

**STATE OF OREGON  
DEPARTMENT OF JUSTICE**

**ATTORNEY GENERAL'S  
PUBLIC RECORDS  
AND  
MEETINGS MANUAL**



“Knowledge will forever govern ignorance.  
And a people who mean to be their own governors, must arm  
themselves with the power knowledge gives. A popular government  
without popular information or the means of acquiring it, is but  
a prologue to a farce or a tragedy, or perhaps both.”  
James Madison (1822)

**ELLEN F. ROSENBLUM  
Attorney General**

**June 2019**



**OREGON ATTORNEY GENERAL'S  
PUBLIC RECORDS AND MEETINGS MANUAL 2019**



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AND  
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**ELLEN F. ROSENBLUM  
Attorney General  
June 2019**

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## INTRODUCTION

It is a particular pleasure to introduce this year's edition of the Attorney General's Public Records and Meetings Manual. This is the first edition since the 2017 legislative session, which saw the most significant reforms to the Oregon Public Records Law since it was originally enacted in 1973. A trio of bills—Senate Bills 481 and 106, and House Bill 2101—promise to breathe new life into the law. For forty years, the public records law had seen little change other than the steady addition of new exemptions that keep information out of public view. Taken together the bills accomplish several important things to improve Oregonians' access to their government:

- Establish clear expectations for the timing of public records requests (with narrow exceptions for small public bodies or unusual circumstances), and give requesters an express right to seek review when they believe that a public body is unduly delaying response to a request (SB 481).
- Provide public bodies with protections from liability and other negative consequences resulting from disclosures of public records, to encourage a culture of transparency within government (SB 481).
- Begin to address more than 500 exemptions from public disclosure requirements, by requiring my office to catalog existing exemptions (SB 481) and work with a newly formed Sunshine Committee to review exemptions and recommend changes to a legislative committee created to work on public records issues (HB 2101).
- Provide government and members of the public with access to an independent Public Records Advocate empowered to resolve public records disputes quickly and informally, and to provide training and resources on the requirements of the law (SB 106).

Much of the credit for these improvements goes to the Attorney General's Public Records Law Reform Task Force, which started its work in October 2015. Senate Bill 481 was a direct result of the task force's effort. Sincere thanks to Michael Kron, my Special Counsel, for chairing the Task Force with grace, enthusiasm, and intelligence.

House Bill 2101 was championed by Representative John Huffman, a task force member, while Senate Bill 106 was proposed by Governor Kate Brown, who was also represented on the task force. Like many other Oregonians who care about transparency, I am very grateful to each member of the group for their contributions to this important work:

- Senator Jeff Kruse (R, Roseburg)
- Senator Lee Beyer (D, Springfield)
- Representative Ken Helm (D, Washington County)
- Representative John Huffman (R, The Dalles)
- Gina Zejdlik (past representative of Governor Kate Brown)
- Ben Souede (past representative of Governor Kate Brown)
- Emily Matasar (Governor Kate Brown)
- Robert Taylor (past representative of former Secretary of State Jeanne Atkins)
- Phil Lemman (Oregon Judicial Department)
- Josh Nasbe (past representative of Oregon Judicial Department)
- Jesse Ellis O'Brien (OSPIRG)
- Dave Rosenfeld (past representative of OSPIRG)
- Betty Reynolds (public member)
- Les Zaitz (past representative of the Society of Professional Journalists)
- Nick Budnick (Society of Professional Journalists)
- Jeb Bladine (Oregon Newspaper Publishers Association)
- Keith Shipman (Oregon Association of Broadcasters)
- John Tamerlano (past representative of Oregon Association of Broadcasters)
- Rob Bovett (Association of Oregon Counties)
- Scott Winkels (League of Oregon Cities)
- Mark Landauer (Special Districts Association of Oregon)

I am very proud of the accomplishments of the task force, and I am committed to continuing our work in favor of transparent and accountable government. This revised version of the Attorney General's Public Records and Meetings Manual—which traces its existence back to 1973—reflects that commitment. I am grateful to Michael, as well as to Assistant Attorney General Noah Ellenberg, Legal Secretary Nancy Barrera, Assistant Attorney General Erika Hamilton, and Paralegals Emily Anderson and Kim Nguyen for their contributions to this new edition.

A handwritten signature in cursive script that reads "Ellen F. Rosenblum". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

ELLEN F. ROSENBLUM  
Attorney General

## PREFACE

This Manual is organized in two parts: Part I discusses the Public Records Law; Part II discusses the Public Meetings Law. Each part is followed by its own set of appendices, which include answers to commonly asked questions about the law; sample forms; summaries of court decisions, Attorney General opinions and public records orders; and a reprint of the statutes.

The Manual cites to various types of sources in the footnotes:

- A cite to “ORS” refers to the Oregon Revised Statutes, which are available at [https://www.oregonlegislature.gov/bills\\_laws/Pages/ORS.aspx](https://www.oregonlegislature.gov/bills_laws/Pages/ORS.aspx).
- A cite to “OAR” refers to a rule adopted by a state agency. Rules are available at <https://secure.sos.state.or.us/oard/ruleSearch.action>.
- A cite to “Or” refers to an opinion by the Oregon Supreme Court, while a cite to “Or App” refers to an opinion by the Oregon Court of Appeals. Opinions issued since January 1998 are available at <https://cdm17027.contentdm.oclc.org/digital/>, while older opinions may be found at sites like Google Scholar and at law libraries.
- A cite to “Op Atty Gen” refers to an opinion by the Oregon Attorney General, while a cite to “Letter of Advice” refers to an opinion by the Oregon Department of Justice’s Chief Counsel of the General Counsel Division. Opinions issued since January 1997 are available at <https://www.doj.state.or.us/oregon-department-of-justice/office-of-the-attorney-general/attorney-general-opinions/>, while older opinions may be found at law libraries or by submitting a public records request to the Oregon Department of Justice.
- A cite to a “Public Records Order” refers to decisions by the Office of the Oregon Attorney General interpreting Oregon’s Public Records Law. Orders issued since 1981 are available at <https://cdm17027.contentdm.oclc.org/digital/collection/p17027collection12>. Keep in mind that older orders may have been superseded by legislative action, opinions of Oregon’s appellate courts, or newer public records orders.

## RENUMBERING OF PUBLIC RECORDS LAW

The Public Records Law was significantly renumbered in the 2017 version of the Oregon Revised Statutes. The below table provides a guide to that renumbering.

<b>2015 ORS</b>	<b>2017 ORS</b>
192.405	192.385
192.410	192.311
192.420	192.314
192.423	192.360
192.430	192.318
192.435	192.365
192.437	192.363
192.440	192.324
192.445	192.368
192.447	192.371
192.448	192.374
192.450(1)-(3)	192.411
192.450(4)-(7)	192.401
192.460	192.415
192.465	192.418
192.470	192.422
192.480	192.427
192.490	192.431
192.493	192.395
192.495	192.390
192.496	192.398
192.497	192.380
192.501	192.345
192.502	192.355
192.504	192.377
192.505	192.338

## I. PUBLIC RECORDS

### A. WHO HAS THE RIGHT TO INSPECT PUBLIC RECORDS?

Under Oregon’s Public Records Law, “every person” has a right to inspect any nonexempt public record of a public body in Oregon.<sup>1</sup> This right extends to any natural person, any corporation, partnership, firm or association, and any member or committee of the Legislative Assembly.<sup>2</sup> However, a public body may not use the Public Records Law to obtain public records from another public body.<sup>3</sup> Similarly, a public official, other than a legislator, acting within an official capacity may not rely on the Public Records Law to obtain records, although the individual could do so in an individual capacity. This does not prevent a public body from sharing records with other public bodies; it merely prevents a public body from using Public Records Law as a mechanism to obtain the desired records.

Generally, the identity, motive, and need of the person requesting access to public records are irrelevant.<sup>4</sup> Interested persons, news media representatives, business people seeking access for personal gain, persons seeking to embarrass government agencies, and scientific researchers all stand on an equal footing.<sup>5</sup>

However, the identity and motive of the person seeking disclosure may be relevant in determining the weight of the public interest in disclosure, a

---

<sup>1</sup> ORS 192.314(1).

<sup>2</sup> ORS 192.311(3) (defining “person”). A legislative committee also may compel the production of public documents by means of a legislative summons. [ORS 171.505](#)–171.530.

<sup>3</sup> Letter of Advice to Wanda Clinton, at 8, 1987 WL 278262 (OP-6049) (June 26, 1987) (Department of Revenue could not use Public Records Law to obtain financial data from local governments); Public Records Order, Oct 7, 2002, [Snow](#) (City of Warrenton could not use Public Records Law); Public Records Order, Apr 12, 2007, [Giordano](#), at 5 (Arizona public body could not use Public Records Law).

<sup>4</sup> E.g., [State ex rel. Frohnmayer v. Or. State Bar](#), 91 Or App 690, 692 (1988) (requester’s intent to use records in a Bar disciplinary proceeding was irrelevant), *aff’d*, 307 Or 304 (1989); [Smith v. Sch. Dist. No. 45](#), 63 Or App 685, 692 (1983); [Turner v. Reed](#), 22 Or App 177, 180 n 2 (1975).

<sup>5</sup> See [MacEwan v. Holm](#), 226 Or 27, 38–39 (1961) (“[A] person may inspect public records and files for a purely personal purpose.”).

factor that is relevant to some exemptions.<sup>6</sup> In addition, the identity and motive of the requester may be relevant to determining whether the public body should waive or reduce its fee in fulfilling the request.<sup>7</sup>

## **B. WHO IS SUBJECT TO THE PUBLIC RECORDS LAW?**

### **1. Public Bodies**

The Public Records Law applies to any public body in this state.<sup>8</sup>

A “public body” is broadly defined to include

every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.<sup>9</sup>

This definition includes any state agency, which means “any state officer, department, board, commission or court created by the Constitution or statutes of this state.”<sup>10</sup>

Thus, all state and local government bodies are subject to the Public Records Law, including “public corporations” such as the Oregon State Bar,<sup>11</sup> the SAIF Corporation,<sup>12</sup> and OHSU.<sup>13</sup>

---

<sup>6</sup> *E.g.*, [In Defense of Animals v. OHSU](#), 199 Or App 160, 176–77 (2005) (public interest did not require disclosure of staff names where requester’s stated purpose of ensuring the proper treatment of animals was not dependent on disclosure).

<sup>7</sup> *See* ORS 192.324(5) (public body may waive or reduce fees if making the records available primarily benefits the general public).

<sup>8</sup> ORS 192.314(1).

<sup>9</sup> ORS 192.311(4).

<sup>10</sup> ORS 192.311(6). The distinction between state agencies and other public bodies becomes important when determining how to appeal a denial of access to records. Appeals of state agency denials go to the Attorney General, while appeals of denials by other public bodies go to the district attorney of the county where the public body is located. ORS 192.411(1); ORS 192.415(1).

<sup>11</sup> [ORS 9.010\(3\)\(e\)](#).

<sup>12</sup> [ORS 656.702\(1\)\(a\)](#).

<sup>13</sup> [ORS 353.100\(1\)](#).

Generally, legislative records are public records subject to inspection. However, a person may not seek to enforce the Public Records Law with respect to legislative records during the period the legislature is in session and the 15 days immediately preceding the start of the session.<sup>14</sup>

Court records are also generally public records subject to inspection.<sup>15</sup>

## 2. Private Bodies

On its face, the Public Records Law does not apply to private entities such as nonprofit corporations and cooperatives. However, if the ostensibly private entity is the “functional equivalent” of a public body, the Public Records Law applies to it.<sup>16</sup> Determining whether a private entity is the functional equivalent of a public body depends on the entity’s character and its relationship with government and government decision-making.<sup>17</sup> The following factors are usually relevant in making this determination:

- the entity’s origin (was it created by government or was it created independently?);
- the nature of the function(s) assigned and performed by the entity (are these functions traditionally performed by government or are they commonly performed by a private entity?);
- the scope of the authority granted to and exercised by the entity (does it have the authority to make binding decisions or only to make recommendations to a public body?);

---

<sup>14</sup> See ORS 192.311(6) (legislators are not considered a “state agency” during the time they are not subject to civil process as provided by Article IV, section 9, of the Oregon Constitution); Letter of Advice to [Dave Henderson](#), at 2, 1998 WL 311989 (OP-1998-3) (June 9, 1998).

<sup>15</sup> ORS 192.311(6) (defining “state agency” to include any court created by the Constitution or statute); ORS 192.311(5)(a) (defining “public record” to include “court records”). However, one court has questioned to what extent court records are subject to inspection. [Jury Serv. Res. Ctr. v. Carson](#), 199 Or App 106, 111 n 2 (2005) (raising possibility that only court records listed in ORS 7.010 are public records), *rev’d on other grounds*, [Jury Serv. Res. Ctr. v. De Muniz](#), 340 Or 423 (2006).

<sup>16</sup> [Marks v. McKenzie High Sch. Fact-Finding Team](#), 319 Or 451, 463 (1994) (private fact-finding team tasked by school board to investigate and report on a high school’s operations was not a public body).

<sup>17</sup> *Id.*

- the nature and level of any governmental financial and nonfinancial support;
- the scope of governmental control over the entity;
- the status of the entity's officers and employees (are they public employees?).<sup>18</sup>

Evaluating these factors generally depends on whether the policies underlying the Public Records Law require that the private entity's records be available for inspection. For example, in concluding that a team charged by a school board with investigating a school's operations was not a public body, the Oregon Supreme Court emphasized that the team could affect matters of public concern only through its report to the board; because that report would be available from the board under Public Records Law, the public would still have access to any information used in the board's decisions.<sup>19</sup>

Analyzing the above factors, the following entities have been determined not to be the functional equivalent of a public body or of a state agency: the Citizens' Utility Board;<sup>20</sup> Oregon Public Broadcasting;<sup>21</sup> and the Oregon Historical Society.<sup>22</sup>

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<sup>18</sup> *Id.* at 463–64. This test may also be used to determine whether an entity is functionally a part of a public body. [Laine v. City of Rockaway Beach](#), 134 Or App 655 (1995) (city had to disclose fire department's records where *Marks* factors indicated the fire department was a functional agency or department of the city government).

<sup>19</sup> See [Marks](#), 319 Or at 465–66 (school board did not control or supervise team, team had no ability to make decisions for the board, and team did not receive any funds from the board).

<sup>20</sup> Public Records Order, Nov 19, 2002, [Forrester](#) (board had no authority to make binding decisions on matters of public policy, was privately funded, and operated independently of government control).

<sup>21</sup> Public Records Order, Sept 3, 2002, [Long](#) (lack of governmental control, broadcasting not being a function traditionally associated with state government, and employees' status as private employees all weighed in favor of private-entity status, despite some state funding and governor's authority to appoint some board members).

<sup>22</sup> Public Records Order, Mar 29, 2004, [Redden](#) (the society was not created by government, was financed largely by membership fees, private contributions, and sales, and was not subject to governmental oversight).

Some entities might be the functional equivalent of a public body only with respect to functions that are governmental in nature; in such cases, only the records related to those functions will be subject to inspection.<sup>23</sup> For example, contracting with a large company to manage a significant government program might mean that the company's records pertaining to the managed program are public records. But it does not mean that all of the company's records are public records.<sup>24</sup>

As government "privatizes" various governmental functions, as the Legislative Assembly exempts state agencies from the application of various statutes, and as government is directed to perform various functions through contracts with private entities, numerous quasi-public entities are being created. The factors discussed above would be used to determine if a quasi-public entity is a public body with respect to its governmental functions.

Even if a private entity is not the functional equivalent of a public body, but contracts with a public body, its records may be obtained from the public body if the public body has custody of copies of the records.<sup>25</sup> In addition, a public body by rule or contract may require private entities with which it deals to make pertinent records available for public inspection. Records in a private entity's possession may also be subject to disclosure where a public body actually owns the records.<sup>26</sup>

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<sup>23</sup> Public Records Order, July 24, 2008, [Rios](#), at 4 (ODOT contractor was not a public body with respect to its payroll records for subcontractors).

<sup>24</sup> *Id.*

<sup>25</sup> 46 Op Atty Gen 97, 105, 1988 WL 416263 (1988) (even though the Oregon Trade Marketing Center was not a public body, its records in the custody of the Economic Development Department would be subject to Public Records Law).

<sup>26</sup> Public Records Order, Dec 11, 1992, [Smith](#), at 2-3 (DHS contractor's reports were public records where the contract made all work product the property of DHS).

### C. WHAT RECORDS ARE COVERED BY THE LAW?

A “public record” is broadly defined to include any writing that contains information relating to the conduct of the public’s business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.<sup>27</sup>

Despite this broad definition, not all public records are available for inspection through Public Records Law. As discussed later, many state and federal laws either prohibit public bodies from disclosing certain records, or give public bodies the discretion not to disclose. If a writing qualifies as a public record, the public body must either disclose it in response to a records request or assert an exemption from disclosure.<sup>28</sup>

#### 1. Writing

A “writing” is also broadly defined to mean handwriting, typewriting, printing, photographing and every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings.<sup>29</sup>

This encompasses information stored on virtually any medium, including information maintained in “machine readable or electronic form.”<sup>30</sup> Examples of writings include paper documents, e-mails, electronic documents (e.g., Word, Excel, and PDF formats), photographs, and audio or video recordings.

Telephone voicemail messages are also writings, but public bodies are not required to retain these types of records.<sup>31</sup> However, if a records request for a voicemail message is received while the message is still available, the

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<sup>27</sup> ORS 192.311(5)(a). Writings not related to the conduct of the public’s business and contained on a privately owned computer are not public records. ORS 192.311(5)(b).

<sup>28</sup> ORS 192.314(1).

<sup>29</sup> ORS 192.311(7).

<sup>30</sup> ORS 192.324(3).

<sup>31</sup> ORS 192.005(5)(b)(F) (voicemail messages are not public records for the purpose of retention laws).

message should be retained until the records request is completed.<sup>32</sup>

The Public Records Law does not require public bodies to create new public records.<sup>33</sup> Nor does it require public bodies to disclose the reasoning behind their actions; answer questions about their records; analyze their records;<sup>34</sup> or perform legal research in order to identify records that are responsive to a request.<sup>35</sup>

However, a public body is required to retrieve pre-existing information, which includes electronic data stored in databases.<sup>36</sup> This obligation exists regardless of whether the public body has actually generated a report for its own use that contains the requested data. Information is not exempt from disclosure simply because it is stored electronically or because retrieving the data would require a public body to query its information systems in ways it otherwise might not.

The format the information is produced in may depend on what formats are available to the public body or software vendor through the specific information system at issue.<sup>37</sup> Electronic data must be provided “in the form requested, if available”; if the requested format is not available, then the data should be provided in the form it is maintained.<sup>38</sup> We note that the common SQL databases in use today readily allow the retrieval and export

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<sup>32</sup> See [OAR 166-030-0045](#) (destruction of records shall be suspended if the records are the subject of a records request).

<sup>33</sup> *E.g.*, Public Records Order, Nov 14, 1996, [Schwartzrock](#) (public body not required to create an investigatory report in response to a records request).

<sup>34</sup> Letter of Advice to Jim Kenney, at 4–5, 1987 WL 278343 (OP-6126) (June 1, 1987) (public body was not required to use its computer program to analyze data).

<sup>35</sup> *E.g.*, Public Records Order, Feb 23, 2006, [Kane](#); Public Records Order, May 26, 2005, [Andrade](#).

<sup>36</sup> See ORS 192.324(3); Public Records Order, July 1, 2015, [Brosseau](#), at 8–9 (State Medical Examiner was required to produce a custom report containing only certain fields from its database of autopsy reports). However, a public body is generally not required to disclose the underlying coding of the program or software. ORS 192.345(15).

<sup>37</sup> Public Records Order, July 17, 2000, [Forgey](#), at 2–3 (OSP was not required to have contractor reprogram software so that requested information could be exported to an electronic file).

<sup>38</sup> ORS 192.324(3).

of specific information in the Excel compatible format that requesters often prefer.

Oregon law imposes specific requirements with respect to state agency's information systems that are intended to ensure nonexempt information is readily accessible to public records requesters. For example, state agencies must use "machine-readable and open formats" and adhere to "data standards approved by the Chief Data Officer \* \* \* to promote data interoperability and openness."<sup>39</sup> And "[a] state agency's use of proprietary software may not diminish the ability of the public to inspect and copy a public record."<sup>40</sup>

## 2. Prepared, Owned, Used, or Retained

Records need not have been prepared originally by the public body to qualify as public records. If records prepared outside the government contain "information relating to the conduct of the public's business," and are "owned, used or retained" by the public body, the records are within the scope of the Public Records Law. For example, records obtained by a public body from private parties in the course of fulfilling its statutory duties are public records if owned, used, or retained by the public body.<sup>41</sup> And records created by and in the possession of a private contractor are public records if the public body owns the records by contract.<sup>42</sup>

However, a document prepared by a private entity does not become a public record merely because a public official reviews the document in the course of official business so long as the official neither uses nor retains the document. Moreover, documents in the possession of a public officer or

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<sup>39</sup> [ORS 276A.365\(1\)\(a\)](#). ORS 276A.365 took effect on May 1, 2019.

<sup>40</sup> ORS 276A.365(3)(a).

