AOC | Association of Oregon Counties

Monday, April 27, 2015

Written testimony before the
House Rules Committee
in opposition to House Bill 3505

Chair Hoyle, Vice-Chairs Gilliam and Smith Warner, and Members of the Committee,

The Association of Oregon Counties (AOC) is strongly opposed to House Bill 3505 as written. We understand that the bill is designed to address issues raised by events leading up to the recent resignation of Governor Kitzhaber. However, there are a number of provisions in the bill that would significantly burden local government. AOC encourages you to read the letters provided to the Committee by a number of our members. Here are just a few specific concerns:

- The requirement for response to a public records request within seven days, and every seven days thereafter, might work for simple and straight-forward requests, but would be burdensome for broad, large, or complicated requests.

- The waiver of fees after three weeks would actually encourage broad, large, and complicated public records requests, sapping counties of resources, and requiring counties to cover the entire expense of responding.

- The provision capping fees at the lesser of two alternate formulas not only complicates administering the law, it would result in counties having to bear much of the cost of responding, even if they managed to do so within the three weeks allowed under the bill.

I have also asked the Oregon County Counsels Association (OCCA) to provide me with their comments on the bill. OCCA members are the attorneys for counties, who are often faced with responding to broad, large, or complicated public records requests. They echoed what I've stated above, as well as in letters you have received from some of our members. Two counties also provided me with some recent examples of public records requests, which I've included on the next page. I've also attached a letter that I received from Crook County Counsel, as it provides further recent examples, as well as going into some depth regarding our concerns.

For the reasons discussed above, the Association of Oregon Counties (AOC) opposes House Bill 3505 as written, and urges a "no" vote.

Sincerely,

Rob Bovett
AOC Legal Counsel

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Examples of Recent Public Records Requests

Request: Information related to 20 years of data covering a park name and the word "safety." In emails alone, this impacted 28,000 documents. Estimated that it would take months to review each document and redact confidential information (such as social security numbers, juvenile information, protected health information, etc), thus the entire cost of the response under HB 3505 would have been borne by the county.

Request: Daily multiple record requests from several sources regarding a recent crime. In order to meet the timelines under HB 3505, all resources of the division would have had to have been pulled together to meet the request. No other service obligations could be performed, or the extensive cost of responding would have all been borne by the county. This would take employees away from their regularly assigned tasks, stopping their work, and creating inefficiencies in the administration of important governmental services.

Request: All accident reports spanning several years. This is somewhat common for private attorneys, and chiropractors, in search for clients. These are massive requests that require a large amount of redactions and staff time, and it would not be feasible to do these with the timeline of HB 3505, thus the entire cost would be borne by the county.

Request: All records relating to a certain piece of property, or with particular roads or intersections, with no time restrictions. These records are in multiple departments, and are difficult to find. It would be impossible to comply with this type of request within the HB 3505 timelines, thus the entire cost of responding would be borne by the county.

Request: 13 search terms and 9 phone numbers. Documents requested included email, texts, land line records, cell phone records and hard file records for 9 current and former employees for a period of two years. It took approximately 8 weeks to determine where the records were and how much time it would take to compile them. The total number of pages was over 7,000, and the estimated cost to compile the documents was approximately $6,000. Because it was not possible to comply with the request within the HB 3505 timeline, the entire cost of the response would have been borne by the county.

Crook County Counsel

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April 23, 2015

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Re: *House Bill 3505*

Dear Rob,

Thank you for bringing House Bill 3505 to our attention. Like you, we have deep concerns that as currently written the bill would create a host of unintended consequences which harm both members of the general public who transact business with public agencies, and negatively impact the ability of public agencies to accomplish their legal responsibilities.

The County, and our office in particular, takes pride in the speed and thoroughness of our responses to Oregon public records requests. We take seriously our duty to provide County documents which relate to the public's business.

Along with the duty to provide public records, the County also takes seriously its responsibility not to disclose private or confidential information, especially related to information in the County's custody which primarily concerns individuals in their private capacities who must deal with the County – whether by their choice or by some mandate of law.

Oregon's public records laws recognize that the disclosure of some kinds of information, even if it is part of a public record, does not further the goal of holding public institutions accountable. Indeed, the release of this information may cause enormous harm or the deprivation of privacy for individual citizens. HB 3505 would make the disclosure of this type of information substantially more likely, with no benefit to the public and to the pronounced harm to individuals.

Below are a few real world examples from the recent past where, had HB 3505 been the law, the risk of harm would have been severe.

