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April 2, 2019

Honorable Jennifer Williamson, Chair
Members of the House Judiciary Committee

Re: HB 3399

Dear Chair Williamson:

I write on behalf of the Multnomah County District Attorney's Office and Oregon District Attorney's Association to express serious concerns about the effect of HB 3399 on the public records appeal process.

Under the current statutory scheme district attorneys offer a quick, effective, and financially accessible process for members of the media and public to seek review of local governmental bodies' decisions to deny them access to public records. Although a robust ongoing debate exists about substantive provisions of the public records law, I have heard nothing but praise for the process of district attorney review. Indeed, the effectiveness of this system is what has led some to seek to add to our offices' authority and jurisdiction to resolve a wider range of public records disputes.

HB 3399 threatens the foundations of that system in its present form in that it seeks to flip the role of the district attorney from an impartial decision maker to that of an advocate. As district attorneys we are well familiar with the role of advocate; we litigate daily in the criminal justice system. However, the role of advocate is incompatible with our public records role as the neutral decision maker and, occasionally, informal mediator.

HB 3399 in its present form would require, whenever a public body seeks to appeal an order issued by a district attorney, that the district attorney appear in court to present argument in favor of upholding the order. When evaluating a public records dispute, quick, informal, and frank conversations with public bodies are essential. We fear these would cease were agencies concerned we would later be arguing against them in court.

When drafting an order, we take pains to note where a question is a close call, or involves an uncertain area of law. If we had to think downstream as to how to best advocate a position when drafting an order, we fear that the quality and impartiality of our work would suffer. Our orders not only resolve the dispute in front of us, but are published and serve as guiding precedent to assist others to avoid the need for litigation in similar situations moving forward. I regularly field calls both from members of the media and public agencies and am able to point

them to prior orders that resolve their dispute without the need for formal process. The ability of our orders to serve this role would suffer were they drafted with an eye to advocacy rather than impartial resolution of a dispute.

Nowhere else in the legal system is a judge expected or forced to defend her ruling to a higher court and we do not feel that requiring such of our offices would serve the public's interest.

The Multnomah County District Attorney's Office receives anywhere from 40 to 70 public records appeals each year. Over the last four years in only three instances have public bodies appealed our order to the circuit court. The records requestors in those few cases were a representative sample of those we see petitioning our office: a reporter, a private citizen, a political organization, and a lawyer. Each obtained counsel and vigorously argued their position in court, as they had previously, and personally, argued their position to me. In neither case would the requestor have received any apparent benefit from any provision of HB 3399 as introduced.

As district attorneys we welcome attention on the public records system that we work in on a daily basis and are eager to participate in attempts to improve it. We believe that HB 3399 would do harm to an already effective system of sub-judicial review without providing any obvious benefit. Accordingly, we oppose the bill in its present form.

Thank you for considering our concerns.

Regards,

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

By: _____
Adam Gibbs
Senior Deputy District Attorney