

Public Records Advisory Council
Meeting Agenda
July 31, 2018, 1 p.m. – 4 p.m.
Oregon State Archives Building
800 Summer Street NE
Salem, OR 97304

- 1:00 Introduction
- 1:05 Updates by the Public Records Advocate
1. Trainings
 2. Deputy Hiring
 3. Mediations/Dispute Resolution
 4. Research Project for Sunshine Committee
 5. Meet & Greets and Other Public Outreach
- 1:35 Feedback from PRAC on updates, etc.
- 2:00 Break
- 2:10 Possible Legislative Concepts
1. Reporting Requirements
 2. Fee Issues
 3. Legislative Fixes for Public Records Advocate Office
- 3:10 Administrative Rules
- 3:30 Public Comment
- 3:45 Concluding Remarks

Public Records Advisory Council
Meeting Minutes
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Attendees:

Ginger McCall, Public Records Advocate, State of Oregon
Mary Beth Herkert, Secretary of State, Archives Division
Michael Kron, Dept. of Justice, Attorney General's Office
Steve Suo, Oregonian (news media)
Lee van der Voo, Investigate West, (news media)
Scott Winkels, League of Oregon Cities, (representative of the cities)
Rob Bovett, Association of Oregon Counties, (representative of the counties)
Mark Landauer, special districts, (representative of the special districts)
Lee van der Voo, Investigate West, (news media)
Les Zaitz, Malheur Enterprise, (news media)
Elizabeth Craig, Department of Administrative Services
Sen. Kim Thatcher,
Richa Poudyal, representing Rep. Karin Power – called in

Not present:

Matt Shelby, Department of Administrative Services
Tony Hernandez, (public member)
Shirin Khosravi, SEIU, (public sector workforce)
Stephanie Clark, Secretary of State, Archives Division (support for council meeting)

I. Introduction

Ginger McCall, as chair of the council, will permit public comment at the conclusion of each section of the agenda.

II. Updates by the Public Records Advocate

1. Trainings

Ginger McCall has been providing government trainings all over the state in Newport, McMinnville, Burns, Vale, Pendleton, Baker City, the Dalles and Redmond. Future trainings in Portland, Salem and Lebanon.

Public trainings have started in the Dalles and Hood River. Hoping to do future trainings in Salem and Portland. Ginger has heard about specific issues with school boards and districts. Have also heard complaints about elected officials and police. Ginger will reach out to those particular groups and tailor trainings specifically to their needs.

2. Deputy Hiring

Ginger McCall reported that there are six candidates. They will be interviewing on August 2nd and August 8th. Ginger hopes to have a deputy in place by the next meeting. Mary Beth Herkert and Emily Matasar (Governor's Office) will assist with that.

3. Mediations/Dispute Resolution

Ginger McCall reported that there have been twenty two requests for assistance so far. Some were requests from individuals about state agencies that could be mediated under the law. Some are requests that probably could not be mediated, including a fair number of complaints about elected officials, school districts, cities and counties. Have been doing informal dispute resolution in these situations and tailoring model of assistance accordingly. Have had some success just giving the government body a call, explaining about the office, and having a conversation about the complaint and status of request. In other instances, calls were about how to make a request or a fee reduction or waiver. Most complaints have been about fee reductions or waivers. Pretty much all of those requests have been resolved but receiving new requests every day.

5:57 Comment regarding Ginger McCall doing a lot of traveling. Question regarding whether the office has the budget to maintain that type of activity. Same person also commented regarding a number of annual conferences that take place – like the Oregon Chiefs of Police or Fire, school boards, etc. – where presentations could be given with “more bang for your travel buck”. It would be a good idea to attend on an annual basis and remind people of the public record statutes. Ginger McCall responded that she is sensitive to the budget concerns so one measure she put into place is to travel with records retention staff to split costs. Also, Ginger McCall will be presenting at the OAMR conference in September and has met with the District Attorneys when they were all meeting in Bend. In addition, she would appreciate an email about particular organizations that . . . had in mind. Mary Beth commented that Ginger McCall would piggyback on a lot of the conferences mentioned that her staff attend.