Jeffrey M. Wilson, County Counsel • Eric Blaine, Assistant County Counsel

A. Not all public records requests ask for the same amount of documents, and HB 3505 would actually disadvantage those who ask for a small number of discrete documents.

Section 3, paragraph (4) of the bill creates extremely narrow timeframes by which public bodies must either disclose all the requested records or claim an exemption from disclosure. If all of the records requested have not either been disclosed or a claim of exemption has been made within three weeks of the request, then all compilation fees necessary for responding to a request are automatically voided. If the public body has not "achieve[d] a complete disposition of the request," not matter how much effort has been expended thus far and no matter who many records have already been turned over, the public body is automatically deemed to have denied the request.

What these requirements do not take into account is the obvious fact that not all public records requests ask for the same amount of documents. Here's an example. In August, 2013, Crook County received a request related to a certain ordinance. The request asked for:

1. Any and all County Court minutes, orders, resolutions, ordinance and other official actions taken regarding the passage, enforcement and repeal of Crook County Ordinance # 212 from January 1, 2009 to present.
2. Any and all records from January 1, 2009 to present concerning the election of Bill Gowen as Planning Commission Chairperson.
3. Any staff reports, memorandum, and correspondence generated regarding the passage, enforcement and repeal of Crook County Ordinance #212 from January 1, 2009 to present.

The request specifically included "all records, including records maintained in digital format such as electronic mail transmissions and attachments and all audio recordings, whether in digital or other format."

The ordinance in this case was not limited to a single subject matter – it covered the powers and recommendations of the local planning commission members, the formation and role of advisory committees, quorum requirements for Planning Commission meetings, expenditures of public funds for commission activities, the function of the chair and vice-chair positions of the commission, expenses that Commission members may lawfully incur, term limits on the commission chairmanship, and other issues.

The County could not have replied to the requester that he was asking for too much material and that he had to narrow his search. Rather, the County took the request seriously and undertook to estimate the amount of time it would require to locate, compile, review, and disclose four-and-a-half years' worth of material. Because of the vast range of topics the ordinance addressed, the County could not simply run a phrase-search function for certain specific words. The County estimated that responding to the request as written would require vast amounts of staff time and provided a cost estimate, based on the County's current fee schedule adopted after a public hearing.

After receiving the fee estimate, the requester amended his request: the audio recording of the December 7, 2011 meeting of the County Court (the board of commissioners for Crook County). The County was able to make a copy of that discrete record the same day as the revised request was received, and the total fees charged to the requester was $5.00, the cost of the CD onto which the recording was saved. Where the requester asked for "any and all" documents, the County took him at

his word and processed the request. It turns out that the requester actually only wanted one specific document, and once he had revised his request the document was made available that very day.

Crook County frequently receives requests for discrete documents or limited sets of documents. Because staff members are able to readily recognize not only that we possess such records, but also which records are being sought, the amount of staff time required to produce them is small and often negligible. For such requests for discrete records, fees are rarely more than a few dollars when the fees are not waived entirely.

As currently written, HB 3505 would create a perverse disadvantage to those who request discrete documents as opposed to those who request a vast range of records dealing with many varied topics from several years. The requesters of discrete documents would largely be treated no differently than they are now – the records are identified, and a small compilation fee may be charged.

Conversely, those who make voluminous requests are almost certain never to pay any fees at all, no matter how vast a collection of documents is sought. Section 3, paragraph (4) of the bill creates extremely narrow timeframes by which public bodies must either disclose all the requested records or claimed an exemption from disclosure. If all of the records requested have not either been disclosed or a claim of exemption has been made within three weeks of the request, then all compilation fees necessary for responding to a request are automatically voided. A requester can therefore avoid any possibility of paying fees simply by requesting a large enough universe of records.

Moreover, if the public body has not "achieve[d] a *complete* disposition of the request" (emphasis added), no matter how much effort has been expended thus far and no matter who many records have already been turned over, the public body is deemed to have denied the request. Even after six weeks of effort, a sufficiently large request may not be completely disposed no matter how much staff time is devoted to responding. If the request takes too long to process, the public body is vulnerable to being fined according to Section 6. Even a conscientious effort may miss these deadlines, leading to the loss of thousands of dollars of taxpayer money through these fines.

Standard timeframes for responses are appropriate in situations where the scope of responses can likewise be more-or-less standardized. As the example above demonstrates, though, the time it takes to respond to a request for an audio recording of a specific commissioners' meeting is not the same as responding to a request for "anything and everything, in whatever form, for the last four and a half years."

B. Even otherwise disclosable records may include confidential or private information of individual citizens, and HB 3505 will make the inadvertent disclosure of this information more likely.

