

Senate Bill 417

Sponsored by Senator THATCHER (at the request of Public Records Advisory Council) (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Directs public bodies to perform search, review and duplication work in responding to public records requests in least expensive manner reasonably possible. Limits hourly rate of compensation that may be charged for public record search, review and duplication work.

Requires public body to provide explanation of basis of fee if explanation is sought by public records requester.

Enumerates factors public body may take into account in determining to waive or reduce fees, although authorizes public records custodian to waive or reduce fees for any reason. Requires custodian to furnish copy of public record without charge if disclosure primarily benefits general public unless disclosure outweighed by substantial prejudice to custodian or if waiver would prevent custodian from performing other required functions. Provides that public records request by representative of news media is assumed to be in public interest unless custodian demonstrates, in particular instance, that request is not in public interest.

A BILL FOR AN ACT

Relating to public records fees; amending ORS 147.421, 192.324, 192.329, 192.464 and 802.183.

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

SECTION 1. ORS 192.324 is amended to read:

192.324. (1) **As used in this section:**

(a) **"Duplicate" means to make a physical or digital copy of a record, including but not limited to a paper copy, an audio or digital tape or file, an item of electronic mail, a database file, an electronic text file or a record in any storage format.**

(b) **"News" means information that is about current events or that would be of current interest to the public.**

(c) **"News media" or "news media entity" means:**

(A) **A television or radio station that disseminates news;**

(B) **The publisher of a periodical that disseminates news, whether through print publication or through electronic dissemination.**

(d) **"Representative of the news media" means:**

(A) **Any person that gathers information of potential interest to a segment of the public, uses editorial skill to turn information into a distinct work and who distributes that work to an audience.**

(B) **A freelance journalist unaffiliated with news media entities, if the journalist can demonstrate a reasonable expectation or prior history of publication through news media, including but not limited to a publication contract with one or more news media entities.**

(e) **"Review":**

(A) **Means reading, listening to, viewing or watching a record to locate content that the public body considers exempt from disclosure and redacting material in order to apply an exemption.**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

(B) Does not include time spent by an attorney determining the application of ORS 192.311 to 192.478 to material.

(f) “Search” means looking for and retrieving physical or digital records responsive to a public records request.

[(1)] (2) 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)] (3) If an individual who is identified in a public body’s procedure described in subsection [(7)(a)] (8)(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)] (4) 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.

[(4)(a)] (5)(a) **Upon compliance with subsection (8) of this section**, 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 meet the request]* **to search, duplicate and review public records in order to make the records available to the requester. Costs associated with reviewing a public record may be recovered by the public body even if the public record is ultimately not disclosed to a requester.**

(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.]* **shall conduct the activities described in paragraph (a) of this subsection in the least expensive manner reasonably possible. In determining costs, the public body may not charge more than the hourly rate of compensation of the lowest-paid employee capable of performing the activities described in paragraph (a) of this subsection. If an unpaid volunteer is available or used to perform the activities described in paragraph (a) of this subsection, the public body may establish a fee for the time spent by the volunteer that does not exceed the applicable minimum hourly wage under the laws of this state.**

(c) 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)] (d)(A) 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.

(B) A requester who has received a notification of the estimated amount of the fee under this paragraph may request an explanation from the public body as to the basis for the fee. If an explanation is requested, the public body shall provide an explanation to the requester of the estimated costs for completing the public body's response to the request that is in sufficient detail to permit a reasonable person to understand the amount and purpose of each component of the estimated fee. The public body shall work in good faith with a requester who seeks to narrow a request in order to reduce a fee.

(C) If a requester seeks an explanation for the basis of the fee under this paragraph, the obligation of the public body to complete its response to the request is not suspended until the public body supplies an explanation to the requester that satisfies the requirements of this paragraph.

(d) 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.

