Attorney General's Public Records Law Reform Task Force
Draft Report
12/15/2016

Introduction

Statement of the Attorney General

I am pleased to present this report detailing the work and recommendations of the Attorney General's Public Records Law Reform Task force to date. I assembled the task force because I saw a clear need to improve public access to information about our government. I was hardly the first to recognize problems. A significant reform effort was launched in the early 1990s, by then-Secretary of State Phil Keisling. And my predecessor in office also proposed ambitious reforms.

Both of those efforts failed, and so have several other attempts at change. As a result, our 1973 law creaks along. It has been tweaked a few times here and there, but is now buckling under the strain of twenty-first century technology and more than four decades of steadily growing exceptions to the simple rule of access that was originally intended. Editorial boards around the state continue to call for a better system of open government. National organizations judge Oregon's public records law to be a failure. And a number of controversies in Oregon government have illustrated that public access can be inadequate.

I am of the firm belief that, in a democratic form of government, leadership requires keeping the public informed about what government is doing, and why. Government officials must be both willing to let the people understand their decision-making process, and prepared to honestly answer tough questions about the difficult choices they are entrusted to make. This commitment is not a new one for me. In one of my first cases as a young attorney, I fought for – and won – the public's right to learn about closed criminal cases using the Oregon Public Records law.

Transparency is not always easy – and not only because it requires courage on the part of our leaders. For one thing, much of the information that governments hold concerns individuals and private enterprises. From the privacy interests of needy recipients of public services to the livelihood of small businesses trying to get by in tough economic times, many legitimate interests may justify withholding documents from public disclosure. And occasionally the ability of our government to function effectively could actually be undermined by public disclosure. Disclosing information about criminal investigations before they have been concluded, for example, could jeopardize investigators' ability to uncover evidence – or threaten the right of the accused to a fair trial by an impartial jury. There are significant practical difficulties as well. The biggest one is that emails and other forms of digital communication have resulted in an explosion of the volume of public records that a public body has to deal with.

Despite such complications, I believe that Oregon government can do better. My work with this task force has reinforced that belief. Legislators, members of the press and the public,

and representatives of state and local government have come together in good faith to find ways we can make the Oregon Public Records Law work better. We will not fix the problems overnight. But I am excited by what this task force has come up with so far, and I look forward to working with the legislature to start making these recommendations into reality.

Task Force Composition and Meetings

The Attorney General's Public Records Law Reform Task Force was announced on October 23, 2015. The Attorney General Rosenblum created the task force out of concern that the Oregon Public Records Law is not working as intended. There is a widespread perception that government officials use vagaries in the law to delay or frustrate the public access that the law is meant to facilitate. Consequently, the Attorney General invited legislators, along with representatives of the press, the public, and state and local governments, to convene the task force. The current members of the task force are

Senator Lee Beyer
Jeb Bladine, Oregon Newspaper Publishers Association
Rob Bovett, Association of Oregon Counties
Nick Budnick, Oregon Territory Society of Professional Journalists[1]
Representative Ken Helm
Representative John Huffman
Michael Kron, Special Counsel to Attorney General Rosenblum
Senator Jeff Kruse
Mark Landauer, Special Districts Association of Oregon
Emily Matasar, Government Accountability Attorney, Office of the Governor[2]
Josh Nasbe, Oregon Judicial Department[3]
Jesse Ellis O'Brien, Oregon State Public Interest Research Group[4]
Betty Reynolds, public member
Attorney General Ellen Rosenblum
Keith Shipman, Oregon Broadcasters Association[5]
Robert Taylor, Deputy Secretary of State
Scott Winkels, League of Oregon Cities

[1] Mr. Budnick replaced Les Zaitz, who served on the task force from its inception through November of 2016.
[2] Ms. Matasar replaced Gina Zejdlik, former Senior Policy Advisor to the Governor, who served on the task force from its inception through the April 2016 meeting of the task force; Ben Souede, General Counsel to the Governor, temporarily replaced Ms. Zejdlik until Ms. Matasar filled the seat in November of 2016.
[3] Phil Lemman of OJD filled in for Mr. Nasbe during some task force meetings.
[4] Mr. O'Brien replaced Dave Rosenfeld, who served on the task force from its inception, in May of 2016.
[5] Mr. Shipman replaced John Tamerlano, who had served on the task force from its inception, in January of 2016.

The Attorney General's goal has been that the task force will identify ways to improve the public's access to information about what its government is doing and why.