Public bodies interact with thousands of Oregon citizens daily, and in so doing frequently come into possession of confidential or private information about those citizens. That information will be stored on public records, but simply because something is a public record does not automatically mean it must be, or can be, disclosed upon request.

The most obvious example is the Social Security number of public employees. Public employees are required to list their Social Security number on W-4 forms. Those forms are public records. However, if a request for a W-4 form is received, the public body has the responsibility to its employees to redact the Social Security number and other confidential information prior to disclosure

of the document. The law recognizes that in certain instances, the risk of harm caused by the disclosure of information outweighs the benefits to the public by making that information available.

This is not a hypothetic situation, but something that public bodies must actually deal with. For instance, in December 2012, Crook County received a request for a certain Sheriff's Deputy's personnel records. Most of the information contained in the file presented no problem – the information contained was the type that the law contemplated would be disclosed upon request.

However, interspersed among the disclosable documents was a host of personal or confidential information. The file contained a form indicating the Deputy's current pay scale including the number and type of income tax exemptions he claimed. While the amount of money a public officer is paid is a matter of public concern, what that public officer spent his salary on is strictly a private matter. The file contained a form listing the name and contact information of the individual(s) who the Deputy would like contacted in case of emergency. While the existence of this form, and the fact that it was completed, are legitimate bases for public inquiry, the identities of the specific persons are an intensely private matter. The file contained the names and contact information for the Deputy's insurance beneficiaries, which information could be used to discern very personal information about changes in the Deputy's family relationships over the course of his tenure with the County. Again, the existence of this form and the fact that it was completed are matters the public may be concerned with, but the identities of those listed and whether or not they were changed with the birth of children, the death of family members, or other such events, has no bearing on the public body's conduct.

And, of course, the personnel records included the Deputy's W-4 form, with his Social Security number included. The harm that could arise from the disclosure of an individuals' Social Security number are both grave and obvious.

In this case, responding to the request for one Deputy's personnel file did not pose a significant challenge – the County reviewed the file, discussed the personal information it contained, and offered to disclose the non-exempt documents after it had redacted this kind of personal information. In this way, the requester could receive information allowing him to review the County's conduct while the County was able to protect the personal information of an employee from intrusion by a complete stranger.

Whatever the intension, though, the narrow deadlines created by Section 3, paragraph (4) would make disclosure of this kind of confidential information more likely. As discussed above, these deadlines encourage the use of extremely broad requests rather than requests for discrete documents.

Imagine in this case that the requester had not asked for one employee's personnel file, but *every* County employee's personnel file. Crook County is a small jurisdiction, but it still has about 200 current employees, not including volunteers. Such a request would require a vast amount of staff time to review hundreds of files, each including potentially hundreds of individual pages, to find this kind of personal information and redact it. With one deadline of three weeks, and a final deadline of six weeks lest the County be deemed to have "denied" the request, the time pressure makes inadvertent oversights inevitable.

As you know, under Oregon law public bodies cannot create a blanket policy of nondisclosure of any specific category of documents. In *Guard Publishing v. Lane County School District*, the Oregon Supreme Court held that a blanket policy exempting public records from disclosure without an

individualized showing for each specific document violates the public records laws and is therefore unenforceable. 310 Or. 32, 40 (1990). If HB 3505 is passed, a public agency cannot simply avoid this problem by declaring certain documents per se exempt and thereby not review them. The public body must review each document, and make an individualized determination whether or not a disclosure exemption applies. For requests of easily identifiable, discrete documents, that obligation is straightforward. For those requests for vast universes of records, a narrow timeframe for response will create a dangerous rush to completion, and sooner or later someone's private information will be disclosed.

It would be a remarkable disgrace if the State encouraged someone's identity to be stolen or some individual's personal activities to be the subject of harassment and ridicule in the name of increased transparency.

C. The bill encourages "harassment" requests whose purpose would be to disrupt public functions rather than to obtain information.

Oregon public bodies sometimes undertake activities which make people upset. Police departments arrest people for alleged crimes. District attorneys' offices prosecute those allegations and recommend sentencing. Building code offices cite people for unsafe or unpermitted structures. Child welfare officials remove children from the custody of their parents. Environmental health officials condemn unsanitary homes. Land use planning departments deny property partitions. City councilors or county commissioners enact ordinances some think unwise or unnecessary, or fail to enact ordinances thought essential. The Department of Revenue requires people to pay taxes, and local assessor's offices assign values to properties from which taxes will become due.

