

LC 747
2017 Regular Session
12100-006
11/17/16 (DJ/ps)

D R A F T

SUMMARY

Creates Public Records Advocate and Public Records Advisory Council.

Directs Public Records Advocate to provide mediation services to facilitate resolution of disputes between requesters of public records and state agencies concerning disclosure of public records. Directs Public Records Advocate to provide training for state agencies and local government bodies on disclosure requirements, best practices for public records management and retention and best practices for processing and responding to requests to inspect public records. Authorizes Public Records Advocate, upon request, to provide guidance and advice on discrete public records issues. Requires Public Records Advocate to review denials of requests for public records if public body is located in county with population below specified threshold and public records requester petitions for review.

Directs Public Records Advisory Council to study issues that arise under the public records law and at least once each biennium to provide written recommendations to Governor and Legislative Assembly on effectiveness and fairness of public records law and public bodies' implementation of public records law requirements.

Provides that Public Record Advocate's duties become operative January 1, 2018.

Takes effect on 91st day following adjournment sine die.

A BILL FOR AN ACT

1
2 Relating to public accountability in administering the public records law;
3 creating new provisions; amending ORS 192.460, 192.465, 192.470 and
4 192.480; and prescribing an effective date.

5 **Be It Enacted by the People of the State of Oregon:**

6 **SECTION 1. (1) The office of the Public Records Advocate is cre-**
7 **ated.**

8 **(2) The Public Records Advocate shall be appointed by the Governor**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 and confirmed by the Senate in the manner prescribed in ORS 171.562
2 and 171.565.

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

5 (4) The term of office of the Public Records Advocate shall be four
6 years, except that the advocate serves at the pleasure of the Governor.
7 The advocate may be reappointed to consecutive terms.

8 (5) The Public Records Advocate is in the unclassified service.

9 (6) The Public Records Advocate may hire one or more deputy ad-
10 vocates or other professional staff to assist in performing the duties
11 assigned to the Public Records Advocate.

12 (7) The Oregon Department of Administrative Services shall furnish
13 office facilities and provide administrative support to the Public Re-
14 cords Advocate.

15 SECTION 2. (1) The Public Records Advocate shall provide medi-
16 ation services when requested by either a person described in sub-
17 section (2) of this section or a state agency under the conditions
18 described in subsection (3) of this section.

19 (2) A person may seek mediation services under this section when
20 seeking to inspect or receive copies of public records and the person:

21 (a) Has been denied access to all or a portion of the records being
22 sought;

23 (b) Has been denied a fee waiver or reduction in fees after asserting
24 under ORS 192.440 (5) that a fee waiver or reduction of fees is in the
25 public interest; or

26 (c) Received a written fee estimate under ORS 192.440 (4) that the
27 person believes exceeds the actual cost to be incurred by the public
28 body in producing the requested records.

29 (3) A state agency may seek mediation services under this section
30 if, in response to a request for public records, the agency asserts:

31 (a) That the records being sought are not public records;

1 (b) That the records being sought are exempt from mandatory dis-
2 closure; or

3 (c) That the agency is, under ORS 192.440, entitled to the fees the
4 agency is seeking in order to produce the records being requested.

5 (4) A state agency may not seek mediation services under this sec-
6 tion unless at least 21 days have passed since the agency received the
7 request.

8 (5) Notwithstanding any other provision of ORS 192.410 to 192.505:

9 (a) The failure of a person seeking to inspect or receive copies of
10 public records to engage in good faith in the mediation process de-
11 scribed in this section upon being authorized to do so under subsection
12 (2) of this section shall be grounds for the state agency to deny the
13 request and refuse to disclose the requested records.

14 (b) The failure of a state agency to engage in good faith in the
15 mediation process described in this section after a public records re-
16 quester seeks mediation services under subsection (2) of this section
17 shall be grounds for the award of costs and attorney fees to the public
18 records requester for all costs and attorney fees incurred in pursuing
19 the request after a good faith determination under subsection (6) of
20 this section.

21 (6) Either party to the mediation may request that the Public Re-
22 cords Advocate make a determination concerning whether a party is
23 acting in good faith for purposes of applying the remedies described
24 in subsection (5) of this section.

