

OREGON PUBLIC RECORDS LAW



What to expect from this training



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The basics of the Oregon public records law

2

Requestor's obligations to make an effective request

3

2017 legislative updates and deadlines

4

Fees and fee waivers/reductions

5

Exemptions to disclosing public records

6

Best practices and assistance from the Public Records Advocate



Section 1

What is a public records request?

“Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided in ORS 192.338, 192.345, and 192.355.” ORS 192.314(1)

- ▶ The Oregon public records law is one of disclosure, not confidentiality.



Who may make a request in Oregon?

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“any natural person, corporation, partnership, firm, association or member or committee of the Legislative assembly.”

➤ A requestor's identify or purpose in requesting a record does not matter at the outset.

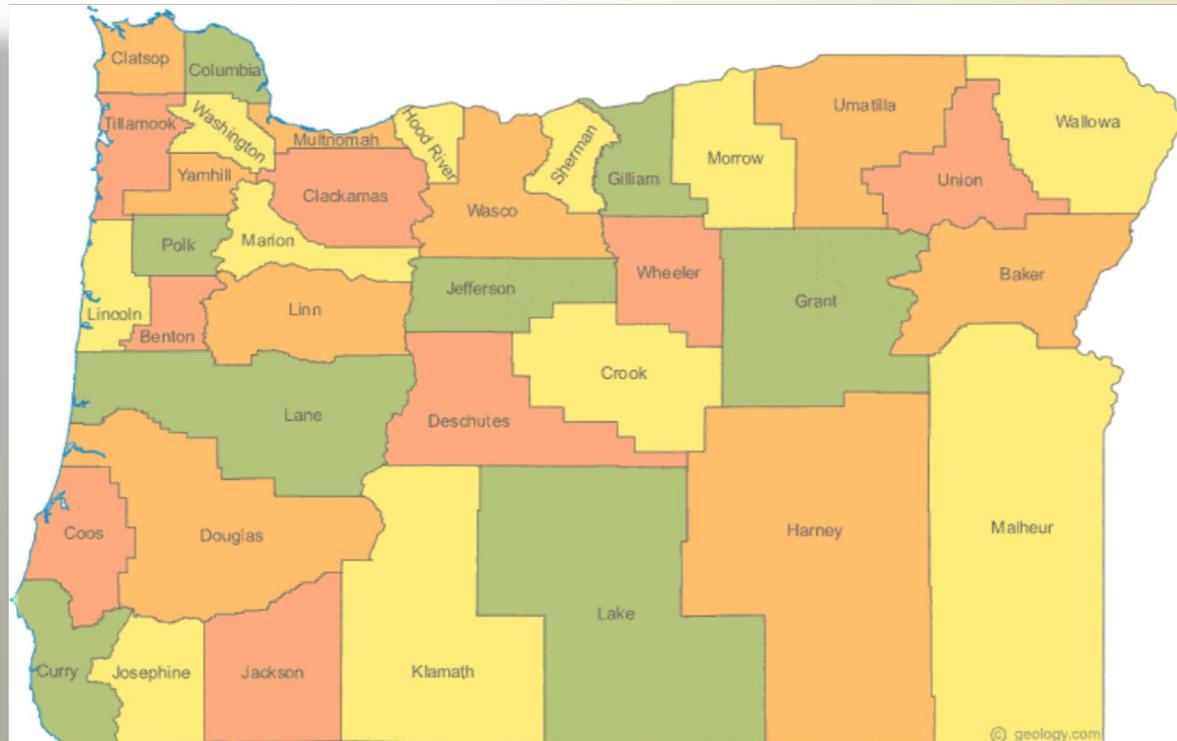
➤ A requestor who accepts responsive records offered, does not challenge records withheld as exempt and pays any fees in full may not be questioned about their identity or intended use of the record(s).

➤ A requestor does not have to be a citizen of Oregon or the United States.



What is a public body?

Every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.



What is a public record?