If HB 3505 is enacted, it creates a ready-made avenue for upset individuals to disrupt public offices under the guise of requesting information. Imagine if an individual charged with domestic violence submits a public records request for "every email message sent to or received from the District Attorney's office for the past seven years." Those messages would be public records, and in order to prevent the inadvertent disclosure of confidential or private information (such as may involve past and present crime victims) each message would have to be found, compiled, and individually reviewed.

In such a scenario, the District Attorney's office would be presented with the choice of ignoring the request (and thereby endure fines pursuant to Section 6 of the bill, plus attorney fees under the existing provisions of ORS 192.490), or reassigning limited personnel from their regular job functions. Even the largest public agencies have a limited number of staff members, and every hour spent reviewing documents for a public records request is an hour the staff member cannot spend on his or her other duties.

Public agencies around the country are dealing with a variety of disgruntled citizens who use legal or faux-legal processes to disrupt, harass, and intimidate officials they dislike. In May 2014, the Journal of the American Bar Association published a report on "sovereign citizens" who "use laws as weapons." Below are some selected exerpts from the report:

- The FBI has called sovereigns "paper terrorists" because they so often fight perceived enemies – generally public employees – by filing false liens, false tax documents or spurious lawsuits.
- The Southern Poverty Law Center roughtly estimated that there were 300,000 sovereigns in the U.S. in 2011, with about a third, or 100,000, as hard-core believers.

- Their ideas can create real problems for the legal system. For one thing, even when sovereigns are genuinely trying to participate in a case, they're often disruptive. Because they believe their own legal system is the only legitimate one – and because they frequently resent authorities they feel are not legitimate – they have trouble cooperating with even the most basis of requirements.
- They're also known for the sheer volume of their filings, which can double the size of a normal court docket. They can frustrate and delay courts as they consider the defendant's competence and otherwise try to minimize disruptions. With many court systems fighting heavy caseloads and budget cuts, these extra headaches are unwelcomed.
- "These are people who are very fond of paperwork," says Michelle Nijm, assistant general counsel in the office of the Illinois secretary of state. "Even in court these cases drag on. They file nonmeritorious motions," which can be fought, "but it takes time and it's expensive."
- Fraudulent liens are one area where the law often permits sovereigns to succeed. That's because the UCC does not permit clerks to reject filings that are clearly bogus. Guided by online kits, sovereigns in many states are free to claim falsely that law enforcement officers, judges or others who upset them owe them millions of dollars.
- According to a 2013 report from the National Association of Secretaries of State, bogus UCC filings have risen dramatically in the past few years, driven by a rise in people identified as sovereign citizens. Nor is there a requirement to notify the victim of a false lien. "Typically, of course, you don't find out about it until you get a job offer and you go to sell your house and find that you're facing this gigantic lien," says Mark Potok of the Southern Poverty Law Center. "Which, of course, you don't really owe – but it takes thousands of dollars in lawyers to sort out the title and get that settled."
- The volume of filings is a "huge problem" – not only because it clogs the courts, but also because fatigued officials sometimes drop the matter. And any small victory is taken as evidence the sovereigns' extreme legal system works. A Florida dog licensing incident involving one individual stands out in her mind. "She refused to pay. They tried to fine her $25, and she hammered the court with paperwork. Something like 65 filings. The county government just gave up, which is unfortunate because then she turned around and packaged her materials as 'This is how you get out of taxes.' "

I have personally been subject to this kind of disruption-by-paperwork tactic. For many years a local resident named Danny Wayne Donaldson refused to pay his property taxes. The County foreclosed on the property, as it was required by law. After numerous attempts to convince Mr. Donaldson to pay the taxes he owed, the County attempted to evict him from the property he no longer owned. Mr. Donaldson flooded the court with voluminous filings which, while bogus, required the County to respond. When the circuit court judge ruled against him on some preliminary matters, he accused the judge of conspiring against him and forced a recusal. When another judge displeased him, he accused that judge of joining in the conspiracy and forced another recusal (our local judicial district only has three judges). When he thought that the case was going against him, he sued six separate district judges in federal court. He sued the circuit court clerks for having the temerity to file the County's motions. He sued the County assessor and Treasurer for applying tax laws against him, and sued a County commissioner for not stopping them. He sued our retired Sheriff for not arresting us all. He sued me personally, my former supervisor, and his predecessor. When the federal magistrate, showing a profound degree of restraint, granted Mr. Donaldson the opportunity to replead his voluminous filings into something sensible, he attempted to sue her as well.

Although Mr. Donaldson's efforts were ultimately unsuccessful, dealing with his appropriation of legal processes required considerable time and energy. While vast amounts of his filings were nonsense, he would occasionally produce a cogent claim which required response.

