STATE OF OREGON

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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)

Chair note: This "REVISION2" updates our working draft after our 9/9/22 meeting.

It includes some draft language based on discussion in the 9/9/22 meeting.

Items agreed to leave out of this proposed legislation are ~~struck out~~ and associated comments removed.

Items agreed to are highlighted in blue and associated comments also removed.

To view any past comment, please see the previous iteration of this document: *Public records cost reform 2023 LC_062122draft-MARKEDUP082522* posted on the PRAC website for our 8/26 meeting.

For items still under discussion (most!), I have tried to insert all comments by members of the subcommittee in the appropriate section, so everyone can see the full scope of responses to a particular idea. Comments are highlighted in yellow with the commentors name in bold. The "general comments" at the top are just that – overarching comments or context offered by subcommittee members. Any specific comments that were submitted with those general comments are separated and inserted in the related place in the document.

Tyler general comment: *Before proceeding, I'll offer the standard caveat that AOC's voting membership (county commissioners, judges, and chairs) carefully reviews the final language of any legislative proposal before taking a position. With that in mind, I've done my best as a PRAC member to offer the following feedback using my county expertise to outline where I think we can achieve unanimous agreement. As I mentioned at our last meeting, I believe the PRAC should focus where we have unanimous consent to both bolster our credibility as an advisory body and ensure that we aren't moving so fast as to enable unintended consequences.*

Emily G general comment: *I am summarizing my concerns and suggestions regarding the proposed reforms to Chapter 192 below. As a representative for public employees, the proposed changes affect public employees who perform the work of responding to public records requests, including workload and resource allocation of public bodies, the costs for records for public employees' labor representatives who request records on behalf of public employees, and affects public employees through the release of their own information. Governmental transparency and access to public records is critically important for the benefit of the public, but I have several*

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*concerns regarding the impacts of the proposed expansions of fee waivers which I will outline below: [**Chair note: these are in document, attributed to Emily Gotthard, in relevant places.]***

***Michael general comment:** 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. [**Chair note: examples listed have been moved to relevant parts of the document, attributed to Michael.]** 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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Steve general comment: *What would happen to Oregon without public records fees? Please see Analysis: Cost of eliminating fees.* ***[Chair note: posted on PRAC site connected to the leg subcommittee 8/26 meeting)***

I. LC/BILL: needs narrow relating clause

II. GOALS

Chair comment: *Goals we're striving to meet with this legislation – understanding any goals are for guidance rather than proposed statute language – should track back to the concerns discussion document that was thoroughly vetted through discussion.*

- Reduce costs for requesters;
- Preserve the ability of public bodies to charge fees and determine when to offer fee waivers or reductions;

Tyler comment*: Add emphasis*

- 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.

Staff time shall be calculated at the staff person's regular hourly rate of pay without consideration of the public body's other employment-related costs, including but not limited to payroll taxes and employee benefits.

Todd comments*: "Up to the actual cost" 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 public records law to be transferred to requesters. Specific categories for fees eliminate confusion over what may be charged as "actual cost", reins in excessive costs for other actions taken by public body to provide records, and standardizes the framework for all public bodies under which "up to actual costs" may be recouped.*

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."
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 format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format."*
Review *as defined in FOIA, p. 50: "means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. It also includes processing any record for disclosure—for example, doing all that is necessary to redact it and prepare it for disclosure. Review costs are recoverable even if a record ultimately is not disclosed. Review time includes time spent considering any formal objection to disclosure made by a business submitter under §304.7 but does not include time spent resolving general legal or policy issues regarding the application of exemptions."*
Steve comment: *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."*
Tyler comment: *Likely county support in 2023 for defining what costs are recoupable as "search, duplication and review" – akin to an itemized receipt, will help eliminate egregious unreasonable fees.*

- 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)

Todd comment*: Already pretty standard amongst many public bodies and incentives narrower requests while giving the public bodies the ability to consider other requests from the same requester over a prescribed period when determining how much time to waive on their combined requests overall.*
Emily H comment*: is the time waiver for search and review, or duplication? Or both?*
Emily H comment*: if combining requestors requests to consider as one request for the purpose of fees is designed to incentivize narrower requests, I suggest we spell that intent out. (may be other places to spell that out too.)*
Emily H comment: *Do we have any data of how frequent the practice of multiple requests over days is? Would this be the right situation to turn to a panel such as Connecticut has in place for imposing a consequence – could be temporarily losing right to request, could be delays in fulfilling, could be full payment – for documented harassing or vexatious behavior by requestors?*

