written agreement described in  
 6 section 2 (8) of this 2017 Act or an advisory opinion described in section 2 (9) of this 2017 Act.

7       **SECTION 5.** (1) The Public Records Advocate shall provide training for state agencies and  
 8 local governments on:

9       (a) The requirements and best practices for processing and responding to public records  
 10 requests; and

11       (b) The requirements and best practices for public records management and retention.

12       (2) The Public Records Advocate shall perform training sessions throughout the state.

13       (3) Upon the written request of a state agency or local government, the Public Records  
 14 Advocate may provide guidance and advice on matters pertaining to public records manage-  
 15 ment, public records request processing and the disclosure and applicability of exemptions  
 16 from disclosure of public records.

17       (4) Guidance and advice provided pursuant to subsection (3) of this section is purely ad-  
 18 visory and must cease when the particular advice sought relates to a matter that is referred  
 19 to mediation under section 2 of this 2017 Act.

20       **SECTION 6.** ORS 192.460 is amended to read:

21       192.460. (1) ORS 192.450 applies to the case of a person denied the right to inspect or to receive  
 22 a copy of any public record of a public body other than a state agency, except that:

23       (a)(A) **In counties with a population of 75,000 or more**, the district attorney of the county in  
 24 which the public body is located, or if it is located in more than one county the district attorney  
 25 of the county in which the administrative offices of the public body are located, shall carry out the  
 26 functions of the Attorney General; **or**

27       **(B) In counties with a population of less than 75,000 and in which the administrative of-**  
 28 **ices of the public body are located, the Public Records Advocate appointed under section 1**  
 29 **of this 2017 Act shall carry out the functions of the Attorney General;**

30       (b) Any suit filed must be filed in the circuit court for the county described in paragraph (a) of  
 31 this subsection; and

32       (c) The district attorney may not serve as counsel for the public body, in the cases permitted  
 33 under ORS 192.450 (3), unless the district attorney ordinarily serves as counsel for the public body.

34       (2) Disclosure of a record to the district attorney, **or to the Public Records Advocate, if ap-**  
 35 **plicable**, in compliance with subsection (1) of this section does not waive any privilege or claim of  
 36 privilege regarding the record or its contents.

37       (3) Disclosure of a record or part of a record as ordered by the district attorney **or the Public**  
 38 **Records Advocate** is a compelled disclosure for purposes of ORS 40.285.

39       **SECTION 7.** ORS 192.465 is amended to read:

40       192.465. (1) The failure of the Attorney General, [or] district attorney **or Public Records Ad-**  
 41 **vocate** to issue an order under ORS 192.450 or 192.460 denying, granting, or denying in part and  
 42 granting in part a petition to require disclosure within seven days from the day of receipt of the  
 43 petition shall be treated as an order denying the petition for the purpose of determining whether a  
 44 person may institute proceedings for injunctive or declaratory relief under ORS 192.450 or 192.460.

45       (2) The failure of an elected official to deny, grant, or deny in part and grant in part a request

1 to inspect or receive a copy of a public record within seven days from the day of receipt of the re-  
2 quest shall be treated as a denial of the request for the purpose of determining whether a person  
3 may institute proceedings for injunctive or declaratory relief under ORS 192.450 or 192.460.

4 **SECTION 8.** ORS 192.470 is amended to read:

5 192.470. (1)(a) A petition to the Attorney General, [or] district attorney **or Public Records**  
6 **Advocate** requesting the Attorney General, [or] district attorney **or advocate** to order a public re-  
7 cord to be made available for inspection or to be produced shall be in substantially the following  
8 form, or in a form containing the same information:

9 \_\_\_\_\_

10 \_\_\_\_\_  
11 \_\_\_\_\_  
12 (Date)

13 I (we), \_\_\_\_\_ (name(s)), the undersigned, request the Attorney General (or Dis-  
14 trict Attorney of \_\_\_\_\_ County, **or Public Records Advocate, if applicable**) to order  
15 \_\_\_\_\_ (name of governmental body) and its employees to (make available for inspection)  
16 (produce a copy or copies of) the following records:

17  
18 1. \_\_\_\_\_  
19 (Name or description of record)

20  
21 2. \_\_\_\_\_  
22 (Name or description of record)

23  
24 I (we) asked to inspect and/or copy these records on \_\_\_\_\_ (date) at \_\_\_\_\_ (address).  
25 The request was denied by the following person(s):

26  
27 1. \_\_\_\_\_  
28 (Name of public officer or employee;  
29 title or position, if known)

30  
31 2. \_\_\_\_\_  
32 (Name of public officer or employee;  
33 title or position, if known)

34  
35 \_\_\_\_\_  
36 (Signature(s))

37 \_\_\_\_\_  
38  
39 **(b) [This form] The form described in paragraph (a) of this subsection** should be delivered  
40 or mailed to the Attorney General’s office in Salem, [or] the district attorney’s office in the county  
41 courthouse **or the Public Records Advocate’s office in Salem.**

42 (2) Promptly upon receipt of such a petition, the Attorney General, [or] district attorney **or**  
43 **Public Records Advocate** shall notify the public body involved. The public body shall thereupon  
44 transmit the public record disclosure of which is sought, or a copy, to the [Attorney General] **person**  
45 **who received the petition**, together with a statement of [its] **the public body’s** reasons for be-

1 believing that the public record should not be disclosed. In an appropriate case, with the consent of  
 2 the Attorney General, the public body may instead disclose the nature or substance of the public  
 3 record to the *[Attorney General]* **person who received the petition.**

4 **SECTION 9.** ORS 192.480 is amended to read:

5 192.480. (1)(a) In any case in which a person is denied the right to inspect or to receive a copy  
 6 of a public record in the custody of an elected official, or in the custody of any other person but  
 7 as to which an elected official claims the right to withhold disclosure[, *no*]:

8 (A) A petition to require disclosure may **not** be filed with the Attorney General, [*or*] district  
 9 attorney[, ] or **Public Records Advocate; and**

10 (B) If a petition is filed, it shall not be considered [*by the Attorney General or district attorney*  
 11 *after*] **if** a claim of right to withhold disclosure by an elected official **is made.**

12 (b) In such case a person denied the right to inspect or to receive a copy of a public record  
 13 may institute proceedings for injunctive or declaratory relief in the appropriate circuit court, as  
 14 specified in ORS 192.450 or 192.460, and the Attorney General or district attorney may upon request  
 15 serve or decline to serve, in the discretion of the Attorney General or district attorney, as counsel  
 16 in such suit for an elected official for which the Attorney General or district attorney ordinarily  
 17 serves as counsel.

18 (2) Nothing in this section shall preclude an elected official from requesting advice from the  
 19 Attorney General, [*or*] a district attorney **or the Public Records Advocate** as to whether a public  
 20 record should be disclosed.

21 **SECTION 10.** (1) **The Public Records Advisory Council is created.**

22 (2) **The Public Records Advisory Council consists of:**

23 (a) **The Secretary of State or a designee of the Secretary of State;**

24 (b) **The Attorney General or a designee of the Attorney General;**

25 (c) **The Director of the Oregon Department of Administrative Services or a designee of**  
 26 **the director;**

27 (d) **A representative of the news media who is appointed by the Governor;**

28 (e) **A member of the public who is appointed by the Governor; and**

29 (f) **The Public Records Advocate, who shall serve as chair of the council.**

30 (3) **The term of office of a member of the council described in subsection (2)(d) or (e) of**  
 31 **this section is four years, but that member serves at the pleasure of the Governor. Before**  
 32 **the expiration of the term of a member described in subsection (2)(d) or (e) of this section,**  
 33 **the Governor shall appoint a successor whose term begins on January 1 next following. A**  
 34 **member described in subsection (2)(d) or (e) of this section is eligible for reappointment. If**  
 35 **there is a vacancy for any cause, the Governor shall make an appointment to become im-**  
 36 **mediately effective for the unexpired term.**