If Mr. Donaldson, and those like him, had the mechanism to use public records laws to disrupt those public offices of which he disapproved, he would have done so. His penchant for expansive, detailed, largely incomprehensible filings would be exactly the type of writing style which would create such a large, broadly defined request for documents that would force the County (or any other public body which aroused his ire) to either devote profound amounts of staff time addressing, or face the possibility of fines or attorney fees for having been deemed to "deny" the request.

D. Existing laws are sufficient to challenge fee amounts.

My understanding is that part of the motivation for this bill is concern that the compilation fees are too high. Leaving aside the matter of very broad or vague requests ("every email, document, meeting minutes, or other record discussing genetically modified organisms for the past seven years"), Oregon law already establishes an avenue for challenging inappropriate fees. ORS 192.440(6) creates a straightforward procedure for appealing to a disinterested third party any denial of either a request for a fee waiver or a fee reduction. The Attorney General's office, or, for local public bodies the resident District Attorney's Office, has seven days to rule on the appeal. If the requester is disappointed by this review, the requester can proceed to appeal to a court of law. The Attorney General's office has already made available, free of charge, their published opinions on such fee waiver requests, creating a large body of law describing under what circumstances fee waivers or reductions are required.

Oregon's existing law therefore creates a flexible system of appeal, where the circumstances of a specific public records request and its associated compilation fee can be evaluated on a case-by-case basis by a disinterested third party. Imposing a rigid formula would deprive the public of this even-handed flexibility in favor of unsophisticated conformity.

E. Concluding remarks and one final example.

Since arriving in Crook County a few short years ago, I've processed a great many public records requests. Whether someone asks for a copy of a single, easily-identifiable document or asks for "anything and everything having to do with this subject, ever" the County's personnel handles the request as thoroughly and expeditiously as possible, given the other important functions each official must also oversee. The sad truth is not all public records requests ask for the same amount of material or require the same amount of time in which to respond, meaning that the amount of time public officials must spend and the amount of material produced cannot be standardized.

In the autumn of 2014, a gentleman filed a public records request to Crook County: "I write to request a copy of the emails, phone records, and URLs visited for the email account, county phone line, and county computers used by DA Daina Vitolins and [Prevention Coordinator] Alex Bitz for June, July, August, and September of 2014 and 2012." The requester specifically asked that the documents be provided in time for him to influence the forthcoming November 2014 election by disseminating their contents. The requester later clarified that regarding the emails, he was only seeking messages with one of several separate "magic" words in either the body or the subject line of the message.

To respond to this message, the County first had to determine just how many documents it possessed with might be responsive. As you can imagine, even one public official will send a large number of email messages and make a large number of phone calls over two years.

The County then had to review each message, as required by the *Guard Publishing* standard, to determine whether any individual document included exempt material, and if so, whether the document must nevertheless be disclosed. As one might imagine, a law enforcement officer like the District Attorney and a public official who communicates with adolescents regarding health-related concerns had many discussions including private, confidential, or legally protected information. Many of the email messages contained attachments, and some of those were hundreds of pages long.

The County compiled thousands of pages worth of material, and decided to waive hundreds of dollars' worth of compilation fees per the requester's demands. Six separate public officials were involved in processing the request, which was expedited to meet the requester's stated goal of having the material produced in time so he could influence the November election. It took four weeks to complete the review, during which time the County remained in frequent contact with the requester. The responsive, non-exempt documents were produced prior to the election, along with the County's request that the requester pay the remaining balance for the review ($38.94).

The requester has never paid the remaining balance and so far as we can discern left the state the day after the election.

This recent scenario highlights how the present system works, and what harm might arise if HB 3505 is passed in its current form. Due to the extreme breadth of the request, the existence of confidential information related to private citizens (some of the minors, some of them crime victims), and the other responsibilities of the public officials involved, it was an enormous challenge to complete the public records request process even in four weeks. If HB 3505 had been the law, the County would have missed the three-week deadline and therefore lost the opportunity to recover any of its fees which are set to reflect the County's actual costs in responding to requests. Even a conscientious effort by half a dozen public officials could not meet this deadline while also conducting the individualized review of each document required by *Guard Publishing* and in such a way as to prevent the release of deeply personal information about private, vulnerable citizens.

Please share these concerns and recent, examples with those who are most involved in reviewing HB 3505. Whatever its intended benefits, the harm that it would create is grave – especially for those persons who must relay confidential information to public agencies whether they choose to or are required by law to do so.

Please let me know if you have any questions.

Sincerely,

Eric Blaine
Assistant Crook County Counsel