<sup>41</sup> Public Records Order, Apr 28, 1988, [Koberstein](#), at 2 (letter received by Portland State University from a private entity was a public record because the university used and retained it).

<sup>42</sup> Public Records Order, Dec 11, 1992, [Smith](#), at 2-3; see [AA Ambulance Co. v. Multnomah County](#), 102 Or App 398, 401-02 (1990) (county must disclose public records in possession of out-of-state consultant). *But see* Public Records Order, Mar 23, 2005, [Har](#), at 3-4 (ODOT's contractual right to access records maintained by contractor was not sufficient by itself to qualify records as "public records").

employee in a personal capacity are not public records.<sup>43</sup>

## **D. HOW CAN A PERSON INSPECT OR OBTAIN PUBLIC RECORDS?**

### **1. Making a Request**

A public body's legal obligation to respond to a public records request is triggered by receipt of a written request.<sup>44</sup> Once a written request is received, the public body must provide copies of any records that are not exempt from disclosure, or a reasonable opportunity to inspect or copy those nonexempt records.<sup>45</sup> In order to facilitate this process, public bodies are required to make available to the public a written procedure for submitting records requests that identifies who the request should be sent to.<sup>46</sup> The written procedure must also provide information on how the public body calculates the fees it charges to fulfill records requests.<sup>47</sup> Once a public employee named in the procedure receives a written records request, certain deadlines to acknowledge and fulfill the request are triggered.<sup>48</sup>

When a public body receives an oral request for records, it is best practice to have the requester submit a written request so as to avoid future disputes over the scope of the request. And while public bodies should have an internal procedure in place to forward misdirected records requests to the employee(s) named in the posted records request procedure, requesters are encouraged to follow the posted procedure rather than include records requests within other correspondence with the public body.

Records requests sometimes reference the federal Freedom of Information Act (FOIA) even though the statutory authority to request

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<sup>43</sup> Public Records Order, June 28, 2001, [Zaitz](#), at 2–4 (correspondence between precursor of the Government Ethics Commission and a public official under investigation was not a public record in the official's possession because official's potential liability was personal in nature).

<sup>44</sup> ORS 192.324(1).

<sup>45</sup> *Id.*

<sup>46</sup> ORS 192.324(7). Public bodies typically comply with this requirement by posting the procedure to their website or adopting rules. See Appendix B-3 for a sample procedure.

<sup>47</sup> ORS 192.324(7).

<sup>48</sup> *See* ORS 192.324(2), 192.329(1). These deadlines are discussed in detail below.

records from Oregon public bodies comes from the Oregon Public Records Law. Oregon public bodies are not bound by FOIA timeframes or any other provisions of that federal act.<sup>49</sup> Nevertheless, public bodies should not deny a request for their records merely because the requester references FOIA.

When the requester is a party to litigation involving a public body or has filed a tort claim notice, and the requested records relate to that litigation or notice, the requester must also send a copy of the request to the public body's attorney.<sup>50</sup> While an attorney requesting records does not need the consent of the public body's legal counsel before submitting the request, the attorney could violate Section 4.2 of the Oregon State Bar's Rules of Professional Conduct by asking questions about the meaning of records or attempting to elicit admissions when the attorney knows that the public body is represented by legal counsel on a matter to which the records are relevant.<sup>51</sup>

In addition to the right to inspect records provided under Public Records Law, other state statutes may provide an independent right to inspect records from a particular public body.<sup>52</sup> For example, certain relatives of a deceased person are entitled to inspect and obtain copies of the autopsy report ordered by a medical examiner.<sup>53</sup>

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<sup>49</sup> Oregon courts do on occasion look to federal FOIA cases to help interpret comparable provisions of the Oregon Public Records Law. *See, e.g., Jensen v. Schiffman*, 24 Or App 11, 14–16 (1976) (interpreting Oregon's exemption for criminal investigatory information in light of federal court interpretations of the similar FOIA exemption).

<sup>50</sup> ORS 192.314(2). The attorney for a state agency is the Attorney General; however, requesters are encouraged to send the request to the assistant attorney general directly involved in the matter.

<sup>51</sup> Oregon State Bar Formal Opinion [No. 2005-144](#) (revised 2007).

<sup>52</sup> *See Oregonians for Sound Economic Policy v. SAIF*, 187 Or App 621, 628–32 (2003) (discussing subsequently amended statute providing that SAIF's records "shall be open to public inspection").

<sup>53</sup> [ORS 146.035\(5\)\(a\)](#).

## 2. Records Custodian

A public body is obligated to disclose only those records it is the custodian of,<sup>54</sup> that is, any records that it is directly or indirectly mandated to create, maintain, care for, or control.<sup>55</sup> In general, any public body that possesses or owns a public record for purposes related to one or more of its particular functions is a custodian of that record. This means that more than one public body can be the custodian of a given public record. This typically occurs when each public body has a copy of the same record for its own purposes. In such cases, each custodian is responsible for responding to public record requests directed to it. However, a public body is not the custodian of a record that it possesses as an agent for another public body, unless the record is not otherwise available.<sup>56</sup> When a public body receives a request for records it had received from another public body, it is permitted to consult with the originating body to determine whether the records may be exempt from disclosure.<sup>57</sup>

## 3. Acknowledging a Request

Once a public records request is received by a public employee identified in a public body's publicly posted procedure, the public body must acknowledge receipt within five business days, unless the request is fulfilled before then.<sup>58</sup> The acknowledgment must also notify the requester whether or not the public body is the custodian of the requested records, or

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<sup>54</sup> ORS 192.324(1).

<sup>55</sup> ORS 192.311(2)(b).

<sup>56</sup> *Id.* Public Records Order, Dec 17, 1999, [Sheketoff](#) (Employment Department was not the custodian of reports it generated for other agencies, where the other agencies controlled the reports' contents).

<sup>57</sup> *Cf.* ORS 192.355(10) (records that are exempt from disclosure in the originating body's custody can under certain circumstances remain exempt when transferred to another public body).

<sup>58</sup> ORS 192.324(2). "Business day" carries its ordinary meaning but applies only to days on which at least one paid employee of the public body is scheduled to and does report to work. ORS 192.311(1). For community college districts (and service districts), public universities, school districts, and education service districts, any day on which the central administration offices are closed does not count as a business day. *Id.*

that the public body is uncertain if it is the custodian.<sup>59</sup>

In certain circumstances discussed in more detail below, a public body is excused from this five business-day deadline.<sup>60</sup> However, even then the public body is required to acknowledge the request as soon as practicable and without unreasonable delay.<sup>61</sup>

A public body's failure to acknowledge a records request cannot be the grounds for a petition to the Attorney General or the district attorney. However, failing to provide timely updates to a requester increases the chances of a petition on other grounds. And an unexplained failure to comply with this deadline may be seen as evidence that the public body did not process the records request in good faith. Therefore, we recommend that even if a public body is unable to provide a substantive update within five business days, it at least notify the requester of the delay and of when the requester should expect a substantive update.

In some cases, federal or state law may prohibit a public body from acknowledging whether responsive records exist; or acknowledging that records exist may result in the loss of federal benefits or some other sanction. For example, any public body that is subject to an expunction judgment for a juvenile's records must respond to a request "by indicating that no record \* \* \* exists."<sup>62</sup> In such cases, the public body should provide a written statement to that effect and cite the relevant state or federal law, unless even citing the law would be a violation.<sup>63</sup>

#### **4. Completing the Response to a Request**

Once a public employee identified in a public body's publicly posted procedure receives a records request, the public body must complete its response as soon as practicable and without unreasonable delay.<sup>64</sup> How quickly a public body should be able to complete a request under this

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<sup>59</sup> ORS 192.324(2).

<sup>60</sup> ORS 192.329(6).

<sup>61</sup> ORS 192.329(8).

<sup>62</sup> [ORS 419A.262\(21\)](#).

<sup>63</sup> ORS 192.329(2)(e).

<sup>64</sup> ORS 192.329(1).

standard depends on various factors, including the specificity of the request, the volume of records requested, the amount of exempt material, and the ease in determining whether any of the records are exempt from disclosure. In most cases it should be possible to complete the response within ten business days. However, in some cases more time—even significantly more time—may be required.

**a. The 15 Business-Day Deadline**

The law establishes a baseline expectation that public bodies will complete their responses no later than 15 business days after receiving the request.<sup>65</sup> However, a public body must still complete its response as soon as practicable and without unreasonable delay. That is, requesters who have made particularly straightforward requests can appeal a public body's inaction even before 15 business days have elapsed.<sup>66</sup> A public body unable to meet the 15 business-day deadline must notify the requester in writing that the request is still being processed and provide the requester with a reasonable estimated date of completion.<sup>67</sup>

A public body completes its response to a records request when it has done all of the following:<sup>68</sup>

- Provided the requester with access to or copies of all the requested records that are not exempt from disclosure, or explained where the records are already publicly available.
- Cited any exemptions used to withhold records, including the specific state or federal statute for any exemption appearing outside of ORS 192.345 or 192.355.<sup>69</sup>

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<sup>65</sup> See ORS 192.329(5) (providing deadline of ten business days after the date the public body is required to acknowledge receipt of the records request).

<sup>66</sup> See ORS 192.407(1)(c).

<sup>67</sup> ORS 192.329(5). The estimated date should be based on the information available to the public body at the time it provides this estimate. *Id.*

<sup>68</sup> ORS 192.329(2).

<sup>69</sup> Certain state and federal statutes that restrict access to records are incorporated as public records exemptions by ORS 192.355(8) (federal laws) and ORS 192.355(9) (state laws). Merely citing to just these two catch-all provisions is not sufficient to complete the response to a records request.

- Provided any nonexempt material from a public record that also contains exempt material.<sup>70</sup>
- If the public body is not the custodian of any of the records, provided a written statement to that effect.
- Cited in writing to any federal or state law that prohibits the public body from acknowledging whether the requested records exist (or to a law that would impose a loss of federal benefits or other sanction), unless providing that citation would violate the federal or state law.
- If the public body has redacted any information or withheld any information from disclosure, included a statement that the requester may seek review of this withholding pursuant to ORS 192.401, 192.411, 192.415, 192.418, 192.422, 192.427 and 192.431.<sup>71</sup>

The 15 business-day deadline is suspended when the public body provides the requester with a fee estimate to fulfill the request (until the fee has been paid or waived)<sup>72</sup> or when the public body, in good faith, requests clarification from the requester (until the requester provides that clarification or declines to).<sup>73</sup> These provisions are intended to facilitate efficient business, not to justify delay. As a result, public bodies should promptly consider requests for fee waiver. And requesters who wish to keep their request on track will respond to inquiries from the public body as quickly as possible. If no response is received to the fee estimate or

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<sup>70</sup> Public bodies typically comply with this requirement by redacting the exempt material (using either black marker or computer software).

<sup>71</sup> Broadly speaking, these statutes permit a requester to appeal a denial by a state agency to the Attorney General, appeal a denial by any other public body to the district attorney in the appropriate county, and appeal a denial by an elected official by filing a lawsuit in the appropriate circuit court. They also permit a requester whose appeal is denied by the Attorney General or district attorney to file suit against the public body in circuit court.

<sup>72</sup> ORS 192.329(3)(a).

<sup>73</sup> ORS 192.329(4)(a). The deadline is suspended only if the public body requested clarification in order to expedite its response to the request. *Id.*

clarifying question within 60 days, the public body can close the request.<sup>74</sup>

**b. Exceptions to the Deadlines**

A public body is excused from the 5 business-day and 15 business-day deadlines if compliance would be impracticable for any of the following reasons:

- The staff or volunteers necessary to complete a response are unavailable (which includes when staff or volunteers are on leave or are not scheduled to work).
- Compliance would demonstrably impede the public body's ability to perform other necessary services.
- The public body is simultaneously processing a high volume of other requests.<sup>75</sup>

The public body carries the burden to demonstrate that one of these exceptions applies,<sup>76</sup> and the exceptions are intended to apply narrowly—either to very small public bodies or in unusual circumstances. Public bodies with the resources to adequately staff its public records requests are expected to do so, and to provide other staff to cover for any absences.<sup>77</sup>

The exception for the unavailability of staff applies when the staff necessary to fulfill a records request are literally unavailable; the necessary staff may be the keepers of the requested records, or in a small public body, the staff responsible for processing records requests.

The exception for impeding services could apply to an extremely large records request, but is more likely to apply where a public body is so small that its staff would be unable to attend to other necessary work in order to comply with the deadlines.

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<sup>74</sup> ORS 192.329(3)(b), (4)(b). The practical significance of this 60-day waiting period is likely that a public body should retain any work product done in fulfilling the request until the request is closed. For example, if the public body needs to run an e-mail search to gather responsive records so that a fee estimate can be provided, it should retain the results of that search until the request is closed.

<sup>75</sup> ORS 192.329(6).

<sup>76</sup> ORS 192.407(1)(a).

<sup>77</sup> See Public Records Order, Jan 14, 2014, [Budnick](#), at 3–4.

And the exception for a high volume of requests recognizes that even a reasonably staffed system may occasionally become overwhelmed. This does not mean that a public body is free to put off work on a new request until all of the prior requests are complete. It may be unreasonable to delay responding to a straightforward request even if a very complex request is in process.

**c. Failing to Complete a Timely Response**

If a public body fails to comply with the 15 business-day deadline or complete its response as soon as practicable and without unreasonable delay, the requester can petition the Attorney General (for state agencies) or the appropriate district attorney (for other public bodies) to order the disclosure of any nonexempt records; or file suit against the public body in circuit court (for elected officials).<sup>78</sup>

A requester can also submit a petition or file suit if the estimated date of completion provided by the public body is unreasonably long and will result in undue delay of disclosure.<sup>79</sup> However, merely failing to comply with a timeframe set by the requester does not constitute a denial entitling the requester to petition for release of the records.<sup>80</sup>

If a petition is granted for failing to timely respond, the public body can be ordered to disclose any nonexempt material within seven days, or within any other appropriate period.<sup>81</sup> This allows the reviewing authority to determine a reasonable amount of time for completing a response to a particular records request. [House Bill 2353](#) (2019) also permits the order, in certain circumstances, to assess a \$200 penalty against the public body or reduce or waive the public body's fee to fulfill the request.

**5. Inspecting Records versus Obtaining Copies**

A requester is entitled to choose between a copy of a public record (if the record is of a nature permitting copying) or a reasonable opportunity to inspect or copy the record.<sup>82</sup>

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<sup>78</sup> ORS 192.407(1).

<sup>79</sup> ORS 192.407(1)(b).

<sup>80</sup> [Morse Bros., Inc. v. ODED](#), 103 Or App 619 (1990).

<sup>81</sup> ORS 192.407(3).

<sup>82</sup> ORS 192.324(1).

### a. Inspecting Records

A public body must provide “proper and reasonable opportunities for inspection and examination of [its] records” at its offices during usual business hours.<sup>83</sup> This duty applies also to records “maintained in machine readable or electronic form.”<sup>84</sup> In addition, requesters must be provided with reasonable facilities to take notes of the records.<sup>85</sup> In short, the law directs public bodies to take reasonable steps to accommodate members of the public while they inspect public records.

The Americans with Disabilities Act (ADA) prohibits discrimination against persons with disabilities in governmental activities and requires public bodies to ensure that their communications with individuals with disabilities are as effective as communications with others.<sup>86</sup> Providing nonexempt public records under the Oregon Public Records Law is a governmental activity covered by the ADA. Thus, when making public records available, a public body must provide an opportunity for individuals with disabilities to request an alternative form (large print, Braille, audio tape, etc.).<sup>87</sup> The public body must give primary consideration to the choice expressed by the individual, but is not required to provide personal devices such as prescription glasses or readers for personal use or study.<sup>88</sup> The public body is entitled to consider the resources available for the program from which the records are sought in responding to a request for alternative format, and may conclude that compliance with the request would create undue burdens.<sup>89</sup> Before refusing a request for accommodation under the ADA, a public body that is unsure of its obligations should consult with its legal counsel.

Note that a public body may not charge a person with a disability to

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<sup>83</sup> ORS 192.318(1).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> [42 USC § 12131–12132](#); [28 CFR § 35.160](#).

<sup>87</sup> [28 CFR § 35.104](#).

<sup>88</sup> [28 CFR §§ 35.135, 35.160](#).

<sup>89</sup> [28 CFR § 35.164](#); [Nelson v. Thornburgh](#), 567 F Supp 369 (ED Pa 1983), *aff’d*, 732 F2d 146 (3rd Cir 1984).

cover any additional costs of providing records in an alternative form, although the public body may charge a fee for all other “actual costs” that may be recovered under the Public Records Law just as it would for any other requester.

### **b. Copying Records**

A public body is required to provide a copy of a nonexempt record if the record is susceptible to copying.<sup>90</sup> Requesters are also permitted to use their own equipment to make copies, subject to reasonable restrictions imposed by the public body to protect the integrity of the records and to prevent interference with the regular duties of the public body.<sup>91</sup>

Some records may not be copied. For example, an individual’s signature on a voter registration card is subject to inspection but not subject to copying.<sup>92</sup> And federal copyright law generally prohibits the copying, but not the inspecting, of protected materials.<sup>93</sup>

Public bodies must provide electronic records in the form requested, if available. If the requested form is not available, the public body must make the record available in the form it is kept.<sup>94</sup>

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<sup>90</sup> ORS 192.324(1)(a). A public body is not required to furnish a *certified* copy of the record. However, certification can be offered as a courtesy to requesters. Certification is not difficult and may be included as a statement on the cover sheet or last sheet of the copy. See Appendix B-7 for a sample. Certified copies of electronic records are more readily susceptible to being subsequently modified than are hard copies of records. In certifying an electronic record, the public body may state that the copy provided in electronic form on a specified date is a true and correct copy of the original, but that the public body cannot ensure that the electronic record will not be modified after release.

<sup>91</sup> 39 Op Atty Gen 721, 721–25, 1979 WL 35665 (1979).

<sup>92</sup> [ORS 247.973\(1\)–\(2\)](#). However, election officials acting in their official capacity for purposes of administering the election laws and rules are permitted to make a copy of these signatures. ORS 247.973(3).

<sup>93</sup> See Appendix A-1 for more information on copyright law.

<sup>94</sup> ORS 192.324(3); see [49 Op Atty Gen 210](#), 227–28, 2000 WL 101166 (2000) (if electronic document were requested in paper form, the public body should print a paper copy if possible).

## 6. Protective Rules

A public body is authorized to “adopt reasonable rules necessary for the protection of [its] records and to prevent interference with the regular discharge of [its] duties.”<sup>95</sup>

When public bodies establish such rules, they should provide notice and opportunity for public comment so as to avoid the appearance of arbitrary action. Public bodies subject to the state Administrative Procedures Act must adopt such rules in conformity with that Act.<sup>96</sup> A rule designed solely to make public access to records more difficult is not valid, while a rule carefully designed to prevent destruction of public records or to expedite staff identification of requested records is lawful.

The statutory right to inspect public records encompasses a right to examine original records, and inspection of originals ordinarily should be allowed if requested. But the right to inspect does not include a right to browse through file cabinets, file folders, or electronic files,<sup>97</sup> and a public body may adopt administrative measures to supervise original document review. Furthermore, the right to examine original records does not require a public body to allow inspection of an original record that contains some information that is exempt from disclosure.<sup>98</sup> In such a case, a public body acts reasonably if it furnishes a copy of the original, with the exempt material redacted.

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<sup>95</sup> ORS 192.318(2).

<sup>96</sup> [ORS 183.310\(9\), 183.335, 183.355](#).

<sup>97</sup> Public Records Order, May 10, 1996, [Kelley](#) (DMV was not required to allow direct access to records via modem as that would allow requester to modify or delete records and to view exempt information).

<sup>98</sup> [Davis v. Walker](#), 108 Or App 128, 133 (1991).

## 7. Fees

A public body is authorized to establish fees “reasonably calculated to reimburse [it for the] actual cost of making public records available.”<sup>99</sup> This includes the “costs for summarizing, compiling or tailoring the public records, either in organization or media, to meet the person’s request.”<sup>100</sup>

State agencies in the executive branch should be aware of a DAS policy on public records fees.<sup>101</sup> The policy provides guidance on all aspects of fees, including how much to charge for particular tasks and when to reduce or waive fees.

If the fee estimate for a request exceeds \$25, the public body must first provide a written estimate to the requester and receive confirmation that the requester is willing to pay.<sup>102</sup> A public body may require prepayment of its estimated charges before taking further action on a request.<sup>103</sup> Of course, if the actual charges are less than the prepayment, any overpayment should be refunded promptly.<sup>104</sup>

“Actual cost” may include a charge for the time spent by the public body’s staff in locating the requested records; reviewing the records in order to redact exempt material; supervising a person’s inspection of original documents in order to protect the records; copying records; certifying

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<sup>99</sup> ORS 192.324(4)(a).

<sup>100</sup> *Id.*

<sup>101</sup> See DAS Statewide Policy 107-001-030 (Feb 15, 2017), available at <http://www.oregon.gov/das/Policies/107-001-030.pdf>. An FAQ is available at [https://www.oregon.gov/das/Docs/07-SSFS\\_PolicyQA.pdf](https://www.oregon.gov/das/Docs/07-SSFS_PolicyQA.pdf). Exempt from the policy are the Secretary of State; State Treasurer; State Lottery; public universities; and the Attorney General with respect to DOJ information systems security. The legislature and courts are also exempt as they are not part of the executive branch.