A document that:

- ▶ Contains information regarding government business
- ▶ Is prepared, owned, used or retained by government
- ▶ Can be in any form
 - electronic or paper, incl. email, photographs, social media posts, meta-data and databases.





Quick Quiz

- ▶ Which of the following are public records under ORS?
 1. The work-related emails of a Deputy Sheriff
 2. Photographs of a workplace accident taken by an Oregon Occupational Safety and Health Administration (OSHA) inspector
 3. Personal photographs stored on the hard drive of a water district employee's work computer
 4. Text messages regarding a proposed new policy exchanged between fire department officials on their work cell phones
 5. An email discussion between two elected special district officials, both using their personal email accounts, discussing a potential city budget decision
 6. A record that could have been destroyed three years ago per a district's record retention policy, but was accidentally retained
 7. The personal medical bills of a irrigation district employee stored in their office at work





Quick Quiz Answer Key

- ▶ Which of the following are public records under ORS?
 1. YES. Work-related emails are public records.
 2. YES. Work-related photographs are public records.
 3. NO. Does not fit the definition of a public record – does not contain info. re: doing the government's business.
 4. YES. Work-related text messages are public records.
 5. YES. Work-related emails on personal email accounts are public records.
 6. YES. A responsive, non-exempt public record that still exists must be provided even if it could have been destroyed pursuant to a lawful retention schedule.
 7. NO. Personal information stored in an employee's office is not a public record merely by being present in the workplace.



Section 2

What are the requestor's obligations?

Request can be in any form (but . . .)

Requestor can be asked to resubmit request as per publicly available policy.

• Best Practice:
Provide for multiple submission options

Request should identify the records sought.

• *If not, public body to communicate with requestor (ORS 192.324(7))*



Section 3

2017 legislative updates

“A public body shall complete its response . . .

as soon as practicable and without unreasonable delay” BUT NOW:

- Must acknowledge request w/in 5 business days; and
- Complete response in 15 business days or provide reasonable estimated completion date

ORS 192.335 – immunity from liability for disclosure of public record

ORS 192.340 – Attorney General to maintain a catalog of exemptions

192.407 – additional grounds for appeal to Attorney General or District Attorney

Public Records Advocate

Public Records Advisory Council

Sunshine Committee

15 day rule?

General obligation is to complete all responses “as soon as practicable and without unreasonable delay.”



*Or provide reasonably estimated completion date.

*To complete a response, provide all nonexempt records and cite any exemptions applied.

- Does not include Saturdays, Sundays, or holidays.

- Must confirm whether custodian/not custodian/not sure re: requested record.



15 day rule cont'd . . .



ORS 192.329(6)-(8)

- ▶ (6) The time periods established by ORS 192.324 and subsection (5) of this section do not apply to a public body if compliance would be impracticable because:
 - (a) The staff or volunteers necessary to complete a response to the public records request are unavailable;
 - (b) Compliance would demonstrably impede the public body's ability to perform other necessary services; or
 - (c) Of the volume of public records requests being simultaneously processed by the public body.
- ▶ (7) For purposes of this section, staff members or volunteers who are on leave or are not scheduled to work are considered to be unavailable.
- ▶ (8) A public body that cannot comply with the time periods established by ORS 192.324 and subsection (5) of this section for a reason listed in subsection (6) of this section shall, as soon as practicable and without unreasonable delay, acknowledge a public records request and complete the response to the request.



Section 4

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What fees can you charge?

Must be reasonable

Actual cost includes staff and supervisor time for gathering records, segregating out exempt material, and copying.

Can only recoup actual cost of making records available

Public bodies may adopt the Department of Administrative Service's (DAS) proposed statewide policy on fees.

Includes attorney time spent reviewing the records and redacting or segregating exempt material. Does not include attorney time spent determining how the public records law applies.

What fees can you charge – example policy.

