

Analysis

Item 4: Judicial Department

Grand Jury Recordation

Analyst: Steve Bender

Request: Acknowledge receipt of a report on implementation of SB 505 (2017) and authorize the use of funds previously appropriated to the Judicial Department for early-adopter county implementation costs to be used for implementation costs in the 33 remaining counties.

Analysis: In 2017, the Legislature enacted SB 505 (Chapter 650, 2017 Oregon Laws). The bill requires county district attorneys to electronically record all grand jury proceedings, and to store and maintain copies of the audio recording. Three counties - Multnomah, Deschutes, and Jackson, were required to begin recording grand jury proceedings on March 1, 2018. The remaining counties are required to begin recording grand jury proceedings on July 1, 2019.

The bill also directs the Oregon Judicial Department (OJD), Public Defense Services Commission (PDSC), and each county that begins the recording of grand jury proceedings by March 1, 2018 to submit a preliminary report to the Legislature by December 1, 2018. OJD responded to this reporting requirement with this Emergency Board request.

Impact of the Grand Jury Recording Requirement to the Judicial Department

The state courts administered by the Judicial Department were expected to incur significant additional costs from the implementation of SB 505. The costs primarily reflect both direct and indirect additions to court workloads. Prior to passage of the bill, OJD's costs associated with grand jury proceedings were limited to per diem and other eligible payments provided to jurors, and to the costs relating to creating jury lists and summoning jurors. Otherwise, OJD judges and staff had no role in the proceedings.

SB 505 *directly* expanded OJD responsibilities in two primary areas:

- The bill requires OJD to supply county district attorney offices with the recording equipment and servers that are needed to record grand juries and maintain the recordings.
- The bill allows district attorneys to request protective orders to deny or restrict defense attorney and defendant access to the recording, or to parts of the recording. Judges or hearings officers might need to conduct hearings to rule on these requests, and when granted, OJD staff will need to redact the relevant portions of the recording to comply with the protective order. Initial estimates projected that protective orders would be sought in 60% of grand jury cases, totaling approximately 8,100 orders per year when phased in statewide.

SB 505 also *indirectly* expanded OJD responsibilities through an expected increase in preliminary hearings. Oregon law governing preliminary hearings was not amended by the bill. Prosecutors may choose to initiate felony charges either through a grand jury proceeding or a preliminary hearing. District attorneys reported, however, that the bill increased the benefits of conducting a preliminary hearing in lieu of seeking a grand jury indictment, and that the number of preliminary hearings would therefore increase substantially.

The courts do not refuse preliminary hearing requests, and preliminary hearings are more expensive for OJD than grand jury proceedings. The preliminary hearing requires both judicial officer and staff involvement. Based on information then available from district attorneys, over 20,000 additional preliminary hearings were projected per year, after the bill was implemented statewide.

Activity to Date

Protective Orders: The number of protective order motions and protective hearings to date have been significantly below earlier projections. As of October 29, only six protective order requests have been made. Initially, 8,100 protective order requests were expected each year, statewide, with approximately 3,100 of those originating in the three early-implementing counties.

Preliminary Hearings: As of September 30, a total of 862 preliminary hearings have been held. The number of preliminary hearings were initially projected to total approximately 20,000 per year statewide, with approximately 4,600 of these originating in the three early-implementing counties. The only county to conduct preliminary hearings was Multnomah. The Multnomah County district attorney office has since announced, however, that it will no longer routinely request preliminary hearings, and will instead use grand juries in felony cases, as it did prior to passage of SB 505.

Initial Budget Impacts

The 2017-19 biennium legislatively approved budget includes \$2.1 million to OJD for expenses associated with implementing the bill *in the three early-implementing counties*. Funding was provided to OJD to purchase and maintain the recording equipment for district attorneys, as well as to support 15 positions (9.79 FTE) in OJD to assist with processing protective orders and conducting preliminary hearings.

OJD now projects that the 2017-19 biennium costs of implementing SB 505 in the three early-implementing counties will only total \$1.1 million of the \$2.1 million provided for this purpose. The Department is asking the Emergency Board to expand the allowable uses of the \$2.1 million appropriation to include approximately \$800,000 of implementation costs for the remaining counties.