<sup>102</sup> ORS 192.324(4)(c).

<sup>103</sup> *E.g.*, Public Records Order, June 30, 2005, [Mills](#) (no denial of records request where public body required prepayment of fees).

<sup>104</sup> 39 Op Atty Gen at 725–26 (home rule counties could not charge a fee that exceeded the actual cost). In order to avoid the possibility of an overpayment, some public bodies require an initial prepayment of only 50% of the fee estimate before beginning any work; the public body then charges the remaining amount once it has completed the request (but before producing the records) and knows the exact cost.

documents as true copies; or sending records by special methods such as express mail. “Actual cost” also may include the cost of time spent by the public body’s attorney reviewing and redacting, although the cost of the attorney’s time spent determining the application of the Public Records Law is not recoverable.<sup>105</sup>

Public bodies may charge for search time even if they fail to locate any records responsive to the request or even if the records located are subsequently determined to be exempt from disclosure.<sup>106</sup> However, it is best practice, where possible, to advise a requester beforehand if significant portions of the records are likely to be exempt from disclosure.

Public bodies are permitted to negotiate with requesters to reduce the cost of fulfilling requests. This can be accomplished in many ways, including using narrower search terms or a narrower date range, limiting the search to only the most relevant employees of the public body, or excluding the records most likely to contain exempt information. The public employees most knowledgeable about the subject matter of a particular request are a useful resource for the public body in determining what alternatives can be offered to the requester. While requesters are under no obligation to refine their request in order to reduce cost, many appreciate the opportunity to work with the public body to obtain the most substantive records for a lower cost.

As noted above, public bodies may not include charges for any additional costs incurred to provide records in an alternative format to individuals with vision or hearing impairments when required by the Americans with Disabilities Act.<sup>107</sup>

#### **a. Fee Schedules**

Public bodies must make available to the public the amounts of and the manner of calculating fees for responding to public records requests.<sup>108</sup> This typically includes such information as the hourly charge for different

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<sup>105</sup> ORS 192.324(4)(b). This means that any factual or legal research done by the attorney to determine whether material is exempt is not chargeable to the requester.

<sup>106</sup> 39 Op Atty Gen 61, 68, 1978 WL 29400 (1978).

<sup>107</sup> [42 USC §§ 12131 et seq.](#)

<sup>108</sup> ORS 192.324(7)(b).

categories of staff work, and the charge to copy records. We recommend that public bodies establish their fee schedules with notice and opportunity for public comment so that the public is aware of the justification for the fees. State agencies should adopt their fee schedules in compliance with the state Administrative Procedures Act.<sup>109</sup>

Public bodies must be prepared to demonstrate that their fee schedules are based upon their actual costs in making public records available for inspection or copying.<sup>110</sup> While there is no provision in the Public Records Law that authorizes a person to petition the Attorney General to review the reasonableness of an agency's fees, state courts do possess this authority.<sup>111</sup> And the Attorney General's authority to enforce the inspection provisions of the Public Records Law may require evaluation of an agency's fees where the amount of the fee in comparison to the nature of the request suggests that the true purpose of the fee is to constructively deny the request, rather than to recoup the agency's actual costs.<sup>112</sup> This evaluation typically requires the public body to explain how it calculated its fee.<sup>113</sup>

#### **b. Waiving or Reducing Fees**

A public body may waive or reduce its fee for a particular request if doing so "is in the public interest because making the record available primarily benefits the general public."<sup>114</sup> If disclosure is in the public interest, the public body's decision to deny a request for a fee waiver or reduction must be reasonable under the totality of the circumstances.<sup>115</sup> A requester can contest a public body's decision not to waive or reduce fees

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<sup>109</sup> [ORS 183.310\(9\), 183.335, 183.355](#).

<sup>110</sup> See [Davis](#), 108 Or App at 131–33 & n 5 (fees charged by city police bureau were not reasonably calculated to reimburse bureau for its actual costs where bureau offered no specific support for its charges for staff time).

<sup>111</sup> [In Defense of Animals v. OHSU](#), 199 Or App 160, 182–83 (2005) (fees were not reasonable where OHSU could not justify why professional staff were needed to redact basic information such as company names).

<sup>112</sup> E.g., Public Records Order, Mar 23, 2009, [Kellington](#), at 4.

<sup>113</sup> E.g., Public Records Order, Oct 18, 2016, [Harden](#), at 2–3.

<sup>114</sup> ORS 192.324(5).

<sup>115</sup> [In Defense of Animals](#), 199 Or App at 188–90.

by submitting a petition to the Attorney General (for state agencies) or the local district attorney (for local public bodies), or by filing suit in circuit court (for elected officials).<sup>116</sup> And a requester can appeal even after paying the fee to the public body.<sup>117</sup>

It is possible that there may be narrow circumstances in which certain public bodies are prohibited from waiving or reducing fees.<sup>118</sup> Public bodies that believe they are so prohibited should consult with legal counsel.

### (1) Public Interest Test

Waiving or reducing fees is in the public interest “when the furnishing of the record has utility—indeed, its greatest utility—to the community or society as a whole.”<sup>119</sup> This is distinct from situations where disclosure would primarily affect “a concern or interest of a private individual or entity.”<sup>120</sup>

If a requester seeks records relating to the requester, a mere allegation that the public body has treated the individual oppressively, absent a broader public interest, does not satisfy the public interest standard.<sup>121</sup> On the other hand, investigative reporters with established credentials, who sought records concerning military aviation safety with the intent of reporting on those records, were able to satisfy the public interest standard by demonstrating that fee requirements inhibited their ability to obtain government records.<sup>122</sup> And a requester who intended to use records in

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<sup>116</sup> ORS 192.324(6).

<sup>117</sup> Public Records Order, Mar 13, 2008, [Harbaugh](#), at 2.

<sup>118</sup> 39 Op Atty Gen at 62–65 (Motor Vehicles Division could not expend constitutionally dedicated highway funds in order to grant fee waiver or reduction). *But see* Public Records Order, Sept 12, 2016, [Friedman](#) (PERS was not prohibited from using statutorily dedicated funds to waive or reduce fees).

<sup>119</sup> [In Defense of Animals](#), 199 Or App at 189. Because this analysis is consistent with how federal courts construed the former federal statute that was the model for ORS 192.324(5), those federal cases provide useful guidance as to how Oregon courts may apply the state standard.

<sup>120</sup> *Id.* at 188; Public Records Order, Dec 5, 2016, [DeMartino](#) (no public interest in fee waiver where requester sought records related to a court case he was a party to).

<sup>121</sup> See [Conklin v. United States](#), 654 F Supp 1104, 1106 (D Colo 1987).

<sup>122</sup> [Badhwar v. U.S. Dep’t of Air Force](#), 615 F Supp 698, 706–08 (DDC 1985).

connection with lectures and articles on the history of the labor movement, without personal financial benefit, demonstrated sufficient public interest.<sup>123</sup>

Regardless of how interested the public may be in the matter the requested records relate to, if the requester fails to demonstrate the ability to meaningfully disseminate the information, disclosure will not primarily benefit the public.<sup>124</sup>

Public bodies may seek additional information from a requester to help clarify the basis for seeking a fee waiver. In determining whether the requester has established a sufficient public interest, relevant factors include the requester's identity, the purpose for which the requester intends to use the information, the character of the information, whether the requested information is already in the public domain, and whether the requester can demonstrate the ability to disseminate the information to the public. The requester's inability to pay is also a factor, but is not, on its own, a sufficient basis for a fee waiver. Without such information, it may be difficult or even impossible to assess whether the requested disclosure is in the public interest.

## (2) Decision on Fee Waiver or Reduction

Even if waiving or reducing the fee is in the public interest, a public body has the discretion whether to do so.<sup>125</sup> However, the public body's decision, on a case-by-case basis, must be reasonable under the totality of the circumstances.<sup>126</sup>

A public body's fee-waiver decision should consider (1) the character of the public interest in the particular disclosure, (2) the extent to which the fee impedes that public interest, and (3) the extent to which a waiver would burden the public body.<sup>127</sup> Of course, other considerations may be

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<sup>123</sup> [Diamond v. FBI](#), 548 F Supp 1158 (SDNY 1982).

<sup>124</sup> See [Judicial Watch, Inc. v. Rossotti](#), 326 F3d 1309 (DC Cir 2003) (contrasting sufficient and insufficient demonstrations of ability to disseminate information to public).

<sup>125</sup> [In Defense of Animals](#), 199 Or App at 189.

<sup>126</sup> *Id.* at 190.

<sup>127</sup> Public Records Order, Sept 10, 2009, [Rogers](#), at 3.

appropriate in any given case.

Facts typically relevant to a fee-waiver decision include how narrowly tailored the request is to a matter of public interest; the time and expense needed to fulfill the request; the volume of the records requested; the need to segregate exempt from nonexempt materials; whether the fee was avoidable; and the ability of the requester to pay the fee. A public body may consider the aggregate effect of numerous public records requests from the same requester in assessing its burden.<sup>128</sup>

In reviewing petitions for fee waiver, we have determined that

- a 50% fee reduction was reasonable for a major news outlet with the resources to pay where the request sought records from over 200 files, rather than from a specific type of file tied to the public interest;<sup>129</sup>
- a 20% fee reduction for a media requester was reasonable where 56 hours of staff time was needed to fulfill a broad request not tailored to specific files;<sup>130</sup>
- no fee reduction was reasonable where the responsive records totaled 14,266 pages;<sup>131</sup>
- no fee reduction for a media requester was reasonable where disclosure would not inform the public about the operation of a state or local governmental body and where the requester had already paid the fee (which indicated that the fee did not deter access);<sup>132</sup> and
- a public body had to waive its fee for retrieving records from a private storage facility where the state-run storage facility offered

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<sup>128</sup> Public Records Order, Apr 24, 2009, [Harbaugh](#), at 3. But note that DAS Statewide Policy 107-001-030 provides that most state agencies in the executive department should not consider previous records requests when deciding whether to waive or reduce fees.

<sup>129</sup> Public Records Order, May 26, 2016, [Brosseau](#).

<sup>130</sup> Public Records Order, Sept 5, 2017, [Woodworth](#).

<sup>131</sup> Public Records Order, May 17, 2010, [Dimitre](#), at 4–5.

<sup>132</sup> Public Records Order, Oct 18, 2016, [Harden](#), at 3.

no-cost retrieval.<sup>133</sup>

When assessing a request for a fee waiver of 100%, public bodies should also determine whether a more modest fee reduction is appropriate. There may be circumstances in which denying a total fee waiver is reasonable, but where refusing a 25% or 50% reduction is unreasonable.

### **8. Consulting with Legal Counsel**

Public bodies often must consult with legal counsel regarding public record requests. Briefly postponing the disclosure of records for that purpose does not violate the Public Records Law. It is reasonable for a public body to obtain legal advice on an extensive public records request when compliance will seriously disrupt the public body's operations. Similarly, it is reasonable for a public body to consult counsel about disclosure of documents that appear to be exempt, in whole or in part, from disclosure. When a public body receives a request for records that the public body believes may be pertinent to a legal claim or litigation against the public body, it is also reasonable to consult counsel.

We advise state agencies to consult with counsel when presented with physically extensive or legally complex requests for disclosure of public records. We have concluded that "when a public body does so, it does not thereby actually or constructively deny the request."<sup>134</sup> However, it is unreasonable to use consultation with counsel merely as a tactic to delay or frustrate the inspection process. In addition, consulting with counsel does not relieve the public body of its obligation to comply with the five business-day and 15 business-day deadlines. If the need for legal advice would push the public body's final response past the 15 business-day deadline, the public body will need to provide the requester in writing with a reasonable estimated date of completion.

### **9. Retaining and Destroying Public Records**

The Public Records Law discussed in this Manual does not govern the retention and destruction of public records. Instead, these activities are regulated by ORS 192.001 to 192.170. The Secretary of State is the public

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<sup>133</sup> Public Records Order, July 8, 2016, [Davis](#), at 4–5.

<sup>134</sup> Public Records Order, May 9, 1989, [Hribernick](#).

records administrator of the state,<sup>135</sup> and the State Archivist possesses rulemaking authority on the retention and destruction of public records.<sup>136</sup> Separate provisions apply for the legislature and the state courts:<sup>137</sup> the State Court Administrator sets retention schedules for the state courts and their administrative offices,<sup>138</sup> while the Legislative Administration Committee in conjunction with the Archivist sets retention schedules for legislative records.<sup>139</sup>

State agencies and political subdivisions must follow the general records retention schedules found in the Archivist's rules,<sup>140</sup> as well as any special retention schedules that are specific to the public body.<sup>141</sup> Even public records that are exempt from disclosure are subject to these schedules. For more information about document retention schedules and preservation of public records, contact the State Archivist, 800 Summer Street N.E., Salem, Oregon 97310.

It is important to understand that the retention and destruction statutes define a "public record" differently than the Public Records Law. In order to trigger the law's retention requirement, a record must, among other things, be "necessary to satisfy the fiscal, legal, administrative, or historical policies, requirements, or needs of the state agency or political

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<sup>135</sup> ORS 192.015.

<sup>136</sup> ORS 192.105(1). The Archivist's rules on retention and destruction are found at chapter 166 of the Oregon Administrative Rules.

<sup>137</sup> ORS 192.005(6) (the Legislative Assembly and the Judicial Department are not state agencies for purposes of ORS 192.001 to 192.170); ORS 192.105(4) (section granting Archivist rulemaking authority on retention and destruction does not apply to legislative records).

<sup>138</sup> [ORS 8.125](#), [ORS 7.010](#), ORS 7.120.

<sup>139</sup> [ORS 171.427](#), [ORS 171.430](#).

<sup>140</sup> ORS 192.108. The Archivist provides access to these rules at [http://sos.oregon.gov/archives/Pages/records\\_retention\\_schedule.aspx](http://sos.oregon.gov/archives/Pages/records_retention_schedule.aspx).

<sup>141</sup> Special schedules are more common for state agencies than for local governments; the Archivist provides access to many state agencies' special schedules at [http://sos.oregon.gov/archives/Pages/state\\_admin\\_schedules.aspx](http://sos.oregon.gov/archives/Pages/state_admin_schedules.aspx).

subdivision.”<sup>142</sup> This element is absent from the definition of “public record” in the Public Records Law. But records that would not be necessary for any of those purposes—and that therefore would not be subject to retention requirements—may still be subject to public disclosure if they are requested while they still exist.<sup>143</sup>

It is a crime to knowingly destroy, conceal, remove, or falsely alter a public record without lawful authority.<sup>144</sup> Lawful authority to destroy public records derives from the statutes governing record retention and from the rules implementing those statutes.

### **10. Oregon Transparency Website**

The Oregon Transparency Website makes certain basic information about government readily available to the public.<sup>145</sup> Its creation marks a turn toward government that is proactively transparent, rather than simply open to inspection on request. The website’s focus is primarily fiscal, with information on budgets, incoming revenues, tax expenditures, direct expenditures, and public employee compensation. State agencies’ public meetings notices are also posted to the website, as required by law.<sup>146</sup>

The Transparency Oregon Advisory Commission advises DAS with respect to the website. DAS welcomes comments about the site, including suggestions for additional content, at [oregon.transparency@oregon.gov](mailto:oregon.transparency@oregon.gov).

Agencies may want to consider a similarly proactive approach with respect to high-profile matters. Anticipating inevitable public records requests can make them far more manageable.

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<sup>142</sup> ORS 192.005(5). The Archivist’s general and special retention schedules are based on these four factors. We caution that a public body should not base its retention decisions on whether the records would be inconvenient to disclose in response to a records request: that consideration is absent from the four retention factors.

<sup>143</sup> Records that are scheduled for destruction must be preserved if a request for those records is received, until the request is fulfilled. [OAR 166-030-0045](#).

<sup>144</sup> [ORS 162.305](#).

<sup>145</sup> The website is located at <http://www.oregon.gov/transparency/pages/index.aspx>.

<sup>146</sup> [ORS 276A.253\(4\)\(a\)](#).

## E. HOW DOES A PUBLIC BODY DETERMINE IF RECORDS ARE EXEMPT FROM DISCLOSURE?

### 1. The Nature of the Exemptions

The Public Records Law is primarily a disclosure law, not a confidentiality law.<sup>147</sup> Every public record of a public body is subject to inspection, except as expressly provided by the exemptions contained in ORS 192.345 and 192.355.<sup>148</sup> Those two statutes also incorporate federal statutes or regulations that prohibit disclosure of records, and Oregon laws that prohibit disclosure or otherwise make records confidential.

Oregon courts interpret exemptions narrowly,<sup>149</sup> as does the Attorney General. In addition, a public body that denies a records request has the burden of proving that the information is exempt from disclosure.<sup>150</sup>

A public body is ordinarily free to disclose a record or information that is exempt from disclosure.<sup>151</sup> And a public body that, acting in good faith, discloses an exempt record is not liable for any loss or damages based on that disclosure.<sup>152</sup>

However, there are some categories of records and information that public bodies are legally prohibited from disclosing or that may be disclosed only to specific entities or in specific circumstances.<sup>153</sup> Statutes

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<sup>147</sup> *E.g.*, [Guard Publ'g Co. v. Lane County Sch. Dist. No. 4J](#), 310 Or 32, 37 (1990) (“Under the statutory scheme, disclosure is the rule.”).

<sup>148</sup> ORS 192.314(1).

<sup>149</sup> *E.g.*, [Guard Publ'g Co.](#), 310 Or at 37. The rule to narrowly construe exemptions means that “if there is a plausible construction of a statute favoring disclosure of records, that is the construction that prevails.” [Colby v. Gunson](#), 224 Or App 666, 676 (2008).

<sup>150</sup> ORS 192.411(1); ORS 192.431(1); [Guard Publ'g Co.](#), 310 Or at 38 (“[T]he burden of proof is on the public body to sustain its action by a preponderance of the evidence.”).

<sup>151</sup> *E.g.*, [Guard Publ'g Co.](#), 310 Or at 37–38 & n 6 (“If the public body is satisfied that a claimed exemption from disclosure is justified, it may, *but is not required to*, withhold disclosure of the information.”).

<sup>152</sup> ORS 192.335(1).

<sup>153</sup> For example, DHS “may not” disclose records compiled in the course of investigating a report of child abuse, but must make those records available to certain entities, such as a law enforcement agency investigating a subsequent case of child abuse, or the Office of Child Care for regulating child care facilities. [ORS 419B.035\(1\)](#).

that use terms like “shall not,” “may not,” “it is unlawful,” or “it is prohibited” typically prohibit disclosure, without leaving any discretion to the public body.<sup>154</sup> Public bodies can potentially incur liability for disclosing these types of records.

Therefore, a public body receiving a public records request should first determine whether disclosure is prohibited by state or federal law, or by court order. If disclosure is not prohibited, and the public body sees no reason to withhold a requested record, the public body may disclose the record without further analysis.

Even if the public body perceives reasons to withhold the record, it must disclose the record unless an express statutory exemption applies. Naturally, the type of information appearing in a record will always be relevant to determining whether an exemption applies. In addition, some exemptions require a public body to weigh public or private interests favoring nondisclosure against public interests favoring disclosure.

Whenever a public body withholds a record or portions of a record from disclosure, it must notify the requester and cite the applicable exemption(s).<sup>155</sup> The public body should also consider briefly explaining the nature of the records withheld or redacted for each exemption asserted. This will provide the requester with the information necessary to decide whether to seek review of the denial.

If a public body asserts an exemption that is ultimately rejected by the courts, the public body may be required to pay the requester’s litigation costs and attorney fees, as well as its own costs.<sup>156</sup>

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<sup>154</sup> Of course some prohibitions on disclosure expressly provide for public disclosure in certain circumstances. For example, a police department may not disclose its personnel investigation of a police officer if no discipline results, but must disclose that investigation if the public interest requires disclosure or if the department determines that nondisclosure would adversely affect the public’s confidence in the department. [ORS 181A.830\(3\)–\(4\)](#).

<sup>155</sup> ORS 192.329(2)(b). A public body does not need to acknowledge that responsive records exist if it is prohibited by state or federal law, or if the loss of federal benefits or imposition of some other sanction would result. ORS 192.329(2)(e). However, the public body must cite that state or federal law, unless prohibited. *Id.*

<sup>156</sup> ORS 192.431(3).

## 2. Conditional and Unconditional Exemptions from Disclosure.

All of the exemptions described in ORS 192.345 are conditional: they exempt certain types of information from disclosure “unless the public interest requires disclosure in the particular instance.” In other words, the public body must balance the public interest in disclosure against the competing interest in confidentiality. The law presumes that the public interest favors disclosure.<sup>157</sup>

In contrast, many of the exemptions in ORS 192.355 are unconditional, in that the protected information is exempt without regard to the public interest. In effect, the legislature has determined that the confidentiality interests outweigh disclosure interests as a matter of law. Several of the exemptions in ORS 192.355 are conditioned on the extent to which confidentiality interests outweigh the public interest in disclosure; however, they are worded differently than the balancing test used in ORS 192.345, and vary by exemption.<sup>158</sup>

Similarly, most of the Oregon laws found outside of ORS 192.345 or 192.355 that prohibit disclosure or otherwise make records confidential are unconditional. However, there are a significant number that apply the same public interest balancing test found in ORS 192.345 or otherwise condition disclosure on a balancing of interests.

