From:	Andrew Hawley
To:	Public Records Task Force
Subject:	Comment to the Attorney General's Public Records Law Reform Task Force
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Attachments:	CommentsonImprovingOregonsPublicRecordsLaws [5162016].pdf

Hello:
Please accept the following comments to the Attorney General's Public Records Law Reform Task Force.

Please contact me if you have any difficulty retrieving the attached document.

Best,
Andrew

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Northwest Environmental Advocates ●
Tualatin Riverkeepers ● WildEarth Guardians

May 26, 2016

Via Electronic Mail: publicrecordstaskforce@doj.state.or.us

Attorney General's Public Records Law Reform Task Force
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096

Dear Task Force Members:

Our groups are each dedicated to the protection of the environment of the Pacific Northwest. In large part, we carry out our missions by ensuring that our federal, state, and local laws are implemented effectively. We do this in a variety of ways, but a significant portion of our work involves tracking the federal, state, and local agencies tasked with protecting Oregonians and our environment. Needless to say, the ready access to public records is integral to our work.

Openness and transparency are essential components of our government. So much so, it is telling that President Obama waited no longer than his first day in office to reaffirm that the federal "Freedom of Information Act should be administered with a clear pre-sumption: In the face of doubt, openness prevails." In doing so, the President invoked Justice Louis Brandeis, noting that "sunlight is said to be the best of disinfectants."

This fundamental principle of openness is also embodied in Oregon law, which gives every person the "right to inspect any public record of a public body in this state," unless there is an express prohibition in the law. In order to protect this right, we must guard against allowing the exception to consume the rule. It is well documented that there are now over 400 exceptions to Oregon's public records disclosure law. While many of these exemptions are necessary and appropriate, without established statutory sideboards and processes for developing and reviewing these exceptions, there is little to stop this list from continuing to grow unchecked. As a result, we support the systematic review and analysis of these exceptions.

However, we believe that the two additional issues this Task Force has raised are of equal importance—namely, the timeliness of responses to public record requests and the fees associated with those requests. It is our opinion that the response to information requests should be swift and costs should not impede access. Again as President Obama stated "[t]he presumption of disclosure should be applied to all decisions" surrounding the release of public documents.

Yet, it is our experience that the time taken to respond to a request and the fees charged can be significant barriers to the access of information under the current law. First, the lack of an enforceable deadline for a public body to respond to a public records request can in and of itself effectively undermine the process. While our experience has been that agencies *eventually* will process our records requests, that process can drag on for weeks and months. In some instances this delay is enough to render the requested information unhelpful to our efforts to protect the environment. Second, the imposition of excessive fees can also effectively lock the agencies' doors. Without specific, statutory guidelines directing how and when agencies should waive these fees, each request carries with it the fear of unknown of whether the agency will be reasonable in its consideration of our fee waiver request.

DEADLINES

Currently, there are no deadlines for responding to a public records request in Oregon. Rather, an agency is merely required to "furnish proper and reasonable opportunities for inspection and examination of the records." ORS 192.430(1). This 'reasonableness' standard has been carried forward into agency regulations. *See, e.g.*, OAR 340-011-0330(5) ("DEQ will respond to a record request as quickly as reasonable."). In this regard, Oregon's public record laws are out of step with the prevailing standards around the nation. *See* Attorney General's Government Transparency Report, at 2 (Oct. 7, 2010).

In has been our experience that the lack of a deadline for the release of records has contributed to significant delays in the processing of public records requests. We have experienced delays of weeks and months for very basic requests, and in at least one instance a process that took over a year to complete. Simply put, without a statutory deadline to regulate the process, it is possible for an agency to deemphasize the prompt processing of records request. Clear, established deadlines for the release of the requested information would ensure the public would have timely access to requested information.