~~[(5)]~~ (6)(a) The custodian of a public record may **for any reason** furnish copies without charge or at a substantially reduced fee *[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]*. **Factors the custodian may take into account in determining to waive or reduce fees include, but are not limited to:**

(A) The cost of collecting the fee exceeding the amount of the fee;

(B) The policy of the custodian to routinely waive fees;

(C) The requester demonstrating indigence to the custodian; or

(D) The request being for public records that primarily concern the requester.

(b) The custodian of a public record shall furnish copies without charge if the custodian determines that disclosure is in the public interest because disclosure of the record primarily benefits the general public, except that the custodian may limit the portion of fees that are waived if the custodian determines that the public interest in disclosure is outweighed by substantial prejudice to the custodian or because waiver will prevent the custodian from being able to carry out the other functions the custodian is charged with performing.

(c) A request by a representative of the news media shall be assumed to be in the public interest unless the custodian demonstrates that, in the particular instance, the request is not in the public interest.

(d) A request by a commercial entity who is not a representative of the news media may not be considered a request made in the public interest.

(e) 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 substantial prejudice or will prevent the custodian from carrying out the other functions the custodian is charged with performing, the custodian shall provide the reason for this determination to the requester in writing.

~~[(6)]~~ (7) 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 (6) 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 in instances when a *[fee waiver or reduction]*

1 *is denied*] **public body has failed to comply with subsection (6) of this section** as when in-
 2 spection of a public record is denied.

3 [(7)] **(8)(a)** A public body shall make available to the public a written procedure for making
 4 public records requests that includes:

5 [(a)] **(A)** The name of one or more individuals within the public body to whom public records
 6 requests may be sent, with addresses; and

7 [(b)] **(B)** The amounts of and the manner of calculating fees that the public body charges for
 8 responding to requests for public records.

9 **(b) The written procedure described in paragraph (a) of this subsection shall be made**
 10 **available:**

11 **(A) On the public body's website; or**

12 **(B) If the public body does not have a website, at a publicly accessible physical space, if**
 13 **available, and also provided upon request to a requester.**

14 **(c) A public body that fails to make the written procedure described in this subsection**
 15 **available to the public in conformance with this subsection may not establish and charge fees**
 16 **for completing a public records request.**

17 [(8)] **(9)** This section does not apply to signatures of individuals submitted under ORS chapter
 18 247 for purposes of registering to vote as provided in ORS 247.973.

19 **SECTION 2.** ORS 192.329 is amended to read:

20 192.329. (1) A public body shall complete its response to a written public records request that
 21 is received by an individual identified in the public body's procedure described in ORS 192.324 as
 22 soon as practicable and without unreasonable delay.

23 (2) A public body's response to a public records request is complete when the public body:

24 (a) Provides access to or copies of all requested records within the possession or custody of the
 25 public body that the public body does not assert are exempt from public disclosure, or explains
 26 where the records are already publicly available;

27 (b) Asserts any exemptions from disclosure that the public body believes apply to any requested
 28 records and, if the public body cites ORS 192.355 (8) or (9), identifies the state or federal law that
 29 the public body relied on in asserting the exemptions;

30 (c) Complies with ORS 192.338;

31 (d) To the extent that the public body is not the custodian of records that have been requested,
 32 provides a written statement to that effect;

33 (e) To the extent that state or federal law prohibits the public body from acknowledging whether
 34 any requested record exists or that acknowledging whether a requested record exists would result
 35 in the loss of federal benefits or imposition of another sanction, provides a written statement to that
 36 effect, citing the state or federal law that the public body relies on, unless the written statement
 37 itself would violate state or federal law; and

38 (f) If the public body asserts that one or more requested records are exempt from public disclo-
 39 sure, includes a statement that the requester may seek review of the public body's determination
 40 pursuant to ORS 192.401, **192.407**, 192.411, 192.415, 192.418, 192.422, 192.427 and 192.431.

