



April 3, 2019

Majority Leader Jennifer Williamson, Chair
House Committee on Judiciary
Oregon State Legislature

Re: HB 3399

Chair Williamson and Members of the Committee:

We greatly appreciate the efforts of Rep. Karin Power and Gov. Kate Brown with HB 3399, which highlights the importance of a pre-court appeal process that works, while seeking to prevent abuse by government agencies. We applaud the leadership shown by Malheur Enterprise Publisher Les Zaitz as well as the intercession of Gov. Brown to halt the state's lawsuit in PSRB vs. Malheur Media LLC. The Enterprise's Montwheeler articles represent the highest form of public-service journalism. As a similar Portland Public Schools case made clear, the concern driving this bill is absolutely well-placed. But we would respectfully prefer a different approach.

Summary: When issuing a pre-court public records order, district attorneys and the Attorney General's office currently need not worry about having to litigate, whether they side with secrecy or disclosure.

Under this bill, a decision to issue public records orders in favor of *releasing* documents, potentially sparking a lawsuit, could require the DA or AG to participate in labor-intensive, burdensome litigation. Pro-secrecy orders by DAs and the AG, in contrast, would bear no such risk.

These disclosure fights can represent a massive investment of time, one that for private attorneys can generate \$100,000 or more in fees.

Potential unintended consequences: Based on discussions with numerous legal observers, including current and former prosecutors, we are concerned that in gray areas of the law — where disclosure is called for under precedent and the law’s intent — HB 3399 could in many cases encourage DAs and the AG to instead side with secrecy in records orders, rather than risk being dragged into court to litigate.

Secondly, under current law the prospect of potentially paying a requester’s attorneys fees, as well the public optics of suing requesters, discourage agency lawsuits. This contributes to a pro-transparency tradition of agency deference to DA and AG orders. We are concerned that tradition could erode under this bill’s current framework.

Potential fixes to current law: SPJ would heartily endorse minor tweaks to Oregon law to more explicitly protect requesters from the sort of thing that happened in Malheur or Portland Public Schools vs. Slovic:

- State law could make more clear that when agencies sue a requester, existing statutes don’t let the government recoup attorney fees.
- The law could be modified to allow requesters, once sued, additional time to shop around for an attorney who likes their odds of success.
- Current statutes could make more clear that once sued, a requester may withdraw their request without cost if they can’t find a lawyer.
- State law could reimburse the AG or DA from general fund if they wish to file an amicus brief on behalf of either side in records litigation.
- The law should explicitly guarantee the requester is reimbursed if an agency sues a requester, only to drop the suit as occurred in Malheur.

In closing, we heartily support the drive to address problems highlighted by the PSRB suit and would like to help. Thank you for your time.

-Nick Budnick, board member, Oregon Territory Society of Professional Journalists. Co-chair, OTSPJ Freedom of Information Committee