

# Biennial Report of the Public Records Advisory Council

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**December 2022**

## Introduction

This report is submitted to the Governor and the Legislative Assembly by the Public Records Advisory Council (“the Council”), per the requirements of ORS 192.483(2). The report summarizes the work of the Council from December 2020 through November 2022, as well as the legislative developments that resulted in the creation of the Office of the Public Records Advocate as an independent state agency.

The Council was created pursuant to SB 106 (2017) (presently authorized under ORS 192.461-483). The Council consists of bipartisan public records experts representing state and local governments, the media, the public, and public sector workforce. The Council is required to meet at least once every six months and at other times and places specified by the call of the chair or a majority of the members.

## Council duties:

- Select and appoint the Public Records Advocate;
- Survey state agency, other jurisdictions and public body practices and procedures for:
  - Receiving public records requests, identifying the existence of records responsive to the requests and gathering and disclosing responsive records;
  - Determining fee estimates and imposing or waiving fees; and
  - Determining and applying exemptions from required disclosure;
- Identify inefficiencies and inconsistencies in application of the public records law that impede transparency in public process and government;
- Make recommendations on changes in law, policy, or practice that could enhance transparency in public process and government, and facilitate rapid dissemination of records to requesters;
- Make recommendations on the role of the Public Records Advocate as facilitator in disputes between custodians of public records and public record requesters; and
- Report to Governor and Legislature by December 1 of each even-numbered year the findings of the council since the council's last report including recommendations for legislation.

## **Welcoming New Members**

Since the previous report was submitted, the following new members have been appointed:

- Andrea Chiapella, designee, Director of the Department of Administrative Services
- Emily Gothard, representative of the public sector workforce
- Tyler Janzen, representative of the counties
- Shasta Kearns Moore, representative of the news media
- PK Runkles, designee, Secretary of State
- Scott Stauffer, representative of the cities

## **Work of the Legislative Subcommittee**

The Legislative subcommittee was charged by the full Council to research problems around the costs of public records and propose legislation. The subcommittee first met on November 12, 2021, approved proposed legislation at its meeting November 3, 2022, and obtained full Council endorsement of the proposed legislation on November 18, 2022. In total, the Legislative subcommittee:

- Consisted of 10 out of 14 Council members, including its two ex-officio members from the House and Senate (see below);
- Met 22 times; and
- Heard testimony from 20 invited witnesses and took additional written comment. The subcommittee also received written and oral testimony from several members of the public.

To assist the subcommittee in its work, Senator Kim Thatcher requested research on other states' statutory public records fees from Oregon's Legislative Policy and Research Office.

All subcommittee meetings were held virtually. Records of the subcommittee meetings, including agendas, video recordings marking the official record of proceedings, some unofficial transcripts, written testimony and working documents are available on the Public Records Advisory Council's page: <https://www.oregon.gov/prs/Pages/advisory-council.aspx>.

**Initial and final subcommittee members were as follows:**

- Emily Harris, chair
  - Todd Albert, vice-chair
  - Rob Bovett, replaced by Tyler Janzen
  - Shirin Kosravi, replaced by Emily Gothard
  - Michael Kron
  - Mark Landauer
  - Scott Stauffer
  - Steve Suo
- Non-voting:

- Senator Kim Thatcher (*non-voting*)
- Representative Karin Power (*non-voting*)

Witnesses who testified:

