



Legislative Testimony

Oregon Criminal Defense Lawyers Association

April 3, 2019

The Honorable Representative Jennifer Williamson, Chair
House Judiciary Committee, Members

Re: Testimony in support to HB 3224

Dear Chair Williamson and Members of the Committee:

Thank you for the opportunity to submit the following comments in support to HB 3224:

House Bill 3224 requires District Attorney's offices, like other government offices, to make their policies available to the public.

This Bill sets out a road to transparency in a three-steps.

- 1) First, the Bill requires District Attorney's offices develop written policies by December 1, 2020, on the following:**
 - (a) Pretrial discovery process;
 - (b) Prosecutorial ethics, compliance with professional rules of conduct;
 - (c) Confidentiality, and handling of confidential information;
 - (d) Qualification standards for prosecutors;
 - (e) Use of certified law students;
 - (f) Charging decisions for several crimes, including those with mandatory minimums;
 - (g) Case dispositions decisions, like opting for restorative justice or plea bargain;
 - (h) Decisions to change judges;
 - (i) Victim engagement and involvement; and
 - (j) Pretrial release policies.

- 2) Once these written policies are developed, the bill requires District Attorney's offices to publish these policies on the District Attorney's website, making them publicly available.**

- 3) The third step requires District Attorneys to review written policies 5 years after adoption, and to make revisions to policies where necessary.**

OCDLA Supports HB 3224 for the following reasons:

(1) Policies that impact the public should be available to the public.

Oregon's District Attorney's offices are an essential function of Oregon's government. Like other Oregon government offices, some have policies for how they carry out their government function.¹

The policies described in this bill are not targeting internal office management, but rather policies that impact the public via the administration of justice. In other words, since these policies guide decisions immediately impacting the public, they should be available to the public.

Further, decisions made pursuant to these policies can have massive consequences on individual Oregonians, ranging from the imposition of significant fines to incarceration or the possibility for restorative justice.

How these decisions are made are important not only for the accused, but the voter who is concerned with safety or reform. DAs offices are not private law firms, they are government offices of elected officials. As such, these offices should be transparent about the policies they develop because these policies specifically affect their constituents.

(2) Where government officials have discretion, transparency is a tool of accountability.

It is the voting public's duty to hold elected officials accountable via the ballot box. In order to make an informed decision, the voters need some basis for seeing decisions of elected officials and to understand them. For legislators, voting and public statements typically provide this record. For executive officials, implementation policies guiding government decision making for enforcing the law provides transparency for voters. In both cases, voting members of the public deserve transparency into the decision-making process of elected officials, not only so that can be informed voters, but so that they can hold elected officials accountable.²

Oregon voters have virtually no insight into how their elected District Attorneys make decisions. Just over a third of District Attorney's offices actually have meaningful policies that guide their decisions, while 40% acknowledge they have no policies guiding their decisions at all.³ What then, are voters supposed to evaluate? Voters deserve at least some basis for evaluation.

The concern for transparency is compounded by the fact that District Attorneys are arguably the most powerful actors in the criminal justice system.⁴ This is because their near unfettered level of discretion, limited only by

¹ See e.g., Oregon Department of Administrative Services, *Policies and Guidelines* [<https://www.oregon.gov/das/Pages/policies.aspx>] (accessed April 2, 2019); Oregon Department of Human Services, *OHA Policies, Process, and Guidelines* [<https://www.oregon.gov/DHS/POLICIES/Pages/dhs-oha-policies-guidelines.aspx>] (accessed April 2, 2019); Oregon Department of Fish and Wildlife, *ODFW's Agency Policies* [<https://www.dfw.state.or.us/hr/policies/>] (accessed April 2, 2019).

² Justice Louis Brandeis, *Other People's Money- and How Bankers Use It*, Ch. V, What Publicity Can Do (1915) (“Sunlight is said to be the best of disinfectants; electric light the most efficient policeman”).

³ ACLU of Oregon, *A Peek Behind the Curtain: Shining Some Light on District Attorney Policies in Oregon* (April 2, 2019) [<https://aclu-or.org/en/publications/peek-behind-curtain-shining-some-light-district-attorney-policies-oregon>] (Accessed April 3, 2019)(Just over a third of Oregon's DAs offices have meaningful written policies, while 40% have no written policies at all).

⁴ German Lopez, *Why you can't blame mass incarceration on the war on drugs, at Prosecutors are enormously powerful*, Vox (May 30, 2019) [<https://www.vox.com/policy-and-politics/2017/5/30/15591700/mass-incarceration-john-pfaff-locked-in>] (Describing prosecutorial discretion as driving mass incarceration) (accessed April 3, 2019).

the constitution's requirement of probable cause, and possibly equal protection.⁵ This discretion extends beyond the charging decision, guiding decisions relating to how criminal history affects plea deals, the level of victim involvement, whether to seek a different judge, or to drop charges all together.

Undoubtedly, discretion is essential for the enforcement of laws, from the police officer stop to a Governor's pardon, because facts and circumstances are important. That said, discretion is not an entitlement to secrecy.

When the voters are virtually the only mechanism for accountability in executive decision making, like those of a District attorney, they are entitled to transparency. In essence, voters ought to know how their elected District Attorneys carry out their jobs.

Requiring District Attorneys to develop written policies creates transparency into decision making, and thus provides information to voters, who can then either support them, or hold them accountable.

For the reasons outlined above, OCDLA urges a "AYE" vote to HB 3224.

Thank you for your consideration.

/s/ Taylor Snell

Taylor Snell for Mary Sofia

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⁵ *Wayte v. U.S.*, 470 U.S. 598, 607 (1985) ("So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.") *See also, United States v. Armstrong*, 517 US. 456 (1996) (Holding exclusive prosecution of black individuals for crack in federal system, while white individuals were afforded lesser sentences in a state system, required a showing that declining to charge was primarily on race).