41 (3)(a) If a public body has informed a requester of a fee permitted under ORS 192.324 (4), the
 42 obligation of the public body to complete its response to the request is suspended until:

43 **(A) The requester has requested an explanation of the basis for the fee, in which case the**
 44 **suspension ceases until the public body has provided an explanation to the requester that**
 45 **satisfies the requirements of ORS 192.324 (5)(d)(B);**

1 **(B) The requester has** paid the fee[.]; **or**

2 **(C)** The fee has been waived by the public body pursuant to ORS 192.324 [(5)] **(6)** or the fee
3 otherwise has been ordered waived.

4 **(b) The public body shall close the request** if the requester fails to pay the fee within 60 days
5 of the **later of**:

6 **(A)** The date on which the public body informed the requester of the fee[, *or fails to pay the fee*
7 *within 60 days of*];

8 **(B)** The date on which the public body informed the requester of the denial of the fee waiver[,
9 *the public body shall close the request*]; **or**

10 **(C) The date on which the public body provided an explanation of the basis for the fee to**
11 **the requester.**

12 (4)(a) A public body may request additional information or clarification from a requester of
13 public records for the purpose of expediting the public body's response to the request. If the public
14 body has requested additional information or clarification in good faith, the public body's obligation
15 to further complete its response to the request is suspended until the requester provides the re-
16 quested information or clarification or affirmatively declines to provide that information or clarifi-
17 cation.

18 (b) If the requester fails to respond within 60 days to a good faith request from the public body
19 for information or clarification, the public body shall close the request.

20 (5) As soon as reasonably possible but not later than 10 business days after the date by which
21 a public body is required to acknowledge receipt of the request under ORS 192.324, a public body
22 shall:

23 (a) Complete its response to the public records request; or

24 (b) Provide a written statement that the public body is still processing the request and a rea-
25 sonable estimated date by which the public body expects to complete its response based on the in-
26 formation currently available.

27 (6) The time periods established by ORS 192.324 and subsection (5) of this section do not apply
28 to a public body if compliance would be impracticable because:

29 (a) The staff or volunteers necessary to complete a response to the public records request are
30 unavailable;

31 (b) Compliance would demonstrably impede the public body's ability to perform other necessary
32 services; or

33 (c) Of the volume of public records requests being simultaneously processed by the public body.

34 (7) For purposes of this section, staff members or volunteers who are on leave or are not
35 scheduled to work are considered to be unavailable.

36 (8) A public body that cannot comply with the time periods established by ORS 192.324 and
37 subsection (5) of this section for a reason listed in subsection (6) of this section shall, as soon as
38 practicable and without unreasonable delay, acknowledge a public records request and complete the
39 response to the request.

40 **SECTION 3.** ORS 147.421 is amended to read:

41 147.421. (1) If a public body is the custodian of any of the following information, upon the re-
42 quest of the victim, the public body shall provide to the victim any of the following information of
43 which it is the custodian and that is about the defendant or convicted criminal:

44 (a) The conviction and sentence;

45 (b) Criminal history;

(c) Imprisonment; and

(d) Future release from physical custody.

(2) A public body, in its discretion, may provide the requested information by furnishing the victim with copies of public records. The public body may charge the victim its actual cost for making public records available as provided in ORS 192.324 [(4)] (5).

(3) As used in this section:

(a) "Criminal history" means a description of the prior arrests, convictions and sentences of the person.

(b) "Future release" means the projected or scheduled date of release of the person from confinement, the name and location of the correctional facility from which the person is to be released and the community where the person is scheduled to reside upon release.

(c) "Imprisonment" means the name and location of the correctional facility in which the person is confined.

(d) "Public body" has the meaning given that term in ORS 192.311.

SECTION 4. ORS 192.464 is amended to read:

192.464. (1)(a) The Public Records Advocate shall provide facilitated dispute resolution services when requested by a person described in subsection (2) of this section or by a state agency under the conditions described in subsection (3) of this section.

(b) The Public Records Advocate may provide facilitated dispute resolution services when requested by a person described in subsection (6) of this section and a city.

