



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

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

III. FEES

(A) Establishing costs

- 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.

Revision: If we adopt tiers as proposed in section B below, it would be important to note this here. Like this: "...up to the actual cost to search, duplicate and review public records for the purpose of making them available upon request, depending on the request type defined in Section B."

- 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)
- 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?
- No fee to transfer records electronically.
- May charge fee for actual cost of external media (e.g., flash drives).
- 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



(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.

- The public body may close the request after 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.
- 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**
- 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.

Comment: My first choice would be to combine the second and third categories and charge them only for duplication

It takes time and resources for a requester to make the case that a request is in the public interest. It takes time and resources for a public body to agree or disagree. And ultimately it's a highly subjective decision. A public body that wishes to withhold documents can say no without providing a justification, and the requester has no ability to appeal the decision to an independent party. Better to follow the approach taken by states with less revenue than ours (Connecticut, Oklahoma and Kentucky): Limit fees for all non-commercial requests to duplication costs, and create processes for public body relief in onerous cases.

If we instead follow the FOIA model as Todd has proposed, we will have to address the definition of news media, which some committee members say should be narrow. Some journalists have balked at the defining who qualifies in because it resembles a form of government licensing of the press, which runs counter to the First Amendment. But the First Amendment does enshrine "press" as special. Federal FOIA offers one definition of news media [5 USC 552 \(4\)\(A\)\(i\)](#). Oregon's reporter shield law (ORS 44.510 to 44.520) also



[defines news media](#) clearly, and the courts -- for better or worse -- have [interpreted the definition](#) narrowly. There is precedent.

If I cannot persuade my colleagues to support a waiver of search and review costs for all non-commercial requesters, I would propose the following definition of news media under Todd's proposal. "An individual or organization [primarily engaged](#) in the gathering and dissemination of news for the general public." The phrase "primarily engaged in" cuts out non-profits, companies or political groups that publish newsletters for members. "General public" tends to reinforce this. Alternatively, we could simply point to ORS 44.510. Whatever definition we choose will upset someone.

(C) Additional requirements

- For each category of records response preparation (search, duplicate, review) public body must utilize lowest class & comp staff member available capable of processing request.

Add bullet:

- Public body must provide written estimate of costs prior to collecting fees, and estimate must itemize labor hours, number of employees assigned, and pay rates for each activity: search, duplication and review. Where possible, the public body should conduct a test run on a single record to provide realistic estimate of time involved in search. These results should be shared with requester.
- No fee for a public body to provide fee estimate.
- No fee for requester's own files or records.
- 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.
- No fee if routine collection and processing of the fee is likely to equal or exceed the amount of the fee.
- 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.
[Proposed addition: "remove redundant or non-responsive electronic or paper records"](#)
- Expand [ORS 192.329\(4\)](#):
 - (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.

Comment: I continue to believe that recordkeeping/database systems built with disclosure in mind can greatly reduce costs, and the past year has shown widespread support in the PRAC for Transparency by Design principles. Because the committee did



not have time to delve deeply into Transparency by Design legislation but generally supports the concept, I think there’s an opportunity here to advance the cause.

I recommend we propose a Transparency by Design Task Force that would report back to the Legislature by June 2024, in time to draft legislation. The task force would consist of the state Chief Data Officer, the State Archivist, a state IT procurement officer, a city or county IT planner, a person from the tech industry, a civic data representative, a member of the news media and lawmakers from House and Senate chosen by each party. Its mission: “Provide a list of recommendations for legislation, policy changes and innovations in the procurement process that would promote adoption of records management systems and practices that simplify disclosure of public records. The task force is asked for proposals that would, for example:

- Make it easier for requesters to understand the contents of a database;
- Ensure new database systems enable a government layperson to export records as a standard feature, without specialized programming knowledge
- Promote segregation sensitive personal information from disclosable information, both in structured databases and in documents such as email”

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).

(b) 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.

- 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.
- 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).

IV. FEE WAIVERS AND REDUCTIONS

Comment: A major difficulty in Oregon’s current approach to the public interest test is that the public body alone gets to choose: a) what constitutes the public interest and; b) whether the public interest compels a waiver. ORS 192.324(6) does say that a requester may appeal a denial of fee waiver to the DA or AG just as with a denial of access to records. However, the DA and AG lack the authority to compel a fee waiver in the public in the way they can order the disclosure of records. That is because ORS 192.324(5) says a public body “may” provide a waiver if disclosure benefits the public.

Add bullet:



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- Amend ORS 192.324(6) to say that, 192.324(5) notwithstanding, AG or DA shall issue an order of partial or total fee waiver if requester demonstrates that the waiver primarily benefits the public. The AG or DA's determination will weigh the benefits of disclosure against any impact that a fee waiver would have on the delivery of other public services.

Further discussion: This proposal is one way to preserve the public body's discretion at the outset while providing a binding third-party review afterward. An alternative, rather than saying "192.324(5) notwithstanding," would be to also amend 192.324(5) itself. It would repeat the language in the bullet in 192.324(5), saying that the public body "shall" grant fee waiver if granting the waiver primarily benefits the public, after considering both benefits of disclosure and impact on delivery of other public services.

- 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.
- 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%.
- 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.

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.

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.

VII. ROUND 2 LEGISLATION?

All of these seem to have good support on the committee. What if, separate from a legislative concept for LC, we present a report to the Legislature that includes these elements as recommended future actions?



1. Organization and accessibility of records

See my recommendation for a task force above

2. Centralized funding/state-administered grants

I think we could try for this right now. Here are some ideas we could try if there were consensus:

- Require by law or request by policy that DAS and Leg Fiscal include line items for public records processing costs in each state agency budget. Or create a pilot project to do so.
- Remove the “actual cost” limit for fees on commercial requesters, so that public bodies could recoup other costs associated with records management (including answering requests from non-commercial requesters).
- Impose a statewide surcharge on commercial records requests for centralized “Oregon Transparency Fund.” I examined fees collected from title companies, insurers law firms, credit rating agencies and data mining companies by Portland police, the Oregon Judicial Department, the Oregon Corporations Division and Multnomah County Assessor. The total from these sources alone is about \$3.6 million – and many, many more examples exist.
- Dedicate a portion of lottery funds to the Oregon Transparency Fund, through constitutional referral. Just .3% would raise \$2.5 million annually.

3. Centralized records officers for small public bodies at state and local levels

Offering this centralized service coordinated through a state agency is highly desirable. I’d also love to discuss a requirement for public bodies, based on annual request volume or budget size, to be required to employ a full-time records officer.

4. ADDITIONAL RECOMMENDATION: Digitization incentives

We should add as a recommendation to the Legislature that it create a grant program for local governments to digitize paper records and place them online, whether it’s through an Oregon Transparency Fund or separate. This could be administered by the State Archivist. We can note the tremendous reduction in records requests achieved by DEQ.