25 (7) Mediation shall be requested by submitting a written request for
26 mediation and such other information as may be required by the
27 Public Records Advocate. Mediation between parties shall be con-
28 ducted and completed within 21 days following receipt by the advocate
29 of the request for mediation. The mediation period may be extended
30 by unanimous agreement among the public records requester, the
31 state agency and the advocate.

1 (8) If the mediation results in an agreement between the public re-
2 cords requester and the state agency, the advocate shall prepare a
3 written document memorializing the agreement. The written agree-
4 ment shall be executed by the public records requester and an au-
5 thorized representative of the state agency. The written agreement
6 shall control the resolution of the records request.

7 (9)(a) If the mediation fails to resolve the dispute between the
8 public records requester and the state agency, the Public Records Ad-
9 vocate may issue an advisory opinion that states the advocate's opin-
10 ion of what the legally correct resolution of the dispute is, including
11 any salient information that supports the advocate's conclusion.

12 (b) The Public Records Advocate shall publish advisory opinions on
13 a publicly accessible website maintained by the advocate and shall
14 provide a copy of each advisory opinion to the Attorney General.

15 SECTION 3. Consistent with section 2 of this 2017 Act and rules
16 adopted thereunder, the Public Records Advocate possesses sole dis-
17 cretion over the conduct of mediation sessions.

18 SECTION 4. (1) Written records, documents, notes or statements
19 of any kind prepared for or submitted to the Public Records Advocate,
20 prepared by the advocate or exchanged between mediating parties are
21 exempt from disclosure under ORS 192.410 to 192.505 and are subject
22 to ORS 40.190.

23 (2) Subsection (1) of this section does not apply to a written agree-
24 ment described in section 2 (8) of this 2017 Act or an advisory opinion
25 described in section 2 (9) of this 2017 Act.

26 SECTION 5. (1) The Public Records Advocate shall provide training
27 for state agencies and local governments on:

28 (a) The requirements and best practices for processing and re-
29 sponding to public records requests; and

30 (b) The requirements and best practices for public records man-
31 agement and retention.

1 **(2) The Public Records Advocate shall perform training sessions**
2 **throughout the state.**

3 **(3) Upon the written request of a state agency or local government,**
4 **the Public Records Advocate may provide guidance and advice on**
5 **matters pertaining to public records management, public records re-**
6 **quest processing and the disclosure and applicability of exemptions**
7 **from disclosure of public records.**

8 **(4) Guidance and advice provided pursuant to subsection (3) of this**
9 **section is purely advisory and must cease when the particular advice**
10 **sought relates to a matter that is referred to mediation under section**
11 **2 of this 2017 Act.**

12 **SECTION 6.** ORS 192.460 is amended to read:

13 192.460. (1) ORS 192.450 applies to the case of a person denied the right
14 to inspect or to receive a copy of any public record of a public body other
15 than a state agency, except that:

16 **(a)(A) In counties with a population of 75,000 or more,** the district
17 attorney of the county in which the public body is located, or if it is located
18 in more than one county the district attorney of the county in which the
19 administrative offices of the public body are located, shall carry out the
20 functions of the Attorney General; **or**

21 **(B) In counties with a population of less than 75,000 and in which**
22 **the administrative offices of the public body are located, the Public**
23 **Records Advocate appointed under section 1 of this 2017 Act shall carry**
24 **out the functions of the Attorney General;**

25 (b) Any suit filed must be filed in the circuit court for the county de-
26 scribed in paragraph (a) of this subsection; and

27 (c) The district attorney may not serve as counsel for the public body, in
28 the cases permitted under ORS 192.450 (3), unless the district attorney ordi-
29 narily serves as counsel for the public body.

30 **(2) Disclosure of a record to the district attorney, or to the Public Re-**
31 **ords Advocate, if applicable,** in compliance with subsection (1) of this

1 section does not waive any privilege or claim of privilege regarding the re-
2 cord or its contents.

3 (3) Disclosure of a record or part of a record as ordered by the district
4 attorney **or the Public Records Advocate** is a compelled disclosure for
5 purposes of ORS 40.285.

6 **SECTION 7.** ORS 192.465 is amended to read:

7 192.465. (1) The failure of the Attorney General, [or] district attorney **or**
8 **Public Records Advocate** to issue an order under ORS 192.450 or 192.460
9 denying, granting, or denying in part and granting in part a petition to re-
10 quire disclosure within seven days from the day of receipt of the petition
11 shall be treated as an order denying the petition for the purpose of deter-
12 mining whether a person may institute proceedings for injunctive or
13 declaratory relief under ORS 192.450 or 192.460.