In determining whether an exemption applies, the identity of the requester and the circumstances surrounding the request are irrelevant to whether the information fits within the category of the exemption.<sup>159</sup> The surrounding circumstances become relevant only if the requested information comes under an exemption that requires a balancing of interests. In that context, the requester’s purpose in seeking disclosure may

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<sup>157</sup> [ACLU of Or., Inc. v. City of Eugene](#), 360 Or 269, 280 (2016).

<sup>158</sup> For example, certain candid, internal discussions are exempt only if “the public interest in encouraging frank communication \* \* \* clearly outweighs the public interest in disclosure,” ORS 192.355(1), while certain confidential information is exempt only if “the public interest would suffer by the disclosure,” ORS 192.355(4).

<sup>159</sup> See [Guard Publ’g Co.](#), 310 Or at 35 n 1 (requester’s purpose in obtaining records was irrelevant to whether the records were exempt); [Morrison v. Sch. Dist. No. 48](#), 53 Or App 148, 153 (1981) (initial determination whether information was of a “personal nature” did not depend upon who requested the information or circumstances existing at time of request).

be relevant to determining whether the public interest requires disclosure: for example, the Court of Appeals held that the public interest did not require disclosure of the names of OHSU employees involved in animal testing where the requester's stated purpose of ensuring the proper treatment of animals did not depend on receiving these names.<sup>160</sup>

### 3. The Public Interest in Disclosure

"The public's interest in disclosure encompasses the public's interest in information about the manner in which public business is conducted and the right of the public to monitor what \* \* \* officials are doing on the job."<sup>161</sup>

Determining whether the public interest requires disclosure of a particular record is a two-step process. First, the public body should determine what the competing interests are in disclosure and nondisclosure, as well as the significance of those interests.<sup>162</sup> This involves looking to the exemption at issue and any case-specific facts, including the records themselves.<sup>163</sup> Second, the public body should weigh those interests and determine which one predominates, with the presumption in favor of disclosure.<sup>164</sup>

Analyzing the case-specific facts typically involves considering the importance of the particular governmental activity at issue;<sup>165</sup> how high-

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<sup>160</sup> *In Defense of Animals v. OHSU*, 199 Or App 160, 176, 178 (2005); see *Jordan v. MVD*, 308 Or 433, 443 (1989) (no public interest in disclosing individual's address from motor vehicle records where there was no link between disclosure and the governmental use of those records).

<sup>161</sup> *In Defense of Animals*, 199 Or App at 175–76 (internal citations and quotation marks omitted).

<sup>162</sup> *ACLU*, 360 Or at 290.

<sup>163</sup> *Id.* at 285–87.

<sup>164</sup> *Id.* at 290.

<sup>165</sup> *City of Portland v. Anderson*, 163 Or App 550, 554 (1999) (public had legitimate interest in confirming high ranking police officer's "integrity and \* \* \* ability to enforce the law evenhandedly"); *Oregonian Publ'g Co. v. Portland Sch. Dist. No. 1J*, 144 Or App 180, 187 (1996) ("[A]lleged misuse and theft of public property by public employees \* \* \* is a matter of legitimate public interest."), *adh'd to as modified on recons*, 152 Or App 135 (1998).

profile the matter is;<sup>166</sup> whether disclosure would impede government functions;<sup>167</sup> whether disclosure would help the public better monitor public business;<sup>168</sup> and the effect of disclosure on any privacy interests.<sup>169</sup> The public interest typically does not depend on the requester's private interests,<sup>170</sup> or on protecting public bodies from embarrassment or scrutiny.<sup>171</sup>

For example, in a decision involving an exemption for internal personnel investigations of police officers that do not result in discipline, the Supreme Court identified the relevant confidentiality interests as protecting the officers' privacy and the police department's ability to effectively discipline, evaluate, and train its officers; the relevant disclosure interest was transparency of police department operations, as well as of the operations of the civilian review board charged with independent oversight

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<sup>166</sup> *City of Portland v. Oregonian Publ'g Co.*, 200 Or App 120, 127 (2005) (stronger public interest in disclosure in a "high profile" police case).

<sup>167</sup> *In Defense of Animals*, 199 Or App at 177–79 (significant public interest in protecting names of staff where there was general concern about harassment by animal rights groups); *Hood Tech. Corp. v. Or.-OSHA*, 168 Or App 293, 305–06 (2000) (revealing identity of confidential complainant might deter others from reporting workplace safety violations).

<sup>168</sup> *In Defense of Animals*, 199 Or App at 178–79 (ensuring the proper treatment of animals was not dependent on receiving the names of public employees engaged in animal testing); see *Jordan*, 308 Or at 443 (no overriding public interest in disclosure where request for individual's contact information did not implicate any of the statutory purposes for which this information was collected).

<sup>169</sup> *Oregonian Publ'g*, 144 Or App at 187 (previous publicity about public employees' alleged misuse and theft of public property meant that it wasn't clear disclosure would intrude into the employees' privacy).

<sup>170</sup> Public Records Order, July 3, 1995, *Garrettson*, at 6–7 (union's interest in obtaining disciplinary records to better represent union members did not qualify as a public interest); Public Records Order, June 8, 1990, *Madrid* (tort claimant's interest in information related to notice of tort claim was not sufficient to require disclosure).

<sup>171</sup> See *Coos County v. Or. Dep't of Fish & Wildlife*, 86 Or App 168, 173 (1987) (potential embarrassment to the agency was not sufficient, in and of itself, to justify withholding records); *Turner v. Reed*, 22 Or App 177, 193 (1975) (records were not exempt where "the only interest in confidentiality [wa]s to protect public officials from criticism of the manner in which they have discharged their duties").

of the personnel investigation at issue.<sup>172</sup>

In determining that the public interest required disclosure, the court emphasized the importance of public oversight of police officer use of force; that this was the first high-profile matter reviewed by the relatively new civilian review board; that the privacy interests of the officers were “substantially diminished” because their identities and alleged misconduct were already public; and that no evidence had been introduced to support the assertion that disclosure would impede the police department’s ability to effectively discipline, evaluate, and train its officers.<sup>173</sup>

#### 4. Separating Exempt and Nonexempt Material

When a record contains both exempt information and nonexempt information, the public body must produce the nonexempt information.<sup>174</sup> Public bodies are excused from this obligation only where separating out the exempt information from the nonexempt is not reasonably possible or where disclosing the nonexempt information would not genuinely preserve the confidentiality of the exempt information.<sup>175</sup>

Similarly, the analysis of whether the public interest requires disclosure of a record is not necessarily all or none. The public interest might be served by disclosing some, but not all, of a particular record.<sup>176</sup>

The obligation to separate exempt and nonexempt information applies regardless of whether the requester expressly invokes it. However, a

<sup>172</sup> [ACLU](#), 360 Or at 297 (analyzing ORS 181A.830(3) and (4), which exempt “information about a personnel investigation of a public safety employee \* \* \* if the investigation does not result in discipline[, unless] the public interest requires disclosure.”).

<sup>173</sup> *Id.* at 298–99.

<sup>174</sup> ORS 192.338; [Gray v. Salem-Keizer Sch. Dist.](#), 139 Or App 556, 566 (1996) (“[D]ocument disclosure is not an ‘all-or-nothing’ proposition \* \* \* .”). Public bodies typically comply with this requirement by redacting the exempt information, using either a black marker or computer software.

<sup>175</sup> [Turner](#), 22 Or App at 186 n 8. While *Turner* dealt with a precursor to the current ORS 192.338, the statutes are essentially identical, and subsequent courts have favorably cited *Turner*. *E.g.*, [Brown v. Guard Publ’g Co.](#), 267 Or App 552, 567 & n 4 (2014).

<sup>176</sup> *E.g.*, Public Records Order, Nov 17, 2014, [Budnick](#), at 3–4 (ordering disclosure of portions of complaint that did not reveal the identities of the complainant or of the licensees complained about).

specific request for the public body to do so—even after a refusal to disclose—can be helpful.

### 5. Waiving an Exemption

A public body risks waiving its discretion to assert an exemption if it publicly discloses the exempt information. For example, the Court of Appeals has held that a school district waived an exemption over a personnel investigation report when its investigator disclosed “substantially all of the information” in that report through testimony at an unemployment hearing (where the transcript of that hearing was publicly available).<sup>177</sup>

However, this does not necessarily mean that a public body waives an exemption by selectively disclosing a record in the course of fulfilling its statutory duties. For example, we concluded that a state university did not waive the exemption over preliminary research data and reports through disclosure to other members of its research cooperative.<sup>178</sup> We explained that “where limited disclosure of a public record does not thwart the policy supporting the exemption, the public body does not thereby waive its prerogative not to disclose the record to others.”<sup>179</sup>

And certain exemptions are not waived by disclosure in response to a written records request, namely the attorney-client privilege and the other evidentiary privileges contained in [ORS 40.225 to 40.295](#).<sup>180</sup>

Because the Court of Appeals has observed that “there is no blanket principle that applies to waiver” under the Public Records Law,<sup>181</sup> a public body that wishes to selectively disclose an exempt public record without

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<sup>177</sup> [Oregonian Publ’g Co. v. Portland Sch. Dist. No. 1J](#), 152 Or App 135, 142 (1998), *aff’d on other grounds*, [329 Or 393](#) (1999); *see also* [Springfield Sch. Dist. #19 v. Guard Publ’g Co.](#), 156 Or App 176, 182–83 (1998) (school district’s disclosure of “charging letter” detailing circumstances of district’s investigations and findings of misconduct against employee waived exemptions to disclosure of investigative report).

<sup>178</sup> Letter of Advice to W.T. Lemman, at 4–5, 1988 WL 416244 (OP-6217) (Mar 29, 1988).

<sup>179</sup> *Id.*

<sup>180</sup> ORS 192.335(2). Because this provision only took effect on January 1, 2018, we recommend that public bodies consult with legal counsel before disclosing records covered by one of these privileges.

<sup>181</sup> [Oregonian Publ’g](#), 152 Or App at 142.

waiving the exemption should consult with counsel.

### 6. Records More than 25 Years Old

Generally, the Public Records Law does not exempt from disclosure records that are more than 25 years old.<sup>182</sup> For example, we have determined that the psychotherapist-patient and physician-patient privileges did not apply to records that were more than 25 years old.<sup>183</sup>

However, there are several exceptions to this rule that either mirror or are subsets of other exemptions:<sup>184</sup>

- (1) “Records less than 75 years old which contain information about the physical or mental health or psychiatric care or treatment of a living individual, if the public disclosure thereof would constitute an unreasonable invasion of privacy.”<sup>185</sup>
- (2) “Records less than 75 years old which were sealed in compliance with statute or by court order.”
- (3) “Records of a person who is or has been in the custody or under the lawful supervision of a state agency, a court or a unit of local government, \* \* \* to the extent that disclosure thereof would interfere with the rehabilitation of the person if the public interest in confidentiality clearly outweighs the public interest in disclosure, [but only] for a period of 25 years after termination of such custody or supervision.”<sup>186</sup>
- (4) “Student records exempt from disclosure under state or federal law.”

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<sup>182</sup> ORS 192.390.

<sup>183</sup> Public Records Order, Feb 7, 1994, [Smith](#), at 6.

<sup>184</sup> ORS 192.398.

<sup>185</sup> This exception appears to be a subset of the exemption that applies to information of a personal nature where disclosure would constitute an unreasonable invasion of privacy, ORS 192.355(2). Therefore our later discussion of that exemption informs the analysis of this exception.

<sup>186</sup> This exception appears to be a subset of the exemption that applies to certain Department of Corrections or Parole Board records, ORS 192.355(5). Therefore our later discussion of that exemption informs the analysis of this exception.

Based on their context, it does not appear that these four exceptions are meant to create separate exemptions from disclosure. They merely describe categories of records that do not lose their exempt status after 25 years. This conclusion is supported by statutory context showing that the exceptions were enacted as a companion to the 25-year rule,<sup>187</sup> the fact that they were not enacted as part of the single exemption statute that existed at the time, and the fact that they generally mirror or are a subset of previously existing exemptions.

## 7. The Federal Freedom of Information Act (FOIA)

Because Oregon's Public Records Law was modeled after FOIA and comparable state laws, it is appropriate to look to federal and state court decisions on those laws in interpreting Oregon's exemptions.<sup>188</sup> However, it is important to keep in mind that the decisions of these other courts are not dispositive in Oregon courts, particularly if the text of the applicable Oregon exemption differs from its federal or state counterpart, or if Oregon case law has already interpreted the Oregon exemption differently.

## 8. Finding Exemptions

The Attorney General maintains a publicly available catalog of public records exemptions found in Oregon law at <https://justice.oregon.gov/PublicRecordsExemptions/>.<sup>189</sup> For each exemption, the catalog provides a brief description, the full statutory text, the affected public bodies, the text of the balancing test (if applicable), and the significant appellate cases and public records orders analyzing the exemption.

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<sup>187</sup> Or Laws 1979, ch 301.

<sup>188</sup> See *Oregonian Publ'g Co. v. Portland Sch. Dist. No. 1J*, 152 Or App 135, 138 (1998) (turning to FOIA cases to analyze waiver of exemptions); *Marks v. McKenzie High Sch. Fact-Finding Team*, 319 Or 451, 458–63 (1994) (looking to opinions of federal and state courts in determining whether a private entity could be subject to Public Records Law); *Jensen v. Schiffman*, 24 Or App 11, 14–16 (1976) (analyzing exemption for criminal investigatory information by looking to federal case law on similar FOIA exemption).

<sup>189</sup> ORS 192.340(1). To help ensure the continued accuracy of this catalog, the Legislative Counsel provides the Attorney General with a copy of any newly passed legislation that creates an exemption, and district attorneys send the Attorney General newly issued public records orders. ORS 192.340(3).

While the catalog does not have legal effect, it serves as a useful guide for both public bodies and records requesters in locating and understanding the exemptions relevant to a particular records request.<sup>190</sup>

### **9. Sunshine Committee**

In 2015, the Attorney General formed a Public Records Task Force consisting of legislators, representatives of media and local government, and other stakeholders.<sup>191</sup> The task force's work resulted in the passage of Senate Bill 481 during the 2017 legislative session. This bill established for the first time clear time frames for responding to public records requests, and directed the creation of the publicly available catalog of exemptions discussed above.

Another bill enacted in the 2017 session established the Oregon Sunshine Committee as a successor to the task force. The Sunshine Committee is tasked with reviewing and reporting on exemptions from disclosure found in Oregon law and on other ways to modify laws to encourage the transparent and efficient handling of records requests.<sup>192</sup> These reports will be reviewed by the Legislative Counsel Committee and its newly established public records subcommittee.<sup>193</sup> More information on the Sunshine Committee can be found at <https://www.doj.state.or.us/oregon-department-of-justice/public-records/public-records-reform/>.

### **F. WHERE AND HOW DOES A PERSON PROCEED IF ACCESS IS REFUSED?**

If a public body denies a requester the right to inspect a public record, the recourse available to the requester generally depends on the identity of the public body. The same procedures apply for denials of a request for fee waiver or reduction,<sup>194</sup> or for a public body's failure to comply with timing

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<sup>190</sup> Note that the catalog does not include any federal prohibitions on the disclosure of records.

<sup>191</sup> Information on the task force is available at <https://www.doj.state.or.us/oregon-department-of-justice/public-records/public-records-task-force/>.

<sup>192</sup> ORS 192.511(3).

<sup>193</sup> ORS 192.499(4).

<sup>194</sup> ORS 192.324(6).

obligations;<sup>195</sup> however, for brevity's sake, we will refer throughout this section to denials of the right to access records.

- If the request was denied by a state agency or official, but not an elected official, the requester may petition the Attorney General for an order compelling disclosure of the records.<sup>196</sup>
- If the request was denied by a local public body, but not an elected official, the requester may petition the district attorney in the county where the public body is located for an order compelling disclosure of the records.<sup>197</sup>
- If the request was denied by a state elected official, the requester may seek review in Marion County Circuit Court;<sup>198</sup> and if the request was denied by a local elected official, the requester may seek review in the circuit court in the county where the official is located.<sup>199</sup>
- The requester can also seek court review in Marion County Circuit Court if the Attorney General has denied any part of a petition.<sup>200</sup> If the appropriate district attorney has denied any part of a petition, the requester can seek review in the circuit court in that same county.<sup>201</sup>

Before seeking formal review of a denial, it may be worthwhile for a disappointed requester to seek a decision at a higher level within the public body. This increases the probability of a favorable decision without the need to seek review, and may encourage the agency to obtain legal advice concerning disclosure of the records at issue.

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<sup>195</sup> ORS 192.407(2).

<sup>196</sup> ORS 192.411(1).

<sup>197</sup> ORS 192.415(1)(a).

<sup>198</sup> See ORS 192.427 (referring to process in ORS 129.411).

<sup>199</sup> See ORS 192.427 (referring to process in ORS 192.415).

<sup>200</sup> ORS 192.411(2). As discussed below, Marion County may not be the appropriate court for certain records of the health professional regulatory boards or of the Health Licensing Office.

<sup>201</sup> ORS 192.415(1)(b).

In addition, the newly created office of Public Records Advocate can help resolve public records disputes. The Advocate offers formal assistance with requests for records from state agencies and cities,<sup>202</sup> and informal assistance in other cases. Either the records requester or agency can request the Advocate's assistance.<sup>203</sup>

## 1. Petitions to the Attorney General

### a. Role of the Attorney General

A public records requester contesting a state agency's denial of a records request, other than by an elected official, must first seek review from the Attorney General,<sup>204</sup> who acts in a quasi-judicial role. The Attorney General will consider the petition and issue an order denying or granting it, or denying it in part and granting it in part. That is, the Attorney General will either order the state agency to disclose the records at issue (or parts of them) or conclude that the records are exempt from disclosure.<sup>205</sup>

While the petition is pending, an agency may continue to seek legal advice and assistance from its assigned attorney at the Oregon Department of Justice. (A separate attorney is assigned to oversee the review process and recommend a disposition to the Attorney General.)

Even if the agency has denied a records request after discussing the request for disclosure with the Department of Justice, petitioning for the Attorney General's formal review may not be futile. Advice given to the agency in such circumstances, sometimes by assigned counsel without further review in the Attorney General's office, often is expressly preliminary. The advice may be based on a description of the requested record, rather than on inspection of the record. And sometimes agencies do not follow the advice of assigned counsel. The petition process also gives the requester the opportunity to provide the Attorney General with additional information. For example, the requester may be able to articulate

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<sup>202</sup> ORS 192.464(1).

<sup>203</sup> *Id.*

<sup>204</sup> [\*Morse Bros, Inc. v. ODED\*](#), 103 Or App 619, 622 (1990) (trial court should have dismissed public records suit where plaintiff filed suit before giving the Attorney General the opportunity to rule on the petition).

<sup>205</sup> ORS 192.411(1).

ways in which the disclosure would serve the public interest. Such information could lead to the conclusion that a conditional exemption claimed by the agency is not available under the circumstances.

#### **b. General Procedures**

The general procedures for seeking review by the Attorney General are described in this section. With respect to certain records of health professional regulatory boards or the Health Licensing Office, the procedures are somewhat different and are discussed below.

There is no filing fee for seeking review by the Attorney General. The statutory form of petition is set out at [Appendix B-9](#), and an electronic form is available at

[https://www.doj.state.or.us/wp-content/uploads/2017/07/public\\_records\\_petition.pdf](https://www.doj.state.or.us/wp-content/uploads/2017/07/public_records_petition.pdf). However, it is not necessary to use any particular form, so long as the petition includes the information required by ORS 192.422(1):

- The identity of the requester,
- The state agency that has the records being sought,
- A description of the records that are sought,<sup>206</sup>
- A statement that a public records request was submitted, and
- A statement that the request was denied, including the person denying the request and the date of the denial, if known.

It is helpful if the petition also explains why the requester believes that the state agency's asserted exemptions do not apply, and attaches any relevant correspondence with the agency.

Upon receipt of a petition, the Attorney General must promptly notify the agency.<sup>207</sup> The agency must then send the Attorney General the requested records for review, together with a statement of its reasons for believing the records should not be disclosed.<sup>208</sup> The Attorney General may

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<sup>206</sup> See Public Records Order, May 10, 1982, [Kane](#) (petition must describe record sought clearly enough to allow record to be identified).

<sup>207</sup> ORS 192.422(2).

<sup>208</sup> *Id.*

permit the agency to disclose the nature or substance of the records rather than the actual records if that is appropriate under the circumstances.<sup>209</sup>

The burden is on the state agency to sustain its denial of the records request.<sup>210</sup> Consequently, if the Attorney General is unable to affirmatively conclude that records are exempt, the Attorney General must order them to be disclosed.<sup>211</sup> Agencies must be able to explain why the withheld records are covered by the asserted exemption, and—for conditional exemptions—why the public interest does not require disclosure.<sup>212</sup>

For conditional exemptions, neither the requester nor the public body is required to introduce facts to explain the significance of the disclosure and confidentiality interests at issue.<sup>213</sup> For example, a requester can choose to rely only on the Public Records Law's "strong and enduring policy that public records and governmental activities be open to the public."<sup>214</sup> However, determinations on review by the Attorney General or a court frequently depend on looking at facts specific to the records at issue.<sup>215</sup> For a requester, this typically means explaining how disclosure will better help monitor public business and why the relevant public business is so significant. For a public body, this typically means explaining how disclosure will cause harm to the relevant interests, such as the public body's operations.