Staff time

Fees for staff time required to fulfill a Public Records Request shall not exceed:

- **\$25/hour for Clerical** (administrative, office specialists, other support staff)
- **\$40/hour for Managerial** (Program managers, PIOs)
- **\$75/hour for Professional** (IT, HR, High-level Analyst)
- **DOJ, special attorney and other applicable legal fees:** at the actual hourly rate charged for Public Records Request-related services. Fees are subject to statutory limitations described in [ORS 192.440\(4\)\(b\)](#).

Production of Responsive Records

Fees generated by providing paper or electronic copies to requesters:

- **Copies:** Based on current state printing and distribution price list.
- **Media:** Based on statewide price-agreement with OfficeMax.
- **Postage:** Based on current postal rates.

Additional Cost Considerations

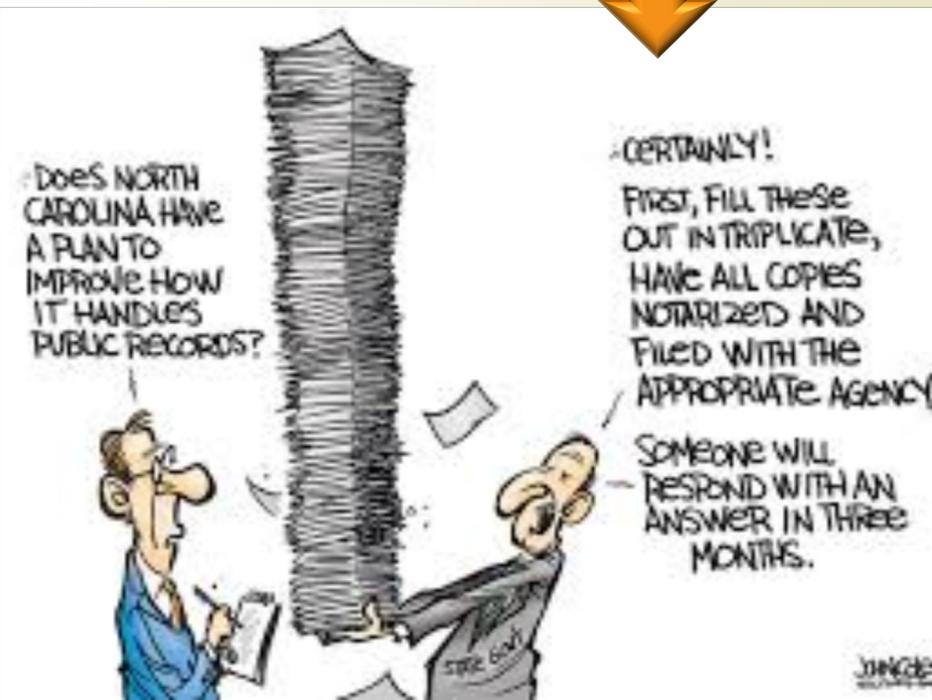
Miscellaneous fees related to production and release of responsive records:

- Expedited Archive retrieval
- Costs of software companies/contracts (as needed to manage the volume of request)
- Other 3rd party costs (in extreme circumstances)

Public Records Policy

- Required by ORS 192.324(7)
- Must be publicly available
 - Include on website
- Must explain how the agency accepts requests and identify the name and address of a person to whom requests may be sent
(i.e., probably the records officer)
- Must list “amounts and the manner calculating fees” for records

Not a good policy!



Good example of a publicly posted public records policy

Looking for a public record?

It may already be online.

A wealth of public information is available at <https://www.oregon.gov/transparency>. More data is available to browse, download, or even embed in your website, at <https://data.oregon.gov> -- Oregon's open data portal.

Can't find what you're looking for?