We believes a combination of a duty to provide a prompt response to all requests, coupled with deadline, and a reasonable opportunity for the agency to extend the deadline for good cause, will meet the objective of ensuring the public's reasonable access to agency documents and information. Requiring a "prompt" response to all requests will ensure that state agencies will give immediate attention to record requests, and will likely result in the processing of the majority of requests in a timely manner. When an immediate response is not possible or practical, however, an established deadline will ensure that the agency commits the appropriate resources to satisfying the request and keeping the requester informed of the progress towards that end. Finally, allowing an agency the opportunity to extend the deadline, while at the same time identifying a reasonable deadline for the release of the requested records, will give the agencies the flexibility necessary to properly manage limited resources.

Thus, we recommend the following requirements be included in any revision to the open government statute:

1. If a person makes a written request to inspect a public record or to receive a copy of a public record, the public body receiving the request shall respond promptly;

2. In response to all such requests, within ten (10) business days of receiving the request, the public body must acknowledge receipt of the request and must include one of the following:

    a. A statement that the public body does not possess or is not the custodian of, the public record(s), or that a state or federal law prohibits the public body from acknowledging whether any requested record exists;

    b. For all requested public records for which the public body does not claim an exemption from disclosure, provide a time and place for the inspection of the documents or copies of the documents; or

    c. A statement that the public body is the custodian of at least some of the requested public records, a proposed date when the public records may be inspected or copies of the records will be provided, a statement of and the explanation for the additional time necessary to process the request, and an estimate of the fees that the requester must pay as a condition of receiving the public records.

FEES

Under the current law, an Oregon agency "may establish fees reasonably calculated to reimburse the public body for the public body's actual cost of making public records available." ORS 192.440(4)(a). The recoupable costs include both staff time for compiling and reviewing the records and the actual costs of producing the records for review. An agency may waive these fees when the release of the records "primarily benefits the general public." ORS 192.440(5).

Without question, the imposition of excessive fees can effectively deny the public access to public records. In many instances our groups have been forced to withdraw public records requests because of the fees associated with those requests. For example, in one instance the Oregon Department of Motor Vehicles gave the Northwest Environmental Defense Center an estimate for the cost associated with a records request that included a charge of $4.38/second for computer time. For the three minutes it would take the computer to search the database for the records requested, NEDC would have been charged $788.00. In other instances our organizations have been quoted fees associated with record requests totaling over $7,000.00, and the agency would not consider waiving or reducing the fees. In these and many other instances, we simply could not afford to pursue the record request, and thus we were effectively denied access to this public information. In addition, we have experienced or heard of situations where the conservation or neighborhood group offered to bring a copier or scanner and to complete all duplication on site at the agency at no cost to the agency, but the agency refused to let that occur.

To ensure the public has reasonable access to agency records, the open government statutes should establish a fee structure that allows the public body to recoup the appropriate fees based on the nature of the request. First, requests for information that will help the public better understand the operations and actions of the government should be processed without charge. Second, where the request is for information that is not of commercial use to the requester, the public should be allowed to inspect the documents for free, and if copies of the documents are requested, the agency should be able to recoup any actual costs (if any) that the agency incurred when reproducing the documents.

Finally, where a business or person is seeking public records because of some commercial interest that information, the agency should be reimbursed for the actual costs incurred in processing the request.

We recommend the following elements for the basis of the necessary revisions to the current statutory fee waiver language:

1. when records are not sought primarily for commercial use and the disclosure of the information is in the public interest because it is likely to contribute to public understanding of the operations or activities of the government, the documents shall be provided without any charge;

2. when records are not sought for commercial use, and the agency has decided that disclosure is not in the public interest, a written explanation of that decision shall be issued and fees shall be limited to the actual costs (if any) that are incurred by the agency duplicating documents – but those cost shall not exceed the reasonable standard duplication costs typically paid in commercial copying; and

3. when records are sought for commercial use, fees shall be limited to reasonable standard charges for document search, review, and duplication.

CONCLUSION

We appreciate the opportunity to provide our perspective on this important issues. We encourage the Task Force to continue to push forward towards recommended changes that will help improve Oregonian's access to public information. If we can be of further assistance please feel free to contact Andrew Hawley, NEDC Staff Attorney, at (503) 768-6673.

Sincerely,

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