- Ellen Osoinach, Local Legal Initiative attorney in Oregon for the Reporters Committee for Freedom of the Press; former senior deputy attorney, City of Portland
- Rachel Alexander, Public Records Committee Chair, Society of Professional Journalists Greater Oregon Chapter. Journalist with the Salem Reporter, covering education and nonprofits
- Tom Holt, Lobbyist for the Society of Professional Journalists, Greater Oregon Chapter
- Jeanne Windham, Public Records and Internal Litigation Process Coordinator, Oregon Health Authority
- Laura Heathcock, Administrative Specialist, Central Records Section, Oregon State Police
- Cheré LeFore, Public Records Unit Manager, Oregon Department of Human Services
- Kelly Rath, Assistant Director, Oregon Correctional Services Division
- Michelle Whitney Dodson, Records Officer, Oregon Correctional Services Division
- Margaret Kwoka, Author of “Saving the Freedom of Information Act” (Cambridge University Press 2021), Lawrence Herman Professor in Law at The Ohio State University Moritz College of Law
- Tom Susman, Member, Federal FOIA advisory Committee. Congressional counsel on 1974 FOIA amendments. Strategic Advisor for Governmental Affairs and Global Programs, American Bar Association
- Marcus Green, reporter, WDRB in Louisville, Kentucky
- Melanie Lowe, General Counsel and records custodian for the Kentucky Office of the Public Advocate
- Mark Thomas, Executive Vice President, Oklahoma Press Association
- Patty Perlow, Lane County District Attorney
- Tammi Weiss, Digital and Public Records Manager, Portland Police Bureau
- Jenifer Johnston, Senior Deputy City Attorney, Portland
- Leela Yellesetty, Information Governance Officer, Oregon Department of Environmental Quality
- Vance Croney, Benton County Counsel
- Michael Savino, Society of Professional Journalists/Connecticut
- B. Thomas Hennick, public education officer, Connecticut Freedom of Information Commission
- Colleen Murphy, Executive Director and General Counsel, Connecticut Freedom of Information Commission

Written testimony or supporting documents provided by:

- Reporters Committee for Freedom of the Press
- Avery Horton
- Oregon Department of Corrections
- Jeanne Windham, Public Records and Internal Litigation Process Coordinator, Oregon

Health Authority

- Margaret Kwoka, Author of “Saving the Freedom of Information Act” (Cambridge University Press 2021), Lawrence Herman Professor in Law at The Ohio State University Moritz College of Law
- Kentucky Office of the Public Advocate
- Oregon Department of Environmental Quality
- City of Portland
- Kelley Shannon, Freedom of Information Foundation of Texas
- National Freedom of Information Coalition
- Chief Chris Heppel, Eugene Springfield Fire
- Jo A. Barker
- Brian Wallace, Chief Civil Deputy, Marion County Sheriff’s Office
- Unnamed Cities of approximately 13k and 97k population, submitted via Nicole Tait, Administrative Services Manager, City of Astoria Police Department
- K. Rambo, editor, Street Roots; Garrett Anderson, reporter, Bend Bulletin; Kenneth Lipp, Associate editor, Newport News Times, via Society of Professional Journalists

Within Oregon, the subcommittee learned from requestors about problems with the status quo, such as arbitrary and sometimes extreme fees, often with little explanation or rationale, and delays and difficulties in getting information that would help streamline a request, such as where documents are kept or dictionaries for databases. We heard specific examples when fees became an impediment to journalism in the public interest. From custodians, we heard a need for requesters to understand agency processes and learned of their desire to retain discretion over setting and waiving fees, and to not move too far too quickly from current Oregon law. We also learned that fees rarely cover the full costs of providing public records, but that agencies build revenue from fees into their budgets. From both requesters and custodians, we heard that much of the time, requesters and custodians are acting in good faith, and a desire to promote better communication.

From other states, we learned that some use automatic fee waivers for all non-commercial requesters or even all requesters in general. We heard about ways other states respond to extreme “vexatious” requests or requestors. From experts in the federal FOIA, we learned that journalists make up a tiny fraction of public records requests; individuals seeking their own records, particularly immigration records, and businesses seeking to repackage records for profit make up the bulk of requests.