The Attorney General has seven days in which to grant or deny the petition in whole or in part.<sup>216</sup> If the Attorney General does not rule on the

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<sup>209</sup> *Id.*

<sup>210</sup> ORS 192.411(1).

<sup>211</sup> Public Records Order, Mar 4, 2008, [Walth](#), at 3.

<sup>212</sup> See [Brown v. Guard Publ'g Co.](#), 267 Or App 552, 570 (2014) ("Trust us, it's exempt" \* \* \* is not how Oregon's public records law \* \* \* is intended to operate.").

<sup>213</sup> [ACLU of Or., Inc. v. City of Eugene](#), 360 Or 269, 294 (2016) ("[T]o establish an interest in disclosure or confidentiality a party may rely solely on legal arguments.").

<sup>214</sup> *Id.* at 285 (quoting [Jordan](#), 308 Or at 438; internal quotation marks omitted).

<sup>215</sup> *Cf. id.* at 286–87 ("A party is entitled to adduce facts to establish an interest in disclosure or confidentiality, or, if a party wishes to claim that the interest propounded is of greater or lesser import given the particular circumstances that the case presents, the party again may rely on legal arguments or evidence that it proffers.").

<sup>216</sup> ORS 192.411(1).

petition within the statutory time period, the petition is considered denied.<sup>217</sup> The order granting or denying the petition is sent to the requester and to the state agency, and is also publicly posted at <http://cdm17027.contentdm.oclc.org/cdm/landingpage/collection/p17027coll2>.

If either the state agency or requester disagrees with the Attorney General's order, court proceedings can be instituted after the petition process is concluded.

### **c. Health Professional Regulatory Boards and Health Licensing Office**

Special procedures for seeking review by the Attorney General apply to certain records of health professional regulatory boards<sup>218</sup> and of certain boards under the administration of the Health Licensing Office (HLO).<sup>219</sup>

If the public record being sought "contains information concerning a licensee or applicant," the requester must send a copy of the petition by

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<sup>217</sup> ORS 192.418(1). Orders are usually issued within the statutory time period; however, if the petition presents complex issues of law or fact, the requester may be asked to grant an extension. *Cf. Davis v. Walker*, 108 Or App 128, 130 (1991) (noting that requester and public body had agreed that review of the petition would be suspended).

<sup>218</sup> The health professional regulatory boards are the Board of Examiners for Speech-Language Pathology and Audiology; Board of Chiropractic Examiners; Board of Licensed Social Workers; Board of Licensed Professional Counselors and Therapists; Board of Dentistry; Board of Massage Therapists; Mortuary and Cemetery Board; Board of Naturopathic Medicine; Board of Nursing; Board of Optometry; Board of Pharmacy; Medical Board; Occupational Therapy Licensing Board; Physical Therapist Licensing Board; Board of Psychology; Board of Medical Imaging; Veterinary Medical Examining Board; and the Oregon Health Authority with respect to its role in licensing emergency medical services providers. [ORS 676.160](#).

<sup>219</sup> As relevant here, the Health Licensing Office provides oversight and services to the Board of Athletic Trainers; Board of Denture Technology; Board of Direct Entry Midwifery; Respiratory Therapist and Polysomnographic Technologist Licensing Board; Environmental Health Registration Board; Sex Offender Treatment Board; Nursing Home Administrators Board; Board of Licensed Dietitians; and the Behavior Analysis Regulatory Board. *See* ORS 192.401(1)(b) (referring to professions listed in [ORS 676.595](#)).

first-class mail to the affected regulatory board or HLO.<sup>220</sup> This must be done on or before the date of filing the petition with the Attorney General.<sup>221</sup> And if the requested records are of the type that can be withheld based on [ORS 676.165, 676.175, or 676.595](#), the requester's petition must include clear and convincing evidence that the public interest in disclosure outweighs the interests in nondisclosure.<sup>222</sup>

The board or HLO then has 48 hours to forward the petition via first-class mail to any affected licensees or applicants; and to notify these licensees or applicants of the right to file a written response to the petition with the Attorney General within seven days.<sup>223</sup> Any response submitted by a licensee or applicant is then forwarded to the requester by the Attorney General.<sup>224</sup>

Because of the opportunity given to the licensee or applicant to submit a response, the Attorney General has 15 days to consider these petitions, instead of the usual seven.<sup>225</sup>

If the Attorney General orders disclosure of the records, the order must be sent by first-class mail to the requester, the affected board or HLO, and affected licensees or applicants.<sup>226</sup> The board or HLO may not disclose records under such an order until seven days after service of the Attorney

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<sup>220</sup> ORS 192.401(1). We use "licensee or applicant" for brevity's sake. The provision covering HLO records technically refers to the holder of an authorization to practice a profession, or an applicant for that authorization.

<sup>221</sup> *Id.*

<sup>222</sup> ORS 192.401(2). These exemptions generally relate to investigations of licensee or applicant conduct, and the relevant confidentiality interests are typically protecting the privacy of the complainant, licensee, and witnesses, and encouraging complainants and witnesses to cooperate. *E.g.*, Public Records Order, Nov 17, 2014, [Budnick](#), at 3.

<sup>223</sup> ORS 192.401(1).

<sup>224</sup> *Id.*

<sup>225</sup> This provision explicitly extends the deadline only when the asserted exemption is [ORS 676.165, 676.175, or 676.595](#); however, we think the legislative intent is to extend the deadline whenever the record contains information about a licensee or applicant, as failing to extend the Attorney General's deadline would conflict with the seven-day deadline for a licensee or applicant to submit a response to the Attorney General.

<sup>226</sup> ORS 192.401(2).

General's order on affected licensees and applicants.<sup>227</sup> Following the Attorney General's order, the board, the requester, or an affected licensee or applicant may institute court proceedings.<sup>228</sup> Jurisdiction rests with the circuit court for the county where the records are held.<sup>229</sup>

## 2. Petitions to the District Attorney

The Attorney General generally does not have authority to consider petitions for the records of a local public body or of any public body that is not a state agency.<sup>230</sup> Examples of such bodies are cities,<sup>231</sup> counties,<sup>232</sup> school districts,<sup>233</sup> special districts,<sup>234</sup> OHSU,<sup>235</sup> and public universities.<sup>236</sup> Instead, a petition for disclosure of those records should be filed with the district attorney in the county where the relevant public body is located.<sup>237</sup> The petition must include the same information that is required in a petition to the Attorney General, and the procedure is identical to the procedure for petitions to the Attorney General. The procedures for court review following the district attorney's order are also largely the same.

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<sup>227</sup> ORS 192.401(2).

<sup>228</sup> ORS 192.401(3).

<sup>229</sup> *Id.*

<sup>230</sup> However, the Attorney General may act for a district attorney at the latter's request, and therefore consider such petitions. *E.g.*, Public Records Order, Nov 29, 2016, [Coughlin](#).

<sup>231</sup> Public Records Order, Dec 14, 1992, [Walker](#) (Baker City Police Department).

<sup>232</sup> Public Records Order, Apr 2, 2001, [Lucey](#) (Multnomah County).

<sup>233</sup> Public Records Order, June 10, 1993, [Dellelo](#) (Eugene School District 4-J).

<sup>234</sup> Public Records Order, Feb 28, 1996, [Ackerman](#) (Shangri La Water District).

<sup>235</sup> See [ORS 353.100\(1\)](#) (OHSU is not a state agency for purposes of ORS 192, which contains the Public Records Law).

<sup>236</sup> See [ORS 352.138\(2\)](#) (public universities listed in ORS 352.002 are not state agencies for purposes of ORS 192, which contains the Public Records Law).

<sup>237</sup> ORS 192.415(1)(a). If the local body is located in more than one county, then the appropriate county is where the body's administrative offices are located. *Id.*

### 3. Elected Officials

Neither the Attorney General nor district attorney may review an elected official's decision to withhold a record from inspection under the Public Records Law.<sup>238</sup> This rule applies regardless of whether the record in question is in the custody of the elected official or in the custody of any other public body, so long as the elected official claims the right to withhold the record.<sup>239</sup> And an elected official can claim the right to withhold a record even while a public records petition is pending.<sup>240</sup> These same rules apply to officials who have been appointed to fill a vacancy in an elective office.<sup>241</sup>

A person whose public records request has been denied by an elected official may initiate court proceedings to challenge the denial.<sup>242</sup> For state elected officials, such proceedings can be instituted in Marion County Circuit Court;<sup>243</sup> for local elected officials, they can be instituted in the county where the official is located.<sup>244</sup>

If the Attorney General or district attorney serves as legal counsel for an elected official, then upon request they may serve or decline to serve as the official's counsel in such a suit.<sup>245</sup>

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<sup>238</sup> ORS 192.427.

<sup>239</sup> *Id.*; see, e.g., Public Records Order, Feb 1, 1989, [Larson](#) (review not allowed where circuit court judge denied the records request, regardless of whether judge was the record's custodian).

<sup>240</sup> ORS 192.427.

<sup>241</sup> Public Records Order, Nov 22, 1995, [Larson](#) (review not allowed where appointed circuit court judge claimed the right to withhold).

<sup>242</sup> ORS 192.427. Even if the elected official has not denied the request, the court will have jurisdiction after seven days from the date the elected official receives the records request. ORS 192.418(2). However, this does not mean that an elected official has improperly withheld records by not fulfilling a records request within seven days. Cf. [Morse Bros., Inc. v. ODED](#), 103 Or App 619, 622 (1990) ("The Public Records Law clearly contemplates that agencies have the opportunity to review the requested records and to act on the request before \* \* \* the courts can review the matter.").

<sup>243</sup> See ORS 192.427 (referring to procedure in ORS 192.411).

<sup>244</sup> See *id.* (referring to procedure in ORS 192.415).

<sup>245</sup> *Id.*

#### 4. Court Proceedings

A records requester or public body that disagrees with an order of the Attorney General or district attorney, or a requester who disagrees with a denial by an elected official, may seek court review. The procedure depends on whether the disputed order granted or denied the petition.

If the Attorney General or district attorney orders a public body to disclose a public record, the public body must comply with the order in full within seven days,<sup>246</sup> or else give notice that the public body intends to institute proceedings for injunctive or declaratory relief against the requester in circuit court. Copies of this notice must be sent to the Attorney General or district attorney, and by certified mail to the requester.<sup>247</sup> If a public body gives such notice, it then has seven days to institute proceedings.<sup>248</sup> However, the public body cannot be represented in the proceedings by the Attorney General or district attorney.<sup>249</sup> If the public body fails to comply with either of these seven-day deadlines, the requester may file suit,<sup>250</sup> in which case the public body will be liable for the requester's costs and reasonable attorney fees regardless of who prevails at circuit court.<sup>251</sup>

If the Attorney General or district attorney instead issues an order denying the petition, then the requester may contest that order by instituting

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<sup>246</sup> As discussed above, in certain cases a health professional regulatory board or the Health Licensing Office must wait until the seventh day following an order to produce the records, in order to give the affected licensee or applicant time to issue notice of intent to file suit. ORS 192.401(2).

<sup>247</sup> ORS 192.411(2).

<sup>248</sup> *Id.*

<sup>249</sup> ORS 192.411(3). In such cases, the public body may retain special counsel, *id.*, and can still be advised by its regular legal counsel on the process for retaining such special counsel.

<sup>250</sup> ORS 192.411(2).

<sup>251</sup> ORS 192.431(3). The seven-day deadlines are unambiguous and strictly applied. [\*Gray v. Salem-Keizer Sch. Dist.\*](#), 139 Or App 556, 567–68 (1996) (requester was entitled to attorney fees where public body disclosed records 11 days after the order, regardless of public body's good faith and reasonableness); see [\*Davis v. Walker\*](#), 108 Or App 128, 130–31, 133–134 (1991) (requester was entitled to attorney fees where public body waited six months for a Supreme Court decision in a separate case before disclosing the records).

proceedings against the public body in circuit court.<sup>252</sup> However, the requester does not need to comply with either of the seven-day deadlines that apply to a public body filing suit. And in such cases, the Attorney General will represent a state agency in defense of the agency's action.<sup>253</sup> A district attorney, however, will not represent a public body unless the district attorney generally serves as the attorney for that body.<sup>254</sup>

If the petition is granted in part and denied in part, the public body, the requester, or both may institute court proceedings.<sup>255</sup> The Attorney General cannot represent a state agency if the Attorney General ordered disclosure of any records and the agency did not fully comply.<sup>256</sup> The same rule applies to an order issued by a district attorney.<sup>257</sup>

Any action for injunctive or declaratory relief following an order of the Attorney General must be filed in the Marion County Circuit Court.<sup>258</sup> Court actions following an order of the district attorney must be filed in the circuit court of the county in which the district attorney exercises jurisdiction.<sup>259</sup> And court proceedings following a denial by an elected official can be instituted in Marion County Circuit Court (for state officials) or in the county where the elected official is located (for local officials).<sup>260</sup>

Regardless of whether court proceedings follow a petition to the Attorney General, a petition to a district attorney, or a denial by an elected official, the powers of the court are the same. Specifically, the court has jurisdiction to enjoin the public body from withholding records and to order

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<sup>252</sup> ORS 192.411(2).

<sup>253</sup> ORS 192.411(3).

<sup>254</sup> ORS 192.415(1)(c).

<sup>255</sup> ORS 192.411(2).

<sup>256</sup> ORS 192.411(3).

<sup>257</sup> ORS 192.415(1).

<sup>258</sup> ORS 192.411(2). The exception is for certain records of health professional regulatory boards or the Health Licensing Office; proceedings regarding those records should be instituted in the county where the records are held. ORS 192.401(3).

<sup>259</sup> ORS 192.415(1)(b).

<sup>260</sup> See ORS 192.427 (referring to the procedures in ORS 192.411 and 192.415).

production of any records improperly withheld.<sup>261</sup> The public body carries the burden to sustain its denial of a records request,<sup>262</sup> but is not limited to the arguments or exemptions it raised in the course of review by the Attorney General or a district attorney.<sup>263</sup>

If a requester prevails in full in the court proceedings, the public body will be required to compensate the requester for the cost of the litigation at trial and on appeal, including reasonable attorney fees.<sup>264</sup> However, if the requester prevails only in part, the award of costs and attorney fees is discretionary.<sup>265</sup> If a public body that has been ordered by the Attorney General or district attorney to disclose records fails to do so and either fails to notify the requester within seven days of its intent to institute court proceedings or fails to actually institute those proceedings within seven days of giving notice, the public body will have to pay the requester's litigation costs regardless of which side prevails.<sup>266</sup> If the public body has disclosed all requested records before trial, the case is generally moot, and no attorney fees will be available.<sup>267</sup> However, the public body may be required to pay these costs if it provides the requested records but does not concede that the records are subject to public disclosure.<sup>268</sup>

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<sup>261</sup> ORS 192.431(1).

<sup>262</sup> *Id.* The exception is for certain records of health professional regulatory boards or the Health Licensing Office, where the requester has the burden of demonstrating by clear and convincing evidence that the public interest in disclosure outweighs the interests in nondisclosure. ORS 192.401(3).

<sup>263</sup> *In Defense of Animals v. OHSU*, 199 Or App 160, 169–70 (2005) (OHSU did not waive its right to assert exemptions in court action by not asserting them to the district attorney).

<sup>264</sup> ORS 192.431(3).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*; see *Gray v. Salem-Keizer Sch. Dist.*, 139 Or App 556, 567–68 (1996) (requester should have been awarded fees where records were not produced until 11 days after district attorney's order).

<sup>267</sup> *Clapper v. Or. State Police*, 228 Or App 172, 178 (2009).

<sup>268</sup> *Kotulski v. Mt. Hood Comm. College*, 62 Or App 452, 458 (1983) (affirming award of fees to requester, despite college's offer to allow inspection of records, where requester had also sought a declaration that the records were subject to public disclosure).

## 5. Public Records Advocate

In addition to seeking review from the Attorney General or district attorney, a requester can ask the Public Records Advocate to help resolve disputes with a state agency or city.<sup>269</sup> The Advocate's services can be requested by a state agency, city,<sup>270</sup> or requester when any portion of the records request has been denied; when a request for fee waiver or reduction has been denied; or when a fee estimate has been provided to the requester.<sup>271</sup> These services will be most effective when requested prior to review by the Attorney General or district attorney. The Advocate may also be able to informally resolve disputes that involve public bodies other than a state agency or city.

Once a written request for assistance has been received, the Advocate has 21 days to help the public body and requester reach an agreement on the disputed issue(s).<sup>272</sup> Both the requester and state agency must engage in the resolution process in good faith;<sup>273</sup> however, when a state agency requests the Advocate's services, the records requester has five days to opt out by written notice.<sup>274</sup> If an agreement is reached, the Advocate will prepare a formal written agreement that will be executed by the public body and requester; that agreement will then control how the records request is resolved.<sup>275</sup> If an agreement is not reached, the requester can still seek

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<sup>269</sup> ORS 192.464(1)–(3). The Oregon Judicial Department is not subject to this dispute resolution process. ORS 192.478.

<sup>270</sup> When a city's records are at issue, the city, requester, and Advocate must all consent to the dispute resolution process. ORS 192.464(6).

<sup>271</sup> ORS 192.464(1)–(3). The ability of the Advocate to resolve disputes over the reasonableness of fee estimates is significant as the authority of the Attorney General or district attorney to review those disputes is limited.

<sup>272</sup> ORS 192.464(7). The dispute resolution period may be extended if the requester, public body, and Advocate all agree. *Id.*

<sup>273</sup> ORS 192.464(4). A requester's failure to engage in good faith may be grounds for the state agency to deny the records request, while a state agency's failure to engage in good faith may be grounds for the award of costs and attorney fees to the requester for further pursuit of the records. *Id.* A city and requester of a city's records are not subject to these penalties. ORS 192.464(6).

<sup>274</sup> ORS 192.464(3)(b).

<sup>275</sup> ORS 192.464(8).

review from the Attorney General (for state agencies), district attorney (for cities), or the circuit court (for elected officials).

In addition to providing these dispute resolution services, the Advocate will train public bodies on processing and responding to public records requests.<sup>276</sup> At a public body's written request, the Advocate may also provide advice on processing public records requests and applying public records exemptions.<sup>277</sup>

More information on the Advocate can be found at <http://sos.oregon.gov/public-records/Pages/default.aspx>.

## **G. WHAT PUBLIC RECORDS ARE EXEMPT FROM DISCLOSURE?**

This section provides information on public records exemptions found in the Public Records Law, ORS 192.311 to 192.478, including the conditional exemptions found in ORS 192.345, the exemptions found in ORS 192.355, and the other miscellaneous exemptions. It does not, however, provide analysis of the hundreds of exemptions found elsewhere in Oregon law, or found in federal law.

### **a. The Conditional Exemptions of ORS 192.345**

Each of the conditional exemptions listed in ORS 192.345 exempts a specific type of record or information "unless the public interest requires disclosure in the particular instance." Thus, for each of these exemptions, public bodies must always apply a balancing test on a case-by-case basis.

#### **(1) Public Records Pertaining to Litigation**

ORS 192.345(1) conditionally exempts:

Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation.

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<sup>276</sup> ORS 192.475(1)–(2).

<sup>277</sup> ORS 192.475(3).

The purpose of this exemption is to place governmental bodies, as parties or potential parties to litigation, on an even footing with private parties. Therefore, we recommend that public bodies invoke this exemption only on the advice of legal counsel.

The exemption applies only to records “compiled or acquired by the public body for use in the litigation,” as distinguished from records compiled or acquired in the ordinary course of business that subsequently become relevant to litigation.<sup>278</sup> The Oregon Court of Appeals has suggested that this exemption is analogous to the attorney-client privilege and the work product protection.<sup>279</sup>

Because public bodies need to investigate and prepare in advance for expected litigation, we think it appropriate to interpret the phrase “reasonably likely” to mean “more likely than not,” rather than “imminent.” One indication that litigation is reasonably likely to occur is the filing of a notice of tort claim against the public body. Notes or reports prepared in response to such a notice would fall within the exemption.<sup>280</sup>

The legislative history makes clear that the litigation exemption does not apply to administrative proceedings, such as contested case hearings. The fact that any administrative proceeding may lead to litigation does not justify claiming this exemption. If, however, the public body objectively can show that court litigation is “reasonably likely to occur,” the exemption may be claimed for information gathered for that litigation, regardless of whether an administrative proceeding also may be involved.

In assessing whether the public interest requires disclosure of records

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<sup>278</sup> [Lane County Sch. Dist. v. Parks](#), 55 Or App 416, 420 (1981) (records were not exempt even though they might reveal a cause of action against the school district and would materially assist the plaintiff in such an action).

<sup>279</sup> *Id.* at 420 (favorably citing a California decision that examined a similarly worded exemption). The privilege applies to “confidential communications made for the purpose of facilitating the rendition of professional legal services to the client,” as long as the communications are between certain parties. [ORS 40.225\(2\)](#). And the work product protection applies, with some limitations, to “documents \* \* \* prepared in anticipation of litigation or for trial.” [ORCP 36 B\(3\)](#).

