



To: Public Records Advisory Council Legislative Subcommittee
From: Todd Albert, Public Records Advocate
Date: June 14, 2022
Subject: First draft of ideas to reform how costs are assessed and collected under the Oregon Public Records Law ([ORS Chapter 192](#))

I. LC/BILL: needs narrow relating clause

II. GOALS

- o Reduce costs for requesters;
- o Preserve the ability of public bodies to charge fees and determine when to offer fee waivers or reductions;
- o Improve and increase communication between records custodians and requesters as normal part of public records request and disclosure process;
- o Clarify terms and processes;
- o Incentivize public body leadership to better fund public records systems/staff, etc.; and
- o Respond to feedback from District Attorney’s Association

III. FEES

(A) Establishing costs

- o Revise [ORS 192.324\(4\)\(a\)](#):
The public body may establish fees reasonably calculated to reimburse the public body for **up to** the actual cost to **search, duplicate and review** public records for the purpose of making them available upon request. No other fees may be established.
 - Must waive at least the first x (30?) minutes (may combine requester’s requests over x amount of time (30 days?) to consider as “one” request for this purpose)
 - Must waive **first** x amount of pages (100?) (may combine requester’s requests over x amount of time (30 days?) to consider as “one” request for this purpose)
- o When determining up to actual cost, should ORS chapter 192 define hourly rate at all and, if so, as based only on salary or salary + benefits?
- o No fee to transfer records electronically.
- o May charge fee for actual cost of external media (e.g., flash drives).
- o A deposit in an amount **not to exceed 25% of the estimated cost of making requested** public records available may be demanded at the time a fee estimate is provided if the public body provides along with a fee estimate:
 - (1) An inventory of responsive records and asserts any exemptions from disclosure that the public body believes apply to any requested records; and

Commented [AT*P1]: This is a more accurate statement of what a public body may do to recoup costs, while making clear that all or most costs are not required by the prl to be transferred to requesters.

Commented [AT*P2]: Search as defined in [FOIA](#), 1 CFR Ch. III § 304.9, p. 50: “means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. The agency will conduct searches in the most efficient and least expensive manner reasonably possible. For example, it will not search on a line-by-line basis where duplicating an entire document would be quicker and less expensive.”

Commented [AT*P3]: Duplication as defined in [FOIA](#), p. 49: “means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others. The agency will honor a requester’s specified preference of form or

Commented [AT*P4]: Review as defined in [FOIA](#), p. 50: “means the examination of a record located in response t

Commented [AT*P5]: Specific categories for fees eliminate confusion over what may be charged as “actual

Commented [AT*P6]: Standardizes the framework for all public bodies under which “up to actual costs” may be

Commented [AT*P7]: Already pretty standard amongst many public bodies and incentives narrower requests whi

Commented [AT*P8]: Also not an uncommon practice, further incentives smaller requests, provides ability of pul

Commented [SS9R8]: Not sure how many paper copy requests cities receive anymore – everything is digital and

Commented [AT*P10]: The law is currently agnostic on this, which leads to differing outcomes in fees for the sar

Commented [SS11R10]: I think cities use different “billable wage” equations that do and do not include benef

Commented [AT*P12]: All too often public bodies demand that all requesters pay in full at the time a fee

Commented [SS13R12]: I think it’s common among cities to require 50% down payment, which may just be

Commented [LY*P14]: I thought most public bodies required payment of their estimate up front? Would this

Commented [SS15R14]: Most cities do not charge for requests, so we’re talking about the few that are charged

Commented [AT*P16]: Payments for fees – including in full – are generally demanded at the time a fee estimate if

Commented [SS17R16]: See noted above – I think most cities only required a 50% down payment.

Commented [SS18R16]:



(2) If the public body cites [ORS 192.355 \(8\) or \(9\)](#) as the basis for an exemption, identifies the state or federal law that the public body relied on in asserting the exemptions along with the fee estimate.

This is the only way in which a public body may demand a deposit.