Since its creation just over a year ago, the task force has met a dozen times. Members of the task force have also solicited public input through hearings held in Salem, Eugene, Portland and Bend.

Purpose and Structure of Report

This report summarizes the work of the task force to date. It describes areas for action identified by the task force, and areas for further consideration going forward. Following a general background and executive summary, the body of the report is organized around six general topics that emerged over the course of the task force's work. For each of those subjects, this report first explains existing laws relevant to the subject. It then briefly describes what the task force found in the course of its work pertaining to the issue. Finally, it provides and explains the specific recommendations of the task force.

Executive Summary

This report presents conclusions and recommendations in six areas.

1. Foster a culture of transparency within government.

The perception that public bodies too often view public records requests as a chore to endure, or a difficulty to avoid, is prevalent. Government representatives acknowledge that responding to records requests often requires taking staff away from other work to focus on a requester's specific interest. Although requests can present a legitimate resource issue, the task force has identified a number of steps that should encourage public officials to view transparency as a core function, rather than an obstruction to their work:

- The legislature should enact a strong legislative policy statement explaining the important value of transparency.
- The legislature should also protect public bodies and public officials who act consistently with that policy by shielding them from liability for good faith disclosures and ensuring that privileged information they disclose cannot be used against them in court.
- Finally, the legislature should create a public records advocate charged with training state and local officials throughout Oregon on the requirements of the public records law. It may be a good idea to provide the advocate with additional resources to help public bodies respond to public records requests as well.

2. Establish timelines for responding to public records requests.

Oregon law differs from that of many states in that it provides no specific timeframes for responding to public records requests. The task force heard a number of concerns about this issue, from journalists working under deadlines and from citizens frustrated by the sense that requests can vanish into a bureaucratic black hole. The task force recommends establishing baseline expectations and communication requirements. Some flexibility is important because different requests require different amounts of work, and because the volume of requests received, and the resources available to respond to those requests, differs from one public body to another. The legislation that is being proposed based on the work of the task force includes this flexibility:

- Require an initial acknowledgment of the request within five business days unless the public body first completes its response to the request.
- A public body must complete its response to the request as soon as practicable, not later than ten additional business days, or else provide an explanation of when the public body expects to complete its response. (This explanation is excused if not reasonably possible under the circumstances.)
- Requesters may petition the Attorney General (state agency records) or District Attorney (any other public body's records) to contest the response time.

3. Simplify and clarify exemptions from public disclosure.

State law currently includes more than 550 exemptions from required public disclosure, scattered throughout 17 volumes of statutes. Some affirmatively prohibit disclosure, while others simply allow information to be withheld. Many exemptions deal with similar kinds of information – but having been enacted piecemeal across more than 40 years, they are not necessarily uniform in how they treat that information. Government representatives point out that the myriad categories of information that the legislature has deemed confidential significantly complicate responses to public records requests. A complete solution to this problem may ultimately require comprehensive legislative review. The task force, and the Attorney General's office, stand ready to assist the legislature in this endeavor should the legislature wish. In the meantime, the task force's work on this issue points to two immediate steps:

- Statutorily require the Attorney General to create a user-friendly electronic catalog of exemptions, allowing requesters and public officials one-stop access to relevant Oregon statutes and court decisions. The task force has made significant progress toward this end, and the legislature should ensure that work is preserved and built on going forward.
- Make a legislative commitment that future exemptions will be carefully considered and written.
- The legislature should figure out a plan for a comprehensive review of exemptions, with an eye towards reducing the overall number of exemptions and making existing exemptions more consistent with one another.

4. Look for electronic solutions to improve public access in the digital age.

Since the Oregon Public Records Law was enacted in 1973, the means by which public business is conducted has changed dramatically. Email and other electronic systems have resulted in an explosion of the volume of public records, which can contribute significantly to the difficulty of responding to requests. Current law does not require public bodies to consider public access when designing electronic systems, from databases to email servers. To truly facilitate ready access to government information in the digital age, the task force submits that this will need to change:

- A forward-looking solution to the problem of electronic records is imperative. The task force intends to review this issue further.
- The legislature may want to consider a simple requirement that public bodies consider the need for appropriate public access when acquiring or designing new electronic systems.