<sup>280</sup> Public Records Order, Jan 12, 1990, [Bischoff](#), at 3; Public Records Order, June 8, 1990, [Madrid](#); Public Records Order, Oct 1, 2003, [Franzen](#).

covered by this exemption, an interest in private litigation does not justify disclosure.<sup>281</sup> The availability of ordinary tools of discovery would generally negate any need for an individual to use the Public Records Law to gain access to records for purposes of pursuing private litigation.<sup>282</sup>

This exemption no longer applies once the litigation has concluded, which does not occur until there is a final judgment and all appeal rights have been exhausted.

Public bodies that are defendants in tort litigation<sup>283</sup> cannot enter into a confidential settlement or compromise, unless federal law requires the specific terms and conditions to remain confidential; or the court orders that the identity of a victim of sexual abuse or a minor remain confidential, after balancing the privacy interests against the public's interest in the relevant terms and conditions.<sup>284</sup>

Even when settling other types of cases, public bodies may not "exempt public records from disclosure simply by promising \* \* \* confidentiality. Absent statutory authority, such action would violate the 'strong and enduring policy that public records and governmental activities be open to the public.'"<sup>285</sup>

Lastly, we note that when a party to civil litigation involving a public body uses the Public Records Law to request information relating to the litigation, the party must send the request to the public body, with a copy to the public body's attorney.<sup>286</sup> This requirement also applies when the requester has filed a notice of tort claim, if the requested records relate to the notice.<sup>287</sup>

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<sup>281</sup> Public Records Order, June 8, 1990, [Madrid](#); Public Records Order, Aug 16, 2004, [Bobbitt](#).

<sup>282</sup> Public Records Order, Jan 12, 1990, [Bischoff](#), at 3.

<sup>283</sup> A tort generally includes most litigation involving an injury to a specific person or persons that is not contractual in nature. [ORS 30.260\(8\)](#).

<sup>284</sup> [ORS 17.095](#). This prohibition applies to actions under [ORS 30.260](#) to 30.300, and [ORS 294.100](#) (unlawful expenditure of funds).

<sup>285</sup> [Guard Publ'g Co. v. Lane County Sch. Dist. No. 4J](#), 310 Or 32, 39 (1990).

<sup>286</sup> ORS 192.314(2).

<sup>287</sup> *Id.*

## (2) Trade Secrets

ORS 192.345(2) conditionally exempts:

Trade secrets. “Trade secrets,” as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

Records withheld from disclosure under this provision must meet all four of the following criteria:

- the information must not be patented;
- it must be known only to certain individuals within an organization and used in a business the organization conducts;
- it must be information that has actual or potential commercial value; and,
- it must give its users an opportunity to obtain a business advantage over competitors who do not know or use it.

This definition is not exclusive, and thus “trade secret” may also include information described in the Uniform Trade Secrets Act (UTSA).<sup>288</sup> Judicial opinions construing the UTSA can therefore be useful in interpreting the scope of a “trade secret” under Public Records Law.

The trade secret exemption is most frequently relevant to information a public body has obtained from third parties, such as contractors or regulated entities. Determining whether information from a particular entity qualifies

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<sup>288</sup> The UTSA allows injunctive relief and damages for the misappropriation of a trade secret. [ORS 646.463, 646.465](#). “Trade secret” is defined as “information \* \* \* that \* \* \* [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” [ORS 646.461\(4\)](#).

as a trade secret is fact specific.<sup>289</sup> And a public body cannot rely merely on the entity's assurance that the information is a trade secret.<sup>290</sup> This often places a public body in the difficult position of carrying the burden to prove that information is exempt as a trade secret, without possessing the facts necessary to meet this burden.

We therefore recommend that public bodies require any entities submitting sensitive business information to clearly label any asserted trade secrets.<sup>291</sup> Submitting entities should be told that this information will be disclosed if it does not qualify as a trade secret or if the public interest requires disclosure.

Once a records request is received for any information that has been labeled as trade secret, the public body should notify the entity and request factual information, and legal argument where appropriate, that supports the assertion of the trade secret exemption. Once the necessary information is obtained, the public body will then be in a position to properly determine whether to assert the exemption.

Relevant facts to obtain from the entity asserting a trade secret often include internal steps the entity takes to keep the information secret; to the extent the information is by necessity shared with or known by outside parties, the steps taken to ensure that these parties keep the information secret; how the information would be economically valuable to a competitor or could be used to economically harm the entity; and the time, effort, and

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<sup>289</sup> E.g., [Kaib's Roving R.P.H. Agency, Inc. v. Smith](#), 237 Or App 96, 103 (2010) (“[T]he question of whether certain information constitutes a trade secret ordinarily is best resolved by a fact finder after full presentation of evidence from each side.” (Internal quotation marks omitted.)).

<sup>290</sup> See [Brown v. Guard Publ'g Co.](#), 267 Or App 552, 570 (2014) (““Trust us, it's exempt” \* \* \* is not how Oregon's public records law \* \* \* is intended to operate.”).

<sup>291</sup> Cf. Public Records Order, Mar 11, 2013, [Meiffren](#), at 5 (information did not qualify as trade secret where submitters did not “take the simple step” of checking a box requesting confidentiality).

expense needed to compile the information.<sup>292</sup>

We have concluded that fee schedules and price lists provided in response to a request for proposal can meet the criteria for exemption as trade secrets.<sup>293</sup> We have also concluded that lightning strike data made available to the Oregon Department of Forestry under a license with a private corporation met the criteria.<sup>294</sup> More recently, we have concluded that an insurer's projections of trend, target loss ratios, and accidental death rates, submitted to the Insurance Division as part of the insurer's rate filing, were exempt as trade secrets.<sup>295</sup>

Determining whether information is exempt as a trade secret depends on the public interest in disclosure.<sup>296</sup> In adopting the UTSA, the Oregon legislature included a provision immunizing public bodies from misappropriation claims.<sup>297</sup> To qualify for this immunity, the disclosure must be made pursuant to an order issued under the Public Records Law or on the advice of an attorney authorized to advise the public body.<sup>298</sup> This provision indicates that the legislature expected that disclosures under the Public Records Law might include information otherwise protected as a trade secret. The legislature chose to address that possibility by giving public bodies immunity against any resulting misappropriation claims. In addition, in adopting the UTSA, the legislature did not amend the existing conditional exemption for trade secrets, despite clearly being aware of the

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<sup>292</sup> See [Kaib's Roving](#), 237 Or App at 102–03 (analyzing claim under the UTSA). An entity seeking to avoid disclosure under the UTSA must “demonstrate[e] that disclosure will work a clearly defined and serious injury[, as opposed to making b]road allegations of harm unsubstantiated by specific examples or articulated reasoning.” [Pfizer Inc. v. Or. Dep't of Justice](#), 254 Or App 144, 162 (2012) (internal quotation marks omitted).

<sup>293</sup> Public Records Order, Dec 7, 1989, [Baldwin](#); see also Public Records Order, Mar 4, 2004, [Zaitz](#), at 6–7 (pro formas related to sale of surplus state property).

<sup>294</sup> Public Records Order, Sept 4, 1998, [Spatz](#), at 6–7.

<sup>295</sup> Public Records Order, Aug 8, 2007, [Kirsch](#).

<sup>296</sup> Public Records Order, Apr 26, 2010, [Bachman](#), at 2. Prior to this order, we had suggested that the UTSA was an unconditional exemption; we no longer believe that prior analysis is correct.

<sup>297</sup> [ORS 646.473\(3\)](#).

<sup>298</sup> *Id.*

UTSA's interplay with Public Records Law. And finally, at the time the UTSA was adopted, the Public Records Law did not contain the "catchall" exemption contained in ORS 192.355(9). Instead, the Public Records Law included an enumerated list of specific statutes providing for some type of confidentiality. The legislature did not add any of the newly passed UTSA to that list.<sup>299</sup>

However, because the UTSA evinces a legislative policy in favor of protecting legitimate trade secrets, it is appropriate to give heightened scrutiny to contentions that the public interest requires the disclosure of a trade secret. That is, the balancing test will be less likely to favor disclosure.

In assessing whether the public interest requires the disclosure of trade secrets, we typically look to how much harm the entity asserting a trade secret would suffer by disclosure; the benefits enjoyed by that entity in connection with submitting the information at issue; and the nature of the governmental activity connected to the information. For example, we concluded that the public interest required disclosure of salary information of private companies that had received sizable property tax abatements: even assuming the information qualified as trade secret, we found that disclosure would help the public monitor the effectiveness of this investment of public funds tied to job creation.<sup>300</sup> We also noted that the information was not specific enough to identify wages paid to each individual or occupational class; that is, there was "only an attenuated possibility that disclosure could actually harm the [relevant] commercial interests."<sup>301</sup>

Absent an order compelling disclosure under the Public Records Law, a public body should not release any trade secret information without determining that the public interest requires disclosure and consulting with an attorney authorized to give it legal advice.<sup>302</sup>

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<sup>299</sup> Or Laws 1987, ch 537 (enacting the UTSA).

<sup>300</sup> Public Records Order, Mar 11, 2013, [Meiffren](#), at 5–6.

<sup>301</sup> *Id.* at 6.

<sup>302</sup> A public body is immunized from any claim or action for misappropriation of a trade secret where the public body in good faith relied on an order of disclosure from the Attorney General or appropriate district attorney, or on its attorney's advice. [ORS 646.473\(3\)](#).

### (3) Criminal Investigations

ORS 192.345(3) conditionally exempts:

Investigatory information compiled for criminal law purposes. The record of an arrest or the report of a crime shall be disclosed unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim. Nothing in this subsection shall limit any right constitutionally guaranteed, or granted by statute, to disclosure or discovery in criminal cases. For purposes of this subsection, the record of an arrest or the report of a crime includes, but is not limited to:

- (a) The arrested person's name, age, residence, employment, marital status and similar biographical information;
- (b) The offense with which the arrested person is charged;
- (c) The conditions of release pursuant to [ORS 135.230 to 135.290](#);
- (d) The identity of and biographical information concerning both complaining party and victim;
- (e) The identity of the investigating and arresting agency and the length of the investigation;
- (f) The circumstances of arrest, including time, place, resistance, pursuit and weapons used; and
- (g) Such information as may be necessary to enlist public assistance in apprehending fugitives from justice.

This exemption generally applies only until the law enforcement investigation or prosecution is completed or abandoned.<sup>303</sup> However, the public interest may not require disclosure of certain information even after the investigation or prosecution is completed:

- o information that would interfere with ongoing law enforcement proceedings;
- o information that would deprive a person of a right to a fair trial;

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<sup>303</sup> [Jensen v. Schiffman](#), 24 Or App 11, 16 (1976).

- information that would constitute an unwarranted invasion of privacy;
- information that would disclose the identity of a confidential source;
- information that would disclose investigative techniques and procedures; or
- information that would endanger the life or physical safety of law enforcement personnel.<sup>304</sup>

Certain information may be subject to disclosure even before the completion of an investigation: a “record of an arrest or the report of a crime” can be withheld only if there is a clear need to delay disclosure in the course of a specific investigation, or if another statute restricts or prohibits disclosure. Disclosable information includes the identity and general biographical information of the victim, complainant, and arrested person, as well as the charges and other details of the arrest.<sup>305</sup>

The criminal investigatory exemption applies not only to information generated during a criminal investigation, but also to information originally compiled for ordinary business purposes that is subsequently gathered in the course of an investigation. This means that even information in the custody of a non-law-enforcement agency may be exempt if it was subsequently gathered by a law enforcement agency, but only if disclosing the information would interfere with an ongoing investigation.<sup>306</sup>

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<sup>304</sup> *Id.*

<sup>305</sup> This exception for arrest records does not apply to juvenile records, as the juvenile code refers to “custody” rather than “arrests,” [ORS 419C.091\(1\)](#).

<sup>306</sup> *E.g.*, Public Records Order, Dec 23, 1991, [Mayes](#), at 2–3 (Treasury records under review by DOJ’s Criminal Justice Division); Public Records Order, Oct 10, 1996, [Reed](#) (OLCC records compiled by police and district attorney). These orders relied on the reasoning of the United States Supreme Court in interpreting a similar exemption in the federal Freedom of Information Act. [John Doe Agency v. John Doe Corp.](#), 493 US 146 (1989).

#### (4) Tests and Examinations

ORS 192.345(4) conditionally exempts:

Test questions, scoring keys, and other data used to administer a licensing examination, employment, academic or other examination or testing procedure before the examination is given and if the examination is to be used again. Records establishing procedures for and instructing persons administering, grading or evaluating an examination or testing procedure are included in this exemption, to the extent that disclosure would create a risk that the result might be affected.

The obvious purpose of this exemption is to protect the integrity of examinations administered by various public bodies for licensing, employment, and other purposes. Information used to administer an exam is generally confidential until the exam has been given or if the exam will be reused.<sup>307</sup> This exemption also applies to an individual's exam answers if disclosure would indirectly reveal the exam questions.<sup>308</sup>

Although primarily applicable to licensing or academic examinations, this exemption will apply to any "examination" for which test questions, scoring keys, or other data will be used again to grade or evaluate applicants.<sup>309</sup>

#### (5) Business Records Required to be Submitted

ORS 192.345(5) conditionally exempts:

Information consisting of production records, sale or purchase records or catch records, or similar business records of a private concern or enterprise, required by law to be submitted to or

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<sup>307</sup> Public Records Order, Jan 12, 2001, [Varenhorst](#), at 3–4 (hypothetical scenarios used to evaluate job applicants); Public Records Order, Feb 28, 2002, Perry (math and reading assessment tests for K-12 students).

<sup>308</sup> See Public Records Order, Nov 19, 1999, [Birhanzi](#), at 2–3 (individual answer sheets were not exempt where disclosure would not compromise the exam's integrity); Public Records Order, Jan 24, 1989, [Parsons](#) (individual's oral exam answers were not exempt absent evidence that disclosure would indirectly reveal the questions).

<sup>309</sup> Public Records Order, May 2, 1997, [Bledsoe](#), at 6–7 (materials used to score and evaluate applicants for tax credits were exempt).

inspected by a governmental body to allow it to determine fees or assessments payable or to establish production quotas, and the amounts of such fees or assessments payable or paid, to the extent that such information is in a form that would permit identification of the individual concern or enterprise. This exemption does not include records submitted by long term care facilities as defined in [ORS 442.015](#) to the state for purposes of reimbursement of expenses or determining fees for patient care. Nothing in this subsection shall limit the use that can be made of such information for regulatory purposes or its admissibility in any enforcement proceeding.

This exemption applies only to business records required to be submitted to a governmental body for use in setting fees or assessments or for establishing production quotas, and to the amount of the fees or assessments, if this information would permit identification of the business. It is intended to protect information that would allow determination of a particular business's production levels. This exemption does not cover business records that a person or business may submit in connection with an application for a license or permit, even if the information is a required part of the application, unless the amount of the license or permit fee is based on the production levels. The exemption is limited to information furnished to allow the governmental agency "to determine fees or assessments payable or to establish production quotas."

#### **(6) Real Estate Appraisals**

ORS 192.345(6) conditionally exempts:

Information relating to the appraisal of real estate prior to its acquisition.

This exemption permits public bodies to obtain information in confidence concerning the value of real estate that the public body may purchase. A parallel provision exists under the Public Meetings Law, which exempts from open meetings requirements "deliberations with persons designated by the governing body to negotiate real property transactions."<sup>310</sup> Even after the real estate is acquired, the exemption may

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<sup>310</sup> ORS 192.660(2)(e).

continue to apply to the appraisal if the information and analysis in the record is relevant to later appraisals of similarly situated properties that the public body may acquire.<sup>311</sup>

#### **(7) Employee Representation Cards**

ORS 192.345(7) conditionally exempts:

The names and signatures of employees who sign authorization cards or petitions for the purpose of requesting representation or decertification elections.

This exemption does not extend to records showing the number of persons who have signed such cards or to checklists of eligible employees who vote in such elections that do not disclose how individual employees voted.<sup>312</sup>

#### **(8) Civil Rights Investigations**

ORS 192.345(8) conditionally exempts:

Investigatory information relating to any complaint filed under [ORS 659A.820 or 659A.825](#), until such time as the complaint is resolved under ORS 659A.835, or a final order is issued under ORS 659A.850.

This exemption applies to investigatory information related to complaints of unlawful employment practices or other civil rights violations that are filed with the Bureau of Labor and Industries. It expires once the complaint is resolved under [ORS 659A.835 or 659A.850](#). This exemption does not apply to the complaint itself or information contained in the complaint.<sup>313</sup>

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<sup>311</sup> Public Records Order, Dec 2, 1994, [Parks](#).

<sup>312</sup> Letter of Advice to Wendy Greenwald, at 7 n 1, 1987 WL 278312 (OP-6087) (Feb 26, 1987); Public Records Order, Mar 6, 1981, [Bishoff](#).

<sup>313</sup> [Pace Consultants, Inc. v. Roberts](#), 297 Or 590, 595 (1984) (the names and addresses of employers against whom unlawful practices complaints were pending were not exempt if contained in a complaint or on a ledger card).

**(9) Unfair Labor Practice Investigations**

ORS 192.345(9) conditionally exempts:

Investigatory information relating to any complaint or charge filed under ORS [243.676](#) and [663.180](#).

This exemption applies to investigatory information relating to complaints or charges of certain unfair labor practices that are filed with the Employment Relations Board. However, the complaint or charge itself would not be exempt from disclosure.<sup>314</sup>

**(10) Debt Consolidator Investigations**

ORS 192.345(10) conditionally exempts:

Records, reports and other information received or compiled by the Director of the Department of Consumer and Business Services under [ORS 697.732](#).

This exemption applies to records received or compiled by the director of the Department of Consumer and Business Services in examining or investigating a debt management service provider. However, the director must disclose any order that suspends, revokes, or refuses to renew a service provider's registration, or that imposes a civil penalty under [ORS 697.832](#).<sup>315</sup>

**(11) Archaeological Site Information**

ORS 192.345(11) conditionally exempts:

Information concerning the location of archaeological sites or objects as those terms are defined in [ORS 358.905](#), except if the governing body of an Indian tribe requests the information and the need for the information is related to that Indian tribe's cultural or religious activities. This exemption does not include information relating to a site that is all or part of an existing, commonly known and publicized tourist facility or attraction.

Archaeological objects refer to objects that meet all of the following

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<sup>314</sup> See *id.* (exemption using the same wording as ORS 192.345(9) did not apply to complaints).

<sup>315</sup> [ORS 697.732\(4\)\(a\)](#).

conditions: are at least 75 years old; are part of the physical record of an indigenous or other culture found in the state or waters of the state; and are material remains of past human life or activity that are of archaeological significance.<sup>316</sup> Examples can be monuments, symbols, and facilities.<sup>317</sup>

Archaeological sites are Oregon sites that contain archaeological objects and the contextual associations of these objects with each other or with biotic or geological remains or deposits.<sup>318</sup> Examples can be shipwrecks, lithic quarries or scatters, house pit villages, camps, burials, homesteads, and townsites.<sup>319</sup>

### (12) Personnel Discipline Actions

ORS 192.345(12) conditionally exempts:

A personnel discipline action, or materials or documents supporting that action.

This exemption applies to records of personnel discipline actions, and the personnel investigations supporting those actions. It does not apply to personnel investigations that do not result in any disciplinary action,<sup>320</sup> and so does not apply when an employee resigns during the investigation or in lieu of disciplinary action.<sup>321</sup> When a records request is received during the course of a personnel investigation, and unless the public interest requires disclosure, the records can be withheld until the investigation concludes so that the public body can determine whether this exemption applies or not.<sup>322</sup>

When determining whether the public interest requires disclosure, the typical interest in confidentiality is to “protect[ ] the public employee from

<sup>316</sup> [ORS 358.905\(1\)\(a\)](#).

<sup>317</sup> ORS 358.905(1)(a)(C).

<sup>318</sup> ORS 358.905(1)(c)(A).

<sup>319</sup> ORS 358.905(1)(c)(B).

<sup>320</sup> [City of Portland v. Rice](#), 308 Or 118, 123–24 (1989); [City of Portland v. Anderson](#), 163 Or App 550, 553–54 (1999) (only the records relating to allegations for which discipline was imposed were conditionally exempt).

<sup>321</sup> Public Records Order, June 26, 1998, [Scheminske](#), at 3 (records not exempt where employee resigned before completion of the investigation and before any disciplinary action was imposed).

<sup>322</sup> Public Records Order, May 9, 2011, [Deutsch](#).

ridicule for having been disciplined.”<sup>323</sup> This confidentiality interest is therefore diminished when information about the disciplinary action or the underlying conduct is already publicly available.<sup>324</sup>

The significance of the public interest in disclosure typically depends on the seriousness of the employee’s alleged misconduct and on the employee’s position. For example, the Oregon Court of Appeals has held that an investigation into a high-school principal and vice-principal’s alleged misuse and theft of school property was not exempt,<sup>325</sup> and that an investigation into a high-ranking police officer’s off-duty conduct was not exempt where the officer’s integrity and ability to enforce the law evenhandedly were implicated.<sup>326</sup>

The public interest in disclosure is not limited to learning about the public employer imposing the disciplinary action: for example, in concluding that an internal affairs investigation of police officers was not exempt, the Oregon Supreme Court relied on not just the public interest in oversight of the police department, but also on the interest in oversight of the independent civilian review board that had reviewed the investigation.<sup>327</sup>

We recommend that a public body consult with its legal counsel for advice in responding to a request for records potentially exempt under the personnel discipline exemption.