14 (2) The failure of an elected official to deny, grant, or deny in part and
15 grant in part a request to inspect or receive a copy of a public record within
16 seven days from the day of receipt of the request shall be treated as a denial
17 of the request for the purpose of determining whether a person may institute
18 proceedings for injunctive or declaratory relief under ORS 192.450 or 192.460.

19 **SECTION 8.** ORS 192.470 is amended to read:

20 192.470. (1)(a) A petition to the Attorney General, [or] district attorney
21 **or Public Records Advocate** requesting the Attorney General, [or] district
22 attorney **or advocate** to order a public record to be made available for in-
23 spection or to be produced shall be in substantially the following form, or
24 in a form containing the same information:

25 _____

26 _____

27 (Date)

28 I (we), _____ (name(s)), the undersigned, request the Attorney
29 General (or District Attorney of _____ County, **or Public Records Ad-**
30 **vocate, if applicable**) to order _____ (name of governmental body) and
31 its employees to (make available for inspection) (produce a copy or copies

1 of) the following records:

2

3 1. _____

4 (Name or description of record)

5

6 2. _____

7 (Name or description of record)

8

9 I (we) asked to inspect and/or copy these records on _____ (date) at
10 _____ (address). The request was denied by the following person(s):

11

12 1. _____

13 (Name of public officer or employee;
14 title or position, if known)

15

16 2. _____

17 (Name of public officer or employee;
18 title or position, if known)

19

20 _____

21 (Signature(s))

22

23 **(b) [This form] The form described in paragraph (a) of this sub-**
24 **section** should be delivered or mailed to the Attorney General's office in
25 Salem, [or] the district attorney's office in the county courthouse **or the**
26 **Public Records Advocate's office in Salem.**

27 (2) Promptly upon receipt of such a petition, the Attorney General, [or]
28 district attorney **or Public Records Advocate** shall notify the public body
29 involved. The public body shall thereupon transmit the public record disclo-
30 sure of which is sought, or a copy, to the [Attorney General] **person who**
31 **received the petition**, together with a statement of [its] **the public body's**

1 reasons for believing that the public record should not be disclosed. In an
2 appropriate case, with the consent of the Attorney General, the public body
3 may instead disclose the nature or substance of the public record to the
4 *[Attorney General]* **person who received the petition.**

5 **SECTION 9.** ORS 192.480 is amended to read:

6 192.480. (1)(a) In any case in which a person is denied the right to inspect
7 or to receive a copy of a public record in the custody of an elected official,
8 or in the custody of any other person but as to which an elected official
9 claims the right to withhold disclosure[, *no*]:

10 (A) A petition to require disclosure may **not** be filed with the Attorney
11 General, [*or*] district attorney[,] or **Public Records Advocate; and**

12 (B) If a petition is filed, it shall not be considered [*by the Attorney Gen-*
13 *eral or district attorney after*] **if** a claim of right to withhold disclosure by
14 an elected official **is made.**

15 (b) In such case a person denied the right to inspect or to receive a copy
16 of a public record may institute proceedings for injunctive or declaratory
17 relief in the appropriate circuit court, as specified in ORS 192.450 or 192.460,
18 and the Attorney General or district attorney may upon request serve or
19 decline to serve, in the discretion of the Attorney General or district attor-
20 ney, as counsel in such suit for an elected official for which the Attorney
21 General or district attorney ordinarily serves as counsel.

22 (2) Nothing in this section shall preclude an elected official from re-
23 questing advice from the Attorney General, [*or*] a district attorney **or the**
24 **Public Records Advocate** as to whether a public record should be disclosed.

25 **SECTION 10. (1) The Public Records Advisory Council is created.**

26 (2) **The Public Records Advisory Council consists of:**

27 (a) **The Secretary of State or a designee of the Secretary of State;**

28 (b) **The Attorney General or a designee of the Attorney General;**

29 (c) **The Director of the Oregon Department of Administrative Ser-**
30 **vices or a designee of the director;**

31 (d) **A representative of the news media who is appointed by the**

1 **Governor;**

2 (e) A member of the public who is appointed by the Governor; and

3 (f) The Public Records Advocate, who shall serve as chair of the
4 council.

