

Attorney General's Public Records Law Reform Task Force
Draft Outline for Report
11/2/2016

Introduction

- AG Statement
- Task force composition
- Hearings and meetings

Timelines

- Current Law
 - No specific timeframes
 - Law provides for production “as soon as practicable and without unreasonable delay” but can simply be a statement that the public body will respond further within a reasonable time.
 - Overall, public body must provide “proper and reasonable” access to records.
 - AG office has advised that 10 business days should be sufficient for completing most requests.
 - DA offices can vary with respect to whether and how they enforce timeliness.
- Task Force Review
 - We heard from many constituents about unexplained or unreasonable delays.
 - Media representatives noted problem of delay in light of short news cycle.
 - Government representatives expressed concerns about limited resources: time spent responding to public records requests can be extensive and take away from other essential duties.
 - Reviewed prior proposals (Kroger, Parrish).
 - Many other states and the federal government provide deadlines of varying lengths; some have flexibility for more complicated requests.
- Recommendation
 - AG has proposed legislation establishing response timeframes (generally no more than 5 business days to acknowledge, 15 days to complete response) with flexibility to recognize that nature of request and resources of public body receiving request may affect ability to comply.

Exemptions

- Current Law
 - More than 550 exemptions
 - 85 are found in the Oregon Public Records Law; the rest are sprinkled throughout the statutes.
 - Several inconsistencies exist. For example, different public bodies have different rules regarding information in matters under investigation; some are not confidential at all, some are temporarily confidential while the investigation proceeds, and some are indefinitely confidential.

- Most Oregon exemptions are relatively specific, while some states that have fewer exemptions rely on exemptions that are worded more broadly and could require more judicial interpretation.
- Task Force Review
 - Input from task force members representing public bodies indicates that number and complexity of exemptions makes processing request difficult. (State Archivist told legislature as early as 1979 that expansion of exemptions was creating a significant burden for records custodians.)
 - Identified, catalogued, and categorized exemptions
 - Created subgroup to begin work of making exemptions more consistent within categories.
- Recommendation
 - Proposal requires the creation and maintenance of a user/friendly electronic catalogue of exemptions. It also aims to minimize the problem going forward by stating that in enacting new exemptions the legislature will identify the purpose of the exemption and insure that it is no broader than necessary to serve that purpose.
 - Ultimately, eliminating or consolidating exemptions will require legislative action. We have concluded that the utility of this task force undertaking this multi-year process on an exemption-by-exemption basis is low without early and strong legislative encouragement, assistance, and buy-in.

Costs

- Current Law
 - Public body may charge fees “reasonably calculated to recover actual costs.”
 - Interpreted to include charges for staff time as well as materials.
 - Fees may be reduced or waived if disclosure primarily is in the public interest because it will primarily benefit the general public. (Why two uses of "primarily?")
- Task Force Review
 - Multiple constituents identified the costs charged by public bodies as a major impediment to public access to records.
 - Perception exists that public bodies will waive charges if information disclosed will be favorable to public body but not where unfavorable.
 - Lack of uniformity in fee structures and waiver decisions can contribute to confusion or even distrust.
 - Representatives of government noted that without the cost recovery mechanism, complicated public records requests can present resource allocation issues.
 - Complicated or large requests are often made by requesters with a specific and private interest – commercial entities or even opposing litigants, for example.
 - The failures of prior proposals to reduce and limit costs of public records were noted.
- Recommendation
 - The issue of costs is a significant one that warrants legislative action, The task force has added emphasis on the problem of burdensome costs to a proposed preamble. The challenge is in finding a solution that ensures public records are actually accessible to members of the public seeking to use them in the public

interest, while avoiding diverting substantial government resources to private ends. The task force intends to continue working toward a proposed solution.

Transparency by Design

- Current Law
 - Electronic records must be provided “in the form requested, if available” and otherwise in the form they are maintained by the public body.
 - The AG has concluded that if the public body uses tools to extract data for its own purposes, it must use those same tools to extract data sought by a public records requester. However, programming new or changed tools is not required. Nor is combining data across datasets.
- Task Force Review
 - Multiple reporters testified that government data sets often seem to lack basic functionality that would facilitate public access. The notion of separate datasets is anachronistic as tools capable of reaching into multiple sources of data become common.
 - However, government datasets are not necessarily up to date; some are several decades old and not easily or cheaply updated.
- Recommendation
 - Although so far this has not been a significant focus of the Task Force’s work, a forward-looking requirement that public bodies consider public access when designing or acquiring new data management tools deserves serious consideration.

Resources

- Current Law
 - Public bodies are required to have publicly-available policies explaining how to make requests for their records.
 - Although not required by law, the AG office updates the Public Records and Meetings Manual approximately every two years. The Manual contains fairly comprehensive explanations of several aspects of the law. It also summarizes decisions by appellate courts and the Attorney General.
- Task Force Review
 - An audit conducted by the Secretary of State’s office found that a number of other states have positions dedicated to assisting in the public records process, and that such a position offers numerous advantages.
 - Task Force members representing government entities, media entities and the public agreed that an advocate of this nature would be welcome, provided that it is designed to meet certain criteria.
- Recommendation
 - The Task Force favors the creation of an advocate and suggests that the office should have the following attributes:
 - Genuine independence.
 - Power to assist requesters and custodians of records in reaching a mutually agreeable outcome.

- Resources and expertise to provide education to members of the public, and education and assistance to government.
 - Potentially, the authority to make decisions on public records disputes in counties where the local District Attorney may not have the resources, expertise or desire to make such decisions.
- Multiple task force members also felt that it would make sense to give an advocate certain authority with respect to the Public Meetings Law.

Culture of Transparency

- Current Law
 - Unlike the Oregon Public Meetings Law, the Oregon Public Records Law contains no explicit statement of its purpose.
 - Exemptions from public disclosure are generally discretionary – meaning that public bodies are usually free to disclose information even if they are not required to disclose it.
 - Potential liability for disclosing public records is not addressed in the law. A number of public bodies have been sued in recent years based on actual or proposed disclosures of public records.
- Task Force Review
 - Constituents expressed the view that governments too often seem to see transparency as a nuisance, an impediment to government work, or worse.
 - Media representatives suggested that public bodies either are unaware that most exemptions are discretionary or rarely take advantage of that fact.
 - The Task Force discussed that appellate courts routinely refer to the policy statement in the Public Meetings Law and interpret the law in ways designed to implement the express policy.
 - Concern about uncertain liability and other potential consequences of disclosure was identified as a cause of both delay and conservative decision making with regard to disclosing public records.
- Recommendation
 - The proposed legislation (1) adopts a policy statement explaining the importance of transparency; (2) provides that public bodies and officials are not liable for disclosures made in a good faith effort to comply with public disclosure requirements; and (3) allows public bodies to retain the evidentiary protections of the lawyer-client privilege in court even when privileged information may have been disclosed in response to a public records request.
 - The Task Force also recommends that a robust educational role for an advocate would be useful in encouraging government entities to adopt a culture of transparency.