

Does the pendency of the proposed rule-based public records initiative announced by the Secretary of State on May 12, 2017, lessen the urgency of passing SB 106A, SB 481A, or HB 2101-18?

Answer: No.

Simply put, the proposed rule-based public records initiative does not duplicate any of the three pending bills.

The Proposed Rule-Based Program¹ and SB 481A: The proposed rule-based program and SB 481 do not address the same aspects of the open governance principle expressed in the Public Records Law. The bill addresses features of the Public Records Law and its execution by state and local governments that are not addressed in the proposed rule. SB 481A addresses the following, none of which are addressed by the proposed rule-based program:

- Establishing a more specific timeline for the timeliness of responses to public records requests. Section 3.
- Creating a statutory framework for substantive interaction between requesters and public bodies about the scope of requests. Section 4 (4).
- Requiring the Attorney General to compile a list (“catalog”) of exemptions. Section 7.
- Encouraging the discretionary release of records by safeguarding the public body’s lawyer-client privilege as to the released records. Section 8(2) and Section 9.
- Encouraging the discretionary release of records by protecting public bodies against potential civil liability. Section 8(1).

The pendency of the proposed rule-based program creates no basis to declare SB 481A or the proposed rule-based program unnecessary in light of the other. Simply, the two proposals are not duplicates.

The Proposed Rule-Based Program and HB 2101-17: The proposed rule-based program and the referenced versions of HB 2101 generally do not address the same aspects of the open governance principle expressed in the Public Records Law. The proposed rule-based program addresses the following, none of which are addressed by any version of HB 2101:

- Specifies circumstances under which a requester may seek “facilitate dispute resolution services” from the State Archivist. Proposed Rule 166-035-010.
- Describes how the State Archivist will provide such services. Proposed Rule 166-035-015.

¹ This comparison is based on a draft of rules the author of this comparison received from the Secretary of State’s office.

- Requires the State Archivist to provide public records management, processing, and response training. Proposed Rule 166-037-0010.
- Requires the State Archivist to survey practices and procedures on specified subjects, and to publish an annual report on the results. Proposed Rule 166-037-0020.

HB 2101-17 create an in-Session system of “Open Government Impact Statements.” The proposed rule-based program has no corresponding provision.

Elements of the Archivist’s duties under proposed 166-037-0020 superficially duplicate those assigned to the Oregon Sunshine Committee established by HB 2101-17. Specifically, proposed 166-037-0020 (1)(c) and (d) require the Archivist to identify inefficiencies and inconsistencies that impair public interests in disclosure, and to recommend changes to enhance public interests in disclosure. These elements correspond word-by-word to Sections 6 (3)(c) and (d) of HB 2101-17 (duties of the Oregon Sunshine Committee).

The seeming equivalence of these provisions is illusory. Simply, the two proposals are not duplicates:

- The Archivist and the Oregon Sunshine Committee bring different perspectives to bear on their respective duties. The Archivist need not have experienced the Public Records Law as a professional journalist, publisher or broadcaster, nonprofit open government or public interest group, or information technology expert. All of those perspectives, and more, would be brought to bear by the Oregon Sunshine Committee in the discharge of its duties. Different perspectives will almost certainly cause varying perceptions of “inefficiencies and inconsistencies.”
- The discharge of the Archivist’s law-improvement duties is potentially more exposed to individual political agendas than the discharge of the superficially identical duties of the Oregon Sunshine Committee.² The Archivist is appointed, controlled day-to-day, and potentially removed by a single elected official. ORS 357.815 (Office created “under the control and supervision of the Secretary of State . . .”). In contrast, the Oregon Sunshine Committee will be relatively insulated from any individual political agenda. The potential political influence of any one elected official over the Oregon Sunshine Committee, and therefore over the Committee’s recommendations, is diluted by design. First, the authority of the direct political appointees to the Oregon Sunshine Committee derives separately from elected officials (Governor, Attorney General, Secretary of State, President of the Senate, and Speaker of the House). Second, the non-voting legislators who are members of the

² This analysis compares systems that could outlast the span of any current office-holder’s term. In describing the risk of self-interested political intrusion into decision-making about the administration or future improvement of the Public Records Law, I intend no commentary on any existing office-holder or official. In building an enduring system, we have to assume the possibility that a future actor will not have pure motives.

