

## PRAC Legislative subcommittee meeting 11/04/2022

### Primary points for discussion and votes, in this order

- Additional presumptive categories in public interest (or not in public interest, but defined to trigger some level fee waiver; similar to our decision on indigent and individual.) *Pg. 5 of this document; ORS 192.324 (5) f-g; X*
  - Educational, scientific etc; conditions of request
  - Labor unions; under bargaining statute
  - Other by written agency policy
  - No differentiation
  - Optional, amendable form (See [Gothard doc](#) p3, (4) and p 4
  - Is the non-media right to argue a request is in the public interest fee adequately retained?
- Appeals to public interest determinations *Pg 6-7 of this doc; current ORS 192.324 (6).*
  - 2-3 proposed versions to review
- Additions to Definitions *pg 2 of this doc; current ORS 192.311*
  - Public interest
  - Authorized representative (potentially relevant to individual records section)

### Possible revisits to approved concepts/language for possible word tweaks/clarifications

- Individual records fee reductions or waivers *Pg 6*
  - Revisit/any proposed changes to language?
- Indigent requesters fee reductions or waivers *Pg 6*
  - Revisit/any proposed changes to language?
- Fixes in approved
  - Points in blue highlight - *throughout*

### GUIDE TO THIS DOCUMENT:

Plain text shows current law

**Bold or strikethrough language with no highlights show language for discussion and vote.**

*Strikethrough and bold indicate deletions and additions*

**Yellow highlights show language for bill that have been approved by the subcommittee.**

**Blue highlights show minor questions in approved language for brief clarification.**

### Public interest definition

**ORS 192.311 is amended to read:**

192.311 Definitions for ORS 192.311 to 192.478. As used in ORS 192.311 to 192.478:

(1) “Business day” means a day other than Saturday, Sunday or a legal holiday and on which at least one paid employee of the public body that received the public records request is scheduled to and does report to work. In the case of a community college district, community college service district, public university, school district or education service district, “business day” does not include any day on which the central administration offices of the district or university are closed.

(2) "Custodian" means:

(a) The person described in ORS 7.110 for purposes of court records; or

(b) A public body mandated, directly or indirectly, to create, maintain, care for or control a public record. "Custodian" does not include a public body that has custody of a public record as an agent of another public body that is the custodian unless the public record is not otherwise available.

(3) "Person" includes any natural person, corporation, partnership, firm, association or member or committee of the Legislative Assembly.

(4) "Public body" includes every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.

(5)(a) "Public record" includes any writing that contains information relating to the conduct of the public's business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.

(b) "Public record" does not include any writing that does not relate to the conduct of the public's business and that is contained on a privately owned computer.

**(6) "Public interest" means making a record available because it primarily benefits the general public. Benefitting the general public includes, but is not limited to, the release of records or information that:**

**(a) Directly impacts, affects, or serves an identified interest of the general public; for example, holds a public body accountable for wise spending or policy decisions;**

**(b) Advances the welfare or well-being of the general public; for example sheds substantial light on the performance of a public official's duties;**

**(c) Is likely to contribute significantly to public understanding of the operations or activities of government; for example, reveals trends and emerging problems in issues of public health and public safety; exposes harm to people whose welfare is the public body's responsibility.**

~~(6)~~(7) "State agency" means any state officer, department, board, commission or court created by the Constitution or statutes of this state but does not include the Legislative Assembly or its members, committees, officers or employees insofar as they are exempt under section 9, Article IV of the Oregon Constitution.

~~(7)~~(8) "Writing" means handwriting, typewriting, printing, photographing and every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings. [Formerly 192.410]

**(9) "Authorized Representative" means a request is made on behalf of an individual by their legal guardian, legal representative, labor representative, or representative who has been granted power of attorney to act on the individual's behalf. (from [Gothard doc](#) p2, (13)**

Fees, reductions and waivers

**ORS 192.324 (4)(a) 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 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 whether an exemption may pertain to material or whether the exemption should be applied (reference note: does this affect 192.324 (4)(b), below?)**
  - (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 (rate) 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.**

**(c) 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.**

**(d) 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.**

**(e) Notwithstanding ORS 192.329(3)(a), 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 this section.** (reference note: 192.329(3)(a) says that once a public body has given a fee estimate, the public body can suspend filling the records request until the fee is paid or waived. This does not change that; (e) says that required explanations must be made before suspension while waiting for fees is allowed.

