



November 8, 2021

Re: Jenifer Johnston's nomination to the state Public Records Advisory Council

Dear Chair Wagner and members of Senate Rules Committee:

In light of the nomination of Portland Senior Deputy City Attorney Jenifer Johnston to serve on the state Public Records Advisory Council, the American Civil Liberties Union of Oregon, the League of Women Voters of Portland, Open Oregon and the Society of Professional Journalists, Greater Oregon chapter, wish to express our continued support for a well-functioning state Public Records Advisory Council (PRAC) and to note the need for continued reforms both at the state and local level, particularly at the city of Portland.

To support the proper functioning of Oregonians' records law, and in light of the city's history of records issues detailed in this letter, we believe it is important for the Senate Rules Committee to, as described below, thoroughly question Ms. Johnston in its Nov. 15 hearing to ensure her alignment with the council's mission as assigned it by the Legislature.

In 2017, the Legislature voted overwhelmingly for SB 106, establishing a Public Records Advocate to provide trainings for public officials and requesters, and help foster transparency. Introduced on behalf of Gov. Kate Brown, the law explicitly charged the state PRAC to work with the Advocate and to "Identify inefficiencies and inconsistencies in application of the public records law that impede transparency in public process and government" in order to recommend "changes

in law, policy or practice that could enhance transparency in public process and government, and facilitate rapid dissemination of public records to requesters.”

The Advocate and PRAC have since received favorable reviews of their work. The PRAC has established itself as a place to work out legitimate differences in procedure, with the shared goal of enhancing transparency. The Oregon Legislature has repeatedly expressed its overwhelming support of the council’s charge of enhancing transparency:

- In 2019, the House (58-1) and Senate (28-0) adopted HB 2430, eliminating the sunset date on the records advisory council, and allowing its work to continue. Gov. Kate Brown signed it into law.
- In 2020, the Senate (29-0) approved SB 1506, intended to protect the independence of the Advocate and the work of the records advisory council. The bill passed House Rules (4-0) before the session prematurely adjourned.
- In 2021, the House (56-0) and Senate (29-1) adopted SB 500, intended to protect the independence of the Advocate and the work of the records advisory council. Gov. Kate Brown signed it into law.

Of note, the Advocate and the PRAC have no authority to require the cooperation of cities, including Portland, to change practices or participate in trainings or dispute resolution.

This limitation is relevant to the PRAC nomination of Portland’s public records attorney in light of repeated public complaints, district attorney public records orders, and court rulings that continue to find deficiencies in the city of Portland’s compliance with Oregonians’ public records law.

In May 2021, Multnomah County District Attorney Mike Schmidt found that the city of Portland had improperly labeled an internal audit as being subject to attorney client privilege in order to keep it secret, explaining “The City has not met its burden of showing that the primary purpose, or even a substantial purpose, of this document is the facilitation of legal services.” Added Schmidt: “All indicators show it to be business, management, personnel, and public relations advice intended to guide the transformation of a struggling office. Such advice, and the fact finding underlying it, is not exempt from disclosure regardless of what label is placed on it.”

Complaints and disclosures concerning anti-transparency actions by the city of Portland led our four organizations to recommend reforms to the city of Portland’s charter to both help and require it to honor the intent of Oregonians’ public records law. Members of the Portland Charter Commission have indicated they intend to take up the issue of transparency early next year.

In our joint testimony to the Charter Commission for its June 28, 2021 meeting, we noted that “Courts have stated clearly — as the Oregon Supreme Court did in *ACLU vs. City of Eugene* in 2016 — that transparency is required by law. And yet headline after headline — echoed by judges’ rulings and district attorney disclosure orders — have questioned the city of Portland’s practices on transparency.”

To help ensure that the city’s policies, practices and employees follow the law, we urged the charter review commission to “establish transparency and openness as clear Portland values” within the city’s charter, and “create a meaningful role within City government to uphold these values.” Based on the success of the state Public Records Advocate in improving records compliance by “leaps and bounds” (state Archivist Stephanie Clark legislative testimony in 2020), we are proposing

the city of Portland employ a transparency advocate to help train employees, field complaints, and change the city's culture to foster public trust.

In June, former state Public Records Advocate Ginger McCall sent written comments supporting the proposed city charter reforms. She noted the recurring problems with the city of Portland's application of records law, saying "There are plenty of officials in Portland who deal with public records requests, but most of them serve their particular office's goals, not the broader goal of transparency." She added that "The City of Portland ... has very real public records problems. A large number of the requests for assistance and complaints I received as Public Records Advocate were related to the City's public records processing. As I mentioned in my report, Portland's fees provisions, in particular, are uniquely onerous. The unique challenges of Portland's public records processing require a better solution than currently exists."

On October 11, 2021, a Multnomah Circuit Court Judge found that the city of Portland had improperly denied and obstructed a public records request in bad faith, saying "any good faith interpretation" would have instead led to the requested record being produced in compliance with public records law.

We believe that given the record of Ms. Johnston's employer, the city of Portland, members of Senate Rules should use the nomination hearing to ask whether Ms. Johnston feels capable (both personally and in terms of her conditions of employment) of taking positions contrary to those that she and her employer have taken in the past. We believe members should also request that Ms. Johnston describe her understanding of the central mission of the PRAC to enhance transparency as well as describe how she would intend to pursue that.

Thank you for your consideration of these comments.

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