Another alternative: Illinois does not have such a panel, but combines requests when they reach a generous threshold. The consequence is allowing agencies more time to respond; does not affect fees: Illinois Section 2(g) of FOIA defines a recurrent requester" as a person that, in the 12 months immediately preceding the request in question, has submitted to the same public body: (i) a minimum of 50 requests for records; (ii) a minimum of 15 requests for records within a 30-

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day period; or (iii) a minimum of 7 requests for records within a 7-day period. However, this provision specifically excludes requests from members of the "news media." Label gives government more time to respond. In Illinois, the Public Access Counselor makes the determination when a requestor says they are media *and the agency disagrees.*

https://www.jdsupra.com/legalnews/the-expanding-definition-of-news-media-25357/

The PAC in Illinois is slightly different from our PRA: The Public Access Counselor (PAC) is a part of the Office of the Attorney General. Working under the direction and supervision of the Attorney General and with a team of attorneys and professional staff, the Public Access Counselor's mission is to help people obtain public documents and access public meetings.

- 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)

***Todd comment**: Also not an uncommon practice, further incentives smaller requests, provides ability of public body to add up recent requests, and eliminates the practice of spending money/resources to recoup fees that probably cost less than the time it took to collect those fees..*
***Scott comment:** Not sure how many paper copy requests cities receive* anymore *– everything is digital and not sure this is needed, especially when the point above it (waiving first 30 minutes) is noted.*
***Emily H comment**: Unclear what the pages refers to. Are there gov bodies that charge per page? Even electronic pages? We heard from some bodies that charge ie per report. Would this affect that? Or would be considered duplication? Which, if we adopt the tiers, is the only thing media/public interest would be charged for. Would having fees charging both for pages and time actually be charging twice, since electronic duplication takes very little time?*
***Emily G comment**: The dramatic expansion of cost waivers (the first 30 minutes / first 100 pages per 30 days) could dramatically increase public records requests without funding or staffing to support this work. This is a concern for both small government agencies and larger state agencies that already have a large volume of public records requests. The proposal also seeks to eliminate fees if a public body exceeds 15 business days to complete a request unless the public body has communicated an updated time estimate to the requester.[Chair note: this is in section (C) Additional requirements] If public employees are overwhelmed and not adequately staffed to process these requests, we cannot expect communications with requesters to be more accurate or timely or for requests to be processed quickly. I am concerned these proposed fee waivers will negatively impact already understaffed public bodies and delay access to records by requesters.*

- 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?

***Todd comment**: The law is currently agnostic on this, which leads to differing outcomes in fees for the same record depending on how the public body calculates its staff time. However, as per the FOIA, p. 49: "'Direct costs' means those expenses that an agency actually incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost*

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of operating duplication machinery. Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept."

Scott comment: *I think cities use different "billable wage" equations that do and do not include benefits in the salary amount. Having some clarification would help.*

Emily H comment: *benefits in particular could use specific definitions. Would a person requesting a public record for example be expected to pick up the fraction cost of an EAP program for ie one person for one hour? Or the taxpayer PERS contribution for that employee?*

Emily H comment: *perhaps this language from "other requirements" below belongs here: "For each category of records response preparation (search, duplicate, review) public body must utilize lowest class & comp staff member available capable of processing request."*

Tyler comment: *One of largest county area of concern/statutorily defining a universal hourly rate-counties have wildly different budgets and professionals.*

Emily H comment *irt Tyler: Do you mean a universal dollar figure, or a universal equation?*

- 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:

Todd comment*: All too often public bodies demand that all requesters pay in full at the time a fee estimate is accepted by the requester, rather than determining who should pay, and how much, when a fee estimate is provided but before records are available to be disclosed. Factors that could be considered on a case-by-case basis include the complexity of a request and a requester's payment history. Payments for fees – including in full – are generally demanded at the time a fee estimate is provided and before a public body will proceed with gathering and disclosing records.*
Scott comment*: I think it's common among cities to require 50% down payment, which may just be easier math, but I would argue for a not to exceed 50% deposit here. It puts a little more weight into the request before staff spends time on it – especially those that end up being pretty big workload impacts it's nice to know the request is real. See noted above – I think most cities only required a 50% down payment.*
Yufeng comment*: I thought most public bodies required payment of their estimate up front? Would this be a bar to that? Some DA opinions have even found denial of fee waiver reasonable because the requesters could not demonstrate that the fee impedes the public interest because they already paid in full and were appealing on principle. Which is a Catch-22 for requesters, of course.*
Scott comment: *Most cities do not charge for requests, so we're talking about the few that are charged for… and then most cities don't require full payment up front, just half and then full payment before the records are released.*
Emily H comment*: Presuming Scott is right (data?) outliers do create real problems. Similar to "vexatious"requestors.*

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***Tyler comment**: Needs more work/Determining an appropriate deposit amount and a backfill for dropped requests. State fund?*
***Michael K comment**: 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.*
***Emily H comment**: Please see SPJ collected examples of fees.**[Posted as Public Comment 1 on the subcommittee's 8/5/22 meeting]**. In one example, a public body estimated $810 fee. The news outlet paid just to get a specific estimate, which came back double. Another example shows a fee estimates for tens of thousands of dollars – after the public body changed their policy and stopped their previous practice of pro-actively posting the records. 50% of $33,000 is a lot. For some news outlets, that could buy a reporter's fulltime services for at least several months.*
***Emily G comment:** The proposed limit on deposits (25% of the estimated cost) will require public employees to perform work to prepare responses to public records requests that may never be paid for, limiting the resources of public bodies to perform other essential work. Limiting public bodies' ability to collect the full cost of fulfilling the request also requires processing more than one payment and additional communication and collection efforts by public employees, increasing the amount of work expended to fulfill the request.*

(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.

Todd comment**: (1) and (2) are already required by ORS 192.329(2)(b)* ***192.329 Public body's response to public records request.

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

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

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

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

***Steve comment:** 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.*

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- 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.

Todd comment: *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.*
Scott comment: *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?*
Emily H comment: *I think "what the information is going to be used for" may be different from determining a commercial interest. Commercial is also the default category if you can't show a public interest, a media role, or – perhaps – an individual getting own records. This does raise a good point though, because giving a public body the responsibility to determine whether a request is in the public interest basically requires them to ask how will you use this specific information, which I also have understood not to be the intent of transparency laws. Using categories could eliminate that friction point.*

  - Media, public interest (affects community, requester has platform to disseminate), educational, non-commercial scientific institution: duplication.

Todd comment: *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 to be charged under this cost tier if they can meet the pre-existing criteria for in the public interest (e.g. they are seeking records relevant to an affected community and have platform to disseminate it).*

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Another option is to define media somewhat in line with the FOIA, p. 49: "'Representative of the news media,' or 'news-media requester,' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. For this purpose, the term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the agency may also consider the past publication record of the requester in making such a determination. To qualify under this category, a requester must not be seeking the requested records for a commercial use. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use."

***Emily H comment:** asking a public body to decide who is a member of the media on a case by case basis would be a challenge, likely vary significantly from body to body, and could create a new friction point rather than eliminate one. Doing something like that would potentially need very specific guidelines, possibly not the best type of thing to enshrine in law due to the rapidly changing methods of disseminating and getting information.*

***Emily H comment:** FOIA language: in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.*

- General: search and duplication.
  - However, may only charge up to the actual cost of duplication for in-person inspection of records.

***Steve 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 noncommercial requests to duplication costs, and create processes for public body relief in onerous cases.

