

ALBERT Todd * PRA

From: Emily Harris <[REDACTED]>
Sent: Thursday, August 25, 2022 8:19 PM
To: ALBERT Todd * PRA
Subject: Fwd: Draft fees bill with all comments incorporated

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From: Kron Michael C <michael.c.kron@doj.state.or.us>
Date: Thu, Aug 25, 2022 at 4:33 PM
Subject: RE: Draft fees bill with all comments incorporated
To: Emily Harris <[REDACTED]>

Emily, apologies if you were hoping to get this earlier. Here's my feedback:

At the core of this document is a transformative proposal that could put to rest many of the complaints we have heard regarding public records fees obstructing transparency in Oregon. It's a proposal worthy of serious consideration and perhaps the endorsement of this subcommittee. That proposal is to allow only limited fees for most public records requests: duplication costs only for those whose requests are made in the public interest; search and duplication costs for other non-commercial requests; and full costs of search, duplication and review only for commercial requests (a category that does not include the press). This is akin to the federal approach, and the subcommittee heard solid arguments for adopting that approach in Oregon.

But this may not address some of the feedback we heard on the agency side especially. For example, if public interest requesters, can be charged only duplication costs, regardless of the nature of a particular request, it may be hard to encourage manageable requests that provide transparency without wasting public resources on fishing expeditions. That something we heard about repeatedly, and other aspects of the proposal (such as the sections that talk about waiving or reducing fees) seem to promote it. Because the cost of reproducing electronic records is likely to be around zero, it is hard to see how the potential to reduce those costs by a further 25% would be an effective incentive. On the other hand, timeliness incentives may work well enough that this doesn't matter. I am not suggesting that we should reject a FOIA model -- just that we still need to have discussion. Another important part of that discussion would be whether a proposal to adopt the FOIA approach is vulnerable to indirect attack through the fiscal impact process, even though from everything we heard it seems highly dubious that any public body is collecting significant fee revenues from public interest requesters.

The document also includes a handful of other proposals that relate directly to fees. It requires at least 25% fee reductions in some circumstances. It floats the idea that some time must be provided to each requester for free, and that a fixed number of pages should be free. It proposes that requesters are entitled to their own files or records at no cost. We should discuss all of these.

Some of those fee ideas are big and some are small. In the way of all of them I see many provisions that seem unrelated. Some of those peripheral suggestions *might* be simple cleanup, but it's hard to predict where that will prove to be true. Some of them look very controversial to me. For example:

- The proposal suggests that public bodies should be required to provide requesters with metadata associated with electronic records. To the extent that metadata is **requested** and not exempt (it is probably rare that metadata would currently be exempt but sometimes it may be), that is already the law. The implication is that public bodies must provide metadata regardless of whether it has been asked for, which would be burdensome and unnecessary.
- The proposal allows public bodies to demand deposits, which currently the statutes do not mention. It conditions the right to collect a deposit on first creating an inventory of public records responsive to the request. I do not recall hearing a single complaint about inappropriate deposit requirements. I would predict that public bodies will think they should be collecting deposits (or that it will be to their advantage to do so) and start creating inventories to justify them. Then they can complain about the burden of creating an inventory no one asked for. In any case it is hard to see how this will improve the public records experience on either side.
- The proposal triples the time for resolving public records appeals. And it also doubles the time for a public body to decide whether to live with a disclosure order. Neither has anything to do with fees. The former change seems unnecessary; in my extensive experience if our office needs more time, requesters always grant it (unsurprising since if we fail to issue an order the petition is treated as denied). As for the latter, it is unclear why a public body would need more than a week to decide whether it will fight a disclosure order. (Current law gives them one week to announce their intention and another week to file.)

Ultimately whether the myriad peripheral changes proposed would be good policy, bad policy, or simply cleanup, each one will require energy we are going to need in order to agree on, and then try to pass, fee reform. My feedback is that we should cull from our discussion draft all of the provisions that do not directly address how much requesters can be required to pay for the public records they request.

(The breadth of the proposals is also inconsistent with the stated desire for a narrow relating clause, although I personally do not think that's important. Messing with the PRAC's bill is not likely to be attractive to many legislators and, if there are enough of them in a single committee to actually accomplish that, I presume there would be good reason.)

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Subject: Draft fees bill with all comments incorporated

Dear PRAC Legislative subcommittee members,

Please find attached the "strawman" draft legislation with all subcommittee members' comments incorporated in the relevant sections.

This has made the document much longer, but hopefully it will also help lead to easier and more focused discussion.

As a reminder, tomorrow's agenda aims to review the calendar for finalizing this proposed legislation, and identifying areas of agreement that we may be able to move forward on already tomorrow.

Many thanks,

Emily

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Emily Harris

she/her

503-320-7862

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