



November 8, 2021

Chair Wagner, Vice-Chair Knopp, members of the Senate Rules Committee:

Members of the Greater Oregon Society of Professional Journalists hold deep concerns over the nomination of a Portland senior deputy city attorney to a council set up to promote transparency.

Under Jenifer Johnston's tenure spearheading Portland's records-law implementation, our members have reported a disturbing increase in secrecy. This has transpired even as other local governments increased transparency to implement the Legislature's 2017 and 2019 reforms.

Given the facts that follow, we request that you, at the least, thoroughly question Ms. Johnston. Oregonians deserve clear answers on how, given her employer, Ms. Johnston feels she could fulfill the committee's statutory mission of enhancing transparency and whether she agrees with the Oregon Supreme Court that Oregonians' records law is a disclosure law, not a secrecy law.

Considering the documented record, it is unlikely that Ms. Johnston will be able to provide satisfactory answers. For that reason, SPJ believes this nomination should be denied.

During Ms. Johnston's tenure as Portland's point person on records, our members have seen:

- A pattern of bad faith decisions, requiring appeals that, when filed, lead to the city's unlawful acts being overturned.
- Her office advising staff to *not* help requesters narrow requests to save the public and the city time and money, directly contrary to Advocate training and legislative intent.
- Hide-the ball tactics and unlawful barriers to frustrate access.
- Requests that used to result in Portland easily producing records to the public for little or no cost now are met with denials, [inexplicable redactions](#) or onerous fees.
- The city routinely drops denials after an appeal is filed or threatened, thus revealing its awareness that its unlawful denials would otherwise be overturned.
- Emails showing Ms. Johnston taking an adversarial approach toward the public.

While our members are accustomed to disagreements over disclosure, they've found Portland to be an extreme outlier in its aggressive anti-transparency practices.

The Advocate's office has repeatedly held up the city of Portland as an example of anti-transparency practices. In 2018, a public PRAC meeting discussed the city of Portland, specifically, as a case study in how not to follow the law and ensure public trust.

Remarkably, city correspondence shows that after investigating citizen complaints about secrecy, Portland Ombudsman staff last year apparently became so concerned about the city's practices that they crafted proposed city charter language. Though never formally proposed, it compelled the city attorney to follow the records law and the Legislature's pro-disclosure intent.

A disturbing pattern

Here is a sampling of the opinions that have come down on Ms. Johnston's watch:

- In 2018, [a judge ruled](#) that the city was wrong to withhold city records discussing the acquisition of a property for a homeless shelter in southeast Portland and ordered the records disclosed. Not only that, but Portland taxpayers [were forced to pay \\$26,000](#) in legal fees because the city refused to back down on its legally unfounded decision to keep the records secret.
- In 2019, responding to a lawsuit from a man who said the city overcharged him for producing data related to several city email accounts, [a judge found](#) the city had inflated its charges and violated a district attorney's order in the case. Ms. Johnston was involved in handling the man's request. The judge issued an injunction on the city prohibiting it from charging excessive fees for "routine email and document searches" in the future. Portland taxpayers, once again, were on the hook for the man's attorneys' fees because the city attorney's office had opted to defend its excessive fees and lost.
- These decisions from judges come on top of numerous orders from the Multnomah County District Attorney's Office against the city in recent years compelling it to disclose records it fought to keep hidden. The city's misinterpretation of Oregon records law in these cases would have gone untested — had the requesters not had the tenacity, knowledge and resources to file an appeal.
- In these decisions, the district attorney found that the city attorney's office improperly applied the records law's trade secrets exemption, an exemption for missing-persons reports and the attorney-client privilege exemption. A recent example of how the DA responded to the city's assertion of attorney-client privilege, from May 2021: "There is [no basis under the public records law](#) to withhold those recommendations from public inspection... The City has not met its burden of showing that the primary purpose, or even a substantial purpose, of this document is the facilitation of legal services."
- Last month, when a ruling came down blasting the city for what the judge considered [bad-faith noncompliance](#) with Oregonian's records law, the Multnomah circuit judge who authored it was, until recently, a longtime Portland deputy city attorney.

We understand that in addition to spearheading the records management system that serves as intake for the public's requests, Ms. Johnston handles the crucial phase of this arcane area of law, appeals, as well as controversial cases. Our understanding is that her style contributes to Portland's approach: rather than seek to prioritize disclosure as the law intends, hyper-lawyer the process, providing the least disclosure possible. The result? Conflict and waste.

Public access hangs in the balance

Our biggest concern is that city practices could taint and obstruct the advisory council's work.

Importantly, the PRAC is intended not just to discuss pro-transparency improvements in records practices, but to provide oversight of the Advocate.

The city's statewide influence is already a concern. Portland has on multiple occasions pushed pro-secrecy legislation in response to rulings that found the city in violation of Oregonians' records law — in essence, asking state lawmakers to rewrite the law to be more secretive before a higher court can rule, sparing the city a court loss and the cost of opposing attorney fees.

Until Portland has committed to interpret the law as the Legislature intended, we are concerned this appointment would risk serious unintended consequences.