Choose one of the following methods to request public records from DAS:

- Submit your request online using our [submission form](#). You will receive a confirmation email that summarizes your request.
- Email your request to the [administrator](#) of the appropriate DAS division. If you are unsure which division to select, contact us at 503-378-3104 or send an email to oregon.info@oregon.gov .
- Mail a written request to this address:

Department of Administrative Services
155 Cottage Street NE
Salem, OR 97301

More information about how DAS responds to requests is available in the agency's [Public Records Requests policy](#) . The policy outlines the fees DAS may charge for records, as well as the process the agency uses to fulfill requests. For more detail, view the answers to [frequently asked questions](#).

If fees are being charged

- ▶ Must provide advance notice and receive requester's authorization to proceed if estimated fee exceeds \$25.
- ▶ May require advance payment of estimated fees, but this is generally discouraged unless necessary. It is usually only recommended in cases where requester has a history of non-payment.



Fee waivers & reductions

● **Request** for fee waiver or reduction.

● **Agency has discretion** to grant or deny waiver requests, though it must act reasonably.

● Many public bodies generally **waive the first thirty minutes** of staff time for all public records requests

● Further waiver/reduction is available where making **the record** available **primarily benefits the public generally.**

This is an ideal time for communication between a public body and requestor. The public body always reserves the right to decide, and may determine public interest based on requestor's identity, use of records, ability to disseminate records to affected public, and agency resources and competing interests in providing the records.



Discussion:

Fee Waivers and Reductions

Would you waive or reduce fees? Why or why not?

- ▶ A reporter for the Oregonian who has made a public records request to the Oregon Health Authority for email communications regarding Salem's recent water crisis
- ▶ A member of the public who has been the victim of alleged police violence and is now requesting the completed Internal Affairs investigation
- ▶ An attorney at a small plaintiff's side law firm who is seeking a fatality investigation file from OSHA for use in a wrongful death case
- ▶ **Yes, no, maybe? Remember: each of these scenarios is an ideal time for communication between a public body and requestor to obtain the information needed to determine if a fee waiver or reduction is warranted in the public interest.**



Section 5

Exemptions to Disclosure

- ▶ Many are listed in ORS 192
 - ORS 192.345
 - ❑ Records Exempt Unless the Public Interest Requires Disclosure
 - ORS 192.355
 - ❑ Each includes its own balancing test
- ▶ All other Oregon statutes that make information confidential or privileged, and any federal statutes or regulations that prohibit disclosure of information.





"I'm afraid releasing that information would not be in the public interest."

Saving a public body from embarrassment is not a valid exemption under the Oregon public records law.



ORS 192.345

- Balancing test: confidentiality interests vs. public interest in disclosure
- Presumption is *always* in favor of disclosure
- Long list of record types, in ORS 192.345, including:
 - Records Pertaining to Litigation
 - Trade secrets
 - Criminal Investigatory Information
 - Personnel Discipline Information



ORS 192.345

What is a “public interest” in disclosure?

- ▶ Information that facilitates public understanding of how government business is conducted
- ▶ Of value to the public at large, not to a particular person at a particular time
 - Possibility that the same record(s) could be treated differently based on timing or identity of requester
- ▶ Court of Appeals: if a government action attracts significant attention or controversy, that may suggest a heightened public interest

WHAT SORT OF SOCIETY WOULD WE HAVE IF EVERYBODY PUT PUBLIC INTEREST AHEAD OF GOVERNMENT INTEREST?



ORS 192.355

- No blanket balancing test, but these exemptions include individual balancing tests
- Sometimes burden is on government body, sometimes on requester
- Includes:
 - Internal advisory communications
 - Personal information
 - Public employee information
 - Confidential submissions
 - “Catchall” provisions



Exception to Exemptions and Exemptions to the Exception

- ➔ ORS 192.390: Records More than 25 Years Old Are Not Exempt from Disclosure Except for:
 - Medical Records
 - Sealed Records
 - Custody Records
 - Student Records



Hey Advocate, where can I find a full

26 list of exemptions?