Some public bodies have stronger protections in place for disciplinary records. For example, district school boards can adopt rules limiting public

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<sup>323</sup> [Rice](#), 308 Or at 124 n 5.

<sup>324</sup> [Oregonian Publ’g Co. v. Portland Sch. Dist. No. 1J](#), 144 Or App 180, 187 (1996) (publicity about the employees’ alleged misconduct indicated that it was not clear that disclosure would intrude into the employees’ privacy), *adh’d to as modified on recons*, 152 Or App 135 (1998); Public Records Order, Nov 26, 1990, Hogan, at 3 (little remaining public interest in withholding the disciplinary letter where the underlying conduct had already been reported on).

<sup>325</sup> [Oregonian Publ’g](#), 144 Or App at 187.

<sup>326</sup> [Anderson](#), 163 Or App at 554.

<sup>327</sup> [ACLU of Or., Inc. v. City of Eugene](#), 360 Or 269, 299 (2016) (analyzing [ORS 181A.830\(3\)](#), which conditionally exempts personnel investigations of public safety employees if no discipline results).

access to teachers' personnel files.<sup>328</sup> A public body cannot publicly disclose a personnel investigation of any of its public safety employees if no discipline results, unless the public interest requires disclosure or if the public body determines that nondisclosure would adversely affect the public's confidence in the body.<sup>329</sup> And a public body may not publicly disclose audio or video records of internal investigation interviews of public safety officers.<sup>330</sup>

Before producing any personnel files, a public body should remember that various personal information about its employees is exempt from disclosure unless there is clear and convincing evidence that the public interest requires disclosure: this includes home addresses, home and cell phone numbers, personal e-mail addresses, driver license numbers, Social Security numbers, dates of birth, and emergency contact information.<sup>331</sup>

### **(13) Information about Threatened or Endangered Species**

ORS 192.345(13) conditionally exempts:

Information developed pursuant to [ORS 496.004, 496.172 and 498.026](#) or ORS 496.192 and [564.100](#), regarding the habitat, location or population of any threatened species or endangered species.

This exemption applies to information on endangered or threatened species related to the Department of Fish & Wildlife's and Department of Agriculture's roles in managing these wildlife and plant species.

The likely intent is to prevent disclosure to persons who might use the information in a manner adverse to the survival of the species. However, a requester's benevolent intent and promise not to disclose the records to anyone else do not necessarily mean that the public body must disclose the record, as the body may have little basis to evaluate the requester's

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<sup>328</sup> [ORS 342.850\(8\)](#).

<sup>329</sup> [ORS 181A.830\(3\)-\(4\)](#). See ORS 181A.830(1)(b) for a definition of "public safety employee."

<sup>330</sup> ORS 192.385(2). See ORS 181A.355 for a definition of "public safety officer."

<sup>331</sup> ORS 192.355(3).

intentions and no means to enforce the requester's promise.<sup>332</sup>

#### **(14) Faculty Research**

ORS 192.345(14) conditionally exempts:

Writings prepared by or under the direction of faculty of public educational institutions, in connection with research, until publicly released, copyrighted or patented.

This exemption is designed primarily to protect public educational institutions from "'piracy' \* \* \* of research ideas and data collected by faculty members."<sup>333</sup> A secondary purpose is avoiding the release of incomplete and inaccurate data.<sup>334</sup> Even if preliminary results have been published, the exemption may continue to apply to the underlying data if further research and publication will be undertaken using the same data.<sup>335</sup>

#### **(15) Computer Programs for the Use of Public Bodies**

ORS 192.345(15) conditionally exempts:

Computer programs developed or purchased by or for any public body for its own use. As used in this subsection, "computer program" means a series of instructions or statements which permit the functioning of a computer system in a manner designed to provide storage, retrieval and manipulation of data from such computer system, and any associated documentation and source material that explain how to operate the computer program. "Computer program" does not include:

- (a) The original data, including but not limited to numbers, text, voice, graphics and images;
- (b) Analyses, compilations and other manipulated forms of the original data produced by use of the program; or
- (c) The mathematical and statistical formulas which would be used

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<sup>332</sup> Public Records Order, June 22, 1993, [Lear](#).

<sup>333</sup> Letter of Advice to W.T. Lemman, at 3, 1988 WL 416244 (OP-6217) (Mar 29, 1988).

<sup>334</sup> *Id.*

<sup>335</sup> Public Records Order, June 19, 1995, [Speede](#), at 3; Public Records Order, July 7, 1989, [McCleery](#).

if the manipulated forms of the original data were to be produced manually.

The legislature added this provision to prevent persons from obtaining from public bodies computer programs that they otherwise would have to purchase or develop themselves. The exclusions from the definition of computer program specified in subsections (a) through (c) ensure public access to electronic information created or obtained by a public body in conducting its statutory duties.

**(16) Agricultural Producer Indebtedness Mediation  
Data**

ORS 192.345(16) conditionally exempts:

Data and information provided by participants to mediation under [ORS 36.256](#).

This exemption applies to mediation services coordinated by the Department of Agriculture in resolving disputes between agricultural producers in danger of foreclosure on their property and their creditors. All “memoranda, work products and other materials” contained in the department’s or mediator’s case files are also confidential.<sup>336</sup> Any mediation agreement, however, is not confidential.<sup>337</sup>

**(17) Unsafe Workplace Investigation Materials**

ORS 192.345(17) conditionally exempts:

Investigatory information relating to any complaint or charge filed under [ORS chapter 654](#), until a final administrative determination is made or, if a citation is issued, until an employer receives notice of any citation.

This exemption applies to investigations of workplace safety and health by the Department of Consumer & Business Services,<sup>338</sup> regardless of who

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<sup>336</sup> [ORS 36.262\(1\)](#).

<sup>337</sup> *Id.*

<sup>338</sup> These investigations are typically handled by Oregon OSHA, a division of the department.

filed the complaint or charge.<sup>339</sup> While the complaint itself is not covered by this exemption,<sup>340</sup> the identity of an employee who makes a complaint will be kept confidential if the employee submits a written request.<sup>341</sup>

### **(18) Public Safety Plans**

ORS 192.345(18) conditionally exempts:

Specific operational plans in connection with an anticipated threat to individual or public safety for deployment and use of personnel and equipment, prepared or used by a public body, if public disclosure of the plans would endanger an individual's life or physical safety or jeopardize a law enforcement activity.

This exemption applies to operational plans of public bodies that are connected to anticipated threats to individual or public safety, as long as disclosure would endanger an individual's safety or jeopardize a law enforcement activity. Examples are carrying out "sting" operations; protecting individuals and groups during high-profile court cases, demonstrations, or visits by dignitaries; or maintaining order after a natural disaster.

We have concluded that an Oregon State Police plan for law enforcement activities and crowd control at a Memorial Day event that had resulted in fires and the discharge of firearms in previous years was covered by this exemption; we noted that disclosing the plan would "allow individuals to learn the tactical procedures and deployment methods that OSP personnel will use, and to take measures to defeat them."<sup>342</sup>

### **(19) Telecommunications Utility Audits**

ORS 192.345(19) conditionally exempts:

(a) Audits or audit reports required of a telecommunications carrier.

As used in this paragraph, "audit or audit report" means any

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<sup>339</sup> Public Records Order, Sept 19, 1997, [Long](#), at 2–3 (exemption applied even though complaint had not come from an employee).

<sup>340</sup> See [Pace Consultants, Inc. v. Roberts](#), 297 Or 590, 593 (1984) (similarly worded exemption did not apply to the complaints themselves).

<sup>341</sup> [ORS 654.062\(4\)](#).

<sup>342</sup> Public Records Order, Jan 27, 2006, [Laws](#).

external or internal audit or audit report pertaining to a telecommunications carrier, as defined in [ORS 133.721](#), or pertaining to a corporation having an affiliated interest, as defined in [ORS 759.390](#), with a telecommunications carrier that is intended to make the operations of the entity more efficient, accurate or compliant with applicable rules, procedures or standards, that may include self-criticism and that has been filed by the telecommunications carrier or affiliate under compulsion of state law. “Audit or audit report” does not mean an audit of a cost study that would be discoverable in a contested case proceeding and that is not subject to a protective order; and

(b) Financial statements. As used in this paragraph, “financial statement” means a financial statement of a nonregulated corporation having an affiliated interest, as defined in [ORS 759.390](#), with a telecommunications carrier, as defined in [ORS 133.721](#).

This provision was proposed by telecommunications utilities, with the concurrence of the Public Utility Commission (PUC), to protect the affiliates’ financial statements and audits that become public records when the telecommunications carrier provides them to the PUC.<sup>343</sup> Release of the information may also provide a competitor of an affiliate with an unfair business advantage if this information is a trade secret.

#### **(20) Voter’s Home Address**

ORS 192.345(20) conditionally exempts:

The residence address of an elector if authorized under [ORS 247.965](#) and subject to ORS 247.967.

A county clerk is required to keep a voter’s home address exempt from disclosure if the voter demonstrates that the public availability of the address endangers the voter’s personal safety or the safety of any family member at the same address.<sup>344</sup> The factors used to determine whether an

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<sup>343</sup> PUC is also permitted to, by rule, conditionally exempt from disclosure information submitted by local exchange telecommunications utilities or cooperatives. [ORS 759.060\(1\)](#).

<sup>344</sup> [ORS 247.965\(2\)](#).

individual's personal safety is in danger are found in statute<sup>345</sup> and in rules adopted by the Secretary of State.<sup>346</sup>

There are several exceptions to this exemption, such as when a county clerk receives a court order or a request from a law enforcement agency.<sup>347</sup>

**(21) Housing Authority and Urban Renewal Agency  
Records**

ORS 192.345(21) conditionally exempts:

The following records, communications and information submitted to a housing authority as defined in [ORS 456.005](#), or to an urban renewal agency as defined in [ORS 457.010](#), by applicants for and recipients of loans, grants and tax credits:

- (a) Personal and corporate financial statements and information, including tax returns;
- (b) Credit reports;
- (c) Project appraisals, excluding appraisals obtained in the course of transactions involving an interest in real estate that is acquired, leased, rented, exchanged, transferred or otherwise disposed of as part of the project, but only after the transactions have closed and are concluded;
- (d) Market studies and analyses;
- (e) Articles of incorporation, partnership agreements and operating agreements;
- (f) Commitment letters;
- (g) Project pro forma statements;
- (h) Project cost certifications and cost data;
- (i) Audits;
- (j) Project tenant correspondence requested to be confidential;

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<sup>345</sup> [ORS 247.969\(1\)](#).

<sup>346</sup> [OAR 165-005-0130](#).

<sup>347</sup> [ORS 247.967](#).

- (k) Tenant files relating to certification; and
- (L) Housing assistance payment requests.

This exemption applies to certain records submitted to local housing authorities and urban renewal agencies by individuals or businesses applying for or receiving certain funding related to affordable, government-subsidized housing or urban renewal projects. It was proposed to encourage participation by developers, contractors, financial institutions, and others in publicly financed low-income housing and urban-renewal transactions. This provision is somewhat similar to the exemption in ORS 192.355(23) for records obtained by the Oregon Housing and Community Services Department. Unlike ORS 192.355(23) however, this exemption is conditional, requiring consideration of the public interest in disclosure. A 2013 amendment to this exemption clarifies that appraisals obtained during transactions that involve the transfer of real property interests are subject to disclosure after those transfers have concluded.<sup>348</sup>

### **(22) Interference with Property or Services**

ORS 192.345(22) conditionally exempts:

Records or information that, if disclosed, would allow a person to:

- (a) Gain unauthorized access to buildings or other property;
- (b) Identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, services; or
- (c) Disrupt, interfere with or gain unauthorized access to public funds or to information processing, communication or telecommunication systems, including the information contained in the systems, that are used or operated by a public body.

In part, this provision is intended to protect the delivery of the state's public services. It exempts from disclosure information that would allow a person to gain unauthorized access to buildings, public funds, or information processing systems, or to identify areas of vulnerability that would permit unlawful disruption to or interference with public services or a public body's information processing systems. A public body also may

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<sup>348</sup> Or Laws 2013, ch 325, § 1.

use the exemption to protect the security of property and services owned, used, or provided by private entities.<sup>349</sup>

We have concluded that information from railroad companies showing the past movements of hazardous materials was not exempt where no significant nonpublic information about future movements would be revealed, and where there was a public interest in being aware of the public safety risks resulting from these movements.<sup>350</sup> And we denied a petition for the teleconference call-in numbers and access codes in use by a public body where disclosure would allow anyone to use the state-funded toll-free service at the state's expense, and where there was no evidence of a public interest in disclosure.<sup>351</sup>

### (23) Security Measures

ORS 192.345(23) conditionally exempts from disclosure:

Records or information that would reveal or otherwise identify security measures, or weaknesses or potential weaknesses in security measures, taken or recommended to be taken to protect:

- (a) An individual;
- (b) Buildings or other property;
- (c) Information processing, communication or telecommunication systems, including the information contained in the systems; or
- (d) Those operations of the Oregon State Lottery the security of which are subject to study and evaluation under [ORS 461.180\(6\)](#).

This provision is also intended, in part, to protect the delivery of the state's public services by exempting from disclosure information that would reveal the security measures taken or recommended to be taken to protect public employees, buildings, and information processing systems. It exempts not only actual or recommended security measures but also weaknesses or potential weaknesses in those measures. The exemption also applies to records concerning individuals, property, and systems beyond

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<sup>349</sup> See Public Records Order, Mar 14, 2014, [Davis](#) (exemption potentially applied to information submitted by railroad companies).

<sup>350</sup> *Id.*

<sup>351</sup> Public Records Order, Aug 15, 2013, [Wilson](#).

those connected to a public body. Finally, the measure specifically exempts from disclosure information that would reveal security measures of the Oregon State Lottery.

We have concluded that courthouse video surveillance footage of a car crash was exempt where disclosure would reveal the location of the courthouse's hidden security cameras and potential blind spots; in assessing the public interest in disclosure, we noted that hundreds of photographs of the incident had already been publicly disclosed.<sup>352</sup>

#### **(24) OHSU and Public University Donation Records**

ORS 192.345(24) conditionally exempts:

Personal information held by or under the direction of officials of the Oregon Health and Science University or a public university listed in [ORS 352.002](#) about a person who has or who is interested in donating money or property to the Oregon Health and Science University or a public university, if the information is related to the family of the person, personal assets of the person or is incidental information not related to the donation.

The institutions covered by this exemption are the University of Oregon, Oregon State University, Portland State University, Oregon Institute of Technology, Western Oregon University, Southern Oregon University, Eastern Oregon University,<sup>353</sup> and OHSU.

#### **(25) Public University Donation Records**

ORS 192.345(25) conditionally exempts:

The home address, professional address and telephone number of a person who has or who is interested in donating money or property to a public university listed in [ORS 352.002](#).

Unlike the exemption in ORS 192.345(24), information need not be held by or under the direction of university officials to qualify for this exemption.

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<sup>352</sup> Public Records Order, Oct 23, 2007, [Martin](#).

<sup>353</sup> [ORS 352.002](#).

**(26) Commodity Commission Filers**

ORS 192.345(26) conditionally exempts:

Records of the name and address of a person who files a report with or pays an assessment to a commodity commission established under [ORS 576.051 to 576.455](#), the Oregon Beef Council created under [ORS 577.210](#) or the Oregon Wheat Commission created under [ORS 578.030](#).

This exemption relates to the producers who pay assessments to the Oregon Beef Council, the Oregon Wheat Commission, and commodity commissions,<sup>354</sup> and the reports filed by those who collect such assessments (typically first purchasers).<sup>355</sup>

**(27) Financial Transfer Records**

ORS 192.345(27) conditionally exempts:

Information provided to, obtained by or used by a public body to authorize, originate, receive or authenticate a transfer of funds, including but not limited to a credit card number, payment card expiration date, password, financial institution account number and financial institution routing number.

This exemption is intended to protect against unauthorized access to, and fraudulent use of, information that a public body possesses in relation to fund transfers. A public body may transfer funds to or receive a transfer of funds from members of the public as well as other public entities. To execute such transfers, the public body may have records containing information that could allow a person to access funds maintained in a private or public account. This provision protects that information from disclosure.

**(28) Social Security Numbers in Divorce Cases**

ORS 192.345(28) conditionally exempts:

Social Security numbers as provided in [ORS 107.840](#).

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<sup>354</sup> An example of a commodity commission is the Oregon Blueberry Commission. The full list of these commissions can be found at [ORS 576.062](#).

<sup>355</sup> [ORS 576.335, 576.345](#).

This exemption applies to Social Security numbers of parties to judicial proceedings for marital annulment, dissolution, separation, or summary dissolution, and to the numbers of the parties' children.<sup>356</sup>

**(29) University Student E-mail Addresses**

ORS 192.345(29) conditionally exempts:

The electronic mail address of a student who attends a public university listed in [ORS 352.002](#) or Oregon Health and Science University.

The institutions covered by this exemption are the University of Oregon, Oregon State University, Portland State University, Oregon Institute of Technology, Western Oregon University, Southern Oregon University, Eastern Oregon University, and OHSU.

**(30) OHSU Medical Researcher Records**

ORS 192.345(30) conditionally exempts:

The name, home address, professional address or location of a person that is engaged in, or that provides goods or services for, medical research at Oregon Health and Science University that is conducted using animals other than rodents. This subsection does not apply to Oregon Health and Science University press releases, websites or other publications circulated to the general public.

The Court of Appeals has held that this exemption applied to the names of OHSU staff engaged in primate research.<sup>357</sup> In assessing the public interest in disclosure, the court noted that the researchers' names were already publicly available, that the requester's stated purpose of ensuring the proper treatment of animals did not depend on disclosure of staff names, and that evidence showed a history of harassment and threats by various animal rights groups.<sup>358</sup>

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<sup>356</sup> See [ORS 107.840](#) (referring to the proceedings conducted under ORS 107.085 and 107.485).

<sup>357</sup> [In Defense of Animals v. OHSU](#), 199 Or App 160, 175–79 (2005).

<sup>358</sup> *Id.* at 178–79.

**(31) Personal Information of Public Safety Officers  
Appearing in Certain Records**

ORS 192.345(31) conditionally exempts:

If requested by a public safety officer, as defined in [ORS 181A.355](#):

(a) The home address and home telephone number of the public safety officer contained in the voter registration records for the public safety officer.

(b) The home address and home telephone number of the public safety officer contained in records of the Department of Public Safety Standards and Training.

(c) The name of the public safety officer contained in county real property assessment or taxation records. This exemption:

(A) Applies only to the name of the public safety officer and any other owner of the property in connection with a specific property identified by the officer in a request for exemption from disclosure;

(B) Applies only to records that may be immediately available to the public upon request in person, by telephone or using the Internet;

(C) Applies until the public safety officer requests termination of the exemption;

(D) Does not apply to disclosure of records among public bodies as defined in [ORS 174.109](#) for governmental purposes; and

(E) May not result in liability for the county if the name of the public safety officer is disclosed after a request for exemption from disclosure is made under this subsection.

Public safety officers include corrections officers, youth correction officers, emergency medical dispatchers, parole and probation officers, police officers, certified reserve officers, reserve officers, telecommunicators, regulatory specialists, and fire service professionals.<sup>359</sup>

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<sup>359</sup> [ORS 181A.355\(16\)](#).

**(32) Personal Information of Certain Government Attorneys**

ORS 192.345(32) conditionally exempts:

Unless the public records request is made by a financial institution, as defined in [ORS 706.008](#), consumer finance company licensed under [ORS chapter 725](#), mortgage banker or mortgage broker licensed under [ORS 86A.095 to 86A.198](#), or title company for business purposes, records described in paragraph (a) of this subsection, if the exemption from disclosure of the records is sought by an individual described in paragraph (b) of this subsection using the procedure described in paragraph (c) of this subsection:

(a) The home address, home or cellular telephone number or personal electronic mail address contained in the records of any public body that has received the request that is set forth in:

(A) A warranty deed, deed of trust, mortgage, lien, deed of reconveyance, release, satisfaction, substitution of trustee, easement, dog license, marriage license or military discharge record that is in the possession of the county clerk; or

(B) Any public record of a public body other than the county clerk.

(b) The individual claiming the exemption from disclosure must be a district attorney, a deputy district attorney, the Attorney General or an assistant attorney general, the United States Attorney for the District of Oregon or an assistant United States attorney for the District of Oregon, a city attorney who engages in the prosecution of criminal matters or a deputy city attorney who engages in the prosecution of criminal matters.

(c) The individual claiming the exemption from disclosure must do so by filing the claim in writing with the public body for which the exemption from disclosure is being claimed on a form prescribed by the public body. Unless the claim is filed with the county clerk, the claim form shall list the public records in the possession of the public body to which the exemption applies. The exemption applies until the individual claiming the exemption requests termination of the exemption or ceases to qualify for the exemption.

