

To: Public Records Advisory Council (“PRAC”)
From: Becky Chiao, Public Records Advocate Nominee, pending Senate confirmation
Date: September 14, 2020
Re: PRAC Independence Legislative Concept

Summary: My overall suggestion is that PRAC advance a bill that provides clarity to the current law establishing the Public Records Advocate and the Public Records Advisory Council, but not attempt to create and fund an independent state agency at this time.

Goals:

- Strengthen Public Records Advocate’s independence
- Sustain office operations during time of budget cuts
- Clarify role of the Public Records Advisory Council

Assumptions:

- All stakeholders are committed to supporting a Public Records Advocate who exercises independent judgment in the furtherance of the office’s mission.
- An independent Public Records Advocate will still need to report to a manager of some sort, and the current proposal puts the PRAC in that role.
- There is no agency independent of one of the three branches of government that does not have an independent source of funding.
- PRAC currently has no plan for funding an independent state agency.
- Seeking a General Fund appropriation for the office or moving to an assessment model with funding from state agencies, cities, counties, and special districts will force the office to compete for scarce resources and divert attention from the core mission of the office.
- An executive office with DAS funding and administrative support is powerful by virtue of its connection to the Governor, head of the executive branch.

Section by Section Analysis

The following are my thoughts regarding the specific language to amend ORS 192.461, 481, and 483 adopted by PRAC in June of this year. I’ve broken down the proposed amendments to into sections A-H: A) Independence, B) Advocate appointment and removal, C) Advocate employment status, D) Exemption from state employment rules, E) State Archivist language, F) PRAC, G) Council Records, and H) Ratification clause and effective date.

A. Current PRAC Language regarding independence

SECTION 1. ORS 192.461 is amended to read: 192.461. (1) The office of the Public Records Advocate is created. **The Public Records Advocate shall be separate and independent from any other state agency.**

BC Proposal--Leave the same, if this language is compatible with support for the office from DAS and SOS. If not, I propose the following:

SECTION 1. ORS 192.461 is amended to read: 192.461. (1) The office of the Public Records Advocate is created. **The duties of the Public Records Advocate shall be carried out in an independent and impartial manner.**

Reasoning: I do not think the office benefits from losing the funding and administrative support of the Governor's office and the Secretary of State. The PRAC's proposal to assume management duties for the office are impractical and will distract the group from its core mission.

Currently, the Advocate's independence is protected by a four-year term, stakeholder expectations that the Advocate exercise independent judgment, and my commitment to operate in an independent manner. The statute can be improved with a policy statement regarding independence, without imposing the burden of financial independence.

B. Current PRAC Language regarding appointment and removal

(2) The Public Records Advocate shall be appointed by the *[Governor from among a panel of three qualified individuals nominated by the]* Public Records Advisory Council under ORS 192.481 *[and shall be confirmed by the Senate in the manner prescribed in ORS 171.562 and 171.565].*

(4) The term of office of the Public Records Advocate shall be four years, except that the advocate may be removed for cause by the *[Governor or upon motion of the]* Public Records Advisory Council *[with the consent of the Governor]*. A determination to remove for cause may be appealed as a contested case proceeding under ORS chapter 183.

BC Proposal--No change to the appointment and removal procedure. Leave the current language of ORS 192.461 (2) and (4) as is.

Reasoning: I do not think that the PRAC currently has the independent capacity to recruit employees or manage a state agency. Furthermore, nothing in the currently proposed language gives the Advocate independence from the PRAC. An Advocate who reports solely to the PRAC without DAS and SOS support, who must individually lobby the legislature for funding every two years or charge for trainings and assistance, is not necessarily more able to exercise independent judgment and will be burdened with many more administrative duties.

The current structure of the office that balances support from the Governor's Office, the Secretary of State, and the PRAC (with its two members of the legislature) can be effective foundation for an office that functions independently as a bridge between the public and various public bodies as intended when the office was established in 2017.

C. Current PRAC Language regarding status of Advocate

(6) The Public Records Advocate is in the *[unclassified] exempt service.*

BC Proposal—Keep this change.

Reasoning: This is a technical correction that shows that the PRA is not an at-will employee.

D. Current PRAC Language regarding the Deputy and exempting office from State Employment Rules

(7) [The Public Records Advocate may hire one or more deputy advocates or other professional staff to assist in performing the duties assigned to the Public Records Advocate.]

a. The Office of the Public Records Advocate is exempt from ORS chapter 240.

b. The Public Records Advocate shall select, appoint and fix the compensation of a person as Deputy Public Records Advocate and may select, appoint and fix the compensation of other professional staff the Public Records Advocate deems necessary to discharge the Public Records Advocate's responsibilities under ORS 192.464 to ORS 192.475 and Sections 8, 9, 10, 13 and 15, chapter 728, Oregon Laws 2017.