### LPRO research

To assist the subcommittee in its charge, Senator Kim Thatcher requested information from the Legislative Policy and Research Office related to public records laws that have been enacted by the 49 U.S. states other than Oregon, and the District of Columbia. Specifically: how those laws authorize or otherwise address fees for records requests, provide for public interest or other fee waivers or reductions; and require or allow itemized cost estimates and advance fee payments. LPRO provided its analysis to Senator Thatcher on May 9, 2022. Melissa Leoni, LPRO analyst, presented the findings to the subcommittee on May 12, 2022. It is accessible here: <https://www.oregon.gov/pr/Documents/2022-March-9-Sen-Thatcher-Public-Records-Memo.pdf>

The subcommittee discussed many topics and ideas that were not ultimately included in its proposed legislation, including: requiring or providing fee waivers for individuals seeking their own records; providing fee waivers based on the indigency of the requestor; providing fee waivers for labor organization in furtherance of certain public policy goals; seeking to add a surcharge to commercial requests; defining media using the definition in Oregon's shield law; providing fee waivers to certain nonprofit educational or scientific organizations; automatic fee waivers for a minimum set time or page numbers for all requests; charge nothing for non-commercial public records requests; create a state fund to support local governments in responding to record requests, potentially through matching funds or block grants; sharing specialized public records officers among small jurisdictions; creating a task force to further Transparency by Design, which would aim to reduce the costs of record management through software design; creating a system to identify and respond to "vexatious" requestors; professionalizing the role of public records officer through advance training or certification.

Based on testimony, extensive subcommittee discussions of concerns and shared priorities, the recognition that we could not come close to consensus on some laudable goals at this time, and the desire that legislation address shared, solvable problems over extreme situations, the subcommittee in the end approved a narrow legislative proposal that would:

- **Clarify which costs are recoverable:**
  - Defines clear categories of costs that may be recovered, listing those categories as search, duplication, and review;
  - Tasks must be done in the least expensive manner reasonably possible;
  - Public bodies may not charge more than rate of the lowest-paid employee capable of searching, duplicating, or reviewing records; and
  - Public bodies may recover fees from requesters for work done by unpaid volunteers.
  
- **Help requesters understand public body's process:**
  - To charge fees, a public body must publicly post its records policy, including contacts for requests;
  - Public body must work in good faith with a requester to narrow a request;
  - A requester may ask for explanation of fee amount proposed; and
  - A public body is to provide requested fee explanation before it can stop the clock on processing a request.
  
- **Preserve discretion over fee waivers while prioritizing requests in the public interest:**
  - Provides that public body may grant fee waivers for any reason, provides examples;
  - If a public body determines a request is in public interest (as defined in current law), it shall grant a fee waiver unless it finds public interest is outweighed by substantial prejudice or prevention of its ability to carry out other functions; waiver may be limited in this case;

- A request from a news media member (as defined by federal FOIA) is considered in the public interest unless public body determines it is not; and
- Requires public body to explain denial of waiver in writing. As in current law, allows denials of fee waivers to be appealed to district attorney or attorney general.

The legislative concept approved by the legislative subcommittee and subsequently the full Council is attached to this report as Appendix A.

### **Move Toward Independence for the Office of the Public Records Advocate**

The Office of the Public Records Advocate was created along with the Public Records Advisory Council by SB 106 (2017). As originally formulated, the Public Records Advocate mediates disputes between public records requestors and public bodies, provides free training on public records laws and best practices, and leads the Public Records Advisory Council. Under SB 106, the Advocate was appointed by the Governor, who selected amongst three candidates forwarded by the Council. The successful appointee would then be confirmed by the Senate.

The first Public Records Advocate, Ginger McCall, resigned from her position in 2019 due in part to perceived political interference in the operations of the office. In response, the Public Records Advisory Council introduced a legislative concept during the 2020 legislative session establishing the office as an independent state agency. During this period, Governor Brown agreed that the office should be “truly independent”. As such, the Public Records Advocate would be able to maintain the public’s expectation that decisions made, and input given by the Advocate were focused on fostering or improving transparency. The concept, which became SB 1506, specified in part that the Advocate’s appointment and removal would be by the Council rather than the Governor, and allowed the Council to elect its own chair and vice chair, rather than designating the Advocate as chair outright. SB 1506 passed the Senate with the support of all members present and passed out of committee in the House with a “do pass” recommendation but could not be voted on by the full House before the session came to an early conclusion.