The Legislative Fiscal Office (LFO) recommends approval of this action. The 2017-19 biennium costs of the full statewide implementation could then be met within OJD's existing budget. LFO, however, believes that further analysis of implementation costs is needed, given the low level of additional responsibilities that are accruing to the courts so far. The need for the additional staff already approved should be evaluated. Furthermore, because OJD's 2019-21 biennium current service level budget includes a significant phase-in for statewide implementation of SB 505, the agency's requested budget likely seriously overfunds this activity, and this phase-in may not be needed.

Legislative Fiscal Office Recommendation: Acknowledge receipt of the report and allow the General Fund appropriation made to the Judicial Department for expenses necessary to carry out the provisions of SB 505 in the 2017-19 biennium to be used for applicable costs in all counties.

4
Oregon Judicial Department
McDonald

Request: Report on the implementation of Senate Bill 505 (2017) related to the recordation of grand jury proceedings and request approval to spend remaining 2017-19 biennium General Fund appropriations specific to Senate Bill 505 and House Bill 5006 on statewide efforts to implement Senate Bill 505.

Recommendation: The Oregon Judicial Department (OJD) is not under executive budgetary authority.

Discussion: Senate Bill 505 (2017) requires county district attorneys (DAs) to record grand jury proceedings and provide copies of recordings to defense counsel when a case is prosecuted in criminal courts. The measure provides for a phased implementation. Three counties were named in the Budget Report as early adopters; Deschutes, Jackson and Multnomah. These judicial districts began recordation on March 1, 2018. All other counties will begin implementation on July 1, 2019.

The implementation of this act required OJD to provide and maintain recording equipment for the counties, create business processes, meet new workload demands, report to the Emergency Board on implementation status by December 1, 2018 and provide a final report to the interim Legislative Committees by February 1, 2019. To support this implementation, Senate Bill 505 appropriated \$1.5 million General Fund for equipment purchases and other expenses necessary to carry out provisions of the act. Additionally, House Bill 5006 (2017) allocated \$600,000 to help address court workload impacts. The OJD projects approximately \$1.1 million of the total \$2.1 million will be spent for the three early adopter counties. The Department is requesting the Emergency Board approve expanding the use of funds appropriated for costs in the initial three counties to also cover implementation costs in the remaining counties. Based on current projections, OJD anticipates the remaining funds will be sufficient for equipment and staff costs of the statewide implementation, which will negate the need for supplemental funds from the \$7.9 million Special Purpose Appropriation set aside for this purpose.

In their report, OJD illustrated four ways in which Senate Bill 505 may change the criminal justice proceedings for judicial districts:

- Preliminary hearings – All but one of Oregon’s 36 DAs indicated to the Legislature the intent to initiate a percentage of felony cases by preliminary hearing instead of grand jury proceedings. Because they require time on the court docket, the workload impact for preliminary hearings is far greater than for grand jury proceedings.
- Grand jury transcripts – Since implementation, there have been two cases in Multnomah County where the DA filed a motion to release a grand jury transcript.
- Protective orders – Senate Bill 505 allows a DA to file a motion for protective orders concerning an audio recording. Six such protective orders have been filed in Multnomah County since Senate Bill 505 implementation.
- Shorthand reporters – DA's may request the court appoint a certified shorthand reporter for the purpose of taking accurate notes, at the expense of the DA. Although appointments may rise due to Senate Bill 505 since implementation, OJD is not aware of any cases a shorthand reporter has been requested or appointed.



OREGON JUDICIAL DEPARTMENT
Office of the State Court Administrator

October 29, 2018

The Honorable Senator Peter Courtney, Co-Chair
The Honorable Representative Tina Kotek, Co-Chair
State Emergency Board
900 Court Street NE
H-178 State Capitol
Salem, OR 97301-4048

Re: Notice of Report and Request Regarding OJD Implementation of 2017 SB 505, Grand Jury
Recordation

Dear Co-Chairpersons:

Nature of Request

The Oregon Judicial Department (OJD) requests that the Emergency Board acknowledge receipt of this preliminary report on implementation of SB 505 (Oregon Laws 2017, chapter 650), related to recordation of grand jury proceedings. OJD also requests approval to spend remaining 2017-19 biennium General Fund appropriations from SB 505 and HB 5006 (Oregon Laws 2017, chapter 702) for statewide efforts to implement SB 505.