(8)(a) The Deputy Public Records Advocate shall be a member in good standing of the Oregon State Bar.

(b) The Public Records Advocate may delegate to the Deputy Public Records Advocate any authority, power or duty to act in the Public Records Advocate's stead, except this power of delegation.

(c) If the position of Public Records Advocate becomes vacant for any reason, the Deputy Public Records Advocate shall serve as acting Public Records Advocate until a new Public Records Advocate has been appointed for a full term.

BC Proposal—Leave in original grant of authority to hire deputies and staff. Take out language exempting office from state employment rules. Revise this language to allow for the possibility that there is more than one deputy and allow PRAC to appoint one as acting advocate.

(7) (a) The Public Records Advocate may hire one or more deputy advocates or other professional staff to assist in performing the duties assigned to the Public Records Advocate.

(b) A Deputy Public Records Advocate shall be a member in good standing of the Oregon State Bar.

(c) The Public Records Advocate may delegate to a Deputy Public Records Advocate any authority, power or duty to act in the Public Records Advocate's stead, except this power of delegation.

(d) If the position of Public Records Advocate becomes vacant for any reason, a Deputy Public Records Advocate shall be appointed by a vote of the majority of the Public Records Advisory Council to serve as acting Public Records Advocate until a new Public Records Advocate has been appointed for a full term.

Reasoning: The additions regarding the Deputy Advocate are useful. However, if the language exempting the office from ORS 240 is included, in the absence of the established State personnel rules, the PRAC will have to create and enforce personnel rules and policies. It is not clear under the current composition of the PRAC that there is capacity to do so. To charge the PRAC with management duties will further divert the Council's attention from reviewing and advancing laws and policies regarding public records.

To contract for the HR payroll and compliance functions currently being provided by the State will increase costs and administrative burdens on the Advocate. While it is possible that exempting the office from ORS 240 could result in cost savings by allowing the Advocate and Deputy Advocate to be

paid at a lower scale than required currently, it does not seem likely that the exemption would lead to additional resources for the office.

E. Current PRAC Language regarding the State Archivist

[(8)(a) The State Archivist may furnish office facilities and provide administrative support to the Public Records Advocate.]
[(b) If the State Archivist declines to furnish office facilities and provide administrative support to the Public Records Advocate, the Oregon Department of Administrative Services shall furnish office facilities and provide administrative support to the advocate.] Deleted

BC Proposal—Leave this language as is currently in the statute, or change to strengthen commitments to mirror the interagency agreement currently being followed.

Option—

(8) (a) The State Archivist shall furnish office facilities and provide administrative support to the Public Records Advocate which includes IT support and SOS network access.

(b) The Oregon Department of Administrative Services shall fund the remaining expenses related to the Public Records Advocate’s performance of duties.

Reasoning: The support provided this far by the State Archivist has been invaluable. The work on public records retention and public records requests has a natural overlap. Rather than seeking to be independent of any other state agency support, continuing the relationship with the Secretary of State will be beneficial to the office.

The language in the option describes the current budget support for the office and does not represent any new allocations. Adding it would clarify the office’s funding, but is not necessary.

F. Current PRAC Language regarding the PRAC

[(m) [Except as provided in subsection (3) of this section,] The Public Records Advocate [, who shall serve as chair of the council].]

(3) The council shall elect a chair and a vice chair, who each shall serve in that capacity for a two-year term, or until their membership on the council ends, whichever is of shorter duration. A chair or vice chair may be reelected to their positions.

[(3)] (4) At any time when the office of the Public Records Advocate is vacant:

[(a) The Secretary of State or a designee of the Secretary of State shall serve as the acting chair of the Public Records Advisory Council,]

[(b) (a) The council shall convene at the time and place designated by the [acting] chair but within 30 days of the vacancy of the office of the Public Records Advocate;

[(c) (b) The council shall take up only the question of the [nomination of three qualified individuals for the Governor to consider for appointment under ORS 192.461 as] process and selection of a new Public Records Advocate; and

[(d) (c) The individual who had vacated the office of the Public Records Advocate may participate in deliberations and vote on the slate of nominees unless the individual vacated the office for reasons described in ORS 192.461 (4).]

[(4)] (5) The appointment of a member of the council described in subsection (2)(d) to (j) of this section is subject to confirmation by the Senate in the manner prescribed in ORS 171.562 and 171.565.

[(5)] (6) A member of the council described in subsection (2)(d), (e), or (j) of this section is entitled to compensation and expenses as provided in ORS 292.495.