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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.
[CHAIR NOTE FOR REFERENCE: 510: "Medium of communication" has its ordinary meaning and includes, but is not limited to, any newspaper, magazine or other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system
520: person connected with, employed by or engaged in any medium of communication to the public]

Steve comment continued: *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.*
Emily H comment: *One way to help with the subjectiveness of individual agencies evaluating the public interest of a request is to include a requirement to explain why a request was deemed not in the public interest when records are denied on those grounds.*
Emily G comment: *The proposed requesting tiers are not clearly defined and would use taxpayer funds to subsidize requests which are not made in the public interest. The proposal limits requests by "Media, public interest (affects community, requester has platform to disseminate), educational, non-commercial scientific institution" to be charged costs only for duplication of records and not for search or review, which comprise the majority of the time and expense associated with fulfilling requests. As noted above, I have concerns that by providing such substantial fee waivers that public employees will be inadequately staffed to process these requests in addition to the essential work the public body is tasked to perform and that such an expansion would actually harm the public and further delay access to requested public records. I believe it is important for such waivers of search and review fees, which are subsidizing requests using taxpayer funds, to meet a public interest requirement. A broad exemption of search and review fees for the media, where media is not defined but is also problematic to define, would open the door for abuse and taxpayer funding for requests that serve no benefit to the public. Many public employees have also expressed concerns regarding their information being disclosed through public records requests and used in a way that at worst, could risk their personal safety for workers like child welfare workers who could be targeted because of their work or workers who have personal safety concerns related to interpersonal violence. While the PRAC is not tasked with reviewing exemptions to public disclosure, proposals which*

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would provide taxpayer subsidization to entities to request and potentially disseminate large databases of public employee information do create concerns for public employees and the proposal as currently drafted would not even require that the subsidization of these requests be based on demonstrating a benefit to the public.

(C) Additional requirements

For each step ~~category~~ of records response preparation (~~search, duplicate, review~~) public body ~~**must utilize**~~ **may not charge more than the lowest hourly rate of** staff member ~~available~~ capable of processing request. *Needs clarification that if lowest class/comp employee (does staff member unintentionally eliminate contractors?) capable of doing the task is unavailable, and higher compensated employee does the task, the agency is still permitted to charge only at the lower rate.*

~~Staff time shall be calculated at the staff person's regular hourly rate of pay without consideration of the public body's other employment-related costs, including but not limited to payroll taxes and employee benefits.~~ For public bodies that are staffed only by unpaid volunteers, they may establish ~~fees reasonably…If only unpaid volunteers are available used available or necessary to respond to requests for public records, the public body may establish~~ a fee for the time spent by such volunteer at an hourly rate not to exceed the then-applicable local minimum hourly wage. ~~in the state of Oregon.~~ (reiterate here the law about attorneys/review but not consultations?)

- No fee for a public body to provide fee estimate.
- No fee for requester's own files or records.

Todd comment: *Up to a certain limit?*
Tyler comment: *Needs more work/Defining what personal records we're talking about when we discuss automatic granting of an individual's own information-police records? Medical examiner? We already charge fees for birth certificates, etc.*
Emily H comment: *fwiw, birth certificates are not a great mode for accessibile records. Oregon charges individuals seeking their own birth certificate differently depending on how the request is made: by internet, phone or snail mail. Search is charged whether or not responsive records turn up. Separate flat fees are charged for both search and duplication. There is no clear relationship to time involved. There is a significant charge for each copy, and requestors appear to be charged again for the same search if they want to order more copies later.*
https://www.oregon.gov/oha/ph/birthdeathcertificates/getvitalrecords/pages/index.aspx
Emily G comment: *The provision of public records which relate to the requester at no cost up to a reasonable limit serves the public interest. The proposal includes that no fee should be charged for a requester's own files or records, with a comment questioning if this should be up to a certain limit. I support the proposal that public records pertaining to the requester, or their representative, should include a fee waiver. It would be impossible to attempt to list the myriad reasons people may need their own public records and my*

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examples are not intended to encompass them all, but public records can be needed for victims of crime, individuals who are injured, and public employees themselves often request records, or request records through their attorney or labor representative, related to employment-related disputes. While it may be necessary to limit such fee waivers to a certain amount of time even for records pertaining to the requester, it is in the public interest for fees not to act as a barrier for individuals to be able to access these important public 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.

Todd comment: *This is to incentive public bodies to communicate more readily with requesters and eliminate most mysteries around delays.*
Scott comment*: This is probably what will concern many cities the most, although I don't think most of the cities run afoul of this requirement.*
Emily H comment: *communication is really useful to incentivize. Unfortunately, sending an email saying it will take longer doesn't really incentivize the type of communication we're really interested in seeing – which is requestors and custodians working to narrow overly burdensome requests.*

- No fee if routine collection and processing of the fee is likely to equal or exceed the amount of the fee.