5. Create a Public Records Advocate to assist public records requesters and public bodies.

A handful of resources are currently available to public bodies and members of the public to help make sense of the Oregon Public Records Law. Every public body is required to have a publicly-available policy describing how public records requests should be made. And the Attorney General makes the Attorney General's Public Records and Meetings Manual available on the Department of Justice website. But the task force agrees that an office dedicated to helping both members of the public and public bodies navigate the Oregon Public Records Law

would be immensely beneficial. Although some of the possible roles for such an office garnered different levels of support, the task force found consensus around a number of critical features:

- Create an independent office in order to ensure that it can be trusted to act fairly.
- Provide the advocate with resources to train state and local government employees across Oregon, and to educate members of the public.
- Make mediation services of the advocate available at no cost to requesters and public bodies acting in good faith.
- Consider providing the advocate with additional resources to help public bodies respond to public records requests.
- Consider giving the advocate authority with respect to the Oregon Public Meetings Law as well.

6. Find a way to ensure that costs do not prevent meaningful public access.

Of all the issues raised before the task force, the issue of cost may be the most difficult to resolve. On the one hand, journalists and members of the public offered persuasive justifications for free public access. Public records are created at taxpayer expense by government workers pursuing ends that are meant to benefit the public as a whole, and officials in a democratic government should not only expect their actions to be scrutinized and questioned, but should welcome the opportunity to explain their leadership to the public they serve. On the other hand, representatives of government pointed out that many of the exemptions that complicate the public records process are designed to protect private information – of individuals and business enterprises – that the government must collect, rather than to protect government information. And they observed that responding to large records requests can effectively divert public resources away from the public mission of a government entity toward the private interest of the particular requester. Given the significance and complexity of this issue – and the fact that prior attempts to address it through legislation have uniformly failed – the task force has largely focused on other areas where consensus seemed more readily achievable. But the task force fully intends to examine this issue going forward, and makes the following recommendations:

- The task force will work to identify solutions that make meaningful public access to government information affordable, while protecting public resources from being unreasonably diverted away from serving the public in favor of serving the private interests of public records requesters.
- The legislature should include in the policy statement language explaining the state's policy with respect to the cost of obtaining public records.

Culture of Transparency

Current Law

Although Oregon's appellate courts frequently cite Oregon's policy of public access to government records, a direct statutory explanation of that policy is nowhere to be found. This is in stark contrast to the Oregon Public Meetings Law, which contains an eloquent explanation of its purpose:

> The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of ORS 192.610 to 192.690 that decisions of governing bodies be arrived at openly.

ORS 192.620.

Part of the legal framework that courts have constructed around Oregon's policy of openness is the idea that public records exemptions are typically discretionary. That means that, even if a public record is exempt from disclosure, a public body is usually free to disclose it anyway. Again, however, this policy exists in judicial decisions, not statutes.

Oregon's statutes are also silent on what consequences a public body, or an individual public official, might face as a result of disclosing public records. Again, court decisions giving public bodies discretion to disclose exempt public records suggest that disclosure is unlikely to result in liability – at least unless there is a law prohibiting disclosure. But Oregon's appellate courts have not said so expressly.

Task Force Review

The perception that public officials resent and work to frustrate public records request was relayed to the task force by more than one member. Government representatives acknowledge that responding to requests can sometimes be difficult and may require public bodies to pull employees off of regular job duties to process responses. The complexity of the Oregon Public Records Law was also cited as a daunting factor. In enacting more than 550 exemptions from public disclosure, the legislature has indicated that good reasons exist to withhold an array of information from records requesters. Media representatives, meanwhile, pointed out that public bodies seem to be either largely unaware that most of those exemptions are optional, or rarely interested in taking advantage of that fact.

The task force also heard that courts interpreting the public meetings law routinely rely on the explicit policy statement in that law. The policy statement provides a clear statement of intent by which other provisions of the law can be judged. The policy statement can similarly provides a ready benchmark that boards and commissions can use to guide their decisions about the application of the public meetings law: is this proposed course of action consistent with the need for our decision to be arrived at openly?

In addition, the task force learned that, in recent years, Oregon public bodies have faced actual or threatened litigation by private entities unhappy with disclosures (or planned disclosures) under the public records law. Similarly, privileged material – which could easily be disclosed in large public records production – could potentially be used against a public body. Like the complexity of the law, these types of risk can make it difficult for public bodies to embrace the virtues of transparency.

Finally, in looking at the concept of a public records advocate – discussed below in more depth – the task force came to the conclusion that such a position could play a significant role in encouraging government openness.