(2) A person may seek facilitated dispute resolution services under this section when seeking to inspect or receive copies of public records from a state agency and the person:

(a) Has been denied access to all or a portion of the records being sought;

(b) Has been denied a fee waiver or reduction in fees after asserting under ORS 192.324 [(5)] (6) that a fee waiver or reduction of fees is in the public interest **or that another factor warrants waiver or reduction in fees;** or

(c) Received a written fee estimate under ORS 192.324 [(4)] (5) that the person believes exceeds the actual cost to be incurred by the public body in producing the requested records.

(3)(a) A state agency may seek facilitated dispute resolution services under this section if, in response to a request for public records, the agency asserts:

(A) That the records being sought are not public records;

(B) That the records being sought are exempt from mandatory disclosure; or

(C) That the agency is, under ORS 192.324, entitled to the fees the agency is seeking in order to produce the records being requested.

(b) A person seeking to inspect or receive copies of public records may opt out of facilitated dispute resolution services being sought by a state agency by giving written notice of the requester's election within five days of the requester's receipt of the agency's request for facilitated dispute resolution. If written notice is given under this paragraph, the state agency may not determine under subsection (4)(a) of this section that the person seeking to inspect or receive copies of public records has failed to engage in good faith in the facilitated dispute resolution process.

(4) Notwithstanding any other provision of ORS 192.311 to 192.478:

(a) The failure of a person seeking to inspect or receive copies of public records to engage in good faith in the facilitated dispute resolution process described in this section upon being authorized to do so under subsection (2) of this section shall be grounds for the state agency to deny the request and refuse to disclose the requested records.

(b) The failure of a state agency to engage in good faith in the facilitated dispute resolution process described in this section after a public records requester seeks facilitated dispute resolution services under subsection (2) of this section shall be grounds for the award of costs and attorney fees to the public records requester for all costs and attorney fees incurred in pursuing the request after a good faith determination under subsection (5) of this section.

(5)(a) Either party to the facilitated dispute resolution may request that the Public Records Advocate make a determination concerning whether a party is acting in good faith for purposes of applying the remedies described in subsection (4) of this section.

(b) A determination by the advocate that a party failed to engage in good faith facilitated dispute resolution and an award of costs and attorney fees are subject to review by the Circuit Court of Marion County as a proceeding under ORS 183.484.

(6) In the case of a person seeking to inspect or obtain copies of public records from a city, either the person seeking records or the city may seek facilitated dispute resolution services under this section, but only if both the person seeking records and the city agree to have the Public Records Advocate facilitate resolution of the dispute and the advocate consents to facilitated resolution of the dispute. A dispute described in this subsection is not subject to subsections (4) and (5) of this section.

(7) Facilitated dispute resolution shall be requested by submitting a written request for facilitated dispute resolution and such other information as may be required by the Public Records Advocate. Facilitated dispute resolution between parties shall be conducted and completed within 21 days following receipt by the advocate of the request for facilitated dispute resolution. The facilitated dispute resolution period may be extended by unanimous agreement among the public records requester, the public body and the advocate.

(8) If the facilitated dispute resolution results in an agreement between the public records requester and the state agency or city, the advocate shall prepare a written document memorializing the agreement. The written agreement shall be executed by the public records requester and an authorized representative of the state agency or city. The written agreement shall control the resolution of the records request.

SECTION 5. ORS 802.183 is amended to read:

802.183. (1) The Department of Transportation may establish fees reasonably calculated to reimburse it for its actual cost in making personal information available to a person or government agency authorized under ORS 802.179 to obtain the information. Fees established under this subsection are subject to the provisions of ORS 192.324 [(4) to (6)] **(5) to (7)**.

(2) The department may adopt rules specifying conditions that must be met by a person or government agency requesting personal information under ORS 802.179. Such conditions may include but need not be limited to:

(a) Providing reasonable assurance of the identity of the requester;

(b) Providing reasonable assurance of the uses to which the personal information will be put, if applicable;

(c) Showing that the individual whose personal information is to be disclosed has given permission for the disclosure, if permission is required; and

(d) Submitting a written request for the personal information in a form prescribed by the department.