Oregon Sunshine Committee are accountable to constituents in four legislative districts. Finally, several members of the Oregon Sunshine Committee would serve at the pleasure of non-governmental organizations.

- The duties assigned the Archivist under the proposed rule-based initiative are relatively impermanent in comparison to the superficially identical duties assigned to the Oregon Sunset Committee. The proposed initiative is necessarily framed as the exercise of rule-making authority by an official (the Secretary of State) to whom discretionary rule-making authority is assigned by statute. The Secretary is under no legal compulsion to continue to advance the current proposal. No future Secretary would be obligated by law to maintain the program or would be obligated by law to maintain it in its original form. In contrast, the Oregon Sunshine Committee would operate within a set of statutorily-assigned duties. None of the appointing authorities would be free to change the Oregon Sunshine Committee's mandate or to dissolve it altogether.
- The law improvement recommendations of the Archivist under the proposed rule-based initiative are less likely to become law than recommendations of the Oregon Sunset Committee, even though identical language describes their respective mandates. Nearly every legislative judgment about the Public Records Law requires the Assembly to examine public interests in non-disclosure as well as public interests in disclosure. A recommendation of the Oregon Sunshine Committee will have a legislative leg up on a recommendation from the Archivist because the former will have been vetted at birth by a group that includes many of the perspectives likely to be vitally interested in the proposed modification to the Public Records Law.

The Proposed Rule-Based Program and SB 106A:

The proposed rule-based proposal and SB 106A address two subjects: 1. Governmental best practices/continuous law improvement, and 2. Facilitated dispute resolution of particular disputes. I draw the comparison separately for each of those subjects.

A.

Governmental Best Practices/Continuous Law Improvement

Elements of the Archivist's duties under proposed 166-037-0020 are assigned the Public Records Advocate and Public Records Advisory Council by SB 106A. Specifically, proposed 166-037-0020 (1)(a) - (d) assign to the Archivist duties corresponding nearly word-for-word with SB 106A, Section 10 (1)(a)-(d). These sections contain responsibilities for identifying best practices and define ongoing roles in law improvement.

The seeming equivalence of these provisions is illusory. Simply, the two proposals are not duplicates:

- The Archivist and the Public Records Advisory Council bring different perspectives to bear on their respective duties. The Archivist need not have experienced the Public Records Law as a professional journalist or as a representative of “news media or as a city, county, or special district. All of those perspectives, and more, would be brought to bear by the Public Records Advisory Council in the discharge of its duties. Different perspectives will almost certainly cause varying perceptions of “inefficiencies and inconsistencies.”
- The discharge of the Archivist’s law-improvement duties is potentially more exposed to individual political agendas than the discharge of the superficially identical duties of the Public Records Advisory Council. The Archivist is appointed, reports directly to, and may potentially be removed by a single elected official. ORS 357.815 (Office created “under the control and supervision of the Secretary of State . . .”). In contrast, the Public Records Advocate (who chairs the Council) is insulated from the Governor’s individual political agenda by a fixed term of office, Senate confirmation, selection from a limited pool not selected individually by the Governor, and “for cause” removal. SB 106A, Section 1. The potential political influence of any one elected official over the Public Records Advisory Council, and therefore over the Council’s recommendations, is diluted in comparison to the Archivist. First, the authority of five members of the Public Records Council derives separately from five elected officials (Governor, Attorney General, Secretary of State, President of the Senate, and Speaker of the House). Second, the two legislators who are members of the Public Records Council are accountable to constituents in two legislative districts.
- The duties assigned the Archivist under the proposed rule-based initiative are relatively impermanent in comparison to the superficially identical duties assigned to the Public Records Council. The proposed initiative is necessarily framed as the exercise of rule-making authority by an official (the Secretary of State) to whom discretionary rule-making authority is assigned by statute. The Secretary is under no legal compulsion to continue to advance the current proposal. No future Secretary would be obligated by law to maintain the program or would be obligated by law to maintain it in its original form. In contrast, the Public Records Council would operate within a set of statutorily-assigned duties. None of the appointing authorities would be free to decide to change the Public Records Council’s mandate or to dissolve it altogether.
- The Archivist’s law improvement recommendations under the proposed rule-based initiative are less likely to become law than recommendations of the Public Records Council, even though identical language describes their respective mandates. Nearly every legislative