Recommendations

Overall the attitude of public bodies and public officials to public records requests undoubtedly varies – from one public body to another and even from one official to another. But it is clear that there are public bodies in the state that do not regard transparency as a core function. Given that public records requesters are perfectly within their rights to make requests that primarily serve their own interests, regardless of the public good, it is probably impossible to imagine a world in which every conceivable public records request will be met with enthusiasm. But the following recommendations of the task force should help public bodies foster a culture that values transparency in service of the public interest..

1. Enact a strong legislative policy statement explaining the important value of transparency.

In addition to providing guidance to government officials and courts, public records requesters will be able to use such a statement to encourage recalcitrant public bodies to embrace transparency. A policy statement will also lay groundwork for future work by the task force and legislature to further improve the Oregon Public Records Law.

2. Protect public bodies and public officials who act consistently with that policy by shielding them from liability for good faith disclosures and ensuring that privileged information they disclose cannot be used against them in court.

A culture of transparency requires public bodies and public officials who are confident state laws will not punish them for embracing the policy of openness in good faith.

3. Create a public records advocate charged with training state and local officials throughout Oregon on the requirements of the public records law, and educating the public.

An independent and trusted third party charged with helping public bodies understand and comply with the law could be invaluable in reinforcing the expectation of open government. Access to training will help ensure that public employees are aware of the requirements of the law. Meanwhile a public-facing educational role may enable the advocate to help explain to requesters when requests may be difficult to process for various reasons.

Timeframes for Fulfilling Requests

Current Law

No Oregon statute provides a specific timeframe for responding to public records requests. Two statutes provide ambiguous – and consequently flexible – guidance.[6] First, ORS 192.440(2) requires a public body to "respond as soon as practicable and without unreasonable delay" to written records requests. But that requirement can be completely satisfied by providing a statement that "the public body is uncertain whether the public body possesses the public record and that the public body will search for the record and make an appropriate response as soon as practicable." Second, ORS 192.430(1) requires public bodies to "furnish proper and reasonable opportunities for inspection and examination." This provision effectively requires public bodies to provide public records as soon as they reasonably can. But the standard is nebulous, and its enforcement can be inconsistent.

Task Force Review

The timeliness of public bodies' responses to public records request was a subject of frequent discussion in the work of the task force. On the one hand, an audit completed by the Oregon Secretary of State on November 17, 2015 found that, at least for the state agencies that the auditors examined, the bulk of routine public records requests are complied with in a timely manner. But the report also found that larger or more complicated requests were another story. Meanwhile, many of the journalists and individuals who presented testimony during public hearings expressed the view that public records requests were often unduly slow. For journalists, the nature of the news cycle amplifies the sense of frustration caused by delays. Others expressed that unexplained or unreasonable delays create an impression that government is divorced from the public and unconcerned with their interests.

On the other hand, government representatives pointed out that the staff time required to respond to public records requests represents a public resource. Allocating it to responding to public records requests submitted by private entities and individuals means that resource is unavailable for other tasks.

The task force also learned that a number of states provide specific timeframes for responding to public records requests, some as short as three days. Other states have timeframes

---

[6] In addition. ORS 192.465(2) provides that "[t]he failure of an elected official to deny, grant, or deny in part and grant in part a request to inspect or receive a copy of a public record within seven days from the day of receipt of the request shall be treated as a denial of the request for the purpose of determining whether a person may institute proceedings for injunctive or declaratory relief under ORS 192.450 or 192.460." Although this may sound like a deadline, its actual effect is slightly different. Basically, it means that after seven days a requester can get into court and argue that the elected official has violated the law – in the words of the statute, the requester may "institute proceedings." But it is not actually a deadline; it does not mean that the requester will necessarily win the lawsuit.

with built in flexibility to account for requests that cannot be satisfied within the generally established deadlines. The task force also reviewed prior proposals to establish response timeframes in Oregon, all of which failed to secure support in the Legislative assembly

Overall, the task force felt that it was important to create statutory timeframes within which requesters could generally expect their requests to be fulfilled. But the task force also felt it important to preserve flexibility to deal with unusually large or complicated requests – and to account for both small public bodies and public bodies that receive high volumes of requests. A significant amount of deliberation and debate went into deciding on the right timeframes to propose. Too short, and the law would be set public bodies up for failure, even those acting in good faith. Too long and the new statute could actually make current response times longer – which would be the opposite of what the task force is trying to achieve. In the end, the task force's recommendation represents a compromise reflecting the agreement between the task force members that the timeframes should be understood to establish outside parameters rather than ordinary practice for responding to records requests. Language in the proposal reflects that, as does the explicit right of a requester to petition for review of longer response times. Should that understanding fail to carry through into practice, the recommended timeframes would certainly need to be revisited.