Attorney General's exemptions website

(<https://justice.oregon.gov/PublicRecordsExemptions/>)

Public Records Exemptions - Ore X +

justice.oregon.gov/PublicRecordsExemptions/

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DOJ Home / Attorney General / Public Records / Public Records Exemptions

The purpose of this catalog of public records exemptions is to assist public officials and members of the public in determining what information is exempt from public disclosure. The catalog is not intended to provide legal advice to public bodies or to members of the public.
Type keywords or the name of a public body into the filter field to search for relevant exemptions.

Filter: Display 25

Statute Number	Statute Description	Agencies Affected	Balancing Test	Court Cases	Public Records Orders
1.002(3)	Personal identifying information submitted to state courts if made confidential by rule	Judicial Department			
1.177(3)	State court security plans, emergency preparedness plans, and business continuity plans	Judicial Department	Not exempt if the Chief Justice determines that the interest of the public would be served by the disclosure and that the disclosure will not impair the integrity of the plan.		
1.180(9)	Court security plans, emergency preparedness plans, and business continuity plans prepared by a judicial district's advisory committee	Judicial Department	Not exempt if the presiding judge determines, with the consent of all sheriffs, that the interest of the public would be served by the		

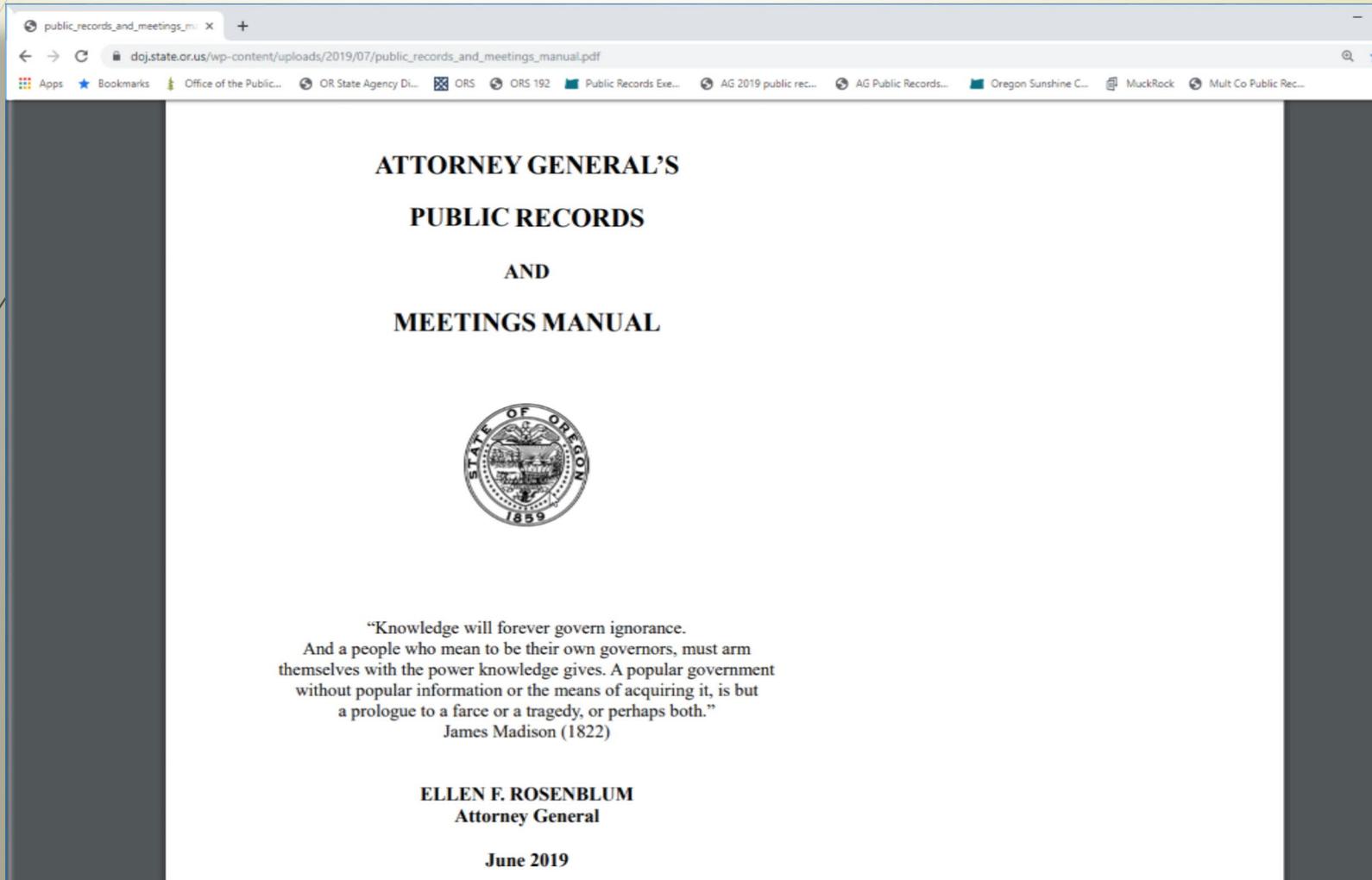


Where else?

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Attorney General's Public Records and Meetings Manual:

https://www.doj.state.or.us/wp-content/uploads/2019/07/public_records_and_meetings_manual.pdf



Section 6

Did you know?

ORS 192.335:

A public body that, acting in good faith, discloses a public record in response to a request for public records is **not liable** for any loss or damages based on the disclosure unless the disclosure is affirmatively prohibited by state or federal law or by a court order applicable to the public body.



2019 legislative update



HB 2353

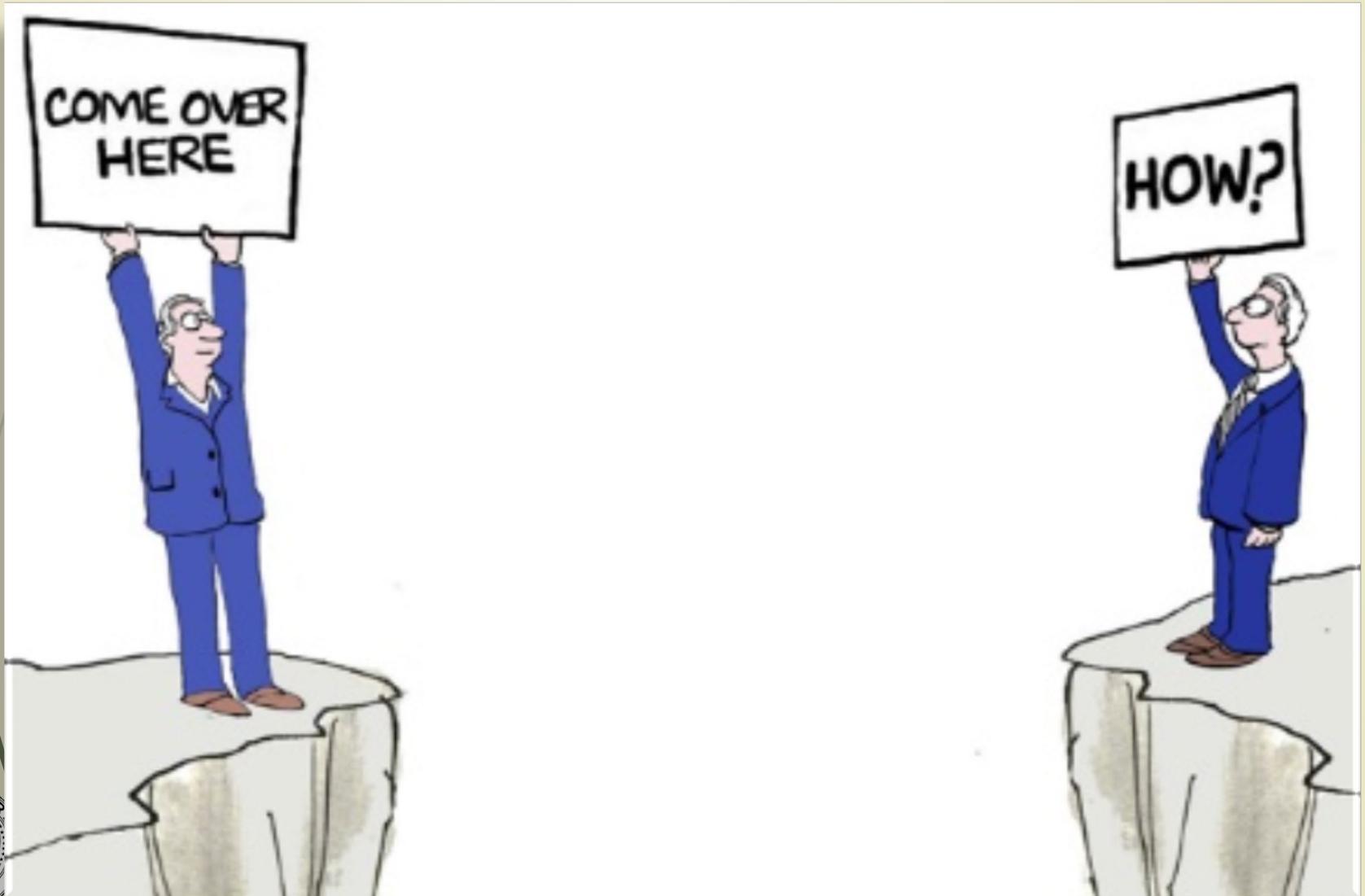
If the Attorney General or District Attorney “grants a petition” filed under ORS 192.407, the order can:

- Require public body to pay penalty of \$200 to requester **if the public body failed to respond or responded “with undue delay”** AND
- May order a fee waiver or fee reduction **if public body responds “with undue delay” or fails to respond** in time and manner prescribed by ORS 192.329.
- Undue delay is not defined.



Communication Recommendations

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Communication Recommendations

- Communicate early and often
- When in doubt, pick up the phone
- Look for creative solutions
- **Use de-escalation strategies . . .**



De-escalation Strategies

- ▶ **Be empathetic** and non-judgmental
 - ▶ Remember: this person's concerns are real and important to them
- ▶ **Avoid overreacting**
 - ▶ Remain calm, rational, and professional
- ▶ Pay attention to the person's underlying feelings and **acknowledge them**
 - ▶ "I understand that this must be frustrating..."
- ▶ **Don't rise to challenges** or incitements
 - ▶ Try to keep the person focused on how you can work together to solve their problem
- ▶ **Request clarification**
 - ▶ "It sounds like what you want is..."
- ▶ **Apologize**
 - ▶ Not for imaginary wrongs, but sincere apologies
 - ▶ "I'm sorry that you have had to wait for so long..."
- ▶ **Wait...** leave time for silence and reflection
 - ▶ Give the person a moment to consider your words
 - ▶ Offer to call back in ten minutes if things get too heated