judgment about the Public Records Law requires the Assembly to examine the public interest in non-disclosure as well as public interests in disclosure. In that unavoidable legislative process, recommendations by the Public Records Council will have a legislative leg up on a recommendation from the Archivist because the former will have been vetted at birth by a group that includes many of the perspectives likely to be vitally interested in the proposed modification to the Public Records Law.

B.

Facilitated Dispute Resolution of Particular Disputes

Elements of the Archivist's duties under proposed 166-037-0020 are assigned to the Public Records Advocate by Section SB 106A. Specifically, proposed 166-035-0010 and 166-035-0015 assign to the Archivist duties corresponding, in some instances, word-for-word with SB 106A, Sections 2 - 4. These sections direct the Public Records Advocate to offer facilitated dispute resolution and specify how that service is to be delivered.

The seeming equivalence of these provisions is illusory. For the following reasons, the overlap between the proposed rule-based initiative and SB 106A as to facilitated dispute resolution creates no basis to declare one unnecessary in light of the other. More simply, the two proposals are not duplicates:

- The discharge of the Archivist's facilitated dispute resolution duties is potentially more exposed to individual political agendas than the discharge of the superficially identical duties of the Public Records Advocate. The Advocate is appointed, reports directly to, and may potentially be removed by a single elected official. ORS 357.815 (Office created "under the control and supervision of the Secretary of State . . ."). In contrast, the Public Records Advocate is insulated from the Governor's individual political agenda by a fixed term of office, Senate confirmation, selection from a limited pool not selected individually by the Governor, and "for cause" removal. SB 106A, Section 1.
- The facilitated dispute resolution duties assigned the Archivist under the proposed rule-based initiative are relatively impermanent in comparison to the superficially similar duties assigned to the Public Records Advocate. The proposed initiative is necessarily framed as the exercise of rule-making authority by an official (the Secretary of State) to whom discretionary rule-making authority is assigned by statute. The Secretary is under no legal compulsion to continue to advance the current proposal. No future Secretary would be obligated by law to maintain the facilitated dispute resolution program or would be obligated by law to maintain it in its original form. In contrast, the Public Records Advocate would operate within a set of statutorily-assigned duties. The Advocate would not be free to discontinue the service or to change statutory terms of participation.

- The scope of a rule-based facilitated dispute resolution program is limited to the authority granted by the statute authorizing rules. In contrast, the legislative power has no limits except for the state and federal constitutions. The proposed 166-037-0020 therefore cannot include at least two of the features of SB 106A's facilitated dispute resolution process that are intended to increase the probability of useful outcomes:
 - The requirement that state agencies pay requesters' costs and attorney fees upon a finding of lack of good faith participation in a facilitated dispute resolution process. SB 106A, Section 2(4)(b). A rule purporting to impose that consequence would exceed the rule-making authority relied upon as the foundation for proposed 166-037-0020.
 - Functionally amending the mediation confidentiality statutes (ORS 36.220 to 36.238) by making them applicable to "facilitated dispute resolution processes" as described in SB 106A when on their face those statutes apply only to "mediations." Proposed 166-037-0020 cannot amend any statute.