8:35 Question regarding whether Ginger McCall will prepare a general summary of general feedback, concerns and complaints the office is receiving at meet-and-greets and trainings because want to adjust public records training section for elected officials.

4. Research Project for Sunshine Committee

Ginger McCall has volunteered to do a research project regarding exemptions related to employees' personal information. The Office will prepare a report and submit it to the Sunshine Committee.

Sen. Thatcher asked a question regarding whether someone is considering where the line is between personal information. Thinking need to differentiate between line of government and this kind of information. Ginger McCall responded that the Sunshine Committee is looking at this broadly. Perhaps may be additional project to do in the future. Keeping it fairly finite currently so there could be quick turnaround to committee. Michael Kron responded that it will start with exemptions for addresses but it will be broader. Starting at next meeting will be taking public testimony on dates of birth and similar categories of information.

Michael Kron asked Ginger McCall about how informal dispute resolution is going. Ginger McCall responded that it is going well. There are instances where cannot get requester everything they are seeking, i.e., when they do not have a strong legal basis for a fee waiver. Also received requests from government entities without requests for intervention with requestor. In general, outcomes have been fairly positive. If working with a reporter, who has a question about exemptions or fee waivers, will work with them to craft request. Most government entities are fairly responsive to the office.

14:21 Question to Michael Kron asking if there has been a change in types of appellate requests being received by his office. Michael Kron responded that he does not have any data to suggest causation but thought the other day he was receiving fewer petitions.

5. Meet & Greets and Other Public Outreach

Ginger McCall reported that she had done a fair number of groups in the public, especially the news media. Has met with the Oregon Society of Professional Journalists, the Bend Bulletin, the Oregonian, and a variety of others in the Portland news media that came to a meet-and-greet there. Has done public trainings and a total of five or six meet-and-greets, including one online session permitting remote access. Received useful feedback about outstanding issues.

Ginger McCall announced that she is anticipating maternity leave and to be out four to six weeks. There should be a deputy in place by then who can cover things.

Question from Les Zaitz inquiring if there are areas of the law that can be improved. Ginger McCall replied that there are areas that can be clearer under a longer term legislative change project, including fees, fee waivers and reductions, and deadlines under the statute.

III. Feedback from PRAC on updates, etc.

Question regarding Ginger McCall's previous comment about assisting people with crafting legal arguments. Ginger McCall responded crafting arguments for how they might get a fee waiver or reduction – approaching how to make a good argument for a public interest under an exemption.

Question about whether there have been questions from any government entity regarding public interest and the balance. Ginger McCall responded that the office has had some questions about fee reductions and waivers, deadlines and how to interpret them. Questions included whether someone should qualify for reductions and when timeline starts to run. Comment that it would be helpful to have accounting of the types of questions received because it may be instructive in future discussions. Ginger McCall responded that she keeps a spreadsheet of requests and could provide that information. Spreadsheet tracks who made the request for assistance, what organization they are affiliated with (governmental or non-governmental), date received, the date completed, what the issue was, steps taken by the office, and ultimate outcome. Anecdotally, most requests received so far have been from reporters, reflecting need for further outreach, including suggested idea of op-eds in newspaper.

A member of the public asked a question about what is the timeline for an agency to respond to a public records response. Ginger McCall responded that an agency has five business days to

acknowledge a request, and then an additional ten days to respond or at least provide an estimated date of completion. Ginger McCall replied that the clock stops when the agency reaches out to a requestor for additional information until the requestor replies.

Sen. Thatcher commented that an agency could abuse the timeline by asking for additional information. Ginger McCall responded that she is aware of this issue and it is something that could possibly be addressed in legislation. Michael Kron responded that there is a good faith requirement in the law. Commented that in his experience people are not trying to game the system. Ginger McCall commented that informal dispute resolution could be helpful on this issue.

