The Statute Is Not the Problem

A public trust, broken.

Robert Samuel White · openrecordsoregon.org/newsroom/the-statute-is-not-the-problem

Every Oregon state agency has a Public Records Officer. A member of the public writes to that officer and asks for a record. The record is email. It is on one state system, and the state has a tool that searches it by name, term, and date in seconds.[1]

The job.

A public records officer who works for the public reads the request, runs the search, and sends what it found. If something is held back, the officer says what and why. If the person asks how the search was done, the officer tells them. If the person has a question, the officer answers it. That is the job. It is already paid for.

What happens instead.

The officer works for the agency. The officer's desk is in the communications office, or government relations, or the director's office.[2,3,4] The communications office is the press office. Its job is to make the agency look good. Government relations lobbies the legislature for the agency's budget. Its job is to keep the agency funded. The director's office is the director's staff. Its job is to serve the director's interests. The Public Records Officer's job is to hand the public the agency's records, including the ones that make the agency look bad, cost it money, or concern the director.

The officer reads the request and does not run the search.[3,5,6,7,8,9,10] The officer sends a form. The form has a case number. It says the request is a burden. Each agency says it in its own words: "very broad in scope,"[11] "significant agency resources,"[11] "substantial staff time,"[2] "increased request complexity,"[12] "the volume and any costs."[13]

It asks the person to make the request smaller.[2,3,8,11,14,15,16,17] When the person offers to narrow it and asks which part carries the weight, the officer does not answer.[18,19,20]

If something is held back, the officer does not say what or why.[6,9,21] If the person asks how the search was done, the officer does not answer.[7,19,20,21] If the person has a question, the officer sends links to the Attorney General's manual and the fee policy.[7]

The person who has the record is the one who looks for it, in their own files, and reports what they found.[10,22] No one checks.[10] The reply says a search was conducted.[5,10,16,20] It does not say which system was searched, which terms were used, who ran it, or how many results came back.[5,10,16,20]

Before the form goes out, the request goes somewhere else. The officer sends it to the director's office[23] and to the agency's lawyer at the Department of Justice.[4,7,11,24,25] From then on the lawyer is copied on everything,[14,26,27] and everything the agency writes to itself about the request is marked privileged, so the public will never see it.[7,28]

In that thread the agency looks up who the person is,[14,29] what they have asked before, where they have published,[14,29] and who else they have written to. It reads the request for what the records would show.[24,25] It decides how much it is willing to release.[25] It sets the fee before any search is run.[3,7,8,14] It decides whether that fee will end the request. It drafts the reply with the lawyer[14,20,24] and sends it through the press office.[2,3,4]

The form the person receives is the last step of that thread, and the only one they are allowed to see. The reason is plain. The agency is deciding what the public may know about the agency, and it does not want that decision to be a public record.

The fee.

An officer who works for the public runs the search and sends the record. The fee is for copies. What happens instead is an estimate. The officer writes down hours of staff time, at a rate the agency set, and sends the number instead of the record.[2,3,7,8,16,20,30] The hours are not for work. No one does them.[6,30] The number is a wall. It is set so the person stops.[2,7] Attorney time is added at a higher rate.[2,4,8,20]

Nothing happens until the number is paid in full, by check.[7,20,30,31] The person says they will pay. No instructions come. The person asks again. They come two days later.[31] If the person pays, the agency sends what it decides to send and refunds the hours it never spent.[6,20,30]

The statute has one line for people who cannot pay. The fee can be waived or reduced when releasing the record benefits the general public.[32] The statute says the custodian decides.[32] The custodian is the agency that set the fee.

The person asks for the waiver in writing. They say who they are. They say what they will do with the records. They say what the public gets from them. They say they will publish them, in full, at no charge, and where.[33,34] The estimate comes back weeks later, without a word about any of it.[3,8] The waiver request was not read.[3,8] The estimate is the template. It would have been the same if the waiver request were blank.[2,3,8]

The person asks again. The reply does not mention it.[19,35] The person asks a third time and cites the statute. The reply does not mention it. The waiver is not denied, because a denial is a decision, and the statute lets a person petition a decision.[32] It is not granted. It is not reduced. It is not decided.[3,15] The statute says the custodian determines.[32] No one determines.

The lawyer.

A person who is refused should be able to ask someone who does not work for the agency.

What happens instead: when the person asks for the decision in writing, the lawyer who was copied on the first reply writes the answer.[14,26] The statute gives the lawyer no part in it.[32] The letter says the waiver is denied.[14,16,20] It gives no reason,[16] or it says the request is personal and cites a state policy on agency resources.[14] It does not say what was weighed. It does not name a lower fee.[14,20] The person has been writing to opposing counsel since the first reply and was not told.

The person petitions. The petition goes to the lawyer's own office, the Department of Justice.[27] That office wrote the manual,[7,14,36] trained the officer, and assigned the lawyer. It decides whether its client was right.[27,37]

Its order does not quote the statute.[37] It cites its own earlier orders,[37] and the earlier orders do not say what the statute says. Where the statute has a condition, the order has an ellipsis.[27] The rule the person is judged by is a sentence the office wrote for itself, for an earlier client, and it is not the sentence in the book.

After the petition.

A person who has been refused, and refused again on petition, should have one more place to go that costs nothing, answers in writing, and can make the agency act. Oregon has one. It is called the Public Records Advocate.[38]

The statute gives the advocate one power that is not advice. ORS 192.464 says that when a requester asks for facilitated dispute resolution, the advocate provides it, and a state agency takes part. The agency does not get to decline. The advocate does not get to decline. That is the table, and the law sets it.[39]

What happens instead: the person asks for facilitated dispute resolution, in writing, citing the section, and sends the whole record.[40] The request, the waiver argument, the denial, the orders. The advocate writes back that his office cannot make the agency do anything.[41] He writes that he can share his thoughts, with the person, and with the agency if the situation calls for it.[41] He asks the person for the request, the waiver argument, and the denial.[41] They are in the letter he is answering.[40,41]

Later he writes that he does not have enough information to say whether the request qualifies.[42] The dispute resolution the statute requires does not begin.[42,43] No table is set.

What is left is the court. The person needs a lawyer. The person pays to file. The agency's lawyer is already there, paid by the state. If the person wins, the court can order the record out and make the agency pay the person's lawyer.[44] If the person loses, the person has paid a lawyer to ask for a public record.

Why the statute is not the problem.

The statute says the officer searches.[45] The officer did not search.[5,6,9]

The statute says the officer names what was held back and why.[45] The officer did not.[6,9,21]

The statute says the officer answers the request.[45] The officer sent a template. The person's questions are still unanswered.[7,11,12,19,46]

The statute says the fee is the actual cost.[32] The fee was a wall, set so the person would stop.[2,7,30]

The statute says the custodian decides the waiver.[32] The custodian did not decide.[3,15]

The statute says the agency finishes the request or tells the person when it will.[45] The agency gave a date, let it pass, and gave another.[19]

The statute says a person who is refused can petition.[47] The agency's lawyer decided the petition.[27,37]

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