Recommendation

1. Require an initial acknowledgment of the request within no more than five business days unless the public body first completes its response to the request.

An initial acknowledgment opens lines of communications between the public body and the requester. It provides an opportunity for a public body to seek clarification of the request or suggest ways in which the request could be narrowed to meet the requesters needs more quickly and at lower cost. The task force anticipates that many public bodies should be able to fulfill this step far more quickly – and will do so – but five business days provides enough time that even small public bodies with few resources should be able to comply.

2. A public body must complete its response to the request as soon as practicable, not later than ten business days after the acknowledgment was due, or else provide an explanation of when the public body expects to complete its response.

This ten day period was the primary subject of debate among task force members. The period is long enough that it could, if misunderstood or misapplied by public bodies, lengthen average response times rather than shortening them. The task force proposal is written to avoid those consequences by (1) ensuring that public bodies are *always* required to complete their responses as soon as practicable; (2) clarifying that this period is meant as an outside window; and (3) providing an explicit right to seek review of a public body's timeframe for completing its response to the request.

3. These timeframes are excused if compliance is not reasonably possible under the circumstances.

The task force heard that there may occasionally be reasons why public bodies are unable to comply with the requirements above. For all but the smallest public bodies, the task force expects that those occasions should be rare, and has therefore crafted the language of the exception narrowly.

4. Requesters may petition the Attorney General (state agency records) or District Attorney (any other public body's records) to contest the response time.

As part of the compromise around the ten-day period, the task force is recommending explicit language making public bodies' response timeframes subject to petition by the public records requester. Although the Attorney General and some district attorneys understand current law to allow them to entertain such challenges, the lack of statewide uniformity favors including such language. Moreover, even where review would be available to a savvy public records requester, the lack of language in the statute expressly permitting review could leave other requesters unaware of their right to challenge a public body's response time.

Exemptions from Disclosure

Current Law

When the public records law was enacted in 1973, it included a total of 54 state law exemptions, plus an exemption for records that federal law prohibits state entities from disclosing. Today, there are more than 550 state law exemptions from disclosure. Of these, 85 are found in the Oregon Public Records Law, where a person wanting to know what information is unavailable to the public would most likely think to look. The others are scattered throughout 17 volumes of Oregon statutes. These are incorporated into the Oregon Public Records Law by ORS 192.502(9)(a), sometimes referred to as the "catchall" exemption.[7]

Several inconsistencies can be found in these exemptions. For example, different public bodies have different rules for information connected with matters under civil investigation. Some agencies have temporary exemptions for their investigative materials during the pendency of an investigation, allowing the investigation to proceed to its conclusion before the information becomes public. Others have exemptions that survive beyond the conclusion of the investigation, while others yet enjoy no exemption whatsoever. Another example concerns public bodies that, as part of their public functions, find themselves in competition with private enterprises. The State Accident Insurance Fund Corporation (SAIF), Oregon Corrections Enterprises (OCE) and the Oregon Health Sciences University (OHSU's) all find themselves in regular competition with private sector businesses. And each has an exemption allowing them to withhold "sensitive business records" from public disclosure. But while SAIF's exemption can be overridden when there is a public interest requiring disclosure of particular documents, neither of the other two exemptions is subject to such a limitation. These two examples are by no means exhaustive.

Task Force Review

[7] The original version of the law did not include a catchall; instead it provided a specific list of other statutes that were incorporated into the Oregon Public Records Law.

The task force dedicated significant time to the issue of exemptions. The numerous exemptions described in this report were identified, put into a rough catalogue, and then divided into categories based on the apparent purpose of the exemption. A subgroup of the task force met several times to discuss the issue and how it might be best approached, and the large group discussed the topic at length.

Comparison to other states confirms that Oregon has a very high number of exemptions. On the one hand, the task force heard that the number of exemptions, combined with the fact that they are scattered throughout the Oregon laws makes it very difficult for public bodies to administer the public records law. This, it turns out, is not a new observation; as early as 1979, the then-State Archivist, J.D. Porter, told legislators that the already-growing number of exemptions was making the public records law more burdensome for public bodies:

> With the proliferation of restrictions on access to records and the broad general language in chapter 192 [the Oregon Public Records Law] considerable burden has been placed on the custodian of records.