[(6)] (7) The members of the council described in subsection (2)(d) to (L) of this section shall each serve two year terms and may be reappointed to successive terms.

[(7)] (8) A majority of the voting members of the council constitutes a quorum for the transaction of business.

[(8)] (9) The council shall meet at least once every six months. The council may also meet at other times and places specified by the call of the chair or of a majority of the members of the council.

[(9)] (10) All public bodies, as defined in ORS 192.311, shall assist the council in the performance of its duties and, to the extent permitted by laws relating to confidentiality, furnish

such information, including public records, and advice as the members of the council consider necessary to perform their duties.

(11)(a) **The council may support or oppose legislation relating to public records law.**

(b) **The council may request that one or more legislators introduce legislation relating to public records law.**

BC Proposal—Keep the Advocate as the Chair of the PRAC, allow replacement efforts to begin at the announcement of a vacancy without waiting for the end of the Advocate’s employment, clarify that PRAC can do additional business in the absence of an advocate, and that PRAC can support or oppose legislation.

(m) Except as provided in subsection (3) of this section, The Public Records Advocate who shall serve as chair of the council.

(3) At any time when the office of the Public Records Advocate is vacant:

(a) The Secretary of State or a designee of the Secretary of State shall serve as the acting chair of the Public Records Advisory Council;

(b) The council shall convene at the time and place designated by the acting chair but within 30 days of the **announcement of a** vacancy of the office of the Public Records Advocate;

(c) **At that meeting, [T]the council shall take up [only] the question of the [nomination of three qualified individuals for the Governor to consider for appointment under ORS 192.461 as] process and selection of a new** Public Records Advocate; and

(d) The individual who had vacated the office of the Public Records Advocate may participate in deliberations and vote on the slate of nominees unless the individual vacated the office for reasons described in ORS 192.461 (4).

(4) The appointment of a member of the council described in subsection (2)(d) to (j) of this section is subject to confirmation by the Senate in the manner prescribed in ORS 171.562 and 171.565.

(5) A member of the council described in subsection (2)(d), (e), or (j) of this section is entitled to compensation and expenses as provided in ORS 292.495.

(6) The members of the council described in subsection (2)(d) to (L) of this section shall each serve two year terms and may be reappointed to successive terms.

(7) A majority of the voting members of the council constitutes a quorum for the transaction of business.

(8) The council shall meet at least once every six months. The council may also meet at other times and places specified by the call of the chair or of a majority of the members of the council.

(9) All public bodies, as defined in ORS 192.311, shall assist the council in the performance of its duties and, to the extent permitted by laws relating to confidentiality, furnish such information, including public records, and advice as the members of the council consider necessary to perform their duties.

(10)(a) The council may support or oppose legislation relating to public records law.

(b) The council may request that one or more legislators introduce legislation relating to public records law.

Reasoning: The PRAC has not demonstrated the capacity for self-governance through a volunteer chair and co-chair. Having the Advocate be the chair of the PRAC allows for paid staff to facilitate the work of the PRAC. If the PRAC is solely responsible for hiring and firing the Advocate, it is not appropriate for the Advocate to chair the PRAC. In that case, I would recommend that the Advocate be a non-voting ex-officio member of the PRAC.

Eliminating the work “only” in subparagraph (3)(c) will clarify an ambiguity in the statute as will adding the explicit language that it is within the authority of the PRAC to introduce legislation independent from the Advocate and/or DAS.

G. PRAC Language regarding Council Records

SECTION 3. ORS 192.483 is amended to read: (5) The Public Records Advocate shall serve as the custodian of all council records.

BC Proposal—Keep this language unless the PRAC decides to go forward with making the Advocate report solely to the PRAC. In that case, a separate custodian of records should be designated as it is not prudent to have an employee act as the sole custodian of records related to their employment.

Reasoning: If the Advocate is the chair of the PRAC, it makes sense to designate them as the custodian of records. If the PRAC becomes the managing entity, they will have to be responsible for maintaining the records related to the Advocate’s employment, at a minimum.

H. PRAC Language regarding ratification and effective date

SECTION 4. Any actions taken by the Public Records Advisory council before the effective date of this 2020 Act to recruit and appoint a Public Records Advocate are hereby ratified and affirmed.

SECTION 5. This 2020 Act being necessary for the immediate preservation of the public peace, health, and safety, an emergency is declared to exist, and this 2020 Act takes effect on its passage.

BC Proposal—Delete these sections as moot.

Reasoning: A new advocate was not hired by PRAC prior to the effective date of the statute and an emergency clause is no longer necessary for the changes.