Although SB 1506 was well received in its effort to promulgate independence for the office, it left unanswered important questions about issues like funding and leadership during the absence of a permanent advocate. The opportunity to introduce a successor bill to SB 1506 during the 2021 legislative session, SB 500, allowed the Council to answer those questions with a holistic response, affirming the independence of the Advocate’s office within the Executive Branch, including appointment by the Council rather than the Governor, broadening the Council’s authority to weigh in on legislation relating to public records law, creating a system of electing council leadership instead of the Advocate acting as de facto chair, and spelling out a strong internal structure and clear continuity of leadership for the Advocate’s office.

The passage of SB 500 has since allowed the Advocate to continue focusing limited resources on the day-to-day work of being an impartial, consistently reliable agency that is now a trusted voice for many in the ongoing conversation about transparency and access to information in Oregon. For instance, since the office began its operations on April 25, 2018, it has successfully completed more than eight hundred and fifty (850) individual requests for assistance about

public records disputes, and trained thousands of public employees, as well as members of the media and public, in groups as small as six and as large as two hundred (200). As the final step toward ensuring the continued operation of the Office of the Public Records Advocate, a legislative concept has been submitted for consideration during the 2023 legislative session to fund the office via a combination of assessments to state agencies and directly from the general fund. This concept, LC 1836, is attached to this report as Appendix B.

### **Summary**

The Public Records Advisory Council remains a deep bench of bipartisan public records experts, currently fully staffed with members of state and local governments, the Public Records Advocate, and representatives of the news media, public sector workforce, the public, and ex-officio legislative members, all of whom are devoted to examining, vetting, and proposing reforms to the public records law for the betterment of all Oregonians. This work will continue unabated into the next biennium. On its horizon includes continuing to debate legislative concepts that would improve the administration of Oregon's public records and establishing, as appropriate, rules and policies for the operation of the Council and oversight of the Advocate's office.

# Appendix A: Legislative concept approved by the Council reforming ORS 192.324

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## GUIDE TO THIS DOCUMENT:

Plain text shows current law

~~Strikethrough~~ and **bold** indicate ~~deletions~~ and **additions**

**192.324 Copies or inspection of public records; public body response; fees; procedure for records requests.** (1) A public body that is the custodian of any public record that a person has a right to inspect shall give the person, upon receipt of a written request:

- (a) A copy of the public record if the public record is of a nature permitting copying; or
- (b) A reasonable opportunity to inspect or copy the public record.

(2) If an individual who is identified in a public body's procedure described in subsection (7)(a) of this section receives a written request to inspect or receive a copy of a public record, the public body shall within five business days after receiving the request acknowledge receipt of the request or complete the public body's response to the request. An acknowledgment under this subsection must:

- (a) Confirm that the public body is the custodian of the requested record;
- (b) Inform the requester that the public body is not the custodian of the requested record; or
- (c) Notify the requester that the public body is uncertain whether the public body is the custodian of the requested record.

(3) If the public record is maintained in a machine readable or electronic form, the public body shall provide a copy of the public record in the form requested, if available. If the public record is not available in the form requested, the public body shall make the public record available in the form in which the public body maintains the public record.

