

Enrolled Senate Bill 106

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CHAPTER

AN ACT

Relating to public accountability in administering the public records law; creating new provisions; amending ORS 36.238; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) The office of the Public Records Advocate is created.

(2) The Public Records Advocate shall be appointed by the Governor from among a panel of three qualified individuals nominated by the Public Records Advisory Council under section 8 of this 2017 Act, and shall be confirmed by the Senate in the manner prescribed in ORS 171.562 and 171.565.

(3) The Public Records Advocate shall be a member in good standing of the Oregon State Bar.

(4) The term of office of the Public Records Advocate shall be four years, except that the advocate may be removed for cause by the Governor or upon motion of the Public Records Advisory Council with the consent of the Governor. A determination to remove for cause may be appealed as a contested case proceeding under ORS chapter 183.

(5) The advocate may be reappointed to consecutive terms.

(6) The Public Records Advocate is in the unclassified service.

(7) The Public Records Advocate may hire one or more deputy advocates or other professional staff to assist in performing the duties assigned to the Public Records Advocate.

(8)(a) The State Archivist may furnish office facilities and provide administrative support to the Public Records Advocate.

(b) If the State Archivist declines to furnish office facilities and provide administrative support to the Public Records Advocate, the Oregon Department of Administrative Services shall furnish office facilities and provide administrative support to the advocate.

SECTION 2. (1)(a) The Public Records Advocate shall provide facilitated dispute resolution services when requested by a person described in subsection (2) of this section or by a state agency under the conditions described in subsection (3) of this section.

(b) The Public Records Advocate may provide facilitated dispute resolution services when requested by a person described in subsection (6) of this section and a city.

(2) A person may seek facilitated dispute resolution services under this section when seeking to inspect or receive copies of public records from a state agency and the person:

(a) Has been denied access to all or a portion of the records being sought;

(b) Has been denied a fee waiver or reduction in fees after asserting under ORS 192.440 (5) that a fee waiver or reduction of fees is in the public interest; or

(c) Received a written fee estimate under ORS 192.440 (4) that the person believes exceeds the actual cost to be incurred by the public body in producing the requested records.

(3)(a) A state agency may seek facilitated dispute resolution services under this section if, in response to a request for public records, the agency asserts:

(A) That the records being sought are not public records;

(B) That the records being sought are exempt from mandatory disclosure; or

(C) That the agency is, under ORS 192.440, entitled to the fees the agency is seeking in order to produce the records being requested.

(b) A person seeking to inspect or receive copies of public records may opt out of facilitated dispute resolution services being sought by a state agency by giving written notice of the requester's election within five days of the requester's receipt of the agency's request for facilitated dispute resolution. If written notice is given under this paragraph, the state agency may not determine under subsection (4)(a) of this section that the person seeking to inspect or receive copies of public records has failed to engage in good faith in the facilitated dispute resolution process.

(4) Notwithstanding any other provision of ORS 192.410 to 192.505:

(a) The failure of a person seeking to inspect or receive copies of public records to engage in good faith in the facilitated dispute resolution process described in this section upon being authorized to do so under subsection (2) of this section shall be grounds for the state agency to deny the request and refuse to disclose the requested records.

(b) The failure of a state agency to engage in good faith in the facilitated dispute resolution process described in this section after a public records requester seeks facilitated dispute resolution services under subsection (2) of this section shall be grounds for the award of costs and attorney fees to the public records requester for all costs and attorney fees incurred in pursuing the request after a good faith determination under subsection (5) of this section.

(5)(a) Either party to the facilitated dispute resolution may request that the Public Records Advocate make a determination concerning whether a party is acting in good faith for purposes of applying the remedies described in subsection (4) of this section.

(b) A determination by the advocate that a party failed to engage in good faith facilitated dispute resolution and an award of costs and attorney fees are subject to review by the Circuit Court of Marion County as a proceeding under ORS 183.484.

(6) In the case of a person seeking to inspect or obtain copies of public records from a city, either the person seeking records or the city may seek facilitated dispute resolution services under this section, but only if both the person seeking records and the city agree to have the Public Records Advocate facilitate resolution of the dispute and the advocate consents to facilitated resolution of the dispute. A dispute described in this subsection is not subject to subsections (4) and (5) of this section.

(7) Facilitated dispute resolution shall be requested by submitting a written request for facilitated dispute resolution and such other information as may be required by the Public Records Advocate. Facilitated dispute resolution between parties shall be conducted and completed within 21 days following receipt by the advocate of the request for facilitated dispute resolution. The facilitated dispute resolution period may be extended by unanimous agreement among the public records requester, the public body and the advocate.