A culture of collaboration, cooperation and efficiency: the intent of SB 106 and the PRAC

During hearings and work group meetings on SB 106, which established the Advocate and PRAC in 2017, lawmakers, stakeholders and supporters expressed explicit intent that the office promote a collaborative approach to reduce waste and build public trust. The Advocate trains government employees and requesters to work collaboratively on requests to save time and money.

In contrast, the city on Ms. Johnston's watch has denied requests for supposedly not describing records with adequate specificity, even while embracing a practice of refusing to assist requesters in making their requests specific and narrow — saying the law doesn't require city officials to do so.

To circumvent Oregonians' disclosure law, the city has also engaged in a practice of requiring that people request confidentiality before submitting routine documents to the city such as job applications or contracts. This allows the city to hide part or all of the document from the public by abusing the law's confidential submissions exemption, contrary to its intent. Some job applicants told reporters they didn't seek confidentiality, but the city required them to ask. In one appeal of this tactic, involving a contract, the city dropped its denial to avoid a district attorney ruling.

Portland officials often point to the high volume of requests they receive as explaining complaints about their practices. Entirely separate from the issue of volume, however, our members find the city erects baffling and unnecessary barriers to transparency, adding to costs and conflict. For example, while agencies are required to set up request procedures and portals helping the public to make requests, nothing in Oregon law *requires* Oregonians to study and follow these procedures before being allowed to exercise their right to file requests, get questions answered and learn about their government. Ms. Johnston, however, has rejected written requests contrary to the clear and plain language of Oregon statute (ORS 192.324), while citing the fact that the requester did not follow city procedures.

Please ask Ms. Johnston to detail her involvement in establishing city practices that so precisely exemplify the problems the Advocate and PRAC were set up to combat.

As you do, please consider this:

- Compliance with the law is crucial to allow public oversight of issues that include government spending, corporate wrongdoing, inequities and police accountability. Use of the records law has helped expose malfeasance and waste in Oregon while leading to three public [corruption convictions](#) in the last six years, including a [Portland manager](#).
- Portland's approach violates what poll after poll shows to be Oregonians' expectations of their government. Applied properly, the law empowers the public to engage with government in a meaningful way. The city's clear pattern of unlawful denials contributes to inequities since only those with specialized knowledge or resources can combat it.
- The city's approach makes the public bear the cost of enforcing the law, a cost measured in dollars, stress, confusion and hours wasted, such as by appealing unlawful denials.
- Portland's practices have the effect of covering up malfeasance and preventing accountability. They cost not just in expenses for needless friction, but in public trust.

Further red flags

In July 2018, based on repeated complaints about the Portland City Attorney's office, and citing Greater Oregon SPJ's well-received assistance to the Portland Public Schools board in crafting pragmatic and lawful district records policies, Mayor Ted Wheeler's then-Chief of Staff asked Greater Oregon SPJ to facilitate a conversation with reporters about improving the city's practices.

SPJ gathered input from 15 reporters who'd recently dealt with the city on records, finding an overwhelming majority felt the city had engaged in what appeared to be willful obstruction of Oregonians' transparency law. SPJ facilitated a Sept. 6 meeting with reporters and Wheeler's staff followed by a recommendation that, among other things, the city ask the Advocate to do a training in an attempt to address city attorney practices and the city's culture of secrecy.

The following month, public records show Ms. Johnston required that the Advocate's office alter its standard training offered to local governments to make the presentation instead reflect Portland's policies on records fees. Weeks later, in November, a biennial report issued by the Advocate cited the same Portland policies as an example of anti-transparency practices.

An adversarial approach

The Portland city attorney's office has sometimes appeared to personalize matters that should be about compliance with the law's intent.

In an August 2016 email to staff on which she accidentally copied Oregonian reporter Brad Schmidt, Ms. Johnston characterized his reporting as an effort to hurt the city with a "bad story" because a requested public interest fee waiver had been denied —rather than instead focusing on the correct application of records law. (The request was to inform the public about [irregularities in how the city awarded a development contract worth millions of dollars.](#))

"Indeed, I did ask for a fee waiver. And I'm not looking to do a 'bad story because you wouldn't waive fees,'" Mr. Schmidt responded to Ms. Johnston. "I'd like to see the paper trail for how the commissioner decided to unilaterally change a public funding decision that had been publicly announced. It's clearly in the public interest to see records relating to the decision to rescind a funding award and award it to another company without any public process. It raises questions about fairness, back-room dealmaking and the integrity of the NOFA process."

The city ultimately charged more than \$400 for the requested public records, and it took more than two months to obtain key documents.

Given all of the above, for our members Portland functions as a recurring reminder that, unlike some states, Oregon does not hold officials meaningfully accountable for violations of records law.

SPJ deeply appreciates Gov. Kate Brown's role in spearheading creation of the Advocate and PRAC. We don't think appointing a city of Portland records lawyer furthers their work on needed reforms.

Thank you for considering our comments. And thank you for your service to Oregonians.

Rachel Alexander, Greater Oregon SPJ board member and Sunshine Chair

Nick Budnick, Co-Chair, Greater Oregon SPJ Freedom of Information Committee