## **ORS 192.324 (4) is amended to read:**

**(4)(a) Upon compliance with subsection (7)** the public body may establish fees reasonably calculated to reimburse the public body for **up to** the public body's actual cost ~~of making public records available, including costs for summarizing, compiling or tailoring the public records, either in organization or media,~~ **to search, duplicate, and review public records to make the records available and** meet the request. **For purposes of this section:**

**(A) "Search" means looking for and retrieving physical or digital records responsive to a request.**

**(B) "Duplicate" means making a physical or digital copy of a record. Copies can be paper documents, taped or digital audio and video recordings, emails, database files, electronic text files or other record storage formats.**

**(C) "Review" means reading a record to locate content the public body considers exempt from disclosure and redacting material to which an exemption is applied. Review does not include an attorney's time spent determining the applications of the provisions of ORS 192.311 to ORS 192.478**

**(i) Review costs are recoverable even if a record ultimately is not disclosed.**

**(D) The public body shall conduct each of these activities in the least expensive**



manner reasonably possible. A public body shall not charge more than the hourly compensation of its lowest-paid employee capable of searching for, duplicating, or reviewing the public records in the particular instance, regardless of who actually performs the labor.

**(E) If unpaid volunteers are available or necessary to respond to requests for public records, the public body may establish a fee for the time spent by such a volunteer at an hourly rate not to exceed the then-applicable minimum hourly wage in the state of Oregon.**

~~(b) The public body may include in a fee established under paragraph (a) of this subsection the cost of time spent by an attorney for the public body in reviewing the public records, redacting material from the public records or segregating the public records into exempt and nonexempt records. The public body may not include in a fee established under paragraph (a) of this subsection the cost of time spent by an attorney for the public body in determining the application of the provisions of ORS 192.311 to 192.478.~~

~~(eb)~~ The public body may not establish a fee greater than \$25 under this section unless the public body first provides the requester with a written notification of the estimated amount of the fee and the requester confirms that the requester wants the public body to proceed with making the public record available.

**(c) A requester who has been notified of a fee under ORS 192.324(4) may request an explanation from the public body as to the basis of the fee, in which case the public body shall provide an explanation of its estimated costs for completing its response to the request. An explanation prepared under this section shall include sufficient detail to permit a reasonable person to understand the amount and purpose of each portion of the estimated fee. A public body shall work in good faith with a requester who seeks to narrow a request in order to reduce a fee.**

**(d) Notwithstanding ORS 192.329(3), the obligation of the public body to complete its response to the request is not suspended until the public body provides any explanation required by subsection (4)(c).**

~~(e)~~ Notwithstanding paragraphs (a) to ~~(eb)~~ of this subsection, when the public records are those filed with the Secretary of State under ORS chapter 79 or ORS 80.100 to 80.130, the fees for furnishing copies, summaries or compilations of the public records are the fees established by the Secretary of State by rule under ORS chapter 79 or ORS 80.100 to 80.130.

**ORS 192.324 (5) is amended to read:**

**(5) The custodian of a public record may furnish copies without charge or at a substantially reduced fee for any reason, such as when if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public; the cost of fee collection would exceed the amount of the fee itself; a public body has established a policy for routinely waiving fees; a requester demonstrates indigence; a request is for records that primarily concern the requester.**

**(a) If the custodian of a public record determines that disclosure is in the public interest because making the record available primarily benefits the general public, the custodian shall furnish copies to the requester without charge. The custodian of a public record may limit the portion of fees waived if the custodian determines that the public interest in disclosure is outweighed by the substantial prejudice or prevention of a public body's ability to carry out the other functions of the public**

body.

- (b) A request by a news media representative (as defined in paragraph ‘e’ below) shall be assumed to be in the public interest unless the public body demonstrates that, in the particular instance, it is not.
- (c) Except for requests made by a news media representative, a request on behalf of a commercial entity shall not be considered to be in the public interest.
- (d) If the custodian of a public record determines that a request is not in the public interest, or that the public interest in disclosure is outweighed by the substantial prejudice or prevention of a public body's ability to carry out the other functions of the public body, the custodian shall provide the reason for this determination to the requester in writing.
- (e) For purposes of this section, “news media representative” means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

**ORS 192.324 (6) is amended to read**

(6) A requester who believes that ~~there has been an unreasonable denial of a fee waiver or fee reduction~~ **a public body has failed to comply with subsection (5) of this section** may petition the Attorney General or the district attorney in the same manner as a requester who petitions when inspection of a public record is denied under ORS 192.311 to 192.478. The Attorney General, the district attorney and the court have the same authority **under this subsection** ~~in instances when a fee waiver or reduction is denied~~ as when inspection of a public record is denied.

