

August 29, 2007

MEMORANDUM

TO: Oregon Watershed Enhancement Board

FROM: Melissa Leoni, Senior Policy Coordinator

**SUBJECT: Agenda Item O: Public Records Administrative Rulemaking
September 18-19, 2007 OWEB Board Meeting**

I. Introduction

This report seeks Board authorization to begin a rulemaking process to address Senate Bill 554, recent legislation passed this session, related to public records requests.

II. Background

The public has a right to inspect and obtain a copy of any public document unless the document is specifically excluded from disclosure (ORS 192.420). At the same time, state agencies may respond to the request in a “reasonable time” and charge a fee reasonably calculated to reimburse it for the costs associated with making the records available (ORS 192.440). “Actual costs” include the time agency staff spend locating the records; searching its records for the requested material (even if it does not locate any requested records); supervising a requestor’s inspection of the records to protect the records’ integrity; copying, certifying, and mailing the requested records; and separating exempt from non-exempt material. An agency may waive its fees for furnishing records pursuant to a public records request when it determines that it is in the public’s interest to do so “because making the record available primarily benefits the general public.” ORS 192.440(4)

Although the statute allows a public body the discretion to waive its fees for furnishing public records when it determines that it is in the public’s interest to do so, some public bodies cannot waive fees for making records available even if the provisions of ORS 192.440(4) are met. If a public body's sole funding for a particular program is from funds that are constitutionally, statutorily or otherwise legally dedicated, the public body has very limited options to waive fees.

OWEB has three sources of funding. OWEB’s primary source of funding is constitutionally dedicated lottery revenues from Measure 66. OWEB also receives funding from the Pacific Coastal Salmon Recovery Fund (PCSRF), which is restricted by agreement with the National Marine Fisheries Service to uses that “further the goal of protecting and restoring anadromous salmon and steelhead species subject to provisions of the federal Endangered Species Act.” Finally, OWEB receives funding from the sale of salmon license plates, which is statutorily restricted (ORS 804.256) to be used “for watershed enhancement projects...that are designed to restore salmonid habitats and improve the health of streams that support salmonid populations.” Because of the limits placed on OWEB’s funding by the Oregon Constitution, Oregon statute, or

intergovernmental agreement with the federal government, the Attorney General (AG) has advised OWEB that it does not have discretion to waive or reduce fees for making records available, unless the cost of charging for the documents would approach or exceed the cost of furnishing the information.

In the absence of its own public records policies, OWEB, through an interagency agreement with the Oregon Water Resources Department (OWRD), had adopted OWRD policy that relate to requests for public records.

III. Senate Bill 554

Enacted by the Legislature in 2007, Senate Bill 554 requires a state agency to respond “as soon as practicable and without undue delay” to a written request for a public document. State agencies may request clarification concerning a public records request. SB 554 requires a response that acknowledges receipt of the request and includes one of the following:

- (1) A statement that the public body does not possess, or is not the custodian of the documents requested.
- (2) Copies of all public documents requested and not exempted from disclosure.
- (3) A statement that the public body is custodian of at least some of the documents and an estimate of the time and cost associated with honoring the request;
- (4) A statement that the public body is the custodian of some of the records and that an estimate of time and cost associated with honoring the request will be provided within a reasonable time.
- (5) A statement that the public body is uncertain whether the public body possesses the public record and that the public body will search for the record and respond as soon as practicable.
- (6) A statement that state or federal law prohibits the public body from acknowledging whether the record exists.

The new law also adds a requirement that government entities must make available to the public a written procedure for public records requests, including the name of the person to whom the request may be sent, the amounts charged for requests, and how these charges are determined. SB 554 is effective on January 1, 2008.

IV. Proposed Rulemaking Process

Given SB 554 and recent advice from the Attorney General’s office about OWEB’s ability to waive or reduce fees associated with public records requests, staff propose updating the agency’s public records request requirements through rulemaking. SB 554 does not specify that the public records procedure must be in rule. OWEB’s legal counsel has advised staff that it would be appropriate to state the agency’s public records procedures and fees in rule.

Staff plan to develop proposed administrative rules to present to the Board in January of 2008 with anticipated Board adoption in March of 2008. Staff do not believe a rules advisory committee is needed for this type of rulemaking; instead the process of developing rules will largely be based on staff research related to how other agencies have addressed public records request procedures in rule.

Since SB 554 will be effective prior to the Board adoption of rule, OWEB staff will assemble a notice regarding public records request procedures to publish on our web site by January 1, 2008, that identifies the name and address of the person or persons to whom public record requests may be sent, and the amounts of and manner of calculating fees that OWEB charges for responding to requests.

V. Recommendation

Staff recommend the Board authorize staff to begin rulemaking to address public records requests.