(8) If the facilitated dispute resolution results in an agreement between the public records requester and the state agency or city, the advocate shall prepare a written document memorializing the agreement. The written agreement shall be executed by the public records requester and an authorized representative of the state agency or city. The written agreement shall control the resolution of the records request.

SECTION 3. Consistent with section 2 of this 2017 Act and rules adopted thereunder, the Public Records Advocate possesses sole discretion over the conduct of facilitated dispute resolution sessions.

SECTION 4. Written records, documents, notes or statements of any kind prepared for or submitted to the Public Records Advocate, prepared by the advocate or exchanged between parties seeking a facilitated dispute resolution are subject to ORS 36.220 to 36.238. The Public Records Advocate may claim any exemption from disclosure under ORS 192.410 to 192.505 that a public body that is a party to the facilitated dispute resolution may claim with respect to a request for public records described in this section.

SECTION 5. (1) The Public Records Advocate shall provide training for state agencies and local governments on the requirements and best practices for processing and responding to public records requests.

(2) The Public Records Advocate shall perform training sessions throughout this state.

(3) Upon the written request of a state agency or local government, the Public Records Advocate may provide guidance and advice on matters pertaining to public records request processing and the disclosure and applicability of exemptions from disclosure of public records.

(4) Guidance and advice provided pursuant to subsection (3) of this section is purely advisory and must cease when the particular advice sought relates to a matter that is referred to facilitated dispute resolution under section 2 of this 2017 Act.

SECTION 6. The Judicial Department is not subject to sections 2 and 5 of this 2017 Act.

SECTION 7. ORS 36.238 is amended to read:

36.238. The provisions of ORS 36.210 and 36.220 to 36.238 apply to:

(1) All mediations, whether conducted by a publicly funded program or by a private mediation provider[.]; and

(2) Facilitated dispute resolution services conducted by the Public Records Advocate under section 2 of this 2017 Act. Solely for purposes of ORS 36.210 and 36.220 to 36.238, a facilitated dispute resolution shall be deemed a mediation.

SECTION 8. (1) The Public Records Advisory Council is created.

(2) The Public Records Advisory Council consists of:

(a) The Secretary of State or a designee of the Secretary of State;

(b) The Attorney General or a designee of the Attorney General;

(c) The Director of the Oregon Department of Administrative Services or a designee of the director;

(d) A representative of the news media who is a member in good standing of a professional journalism association and who is appointed by the Governor;

(e) Two additional representatives of the news media who are appointed by the Governor;

(f) A representative of the cities of this state who is appointed by the Governor;

(g) A representative of the counties of this state who is appointed by the Governor;

(h) A representative of the special districts of this state who is appointed by the Governor;

(i) A representative of the public sector workforce who is appointed by the Governor;

(j) A member of the public who is appointed by the Governor;

(k) A Senator who is appointed by the President of the Senate and who serves as an ex officio nonvoting member;

(L) A Representative who is appointed by the Speaker of the House of Representatives and who serves as an ex officio nonvoting member; and

(m) Except as provided in subsection (3) of this section, the Public Records Advocate, who shall serve as chair of the council.

(3) At any time when the office of Public Records Advocate is vacant:

(a) The Secretary of State or a designee of the Secretary of State shall serve as the acting chair of the Public Records Advisory Council;

(b) The council shall convene at the time and place designated by the acting chair but within 30 days of the vacancy of the office of Public Records Advocate;

(c) The council shall take up only the question of the nomination of three qualified individuals for the Governor to consider for appointment under section 1 of this 2017 Act as Public Records Advocate; and

(d) The individual who had vacated the office of Public Records Advocate may participate in deliberations and vote on the slate of nominees unless the individual vacated the office for reasons described in section 1 (4) of this 2017 Act.

(4) The appointment of a member of the council described in subsection (2)(d) to (j) of this section is subject to confirmation by the Senate in the manner prescribed in ORS 171.562 and 171.565.

(5) A member of the council described in subsection (2)(d), (e) or (j) of this section is entitled to compensation and expenses as provided in ORS 292.495.

(6) A majority of the members of the council constitutes a quorum for the transaction of business.

(7) The council shall meet at least once every six months. The council also may meet at other times and places specified by the call of the chair or of a majority of the members of the council.

(8) All public bodies, as defined in ORS 192.410, shall assist the council in the performance of its duties and, to the extent permitted by laws relating to confidentiality, furnish such information, including public records, and advice as the members of the council consider necessary to perform their duties.