Minutes of the House Committee on Judiciary, January 31 1979. On the other hand, though, the laws that boast the fewest numbers of exemptions – such as the federal Freedom of Information Act, which provides only nine – have exemptions that are far broader and far more ambiguous than most of the exemptions in Oregon law. The task force recognizes that specificity is a virtue in that it can significantly limit the ability of public bodies to accidentally or intentionally misuse exemptions.

Nevertheless the task force believes that Oregon's exemptions are out of control and need systematic review. The task force has done significant work that should facilitate such a review, and both the task force and the Attorney General's office stand ready to offer further assistance as needed. That commitment includes the proposal to require the creation of a user-friendly catalog of exemptions. But ultimately, exemptions were enacted by the legislature, at the apparent urging of various constituencies that will undoubtedly expect to be heard as this review process proceeds. The task force is not able to fulfill the role of the legislature in that regard; the issue must be addressed legislatively if it is to be comprehensively addressed.

Recommendation

1. Statutorily require the Attorney General to create and maintain a user-friendly electronic catalog of exemptions, allowing requesters and public officials one-stop access to relevant Oregon statutes and court decisions.

The task force has made significant progress toward this end, and the legislature should ensure that work is preserved and built on going forward. As noted above, the scattering of numerous exemptions throughout the entirety of the Oregon statutes creates a daunting system in which neither public employees nor those requesting public records can be confident that they have a clear understanding of what information is not exempt from disclosure. By requiring District Attorneys to provide the Attorney General with copies of their orders, the task force's

proposal will ensure that gaps in the catalogue can be identified. It will also enable the collection of information about how frequently various exemptions are being used in contentious ways across the state. Requiring the Office of Legislative Counsel to provide the Attorney General with information about new enactments creating public records exemptions will also contribute to ensuring a catalogue that is as complete and up-to-date as possible.

2. Make a legislative commitment that future exemptions will be carefully considered and written.

The scattershot spread of exemptions throughout 17 volumes of statutes is the result of 43 years of legislative enactments undertaken with little apparent consideration for consistency. Although the legislature technically cannot bind future legislatures, even an aspirational statement that future exemptions should be crafted rigorously and narrowly is likely to have a profound effect on the choices of future legislatures. In the alternative, the legislature could consider some sort of binding directive to one or more of its administrative offices to flag this issue as it arises going forward.

3. The legislature should figure out a plan for comprehensive review of exemptions, with an eye towards reducing the overall number of exemptions and making existing exemptions more consistent with one another.

At the end of the day, the task force does not have the authority to eliminate exemptions or streamline those it feels should be kept. The task force has done a significant amount of work on this issue and is more than willing to continue its work in support of legislative action. But the proponents of existing exemptions will almost certainly expect to be heard by the legislature if the legislature is going to revisit its prior enactments – and being heard by this task force will not change that expectation. The task force believes that the legislature should come up with a plan for the comprehensive review of existing exemptions, with the goal of creating a more workable system.

Transparency by Design

Current Law

Given that it was written in 1973, it is not remotely surprising that the Oregon Public Records Law was not drafted with today's digital workplace in mind. Although computers existed in 1973 – and indeed some public bodies are using electronic data systems that predate the Oregon Public Records Law – the seismic shift towards computer systems would have been very difficult to predict. Nevertheless, two provisions of the Oregon Public Records Law address electronic records. The first is ORS 192.430, which confirms that the disclosure requirements of the Oregon Public Records Law apply to electronic records and requires public bodies to "furnish proper and reasonable opportunity to assure access" to such records. The second is ORS 192.440(3):

> If [a] public record is maintained in a machine readable or electronic form, the custodian shall provide a copy of the public record in the form requested, if

> available. If [a] public record is not available in the form requested, the custodian shall make the public record available in the form in which the custodian maintains the public record.

These statutes clearly provide a right to obtain electronic records in their original format, or any other format that is "available." Based on these statutes and the general provisions of the Oregon Public Records Law, the Attorney General has concluded that, if a public body uses tools to extract data from electronic systems for its own purposes, it must use those same tools to extract data sought by a public records request. However, a public body is not required to program new or changed tools for the purpose of fulfilling a request. Nor is a public body required to combine data from multiple datasets.

Task Force Review

On the one hand, the task force has so far spent little time talking specifically about transparency by design. But on the other hand, the task force heard a lot about the significant effects that the digital age has had on the ability of public bodies to administer the Oregon Public Records Law. The chief culprit is probably email – not because it presents unique issues, but because email is ubiquitous throughout government. Public employees can receive easily hundreds of work-related emails every day, each of them a public record that is potentially subject to disclosure on request. In 1973, such communications were obviously unheard of; public employees could speak on the phone or speak in person – neither of which would entail the creation of any public record – or might compose a formal letter or memorandum if a particular matter warranted. In other words, the volume of public records has exploded in the electronic era, and the task force heard how that reality can strain the ability of public bodies to deal with public records requests.