A member of the public asked whether concerns from requestors are primarily from state agencies or more local categories. Ginger McCall responded that most requests are about local governments, especially elected officials.

A discussion ensued amongst committee members about various conferences the Public Records Advocate may wish to attend.

IV. Discussion of Department of Administrative Services (DAS) fee schedule

Copy of statewide policy was sent out via email. Distributed comments from the Oregon Society of Professional Journalists that morning.

Liz Craig commented that she was on the workgroup that helped develop some of DAS's new policies. In 2015, in response to the Secretary of State's audit on records management, a governor's executive order came out directing DAS to carry out all of the recommendations that were in the audit. DAS established a project team and first worked on a records management policy, covering everything from ownership and access, to training, to how to deal with electronic records and text messages, etc. That was adopted as a statewide policy and all state agencies were supposed to adopt an internal policy based on the policy and file it with the Secretary of State's office. The second piece of work was to look at the lack of a fee structure across the executive branch. The group found variation in when agencies were charging and how they were charging. The goal was to limit variation in fees and develop methodology for evaluating fee reductions and waivers. Representatives from nine agencies audited, plus about eight others who have complexity with records management in their agencies, and plotted out what everyone was doing. The group tried to come up with something that was an average of all that and fair. The goal was never that agencies would have to increase fees to meet schedule and that the schedule would be a ceiling; agencies were free to charge less than the established fee structure. The policy was adopted one and a half years ago. The intent was to put it through formal rule making. A member of the public commented that DAS's FAQs are helpful on this. Because waiting to go to the formal rule making process, it is unknown if agencies have adopted internal rules yet. Agencies were asked to use the new fee structure for ninety days to log everything about the request.

Comments from Nick Budnick of the Oregon Society for Professional Journalists summarizing his organization's written comments about DAS's policy. Mr. Kron suggested adding provisions to the policy that nothing in the policy is intended to require or encourage agencies to charge for

requests. Mary Beth Herkert suggested adding language that emphasizes that agencies should communicate with requesters and clarifies that these are the maximum charges that agencies can levy. Les Zaitz suggested adding language that says that agencies can choose to not charge and that these are the maximum charges that can be levied. Another member suggested that DAS indicate on the document that this policy is still in draft format. Ginger McCall agreed with Mary Beth's comment that the policy should emphasize communication and also offered up another model for fees under the Federal Freedom of Information Act. Ms. McCall emphasized the importance of creating a presumption that media requesters will have reduced or waived fees. Michael Kron suggested further guidance on when to waive as opposed to just reduce fees. Ms. McCall agreed that the fee reduction of 20% is perhaps too low. Members discussed what the standard is and should be. Rob Bovett suggested that automatic waiver be granted for requests that take an hour or less. He also raised the issue of who should qualify as a news media requester for fee reduction/waiver purposes. The group then discussed this. Another member suggested clarification regarding what is in the public interest and suggested review of previous work on this topic. Les Zaitz revisited the issue of a presumptive waiver/reduction for news media. The members then discussed this, including a discussion of the ambiguities of the public interest test included in the current statute/policy. Steve Suo summarized the Freedom of Information Act's comparatively simpler guidance. Ginger McCall suggested that the policy include examples of public interest situations. Michael Kron asked questions regarding what kind of requesters qualify for reduced fees under the Freedom of Information Act, Ginger McCall replied. Members discussed this further. Mark Landauer pointed out that this policy doesn't apply to local entities and hence, this would create separate rules regarding state agencies and local entities. Members discussed this. Members also discussed adopting Freedom of Information Act style favored fee categories, weighing costs and benefits – including the usefulness of fees to encourage narrow requests and the relative simplicity of the Freedom of Information Act's guidelines. Liz Craig replied that further discussion is necessary, and should perhaps be added to the next council meeting agenda.

V. Break

The committee took a ten minute break.