**ORS 192.324 (7) is amended to read:**

(7) A public body shall make available to the public **on its website, or if the public body does not have a website, in a publicly available space if such a space is available and by** ~~make available upon~~ request, a written procedure for making public records requests that includes:

- (a) The name of one or more individuals within the public body to whom public records requests may be ~~sent~~ **made, how to contact that individual and make a request with** addresses; and

(b) The amounts of and the manner of calculating fees that the public body charges for responding to requests for public records.

**(c) A public body that fails to make such information available to the public may not establish a fee for completing a public records request.**

LC 1836  
2023 Regular Session  
11/2/22 (DJ/ps)

# D R A F T

## SUMMARY

Directs Public Records Advocate to estimate biennial costs to carry out duties of advocate and to allocate and assess costs among public bodies of state government. Directs advocate to adopt rules establishing methods for allocating and collecting assessments. Credits assessments to Public Records Advocate Fund.

Takes effect on 91st day following adjournment sine die.

## A BILL FOR AN ACT

1  
2 Relating to the Public Records Advocate; creating new provisions; amending  
3 ORS 192.477; and prescribing an effective date.

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

5 **SECTION 1. (1) On or before January 1 preceding the start of a**  
6 **biennium, the Public Records Advocate shall estimate the expenses the**  
7 **advocate will incur for the upcoming biennium in carrying out the**  
8 **provisions of ORS 192.461 to 192.475. The advocate shall report the es-**  
9 **timate to the Oregon Department of Administrative Services and the**  
10 **Legislative Fiscal Officer.**

11 **(2) The advocate shall charge an assessment to each public body in**  
12 **state government so as to recoup the costs estimated under subsection**  
13 **(1) of this section. Each public body in state government shall pay to**  
14 **the credit of the advocate the amount the public body was assessed**  
15 **under this subsection as an administrative expense from funds or ap-**  
16 **propriations available to the public body in the same manner as other**  
17 **claims against the public body are paid.**

18 **(3) The advocate shall adopt rules specifying the method for allo-**

1 **cating the expenses described in subsection (1) of this section among**  
2 **public bodies in state government and for collecting the assessments**  
3 **described in this section.**

4 **(4) As used in this section, “state government” has the meaning**  
5 **given that term in ORS 174.111.**

6 **SECTION 2. ORS 192.477 is amended to read:**

7 192.477. (1) The Public Records Advocate Fund is established in the State  
8 Treasury, separate and distinct from the General Fund. Interest earned by  
9 the Public Records Advocate Fund shall be credited to the Public Records  
10 Advocate Fund.

11 (2) The Public Records Advocate Fund shall consist of:

12 **(a) Moneys collected under section 1 of this 2023 Act;**

13 **(b) Moneys appropriated or otherwise transferred to the fund by the**  
14 **Legislative Assembly; and**

15 **(c) Interest earnings of the fund.**

16 (3) Moneys in the Public Records Advocate Fund are continuously ap-  
17 propriated to the Public Records Advocate for the purpose of funding the  
18 operations of the office of the Public Records Advocate and the Public Re-  
19 cords Advisory Council.

20 **SECTION 3. Section 1 of this 2023 Act and ORS 192.477 are added to**  
21 **and made a part of ORS 192.461 to 192.475.**

22 **SECTION 4. This 2023 Act takes effect on the 91st day after the date**  
23 **on which the 2023 regular session of the Eighty-second Legislative**  
24 **Assembly adjourns sine die.**

25