Journalists who submitted testimony to the public hearings held by the task force identified other problems with Oregon's current approach to electronic public records. Oregon agencies often assert, sometimes correctly, that archaic or propriety data systems cannot export the public records they contain. Public bodies may also deny access to "data dictionaries," which explain how databases are organized. But the task force heard that access to data dictionaries makes it much easier for the requestor to formulate a narrow record request that limits agency staff time. Finally, the rule that public bodies need not combine data from multiple datasets, or even within the same dataset, may artificially restrict public access, given that the ability to combine information is one of the greatest advantages of modern computer technology.

Unless public bodies can find ways to efficiently deal with electronic data, public access to government will remain problematic. Under the current system, the exponentially larger volume of public records that exist in an electronic business place can be reviewed for exemptions only using the same analog method that existed in 1973: a human reader. The problem is obvious enough that, despite a relatively small amount of time spent discussing these issues, the task force believes designing electronic systems with appropriate transparency in mind is crucial to meaningfully improving access to public records.

Recommendation

1. A forward-looking solution to the problem of electronic records is imperative. The task force intends to review this issue further.

Specific solutions to this problem are, unfortunately, not nearly as obvious as identifying the problem. Information security issues may arise, along with the sheer complexity of designing solutions for a problem stemming from the intersection of a high volume of electronic records and a large number of exemptions from public disclosure. Nevertheless, it is likely that specific improvements – if not complete solutions – can be identified with additional work.

2. The legislature may want to consider a simple requirement that public bodies consider the need for appropriate public access when acquiring or designing new electronic systems.

Although specific solutions to this overall problem will require more thought, it may be desirable to task public bodies acquiring or building specific systems with consideration of these issues in connection with their particular projects. A basic requirement in the public procurement code directing public bodies to consider the need for appropriate public access could create improvements going forward without imposing specific requirements that might carry unintended consequences. In other words, although the task force is not currently in a position to recommend specific future steps going forward, there may be ways to begin to address the issue in more general ways.

Public Records Advocate

Current Law

Oregon does not have a public records advocate, ombudsman, or similar position. At the state level, the Attorney General has authority to issue orders with respect to public records disputes involving state agencies. As a consequence, the Attorney General's office occasionally finds itself essentially mediating public records disputes involving state agencies. The parallel authority of district attorneys with regard to local and county government records may sometimes put district attorneys in a similar position.

Task Force Review

The November 2015 audit report released by the Secretary of State's office highlighted that a number of states have established an ombudsperson to assist public records requesters and public bodies with public records issues, and suggested that Oregon consider following suit. After the issuance of the report, Oregon State Archivist Mary Beth Herkert spoke to the task force about her research into the experience of various states that have created this type of position. She identified genuine independence as a vital factor for insuring that both public records requesters and public officials trust and respect the office. She further emphasized the education that such an office can provide to public bodies and to the public at large as an important factor for success. Different states differ on a number of particulars. For example,

some offices have authority to issue advisory opinions, others have authority to make binding decisions, and still others are limited to attempting to mediate the dispute.

Based on this testimony and robust discussion, the task force reached consensus on a number of points. Members agreed that such an office would be invaluable to both requesters and public bodies. The task force unanimously endorses a statewide educational role – for requesters and public bodies alike – along with the ability to mediate disputes that arise between requesters and state or local governments. Members were split on other aspects of the position. Some expressed concern that authorizing the advocate to issue advisory opinions could undercut its role as a mediator of disputes. Others felt that such authority could empower the advocate; if the neutral advocate were inclined to side with the requester, an advisory opinion to that effect could encourage a public body to adopt that view, and conversely an advisory opinion in support of the public body could go a long way toward explaining the decision to the larger public. Given the split of opinion on the task force, this report makes no recommendation with respect to this issue.

Several members of the task force, including representatives of the media, the public, and state and local government, felt that the legislature should also consider giving the advocate authority with respect to the Oregon Public Meetings Law. Currently, most perceived violations of the Oregon Public Meetings Law can only be challenged in court, creating significant potential costs to public bodies and members of the public alike. While the Oregon Government Ethics Commission has limited authority in this area – it can entertain complaints that a public body excluded the public in an unlawful "executive session" – that body is generally charged with enforcing an entirely different sent of laws. The reasons for giving it this limited authority to enforce the public meetings law are unclear.