VI. Possible Legislative Concepts

1. Reporting Requirements

Ginger McCall restated reported concerns about potential for reporting slowing request process. Instead, perhaps a narrow reporting requirement provision, included in handout, requiring annual reporting on:

- (1) The number of requests state agency has not succeeded in fulfilling within the fifteen day statutory time period;
- (2) The number of requests state agency has not completed its response within sixty calendar days;
- (3) Number of requests for fee waivers or reductions the state agency has denied; and
- (4) A complete list of all statutes, regulations, or administrative rules that the state agency has relied upon to authorize the agency to withhold information and the number of occasions upon which each was relied upon.

The Council discussed whether monetary amounts of various categories of data collected should be included, such as total cost of records assessed in instance where a fee waiver or reduction was requested and denied. Ginger McCall summarized proposals on the table for revisions:

- (1) State agencies report the number of requests received pursuant to agency's public records policies;
- (2) State agencies report the number of requests received pursuant to the agency's public records policies for which the agency has not completed within the fifteen day time period included in the statute; and
- (3) Some proposals for adding in the total value of fees assessed in instances where the fee reduction or waiver was requested and denied.

A vote of the Council followed on the proposals. The vote was held as follows:

- (1) To require annual reporting on the number of records requests received pursuant to the agency's public records policy.
Moved to a vote by Ginger McCall. Vote seconded. No objections. Vote unanimous.
- (2) The number of requests received pursuant to the agency's public records policy for which the agency has not completed its response within the fifteen business day timeframe included in section 192.329(5)(a).
Moved to a vote by Michael Kron. Vote seconded by Les Zaitz. Vote unanimous.
- (3) The number of requests received pursuant to the agency's public records policy for which the agency has not completed its response within sixty calendar days.
Moved to a vote and seconded. Vote unanimous.
- (4) A discussion ensued by the Council about how to include the collection of fees issue. It was agreed that this issue would be tabled until the next meeting.
- (5) Record the number of fee waivers collected and denied.
Moved to a vote by Michael Kron. Vote seconded. Vote unanimous.
- (6) A discussion ensued by the Council about ensuring that the relating clause of the bill was narrowly tailored, including the definition of state agency, to protect the bill from unintended amendments. Also, that a second bill was required to continue the PRAC beyond its current sunset deadline in 2020.
- (7) A complete list of all the statutes, regulation or administrative rules that the agency relies upon to authorize the agency to withhold information and the number of occasions on which each statute was relied upon.
Moved to a vote seconded. Eleven in favor. Two opposed. Upon further discussion by the Council, this proposal was tabled for later discussion.

2. Fee Issues

Tabled for further discussion due to time constraints.

3. Legislative Fixes for Public Records Advocate Office

A member of the public commented on the facilitated dispute resolution aspect of the office and its relationship to the definition of "state agency". Under the current legislation, mediation services could be provided to the executive, legislative and judicial branch. Also, all judges, courts, legislator and legislative body would have to report on public records requests. It applies to many that are not traditionally thought of as a "state agency". The present definition of ORS 192.005(6) does not include the Legislative Assembly when it is in session. A discussion by the

Council ensued regarding whether the Public Records Advocate could conduct dispute resolution for the Legislative Assembly, the Judicial Department, and judges. Further discussion was tabled for the next meeting due to time constraints.

VII. Administrative Rules

Ginger McCall does not believe there will be a fiscal impact of the administrative rules but she is required to address this issue with the PRAC. The Council discussed proposed amendments, any potential impacts on local governments or small businesses, and a notice rule. 2:53:10 Moved to a vote by . Vote seconded by Les Zaitz. Vote unanimous.

VIII. Concluding Remarks

Ginger McCall commented that an October date was necessary for the next meeting.

Next Meeting Date

October 10, 2018, 1:00 pm – 4:00 pm, State Archived Building, 800 Summer St. NE, Salem, OR.

For more information on the council: <http://sos.oregon.gov/archives/Pages/public-records-advisory.aspx>

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