SECTION 9. Notwithstanding section 8 (3) of this 2017 Act, the acting chair of the Public Records Advisory Council as determined under section 8 (3) of this 2017 Act shall convene the council within 10 business days following the Senate confirmation of all members of the council for the purpose of nominating individuals for the Governor to consider for appointment as Public Records Advocate under section 1 of this 2017 Act. The council shall take up only the question of the nomination of qualified individuals for the office of Public Records Advocate.

SECTION 10. (1) The Public Records Advisory Council created under section 8 of this 2017 Act shall periodically perform all of the following:

(a) Survey state agency and other public body practices and procedures for:

(A) Receiving public records requests, identifying the existence of records responsive to the requests and gathering and disclosing responsive records;

(B) Determining fee estimates and imposing or waiving fees under ORS 192.440; and

(C) Determining and applying exemptions from required disclosure of public records.

(b) Examine practices similar to those described in paragraph (a) of this subsection in other jurisdictions.

(c) Identify inefficiencies and inconsistencies in application of the public records law that impede transparency in public process and government.

(d) Make recommendations on changes in law, policy or practice that could enhance transparency in public process and government, and facilitate rapid dissemination of public records to requesters.

(e) Make recommendations on the role of the Public Records Advocate as facilitator in disputes between custodians of public records and public record requesters.

(2) No later than December 1 of each even-numbered year, the council shall submit to the Governor, and to the Legislative Assembly in the manner provided by ORS 192.245, a report that describes the findings of the council since the council's last report. The report may include recommendations for legislation.

(3) The council or the Public Records Advocate may prepare reports and studies more frequently than required under subsection (2) of this section.

(4) The council may adopt rules governing the operations of the office of the Public Records Advocate, including but not limited to rules establishing procedures for the conduct of facilitated dispute resolution under section 2 of this 2017 Act. The council shall consider efficiencies and the preference for a policy of transparency and openness in government in this state in adopting rules under this subsection.

NOTE: Section 11 was deleted by amendment. Subsequent sections were not renumbered.

SECTION 12. Sections 1 to 6 of this 2017 Act are added to and made a part of ORS 192.410 to 192.505.

SECTION 13. Sections 8, 10 and 11 of this 2017 Act are added to and made a part of ORS chapter 192.

SECTION 14. Sections 2 to 6 of this 2017 Act and the amendments to ORS 36.238 by section 7 of this 2017 Act become operative on January 1, 2018.

SECTION 15. Sections 8, 9 and 10 of this 2017 Act are repealed on January 1, 2021.

SECTION 16. Section 1 of this 2017 Act is amended to read:

Sec. 1. (1) The office of the Public Records Advocate is created.

(2) The Public Records Advocate shall be appointed by the Governor [*from among a panel of three qualified individuals nominated by the Public Records Advisory Council under section 8 of this 2017 Act,*] and shall be confirmed by the Senate in the manner prescribed in ORS 171.562 and 171.565.

(3) The Public Records Advocate shall be a member in good standing of the Oregon State Bar.

(4) The term of office of the Public Records Advocate shall be four years, except that the advocate may be removed for cause by the Governor [*or upon motion of the Public Records Advisory Council with the consent of the Governor*]. A determination to remove for cause may be appealed as a contested case proceeding under ORS chapter 183.

(5) The advocate may be reappointed to consecutive terms.

(6) The Public Records Advocate is in the unclassified service.

(7) The Public Records Advocate may hire one or more deputy advocates or other professional staff to assist in performing the duties assigned to the Public Records Advocate.

(8)(a) The State Archivist may furnish office facilities and provide administrative support to the Public Records Advocate.

(b) If the State Archivist declines to furnish office facilities and provide administrative support to the Public Records Advocate, the Oregon Department of Administrative Services shall furnish office facilities and provide administrative support to the advocate.

SECTION 17. The amendments to section 1 of this 2017 Act by section 16 of this 2017 Act become operative on January 1, 2021.

SECTION 18. In addition to and not in lieu of any other appropriation, there is appropriated to the Oregon Department of Administrative Services, for the biennium beginning July 1, 2017, out of the General Fund, the amount of \$633,187, which may be expended for the office of the Public Records Advocate and the support of the Public Records Advisory Council.

SECTION 19. This 2017 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2017 Act takes effect on its passage.

Passed by Senate July 3, 2017

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Lori L. Brocker, Secretary of Senate

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Peter Courtney, President of Senate

Passed by House July 7, 2017

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Tina Kotek, Speaker of House

Received by Governor:

.....M,....., 2017

Approved:

.....M,....., 2017

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Kate Brown, Governor

Filed in Office of Secretary of State:

.....M,....., 2017

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Dennis Richardson, Secretary of State