Background

SB 505 required district attorneys to begin recording grand jury proceedings and directed or authorized OJD to perform related functions. Recording began in three 'early-adopter counties' specified in statute, and begins in the remaining 33 counties on July 1, 2019. Implementation of the bill required OJD to:

- provide recording equipment to county district attorneys and maintain the equipment.
- create business processes and meet new workload demands.

- implement SB 505 for judicial districts with a population of between 150,000 to 300,000 or over 700,00 on March 1, 2018, (Deschutes, Jackson and Multnomah Counties, the 'early adopter counties'), and all remaining counties on July 1, 2019.
- provide a preliminary report on the implementation of the recording requirements to the Emergency Board and the interim committees of the Legislative Assembly related to the judiciary, in the manner provided in ORS 192.245, no later than December 1, 2018.
- Provide a final report in the manner required above no later than February 1, 2019.

OJD received a one-time, \$1.5 million General Fund appropriation in SB 505 for the purchase of equipment and services and for other expenses necessary to carry out provisions of the Act. That appropriation was limited in the SB 505 Budget Report and Measure Summary "to provide funding for recording equipment and court costs in the three early-adopter counties only."

In section 141 of HB 5006, the Legislature increased this allocation by \$600,000 (\$2.1 million total) to help address court workload impacts from the anticipated use of preliminary hearings or protective order proceedings in the three early-adopter counties.

Early-Adopter Implementation Activities

To meet the requirements of SB 505 and to begin to capture data in the early-adopter counties, OJD implemented new Odyssey business processes, codes, and event statuses, which took effect in October 2017. OJD also purchased and installed the necessary recording equipment and hired court employees to meet the anticipated workload.

SB 505 requires the Chief Justice to designate the audio electronic recording devices suitable for recording grand jury proceedings and authorizes the Chief Justice to establish policies and procedures by rule or order to carry out the provisions of the measure. In Chief Justice Order 18-011, the Chief Justice designated the 'FTR Touch' system manufactured by For The Record (FTR) as the sole suitable electronic recording device system to be used by district attorneys when recording grand jury proceedings. This designation was made following demonstrating the equipment to the district attorney offices in the three early-adopter counties.

Equipment purchase and installation costs totaled approximately \$66,000 for the early-adopter counties. The equipment costs for the remaining 33 counties is projected to be approximately \$500,000.

To meet the expected workload in the early-adopter counties, SB 505 and HB 5006 authorized 15 new positions in OJD. OJD has filled 13 of those authorized positions as follows: two hearings referees and seven judicial support specialists in the Multnomah County Circuit Court, one judicial support specialist in the Deschutes County Circuit Court, and one hearings referee and two judicial support specialists in the Jackson County Circuit Court. Staff costs to date for these counties and for the remainder of the biennium are projected to be approximately \$1.0 million. Similar costs for the remaining 33 counties are projected to be approximately \$300,000 in the current biennium to hire and

train nine hearings referee positions and 14 Judicial Support Specialist positions to be prepared for the July 1, 2019, effective date of recording.

Preliminary Hearings

In response to the requirement to record grand jury proceedings, 35 of Oregon's 36 district attorneys indicated to the legislature that they would begin initiating some percentage of felony cases by preliminary hearing instead of by grand jury proceedings. Unlike grand jury proceedings, which do not require time on the court's docket, preliminary hearings require a judge, court staff, and docket time in order to proceed. The workload impact to court is far greater for preliminary hearings than for grand jury proceedings.

The Multnomah County District Attorney stated his intent to use the preliminary hearing process for approximately 80 percent of all felony cases. To date, the preliminary hearing process has been used in only about 34 percent of expected cases, but those cases have required approximately 33% more time than originally estimated. The Multnomah Circuit Court held 142 preliminary hearings before SB 505 went into effect, and held another 720 hearings between March 1 (when the recording requirement took effect) and September 30, 2018. The average hearing lasted approximately 15 minutes, although 27 percent lasted 31-90 minutes and two lasted more than 91 minutes.

The Deschutes County District Attorney, as indicated during legislative deliberations, continued to use only the grand jury process for all cases.

The Jackson County District Attorney estimated that approximately 25 percent of felony cases would go to preliminary hearing. However, the district attorney ultimately adopted a "wait and see" approach and the Jackson County Circuit Court has not held any preliminary hearings as of September 30, 2018.