37 (4) **The appointment of a member of the council described in subsection (2)(d) or (e) of**  
 38 **this section is subject to confirmation by the Senate in the manner prescribed in ORS 171.562**  
 39 **and 171.565.**

40 (5) **A member of the council described in subsection (2)(d) or (e) of this section is entitled**  
 41 **to compensation and expenses as provided in ORS 292.495.**

42 (6) **A majority of the members of the council constitutes a quorum for the transaction**  
 43 **of business.**

44 (7) **The council shall meet at least once every three months. The council also may meet**  
 45 **at other times and places specified by the call of the chairperson or of a majority of the**

1 members of the council.

2 (8) All public bodies, as defined in ORS 192.410, shall assist the council in the performance  
3 of its duties and, to the extent permitted by laws relating to confidentiality, furnish such  
4 information and advice as the members of the council consider necessary to perform their  
5 duties.

6 **SECTION 11.** Notwithstanding the term of office specified by section 10 of this 2017 Act,  
7 of the members first appointed to the Public Records Advisory Council:

8 (1) The member described in section 10 (2)(d) of this 2017 Act shall serve for an initial  
9 term ending December 31, 2019.

10 (2) The member described in section 10 (2)(e) of this 2017 Act shall serve for an initial  
11 term ending December 31, 2020.

12 **SECTION 12.** (1) The Public Records Advisory Council created under section 10 of this  
13 2017 Act shall periodically perform all of the following:

14 (a) Survey state agency and other public body practices and procedures for:

15 (A) Receiving public records requests, identifying the existence of records responsive to  
16 the requests and gathering and disclosing responsive records;

17 (B) Determining fee estimates and imposing or waiving fees under ORS 192.440; and

18 (C) Determining and applying exemptions from required disclosure of public records.

19 (b) Examine practices similar to those described in paragraph (a) of this subsection in  
20 other jurisdictions.

21 (c) Identify inefficiencies and inconsistencies in application of the public records law that  
22 impede transparency in public process and government.

23 (d) Make recommendations on changes in law, policy or practice that could enhance  
24 transparency in public process and government, and facilitate rapid dissemination of public  
25 records to requesters.

26 (e) Make recommendations on the role of the Public Records Advocate as mediator in  
27 disputes between custodians of public records and public record requesters and the  
28 advocate's role in providing advisory opinions addressing public records issues.

29 (2) No later than December 1 of each even-numbered year, the council shall submit to  
30 the Governor, and to the Legislative Assembly in the manner provided by ORS 192.245, a  
31 report that describes the findings of the council since the council's last report. The report  
32 may include recommendations for legislation.

33 (3) The council may prepare reports and studies more frequently than required under  
34 subsection (2) of this section.

35 (4) The council may adopt rules governing the operations of the office of the Public Re-  
36 cords Advocate, including but not limited to rules establishing procedures for the conduct  
37 of mediation under section 2 of this 2017 Act.

38 **SECTION 13.** (1) The Public Records Advisory Account is established in the General  
39 Fund. The account shall consist of moneys appropriated by the Legislative Assembly.

40 (2) Moneys in the Public Records Advocate Account are dedicated to funding the oper-  
41 ations of:

42 (a) The office of the Public Records Advocate; and

43 (b) The Public Records Advisory Council.

44 **SECTION 14.** Sections 1 to 5 of this 2017 Act are added to and made a part of ORS 192.410  
45 to 192.505.

1        **SECTION 15.** Sections 10, 12 and 13 of this 2017 Act are added to and made a part of ORS  
2 **chapter 192.**

3        **SECTION 16.** Sections 2 to 5 of this 2017 Act and the amendments to ORS 192.460, 192.465,  
4 **192.470 and 192.480 by sections 6 to 9 of this 2017 Act become operative on January 1, 2018.**

5        **SECTION 17.** This 2017 Act takes effect on the 91st day after the date on which the 2017  
6 **regular session of the Seventy-ninth Legislative Assembly adjourns sine die.**

7