Todd comment*: Taking this from FOIA. In other words, if there is a fee for $25 but it would cost the public body $50 in staff time and resources to collect it, then the public body may not do so.*
Yufeng and Scott comment: *Needs clarification/not sure what this means.*
Todd comment: *Or simply no fee if below x ($25?) amount?*
Scott comment*: That makes more sense, but wouldn't that almost be remedied by the first 30 minutes or 100 pages free rule?*
Emily H comment*: It does seem that we could clear up the time/pages/base fees and streamline.It certainly makes sense that a public body wouldn't charge for something if it costs them more to get the money than the money they'd receive.*

- 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.

Yufeng comment*: I think the effort to go through a trove of documents and dedupe may actually increase cost? I'm envisioning a public body with paper files that would need to have staff sift and dedupe versus send the entire trove. Not sure what the incentive to public body to dedupe would be?*
Scott comment*: 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 – that would be cumbersome and a city would not be likely to spend time doing that – we'd just release them.*
Todd comment: *Adding only for electronic records to try and ameliorate such concerns.*
Steve comment*: Proposed addition: "remove redundant or non-responsive electronic or paper records"*
Emily H comment: *An example would be helpful to evaluate this; also how often this comes up.*

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- 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.

Scott comment: *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.*
Emily H comment: *Agree, we shouldn't mandate something like this if the requestor or the custodian doesn't want it; rather we should make clear that it is helpful for both sides (if you provide a data dictionary; you eliminate a lot of follow up questions and help the records be accurately understood) and a completely legitimate up front request that must be fulfilled and probably shouldn't be considered as a separate request. Perhaps words like "upon request" instead of "where applicable" or "obligated to"? Also, recognizing these types of requests are frequent and do have specific characteristics, perhaps this approach of providing information that will help records be accurately understood should not just be tied these types of requests.*
Michael K comment: *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.*
Steve 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"

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(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.

Emily H comment: *Clarify type of days? noting that 60 days is roughly 2 months and 60 business days roughly 3.*

- Expand ORS 192.324(7) to include that a public body must post their public records policy on their website if they have one~~, in another public manner if they don't~~,and if not, **posted in a publicly available space ~~at a physical location open and available to the public~~ if such a space is available, and made available upon request, ~~including in response to public records requests~~**. Add that a public body is not permitted to recoup costs from a requester if the amounts of and the manner of calculating fees is not in policy and policy is not posted. Include education grace period.

[CHAIR NOTE FOR REFERENCE: Current language of ORS192.324(7): A public body shall make available to the public a written procedure for making public records requests that includes:
(a) The name of one or more individuals within the public body to whom public records requests may be sent, with addresses; and
(b) The amounts of and the manner of calculating fees that the public body charges for responding to requests for public records. CHAIR NOTE ENDS]

- 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).

Emily H comment: *If a requestor wanted to appeal this, ie there was a dispute about whether the parties acted good faith would that go through the current DA process?*

IV. FEE WAIVERS AND REDUCTIONS

Steve 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:*
-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.

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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
Tyler comment: One of largest county area of concern/proposing fee waivers with no accompanying backfill for requestees

- 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.

Emily H comment: *Is this suggesting that the law would list examples, ie as part of (3) below? Such as financial hardship, or receiving government assistance.?*

- 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%.

Todd comment re (3) *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.*
Emily H comment: *Is there an opportunity to incentivize the development of consistent professional records management skills, and recognition of that through a certificate or professional skills add on?*

Emily H comment: *I believe there are examples of 40% reduction of fees in media/public interests that have been working well.*

- 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

Yufeng comment: *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?*
Todd comment*: Perhaps based on cost and/or time?*
Emily H comment: *It does seem we'd want to avoid specific definitions of narrow in law. We've heard that many agencies handle a great many requests, including complex, with speed and accuracy. Also, would this be a good place to reiterate incentives for requestors/custodians to work together?*

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- 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? (or companion bill?)

Steve comment: *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

Steve comment*: See my recommendation for a task force above*

2. Centralized funding/state-administered grants

Steve comment: *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

Steve comment*: 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.*

Steve comment: *Add 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*

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Fund or separate. This could be administered by the State Archivist. We can note the tremendous reduction in records requests achieved by DEQ.