- o The public body may close the request after a-making a demand for a deposit if:
 - (1) The requester does not accept and pay the required percentage of the estimated fee within 60 days; or
 - (2) The requester does not negotiate in good faith with the public body to reduce the proposed fee after a fee estimate has been provided estimate.
- o Paper records
 - No charge for up to x pages (100?) (may combine requester's requests over x amount of time (30 days?) to consider as "one" request for this purpose).
 - After that, set amount per page (e.g. like other states &-or at 25 cents per page as per OR counties/[ORS 205.320\(1\)\(d\)\(B\)](#)).

(B) Requester tiers – charging requesters based on who they are

- o Requester tiers for charging up to actual cost:
 - Commercial: document search, duplication, and review.
 - Media is not commercial.
 - Media, public interest (affects community, requester has platform to disseminate), educational, non-commercial scientific institution: duplication.
 - General: search and duplication.
 - However, may only charge up to the actual cost of duplication for in-person inspection of records.

(C) Additional requirements

- o For each category of records response preparation (search, duplicate, review) public body must utilize lowest class & comp staff member available capable of processing request.
- o No fee for a public body to provide fee estimate.
- o No fee for requester's own files or records.
- o No fee if public body exceeds 15 business days to complete a request unless the public body has communicated an updated time estimate to requester.
- o No fee if routine collection and processing of the fee is likely to equal or exceed the amount of the fee.
- o Public body may remove redundant electronic records (like deduping in discovery) at no cost to requester if process is agreed to by requester. Requester may request to receive duplicate records at the appropriate cost.
- o Expand [ORS 192.329\(4\)](#):

Commented [AT*P19]: This part is already required by ORS [192.329\(2\)\(b\)](#).

Commented [AT*P20]: More than one public body has told me they are charging a reporter because "they can pay", but I believe this runs counter to the letter and spirit of the public records law.

Commented [SS21R20]: I agree and would ask if the whole tier idea is contrary to the public records law. I've always been advised that cities shouldn't ask what the information will be used for – so figuring out who is asking, what tier the requestor falls in – may not be in keeping with the spirit of the law? Except for public safety or other exempted activities (immigration enforcement) concerns, why does a government need to know what the information would be used for?

Commented [AT*P22]: Separating media from public interest eliminates the need to do a deep dive into whether someone is in the "media" for purposes of establishing tiers of cost. Clearly traditional media organizations can be recognized as such. Those identifying as journalists who are not from "legacy" organizations may still be eligible to be considered media too based on the public body's own analysis. Alternatively, even if a requester does not fit into a public body's definition of media, they may still be eligible...

Commented [AT*P23]: Aligning the written law with the current state of binding case law in OR, [In Defense of](#)...

Commented [AT*P24]: Up to a certain limit?

Commented [AT*P25]: This is to incentive public bodies to communicate more readily with requesters and elimin...

Commented [SS26R25]: This is probably what will concern many cities the most, although I don't think most of the cities run afoul of this requirement.

Commented [LY*P27]: I'm not sure I understand what this means.

Commented [AT*P28]: Taking this from FOIA. In other words, if there is a fee for \$25 but it would cost the public...

Commented [SS29R28]: I'm not sure I'm understanding this either...

Commented [AT*P30]: Or simply no fee if below x (\$25?) amount?

Commented [SS31R30]: That makes more sense, but wouldn't that almost be remedied by the first 30 minutes or 100 pages free rule?

Commented [LY*P32]: I think the effort to go through a trove of documents and dedupe may actually increase cost...

Commented [SS33R32]: My guess is most deduping of records requests will be for electronic records – email or PDFs. But I get the point about deduping paper records –

Commented [AT*P34]: Switching to this provision only for electronic records to try and ameliorate such concerns.

Commented [SS35R34]: Exactly.