**(f) Notwithstanding paragraphs (a) to (c) 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, is partially or entirely outweighed by a severe impact on public services that will be created by preparing the records for the requester, the custodian shall provide the reason for this determination to the requester in writing.**

*[the following is adapted from 5 USC 552(a)(4)(A)(ii)]*

- (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.

- (f) The request is made by a nonprofit educational, scientific, or other nonprofit organization which can express a purpose of research or use that advances the welfare or well-being of the general public or for a purpose which is likely to contribute significantly to public understanding of the operations or activity of government; (from [Gothard doc](#) p3, (d)
- (g) The request is made by a labor organization, in furtherance of the public policy goals set forth under ORS 243.650-806, if the public body did not already have an established status quo or an agreement regarding such fees. This provision does not waive any requirement under ORS 243.650-806. (from [Gothard doc](#) p3, (e)
- (h) Any other reason established in written policy by the public body identifying other types of requests which may qualify for a public interest fee waiver or reduction. (from [Gothard doc](#) p3, (f)

(X) A public body may prioritize fee waivers for individual requesters, but may not discriminate between individual requesters or discriminate between public interest requests made by news media or organizations. A public body may alter policy regarding fee waivers as applied to all requesters based on the current needs of the public body to provide public services, but shall not give any organization preference over another, unless otherwise required by law. (from [Gothard doc](#) p3, (3)

(6) If the custodian of a public record determines that a public record’s requester is the subject of the record or the subject’s legal guardian, the records shall be furnished without charge for the first

**\$25.00 of the fee for each request, which is in addition to any reduction or waiver of fees presently offered by the public body, unless:**

- (A) The record requested is prepared under a statute or administrative rule specifically authorizing the sale of the record to the public, or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by a statute or administrative rule; or
- (B) Waiving the first \$25.00 of fees substantially prejudices or prevents the carrying out of the functions of the public body, so long as the public interest in the efficient functioning of the public body clearly outweighs the public interest in disclosure. If a public body makes such a determination, the public body shall furnish the records at a reduced fee that balances the public interest in disclosure against the impact on public services.

**(7) If the custodian of a public record determines that the person requesting the records is indigent and the requested record effects the legal right of a requester, the public body shall waive or substantially reduce the fees for completing the request unless:**

- (A) Providing the records at no or substantially reduced cost substantially prejudices or prevents the carrying out of the functions of the public body, so long as the public interest in the efficient functioning of the public body clearly outweighs the public interest in disclosure. If a public body makes such a determination, the public body shall furnish the records at a reduced fee that balances the public interest in disclosure against the impact on public services.
- (B) An individual who is entitled to records under section (5)(d), must submit an affidavit at the time of their public records request, in response to the receipt of a fee estimate, or at any time requested by a public body stating:
  - (i) That the individual is indigent and receiving specific public assistance or, if not receiving public assistance, stating facts showing inability to pay the cost because of indigency; and
  - (ii) The legal rights affected by the requested record.

Appeals:

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

From Michael Kron email 10/23 to subcommittee Chair and Vice-chair:

*I think very minor changes to ORS 192.324 (6) would be appropriate, given the changes we are proposing to (5).*

**(6) (8) 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.

From Emily G suggestions (underlined bold) 10/28 (Other bold, including strikeout bold, is from a previous suggestion)

~~(6)~~ **(8)** A requester who believes that there has been an unreasonable denial of a fee waiver or fee reduction 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. **In determining whether there has been an unreasonable denial of a fee waiver or fee reduction, the Attorney General or the district attorney shall consider, amongst other relevant factors, whether providing the records, in the context of all public interest requests received, at no or substantially reduced cost substantially prejudices or prevents the carrying out of the functions of the public body, so long as the public interest in the efficient functioning of the public body clearly outweighs the public interest in disclosure.** The Attorney General, the district attorney and the court have the same authority in instances when a fee waiver or reduction is denied as when inspection of a public record is denied. **This provision does not limit any rights of labor organizations under ORS 243.650-806.**

Costs unrecoverable without publicly available policy

**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.**