Recommendation

1. Create an independent office in order to ensure that it can be trusted to act fairly.

The legislature should create a public records advocate. The office should be vested with sufficient independence that its neutrality will be trusted by both public records requesters and public bodies.

2. Provide the advocate with resources to train state and local government employees across Oregon, and to educate members of the public.

A public records advocate charged with providing free training to government entities across the state would be very useful in fostering a culture of government transparency throughout the state. Authority to also educate members of the public will help ensure that the public understands when government entities are faithfully implementing the will of the legislature, particularly when decisions to withhold records might otherwise seem inconsistent with the public interest.

3. Make mediation services of the advocate available at no cost to requesters and public bodies acting in good faith.

It is clear that neither public records requesters nor public bodies responding to public records requests have a monopoly on the truth. Though government may too often default to secrecy, public records requests can be overly broad, or reflect private interests that are not aligned with the public's interest in how government resources are allocated. Robust authority for an independent advocate to mediate public records disputes can allow the public to see the extent to which government institutions need to improve – and to more objectively evaluate allegations that the public body is flouting the law.

4. Consider providing the advocate with additional resources to help public bodies respond to public records requests.

As discussed at some length above, the digital office environment of the 21st century creates significant challenges for public bodies responding to public records requests. Those challenges are magnified for small public bodies. To the extent that a public records advocate could be empowered to provide such resources to public bodies, that could be extremely helpful.

5. Consider giving the advocate authority with respect to the Oregon Public Meetings Law as well.

Like public records issues, public meetings issues can create rifts between members of the public and representatives of government. Though the task force has not studied the public meetings law, many members suggested that the advocate could be useful in this context as well.

Cost of Public Records

Current Law

Oregon law allows public bodies to charge fees for public records that are "reasonably calculated to recover actual costs." ORS 192.440(4). The appellate courts have indicated that this allows charges for staff time as well as materials necessary to provide access to public records. Fees may be waived or reduced if disclosure is in the public interest because it will primarily benefit the general public. But even if that condition is met, public bodies are not required to waive fees; they may refuse to do so unless that refusal is unreasonable.

Task Force Review

Multiple constituents identified the costs charged by public bodies as a major impediment to public access to records. Some members of the press and the public expressed the view that public bodies will waive charges if the information disclosed will be favorable to public body, but not if the information will be unfavorable. Others observed that there is a significant lack of uniformity in fee structures and waiver decisions. This can contribute to confusion or even distrust; if one government entity is willing to provide information at low cost – or even no cost at all – why would another one insist on payment of fees?

Representatives of government, meanwhile, noted that without the cost recovery mechanism, complicated public records requests can present resource allocation issues. A public records request is submitted by an individual – either in a personal capacity or representing a private entity. The connection between the requester's interest and the public interest can be tenuous or even nonexistent. In particular, complicated or large requests are often made by requesters with a specific and private interest – commercial entities or even opposing litigants, for example.

For the most part, these issues have not come up during meetings of the task force, but in public hearings and public reaction to the work of the task force. The task force acknowledges that the issue of cost is one that is of significant interest to the public. But prior attempts to revise the cost structure at the legislature have died quickly. As a result, the task force has focused its initial work on areas more likely to generate consensus – and more likely to result in successful legislative proposals. Nevertheless, the task force is well aware that the issue of cost is significant to addressing problems with the Oregon Public Records Law. To some extent, it is a problem entwined with the problem of electronic records described above; while review technology has not improved since the law was initially enacted in the 1970s, the volume of public records has exploded. Nevertheless, the task force believes that improvements in the fee area may be possible, and will work to identify solutions.

Recommendation

1. The task force will work to identify solutions that make meaningful public access to government information affordable.

The task force fundamentally agrees that seeking information about the activities of government should not be inherently unaffordable. But in trying to identify solutions, the task force recognizes that it is necessary to protect public resources from being unreasonably diverted away from serving the public in favor of serving the private interests of public records requesters.

2. The legislature should include in the policy statement language explaining the state's policy with respect to the cost of obtaining public records.

As the task force continues with its work in this area, a statement of policy from the legislature will provide useful guidance. In addition, public records requesters and public bodies alike should benefit from a clear expression of legislative purpose. The legislative concept proposed by the Attorney General includes a statement that essentially reflects current law. Any changes adopted by the legislature will further clarify the work of the task force with regard to costs.