5 (3) The term of office of a member of the council described in sub-
6 section (2)(d) or (e) of this section is four years, but that member
7 serves at the pleasure of the Governor. Before the expiration of the
8 term of a member described in subsection (2)(d) or (e) of this section,
9 the Governor shall appoint a successor whose term begins on January
10 1 next following. A member described in subsection (2)(d) or (e) of this
11 section is eligible for reappointment. If there is a vacancy for any
12 cause, the Governor shall make an appointment to become imme-
13 diately effective for the unexpired term.

14 (4) The appointment of a member of the council described in sub-
15 section (2)(d) or (e) of this section is subject to confirmation by the
16 Senate in the manner prescribed in ORS 171.562 and 171.565.

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

19 (6) A majority of the members of the council constitutes a quorum
20 for the transaction of business.

21 (7) The council shall meet at least once every three months. The
22 council also may meet at other times and places specified by the call
23 of the chairperson or of a majority of the members of the council.

24 (8) All public bodies, as defined in ORS 192.410, shall assist the
25 council in the performance of its duties and, to the extent permitted
26 by laws relating to confidentiality, furnish such information and ad-
27 vice as the members of the council consider necessary to perform their
28 duties.

29 **SECTION 11.** Notwithstanding the term of office specified by section
30 10 of this 2017 Act, of the members first appointed to the Public Re-
31 cords Advisory Council:

1 (1) The member described in section 10 (2)(d) of this 2017 Act shall
2 serve for an initial term ending December 31, 2019.

3 (2) The member described in section 10 (2)(e) of this 2017 Act shall
4 serve for an initial term ending December 31, 2020.

5 **SECTION 12. (1) The Public Records Advisory Council created under**
6 **section 10 of this 2017 Act shall periodically perform all of the follow-**
7 **ing:**

8 (a) Survey state agency and other public body practices and proce-
9 dures for:

10 (A) Receiving public records requests, identifying the existence of
11 records responsive to the requests and gathering and disclosing re-
12 sponsive records;

13 (B) Determining fee estimates and imposing or waiving fees under
14 ORS 192.440; and

15 (C) Determining and applying exemptions from required disclosure
16 of public records.

17 (b) Examine practices similar to those described in paragraph (a)
18 of this subsection in other jurisdictions.

19 (c) Identify inefficiencies and inconsistencies in application of the
20 public records law that impede transparency in public process and
21 government.

22 (d) Make recommendations on changes in law, policy or practice
23 that could enhance transparency in public process and government,
24 and facilitate rapid dissemination of public records to requesters.

25 (e) Make recommendations on the role of the Public Records Ad-
26 vocate as mediator in disputes between custodians of public records
27 and public record requesters and the advocate's role in providing ad-
28 visory opinions addressing public records issues.

29 (2) No later than December 1 of each even-numbered year, the
30 council shall submit to the Governor, and to the Legislative Assembly
31 in the manner provided by ORS 192.245, a report that describes the

1 findings of the council since the council's last report. The report may
2 include recommendations for legislation.

3 (3) The council may prepare reports and studies more frequently
4 than required under subsection (2) of this section.

5 (4) The council may adopt rules governing the operations of the
6 office of the Public Records Advocate, including but not limited to
7 rules establishing procedures for the conduct of mediation under sec-
8 tion 2 of this 2017 Act.

9 SECTION 13. (1) The Public Records Advisory Account is estab-
10 lished in the General Fund. The account shall consist of moneys ap-
11 propriated by the Legislative Assembly.

12 (2) Moneys in the Public Records Advocate Account are dedicated
13 to funding the operations of:

14 (a) The office of the Public Records Advocate; and

15 (b) The Public Records Advisory Council.

16 SECTION 14. Sections 1 to 5 of this 2017 Act are added to and made
17 a part of ORS 192.410 to 192.505.

18 SECTION 15. Sections 10, 12 and 13 of this 2017 Act are added to and
19 made a part of ORS chapter 192.

20 SECTION 16. Sections 2 to 5 of this 2017 Act and the amendments
21 to ORS 192.460, 192.465, 192.470 and 192.480 by sections 6 to 9 of this 2017
22 Act become operative on January 1, 2018.

23 SECTION 17. This 2017 Act takes effect on the 91st day after the
24 date on which the 2017 regular session of the Seventy-ninth Legislative
25 Assembly adjourns sine die.

26