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To: Public Records Advisory Council

Re: Clarifying Public Records Law

Proposal: Add the following provision:

> **192.431 Court authority in reviewing action denying right to inspect public records; docketing; costs and attorney fees.** * * *
>
> (4) "Prevails" includes the following:
>
> a. If the public body sues following an adverse ruling by the Attorney General or District Attorney, then the disclosure of contested records at any time following commencement of the action.
>
> b. If the requester sues to enjoin the withholding of records, then the disclosure of contested records more than 30 days following the date of service of the lawsuit.

Purpose:

Prompt disclosure of public records is paramount.[1] Occasionally, a public official believes other values (personal or public) outweigh prompt disclosure and withholds records. Then, in those rare cases when journalists or citizens can retain a lawyer, a lawsuit ensues.

Public officials have withheld records, fought disclosure in court for months, and only then "voluntarily" disclosed the records just before the judge rules. Public officials have argued that because no judge ordered disclosure, the requestor had not "prevailed" - even though the

[1] Public body must act on a request "as soon as practicable." ORS 192.329(1). Attorney General or District Attorney must decide on a petition to order disclosure within seven days. ORS 192.411 and 192.418. In the circuit court, public records actions "take precedence on the docket over all other causes [except those considered of greater importance] and shall be assigned for hearing and trial at the earliest practicable date and **expedited in every way.**" ORS 192.431(2) (emphasis added).

public body required the requester to hire a lawyer and even though the lawsuit caused disclosure.

"Prevails" is not defined for ORS 192.431(3).[2] Trial judges have interpreted it differently. Some decided that if the lawsuit caused disclosure, then the person "prevailed." That's known as the "catalyst theory:" if the lawsuit was the catalyst for action, then a person should get attorney fees. Somewhat coyly, Oregon's Court of Appeals has noted Oregon has not adopted the catalyst theory, at least not yet, leaving the door open to it in some future case, maybe. As the court awaits legislative guidance, litigation happens over entitlement to attorney fees after disclosure of records because of the statute's ambiguity. And it can be costly. In *Merrick v. City of Portland*, 313 Or App 647 (2021), that ambiguity cost Portland taxpayers $250,000 after Portland lost.

It is time to help everyone by exchanging ambiguity for precision.

Public records lawsuits arise in two ways. First, if the Attorney General or District Attorney rules in favor of the requester, then the public body may appeal by suing in circuit court. Second, if the AG or DA rule in favor of the public body, then the requestor may sue.

The above provision covers both situations.

Clearly, if the public body starts the lawsuit, then it should be responsible for attorney fees if records are later disclosed.

In a lawsuit of <u>any</u> kind, a defendant must respond within 30 days of service. The above proposal gives the public body a choice. Fight the lawsuit or disclose the records. If they fight but disclose later, then the journalist or citizen "prevails," and the public body should and must reimburse the journalist or citizen.

[2] *Upham v. Forster*, 316, Or App 357, 504 P2d 654, 664 (2021) citing, *Merrick v. Portland*, 313 Or App 647, 662, 492 P3d 1085 (2021).

This proposal is precise. "Commencement" of a lawsuit is defined as filing a lawsuit. ORCP 3. Dates of service are also defined by the Oregon Rules of Civil Procedure.

Certainly, this needed legislative clarification will reduce post-disclosure litigation over attorney fees. More importantly, it will lead to faster disclosure and common-sense fairness to ***reimburse journalists and citizens when the public body requires them to hire lawyers***.