



Legislative Testimony

Oregon Criminal Defense Lawyers Association

May 22, 2019

The Honorable Senator Floyd Prozanski, Chair
Senate Judiciary Committee, Members

Re: Testimony in support of HB 3224

Dear Chair Prozanski and Members of the Committee:

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

House Bill 3224 requires District Attorney's offices to develop and adopt policies relating to discovery, charging decisions and case disposition and to make policies available to the public on their websites. This proposed legislation is a commonsense proposal that highlights the need for consistency and transparency in the 36 district attorneys' offices across the state.

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.

Decisions made pursuant to these policies have massive consequences on individual Oregonians, ranging from the imposition of significant fines to a lifetime of incarceration.

How these decisions are made are important for the accused, but also for 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—people they prosecute and people they set out to protect.

Oregon voters—*those accused of crimes and those victimized by crime*— 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.² What then, are voters supposed to evaluate? Voters deserve at least some basis for evaluation.

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 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).

The concern for transparency is compounded by the fact that District Attorneys are arguably the most powerful actors in the criminal justice system.³ This is because their near unfettered level of discretion, limited only by the constitution’s requirement of probable cause, and possibly equal protection.⁴ This discretion extends beyond the charging decision, guiding decisions relating to how criminal history effects 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—this bill is a step towards much needed transparency in these processes.

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.⁵

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.

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³ 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).

⁴ *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).

⁵ 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”).