The decision of whether to initiate a case through a grand jury proceeding or preliminary hearing rests with the district attorney in each county. OJD does not have current information regarding each district attorney's plan regarding use of preliminary hearings, but as recently as October 6 the Clatsop County District Attorney's office estimated it would use preliminary hearings in approximately half of its felony cases.

Grand Jury Transcripts

In cases where the grand jury considers the conduct of a public servant and returns a "not a true bill," SB 505 authorizes the public servant or the district attorney to file a motion requesting a court order to release all or a portion of a transcript (not the recordings) of the grand jury proceedings. There were two cases in Multnomah County Circuit Court where the district attorney filed a motion to release a grand jury transcript. Both cases involved the use of deadly force by law enforcement officers and required additional court time for resolution.

Protective Orders

SB 505 allows a district attorney to file a motion for a protective order concerning an audio recording, notes or report of certified shorthand reporter, or a transcript of the grand jury proceeding. The district attorney also may file a motion on behalf of a victim or a witness. Six protective orders have been requested and resolved to date in Multnomah County Circuit Court. No protective orders have been requested in Deschutes or Jackson County.

Shorthand Reporters

A district attorney may request that the court appoint a certified shorthand reporter to attend grand jury proceedings for the purpose of taking accurate notes. If appointed, the court shall swear the reporter to correctly report the grand jury proceedings. The district attorney shall pay for the shorthand reporter's services. OJD is not aware of any cases where a district attorney has requested, or the court has appointed a certified shorthand reporter.

Statewide Implementation

On July 1, 2019, district attorneys in the remaining 33 counties in Oregon will be required to begin grand jury recordation. OJD needs to purchase the designated equipment in the 2017-19 biennium in order to provide and install the equipment and allow district attorneys to develop internal processes before the recording requirement begins.

Similarly, OJD will need to hire and train staff during the current biennium to prepare for the expected court workload resulting from the use of preliminary hearings in some counties. OJD is using the same equipment estimate as in 2017, but based on the current experience, has reduced its full-implementation funding request for staffing by 60% and reduced its position authority request by 77%. These updated request levels will also be reflected in the Current Service Level budget request for the 2019-21 biennium. This will be revisited in our February report and as part of our 2019 legislative budget presentation.

In terms of expenditures to date and projected spending, OJD projects approximately \$1.1 million of the available \$2.1 million will be spent for the early adopter counties. The experience of the three early-adopter counties is not predictive of the results of the implementation of SB 505 in other counties. However, if such experience were representative of the needs of the remaining 33 counties, then OJD would project the additional costs in this biennium for statewide implementation to be approximately \$800,000, leaving approximately \$200,000 of OJD's current appropriations to cover unexpected costs.

To ensure that OJD can carry out the provisions of the 2017 Act, OJD is requesting that the Emergency Board approve expanding the use of funds appropriated for costs in the early-adopter counties so they can be applied to also cover the implementation costs in the remaining counties in Oregon. Based upon present projections, OJD expects that the remaining funds in the current appropriation would be sufficient for the equipment and staff costs preparing for statewide

The Honorable Senator Peter Courtney, Co-Chair
The Honorable Representative Tina Kotek, Co-Chair
October 29, 2018
Page 5

implementation and OJD would not require supplemental funds from the \$7.9 million Special Purpose Appropriation set aside in the Emergency Board for this purpose.

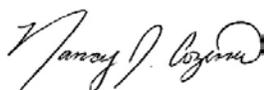
Action Requested

The Oregon Judicial Department requests that the Emergency Board acknowledge receipt of this preliminary report on implementation of SB 505 and approve expanding the use of funds appropriated for early-adopter counties to cover the implementation expenditures in the 33 remaining Oregon counties that will start grand jury recordation on July 1, 2019.

Legislation Affected

2017 Senate Bill 505 (Oregon Laws 2017, chapter 650)

Sincerely,



Nancy J. Cozine
State Court Administrator

NJC:DM:ma/18eNJC015ma

cc: Chief Justice Martha L. Walters
Steve Bender, Principal Legislative Analyst, LFO
April McDonald, Policy and Budget Analyst, CFO-BAM
David Moon, Director of BFSD, OJD