How the Public Records Advocate Can Assist You in Your Work

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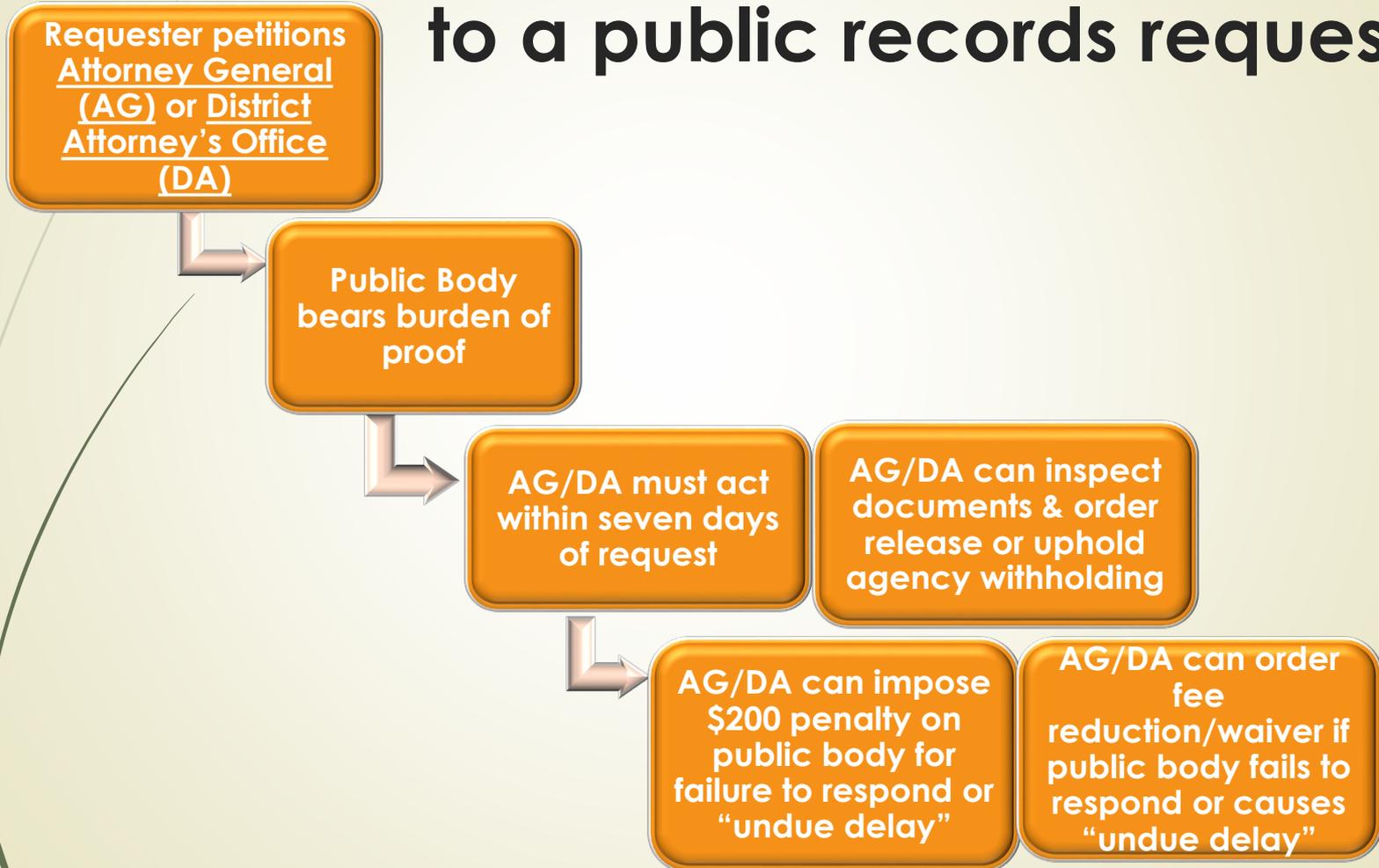
Facilitated
dispute
resolution/
policy
development

Gov't
employee &
public
training

Lead the
Public
Records
Advisory
Council



Attorney General & District Attorney review of a public body's response to a public records request



Judicial Review



- ▶ Public body or requester may appeal Attorney General/ District Attorney order.
- ▶ Public body must comply or give notice of appeal within seven days.
 - No similar time limit on requester.
- ▶ Burden remains on public body.
- ▶ If requester prevails, requester may be granted attorney's fees & costs.
- ▶ Court may require public body to pay penalty of \$200 to requester if the public body failed to respond or responded "with undue delay".
- ▶ Court may order a fee waiver or fee reduction if public body responds "with undue delay" or fails to respond in time and manner prescribed by ORS 192.329.



Advice? Dispute Resolution? Feedback?

Contact:



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www.oregon.gov/pr