- (a) For requests for email, structured data, and metadata, public body to work with requester to establish record custodians, timeframes, key words/search terms and to provide data dictionaries where applicable. Where public body has appropriate search technology, the public body is obligated to provide all available, non-confidential metadata and field definition information for requester to understand names, titles, field listings, definitions of those fields, terms, headings, systems, processes, forms, etc. relevant to request.
- (b) 60-day time frame to close request due to non-responsive requester after public body request for clarification does not begin to run for the types of records requested in (a) until public body has offered to establish the categories of information denoted in (a).
- (c) Requester is obligated to communicate in good faith with public body for the types of records requested in (a) to establish the categories of information denoted in (a). Otherwise, public body may close request after 60 days.
- o Expand [ORS 192.324\(7\)](#) to include that a public body must post their public records policy on website (if they have one) as well as being required to post it “publicly”. Also, a public body is not permitted to recoup costs from a requester if how the amounts of and the manner of calculating fees is not in policy and policy is not posted.
- o Fees may be recouped for request that does not disclose responsive records, except:
 - No fee may be charged for a record request that does not disclose responsive records if the public body and requester engaged in good faith in the process described in the expanded [ORS 192.329\(4\)](#).

Commented [SS36]: This may make for a very wide scope – expanded incidentally when a requestor has only asked for something specific and not all the data available.

Commented [AT*P37]: Many public bodies are lacking a publicly-posted public records policy and the mere requirement under the law to do so remains unknown or has failed to spur them to act.

IV. FEE WAIVERS AND REDUCTIONS

- o List factors for determining when to waive or reduce fees as “including but not limited to ...”, e.g., community affected, ability to disseminate to that community, # of requests by requester over specified amount of time, etc.
- o If (1) requester is a member of the media, (2) public body determines request is in the public interest, or (3) for any other reason of the public body’s choosing and public body has at least one full or principally dedicated FTE for processing public records requests:
 - Public body shall waive or reduce fees by at least 25%.
- o If (1) requester is a member of the media, (2) public body determines request is in the public interest, or (3) for any other reason of the public body’s choosing and public body does not have at least one fully or principally dedicated FTE for processing public records requests:
 - Public body shall waive or reduce fees by at least 25% if request does not exceed certain level/scope; and
 - Public body may waive or reduce for all other instances.

Commented [AT*P38]: Some public bodies may wish to take indigency into account when determining fees but feel compelled not to because it is currently not denoted in the law as an element to be considered.

Commented [LY*P39]: Or if the scope of the request is sufficiently narrow e.g. e-mail inbox of a single employee or the public body has a pre-existing means of extrapolating the data like a search function for a particular database?

Commented [AT*P40]: Perhaps based on cost and/or time?

STATE OF OREGON

TODD ALBERT
OREGON PUBLIC
RECORDS ADVOCATE



2850 SW Cedar Hills Blvd, # 1121
Beaverton, Oregon 97005
(503) 871-9036

V. EXPAND PUBLIC BODY TIME TO APPEAL

- Amend ORS [192.411\(2\)](#) to increase time period from 7 calendar days to 10 business days to give public bodies more time to negotiate disposition after adverse DA/AG order rather than being compelled to file a lawsuit against the requester to preserve its rights.

Commented [LY*P41]: The DAs probably wouldn't have the appetite for this but what about allowing the DAs to have limited continuing jurisdiction to enforce/modify their order based on further negotiation? It might even make sense to extend the time period even further to say—30 days.

VI. EXPAND DA/AG TIME TO ADJUDICATE A PUBLIC RECORDS APPEAL

- Amend ORS [192.411\(1\)](#) and ORS 192.418(1) from 7 calendar days to 15 business days.

Commented [AT*P42]: The feedback about the state of the intermediate appellate process from three District Attorneys at a recent OR DA's Association meeting was that adjudicating these appeals was an unfunded mandate, focused on an area of the law in which DAs lacked expertise, and competed with limited staff and resources when the focus should be on prosecuting cases. One DA suggested they may not be able to continue processing appeals in the 7-day timeframe, creating de facto denials for all appeals. That would shift the burden to requesters and the courts. Extending the time frame to issue an order removes some of that pressure.

VII. ROUND 2 LEGISLATION?

1. Organization and accessibility of records
2. Centralized funding/[state-administered grants](#)
3. Centralized records officers for small public bodies at state and local levels