This exemption applies to the home address, home and cell phone

numbers, and personal e-mail addresses of certain government attorneys engaged in the prosecution of criminal matters, but applies only upon request by the attorney and only to the public records specified by the attorney. However, for certain types of records in the possession of a county clerk, the specific public records containing the exempt information do not need to be listed. The exemption does not apply to public records requests made by financial institutions, consumer finance companies, mortgage bankers, mortgage brokers, or title companies.

This information is generally already exempt when in the personnel files of the attorney's public employer, unless there is clear and convincing evidence that the public interest requires disclosure.<sup>360</sup>

### **(33) Land Management Plans**

ORS 192.345(33) conditionally exempts:

The following voluntary conservation agreements and reports:

- (a) Land management plans required for voluntary stewardship agreements entered into under [ORS 541.973](#); and
- (b) Written agreements relating to the conservation of greater sage grouse entered into voluntarily by owners or occupiers of land with a soil and water conservation district under [ORS 568.550](#).

This exemption applies to the land management plans that are required by the voluntary stewardship agreements entered into between a landowner and the State Department of Agriculture or the State Board of Forestry; under these agreements, the landowner agrees to "self-regulate to meet and exceed applicable regulatory requirements and achieve conservation, restoration and improvement of fish and wildlife habitat or water quality."<sup>361</sup> The land management plan includes a comprehensive description and inventory of the subject property, its features and uses, and a prescription for the protection of resources.<sup>362</sup>

The exemption applies also to voluntary agreements between the owner/occupiers of lands and soil and water conservation districts that

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<sup>360</sup> See ORS 192.355(3).

<sup>361</sup> [ORS 541.973\(1\)](#).

<sup>362</sup> ORS 541.973(4).

relate to the conservation of greater sage grouse.

**(34) SAIF Corporation Business Records**

ORS 192.345(34) conditionally exempts:

Sensitive business records or financial or commercial information of the State Accident Insurance Fund Corporation that is not customarily provided to business competitors. This exemption does not:

(a) Apply to the formulas for determining dividends to be paid to employers insured by the State Accident Insurance Fund Corporation;

(b) Apply to contracts for advertising, public relations or lobbying services or to documents related to the formation of such contracts;

(c) Apply to group insurance contracts or to documents relating to the formation of such contracts, except that employer account records shall remain exempt from disclosure as provided in ORS 192.355(35); or

(d) Provide the basis for opposing the discovery of documents in litigation pursuant to the applicable rules of civil procedure.

The Oregon Court of Appeals has interpreted “sensitive” in a similarly worded exemption to apply to information that is “intended to be treated with a high degree of discretion.”<sup>363</sup>

**(35) Public Safety Officer Investigations**

ORS 192.345(35) conditionally exempts:

Records of the Department of Public Safety Standards and Training relating to investigations conducted under [ORS 181A.640](#) or [181A.870\(6\)](#), until the department issues the report described in ORS 181A.640 or 181A.870.

This exemption applies to DPSST investigations conducted to decide whether to deny, suspend, or revoke the certifications of public safety

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<sup>363</sup> [In Defense of Animals v. OHSU](#), 199 Or App 160, 173 (2005) (interpreting what is now ORS 192.502(21), which exempts certain information of OHSU) (quoting *Webster’s Third New Int’l Dictionary* 2068 (unabridged ed 2002)).

officers<sup>364</sup> or instructors,<sup>365</sup> or to determine whether the laws related to private security services have been violated.<sup>366</sup> However, the exemption expires once DPSST issues the report marking the end of the investigation.<sup>367</sup>

DPSST's investigations of a police officer may involve obtaining a police department's personnel investigation of that officer. While these records are conditionally exempt in the custody of the police departments,<sup>368</sup> we have concluded several times that, under the circumstances, these records were not exempt in DPSST's custody; our decisions have been based in part on the strong public interest in transparency of police operations and of the certification of police officers.<sup>369</sup>

### (36) Medical Examiner Records

ORS 192.345(36) conditionally exempts:

A medical examiner's report, autopsy report or laboratory test report ordered by a medical examiner under [ORS 146.117](#).

This exemption does not apply to a records request by a deceased's parent, spouse, sibling, child, or personal representative, or by a criminal or

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<sup>364</sup> Public safety officers include corrections officers, youth correction officers, emergency medical dispatchers, parole and probation officers, police officers, certified reserve officers, reserve officers, telecommunicators, regulatory specialists, and fire service professionals. [ORS 181A.355\(16\)](#).

<sup>365</sup> See [ORS 181A.640](#).

<sup>366</sup> See [ORS 181A.870\(6\)](#) (referring to violations of ORS 181A.840 to 181A.891, which regulate private security services).

<sup>367</sup> See [ORS 181A.640\(8\)](#) (DPSST shall issue a report when it completes an investigation of a public safety officer or instructor); ORS 181A.870(6) (DPSST shall issue a report when it completes an investigation of an alleged violation of ORS 181A.840 to 181A.891).

<sup>368</sup> See ORS 192.345(12) (conditionally exempting personnel discipline actions), 181A.830(3)–(4) (conditionally exempting personnel investigations of public safety employees where no discipline results).

<sup>369</sup> E.g., Public Records Order, Aug 25, 2017, [Brousseau](#); see [ACLU of Or., Inc. v. City of Eugene](#), 360 Or 269, 298 (2016) (“[T]he public interest \* \* \* is particularly significant when it comes to the operation of its police departments and the review of allegations of officer misconduct.”).

civil defendant in the death of the deceased.<sup>370</sup>

In assessing whether the public interest requires disclosure of a covered report, we have ordered disclosure where the report would shed light on the possible causes of a fatal car accident and on public concern with the safety of the bridge that was the accident site.<sup>371</sup> And we ordered disclosure of the names, ages, dates of death, and causes of death of homicide victims, noting that such information is frequently publicly disclosed and would not implicate privacy interests to the same extent as disclosure of the full reports.<sup>372</sup>

### **(37) Ongoing Audits of Public Bodies**

ORS 192.345(37) conditionally exempts:

Any document or other information related to an audit of a public body, as defined in [ORS 174.109](#), that is in the custody of an auditor or audit organization operating under nationally recognized government auditing standards, until the auditor or audit organization issues a final audit report in accordance with those standards or the audit is abandoned. This exemption does not prohibit disclosure of a draft audit report that is provided to the audited entity for the entity's response to the audit findings.

This exemption allows, but does not require, public bodies to decline to disclose documents and information related to audits of the public body (or audits by the public body of other public bodies) while the audit is ongoing. In order to qualify for this exemption, the auditor or audit organization must be operating under "nationally recognized government auditing standards," and the audit must still be ongoing. An audit is ongoing when it has not been abandoned, and the final audit report in accordance with nationally recognized government auditing standards has not been issued. Note that this exemption expressly states that it "does not prohibit disclosure of a draft audit report that is provided to the audited entity for the entity's

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<sup>370</sup> [ORS 146.035\(5\)](#).

<sup>371</sup> Public Records Order, Dec 14, 2012, [Webb](#), at 3–4 (also noting the reduced privacy interests of the use of intoxicants when operating a motor vehicle).

<sup>372</sup> Public Records Order, July 1, 2015, [Brosseau](#), at 7–8 (also noting the public interest in compiling reliable data on homicides in Oregon).

response to the audit findings.”

**(38) Electronic Fare Information**

ORS 192.345(38) conditionally exempts:

(a) Personally identifiable information collected as part of an electronic fare collection system of a mass transit system.

(b) The exemption from disclosure in paragraph (a) of this subsection does not apply to public records that have attributes of anonymity that are sufficient, or that are aggregated into groupings that are broad enough, to ensure that persons cannot be identified by disclosure of the public records.

(c) As used in this subsection:

(A) “Electronic fare collection system” means the software and hardware used for, associated with or relating to the collection of transit fares for a mass transit system, including but not limited to computers, radio communication systems, personal mobile devices, wearable technology, fare instruments, information technology, data storage or collection equipment, or other equipment or improvements.

(B) “Mass transit system” has the meaning given that term in [ORS 267.010](#).

(C) “Personally identifiable information” means all information relating to a person that acquires or uses a transit pass or other fare payment medium in connection with an electronic fare collection system, including but not limited to:

(i) Customer account information, date of birth, telephone number, physical address, electronic mail address, credit or debit card information, bank account information, Social Security or taxpayer identification number or other identification number, transit pass or fare payment medium balances or history, or similar personal information; or

(ii) Travel dates, travel times, frequency of use, travel locations, service types or vehicle use, or similar travel information.

Enacted in 2014,<sup>373</sup> this exemption applies to personally identifiable information of passengers using public transit. A significant impetus was TriMet's new electronic fare collection system, and the concern that this system would be gathering information on a passenger's travel patterns, and private financial and account information.<sup>374</sup>

**(39) Personal Information of Civil Code Enforcement Officers in Certain Records**

ORS 192.345(39) conditionally exempts:

(a) If requested by a civil code enforcement officer:

(A) The home address and home telephone number of the civil code enforcement officer contained in the voter registration records for the officer.

(B) The name of the civil code enforcement officer contained in county real property assessment or taxation records. This exemption:

(i) Applies only to the name of the civil code enforcement officer and any other owner of the property in connection with a specific property identified by the officer in a request for exemption from disclosure;

(ii) Applies only to records that may be made immediately available to the public upon request in person, by telephone or using the Internet;

(iii) Applies until the civil code enforcement officer requests termination of the exemption;

(iv) Does not apply to disclosure of records among public bodies as defined in [ORS 174.109](#) for governmental purposes; and

(v) May not result in liability for the county if the name of the civil code enforcement officer is disclosed after a request for exemption from disclosure is made under this subsection.

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<sup>373</sup> [Or Laws 2014, ch 37, § 1.](#)

<sup>374</sup> Testimony, Senate Committee on General Government, Consumer & Small Business Protection, HB 4086, Feb 19, 2014, Ex 4 (statement of TriMet), *available at* <https://olis.leg.state.or.us/liz/2014R1/Downloads/CommitteeMeetingDocument/35111>.

(b) As used in this subsection, “civil code enforcement officer” means an employee of a public body, as defined in [ORS 174.109](#), who is charged with enforcing laws or ordinances relating to land use, zoning, use of rights-of-way, solid waste, hazardous waste, sewage treatment and disposal or the state building code.

Enacted in 2015,<sup>375</sup> this exemption applies upon request to public employees who enforce laws relating to land use, zoning, use of rights-of-way, solid waste, hazardous waste, sewage treatment and disposal, or the state building code. While it applies only to voter registration records and county real property assessment or taxation records, public employee home addresses and phone numbers are also generally exempt when contained in personnel files, unless there is clear and convincing evidence that the public interest requires disclosure.<sup>376</sup>

#### **(40) Body Camera Footage**

ORS 192.345(40) conditionally exempts:

Audio or video recordings, whether digital or analog, resulting from a law enforcement officer’s operation of a video camera worn upon the officer’s person that records the officer’s interactions with members of the public while the officer is on duty. When a recording described in this subsection is subject to disclosure, the following apply:

(a) Recordings that have been sealed in a court’s record of a court proceeding or otherwise ordered by a court not to be disclosed may not be disclosed.

(b) A request for disclosure under this subsection must identify the approximate date and time of an incident for which the recordings are requested and be reasonably tailored to include only that material for which a public interest requires disclosure.

(c) A video recording disclosed under this subsection must, prior to disclosure, be edited in a manner as to render the faces of all persons within the recording unidentifiable.

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<sup>375</sup> [Or Laws 2015, ch 313, § 1.](#)

<sup>376</sup> See ORS 192.355(3).

Enacted in 2015,<sup>377</sup> this exemption applies to audio or video footage from a law enforcement officer's body camera. Before disclosing this information in response to a public records request, the video must be edited to make any faces unidentifiable. The exemption was part of legislation requiring law enforcement agencies to establish policies and procedures on the use of body cameras.

**b. The Exemptions of ORS 192.355**

Unlike the exemptions in ORS 192.345, the exemptions in ORS 192.355 are not dependent on whether “the public interest requires disclosure in the particular instance.” However, each of the exemptions in subsections (1) to (6) of ORS 192.355 expressly requires a particularized weighing of the public interest in disclosure; some of these exemptions contain balancing tests that are more pro-disclosure than the conditional exemptions of ORS 192.345.

**(1) Internal Advisory Communications**

ORS 192.355(1) exempts:

Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

The central thrust of this exemption is to encourage frankness and candor in opinions and recommendations exchanged within or between governmental bodies. Because it has several elements, and requires a showing by the public body that the interest in encouraging frank communication *clearly* outweighs the public interest in disclosure, it applies narrowly.

The exemption applies only if all five of the following criteria are met:

- the information is a frank communication within a public body or

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<sup>377</sup> [Or Laws 2015, ch 550, § 5.](#)

between public bodies;

- it is of an advisory nature (e.g., recommendations or opinions);
- it is communicated preliminary to any final agency action;
- it covers other than purely factual materials; and
- in the particular instance, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure.

Even if parts of a record meet these criteria, factual material in the record must still be disclosed.<sup>378</sup> Even a report prepared for the purpose of providing an opinion or recommendation may contain purely factual portions that must be disclosed regardless of the public interest in disclosure.<sup>379</sup> It may be appropriate to withhold or redact a communication that is not advisory in itself, if the communication would reveal the substance of an exempt internal advisory communication.

#### (a) Types of Records

Public bodies sometimes mistakenly take the view that preliminary reports or recommendations may be withheld simply because they have not been reviewed or finalized. However, drafts or incomplete records are not inherently exempt from disclosure. Even before adoption of the Public Records Law, the Oregon Supreme Court held that data collected by a state agency in the course of carrying out a study was subject to inspection before the study was completed.<sup>380</sup>

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<sup>378</sup> ORS 192.338; see *Coos County v. Or. Dep't of Fish & Wildlife*, 86 Or App 168, 172 (1987) (criticizing public body for “adopt[ing] an all or nothing approach, making no effort \* \* \* to provide plaintiff with the purely factual portions”).

<sup>379</sup> See *Coos County*, 86 Or App at 171–72 & n 3 (suggesting that portions of questionnaires designed to rate the effectiveness of a state act were purely factual in nature); *Bay Area Health Dist. v. Griffin*, 73 Or App 294, 300–01 (1985) (portion of a report containing information on a hospital’s current staffing levels was purely factual and disclosable, even though the report generally consisted of subjective observations and recommendations); Public Records Order, Jan 15, 1997, *Burr*, at 9–10 (portions of job references discussing factual details of applicant’s employment were not exempt).

<sup>380</sup> *MacEwan v. Holm*, 226 Or 27, 43 (1961); see 38 Op Atty Gen 1761, 1978 WL 29465 (1978) (background materials provided to governing body in advance of public hearing were public records and subject to disclosure unless an exemption applied).

For example, although a board may not appreciate hearing about a report in the media before its members receive their copies, this does not justify delaying disclosure. Similarly, the minutes of a meeting of a public body are generally subject to disclosure regardless of whether they have been approved by the public body. Of course, a public body may inform the requester that the disclosed minutes have not been approved.

**(b) Balancing Disclosure and Nondisclosure**

The Oregon Court of Appeals has said that a public body faces a “daunting” burden to sustain this exemption.<sup>381</sup> The court’s opinions indicate that there must be a strong showing of a “chilling effect” based on something more than potential embarrassment to the public body or staff.<sup>382</sup>

For example, the court held that internal documents regarding the investigation and discipline of a police officer who killed a civilian during a traffic stop were not exempt, even though the public body argued that disclosure would diminish its employees’ ability to candidly evaluate supervisors, subordinates, and colleagues.<sup>383</sup> The court questioned whether disclosure would have a “seriously chilling effect” on future investigations, observing that disclosure would not reveal anonymous whistle blowers, personal criticism, or supervisory personnel judgments that were other than “clinical and detached.”<sup>384</sup> The court also stressed the public interest in disclosure, given the “highly inflammatory and widely reported” nature of the underlying incident.<sup>385</sup> The court found that the value of transparency to public confidence that a “thorough and unbiased” investigation had been undertaken was not “outweighed by the speculation that transparency

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<sup>381</sup> [City of Portland v. Oregonian Publ’g Co.](#), 200 Or App 120, 124 (2005).

<sup>382</sup> The public body’s balancing of interests should include not just an analysis of the interest in nondisclosure, but analysis of the public interest in disclosure as well. [Kluge v. Or. State Bar](#), 172 Or App 452, 460 (2001) (summary judgment for the Bar was not appropriate where Bar did not “analyze[] the public’s interest in the disclosure of th[e] records and, consequently, [did] not weigh th[e] competing interests”).

<sup>383</sup> [Oregonian Publ’g](#), 200 Or App at 122.

<sup>384</sup> *Id.* at 126–27.

<sup>385</sup> *Id.* at 125.

w[ould] quell candor at some future date.”<sup>386</sup>

The court has also concluded that fish and wildlife biologists’ responses to questionnaires on the effectiveness of the Forest Practices Act were not exempt, despite the contention that disclosure would chill the free flow of information within the public body.<sup>387</sup> The court explained that “[a]ny ‘chilling effect’ that disclosure may have on future communications within the agency, because of potential embarrassment to the agency or its employees, is not sufficient, in and of itself, to overcome the presumption favoring disclosure.”<sup>388</sup>

We emphasize that a public body asserting this exemption should be able to explain why the particular circumstances show that disclosure would deter its employees from offering recommendations and opinions that are part of their job duties.<sup>389</sup> For example, we determined that a draft report on the costs of early shutdown of a nuclear power plant was not exempt where the final report containing essentially the same material was already public.<sup>390</sup> We explained that although there were some differences between the final and draft reports, the public body did not explain how disclosure of those specific differences would deter frank communications.<sup>391</sup> And we rejected an argument for nondisclosure that would justify the withholding of any advisory communications by public employees with sophisticated technical expertise.<sup>392</sup>

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<sup>386</sup> *Id.* at 127.

<sup>387</sup> [Coos County](#), 86 Or App at 172–73.

<sup>388</sup> *Id.* at 173.

<sup>389</sup> To the extent older public records orders can be read to allow conclusory or blanket assertions of a chilling effect, we consider those orders to be superseded by more-recent appellate cases and public records orders.

<sup>390</sup> Public Records Order, Oct 2, 1990, [Esteve](#), at 4–5; *see* Public Records Order, Feb 24, 1989, [Weill](#) (proposed opinion and order in a Department of Revenue appeal was not exempt where the department already had disclosed records that discussed the proposed order in some detail).

<sup>391</sup> Public Records Order, Oct 2, 1990, [Esteve](#), at 5.

<sup>392</sup> *Id.* at 4–5; *see also* Public Records Order, May 16, 2018, [Moore](#), at 4 (rejecting argument that an executive director’s recommendations on discipline of licensees should always be exempt).

We have concluded that this exemption applied to the Oregon State Bar's candid analysis of pending disciplinary proceedings against an attorney, noting that this internal analysis would be undermined by allowing disclosure to the accused attorney.<sup>393</sup> And we have determined that subjective evaluations contained in employment references were exempt where the references would not have provided their candid opinions if disclosure were anticipated.<sup>394</sup>

## (2) Personal Privacy Exemption

ORS 192.355(2) exempts:

(a) Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

(b) Images of a dead body, or parts of a dead body, that are part of a law enforcement agency investigation, if public disclosure would create an unreasonable invasion of privacy of the family of the deceased person, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

The purpose of this exemption is to protect the privacy of individuals from unreasonable invasion.<sup>395</sup> It reflects a policy that persons working for or dealing with the government should not be subject to indiscriminate

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<sup>393</sup> Public Records Order, Mar 30, 1989, [Howser](#), at 4–7; *see also* Public Records Order, Oct 21, 1988, [Best](#) (PUC's candid analysis of contested case proceeding was exempt while proceeding was pending).

<sup>394</sup> Public Records Order, Jan 15, 1997, [Burr](#), at 5–9. *But see* Public Records Order, July 17, 1997, [Wilker](#), at 6 (suggesting an alternative of disclosing the substance of the evaluations but redacting the references' identifying information).

<sup>395</sup> [Jordan v. MVD](#), 308 Or 433, 441 (1989).

disclosure of personal information merely because of that association. We emphasize that the exemption protects only the privacy of the person about whom the record contains information. Unlike the exemption for internal advisory communications found in ORS 192.355(1), the personal privacy exemption is not intended for the benefit of the public body.<sup>396</sup>

**(a) Personal Information**

The exemption applies to “personal” information, and to images of a dead body that are part of a law enforcement agency investigation. In concluding that an individual’s address contained in DMV records qualified as personal information, the Oregon Supreme Court noted that home addresses, age, weight, and home phone numbers will always be personal as they are specific to an individual.<sup>397</sup> The court relied on the dictionary definition of “personal”: “of or relating to a particular person: affecting one individual or each of many individuals: peculiar or proper to private concerns: not public or general.”<sup>398</sup>

In subsequent decisions, the Oregon Court of Appeals has focused on whether information specific to an individual is also “peculiar \* \* \* to private concerns.” For example, the court held that the name of a claimant in an employment-related tort claim notice was not personal information because the process of sending a tort claim notice and resolving the claim were “matters of public concern [] rooted in statutory policy.”<sup>399</sup> And the court held that a personnel investigation of a police captain’s off-duty sexual conduct was not of a personal nature because the information had “a bearing on [the captain’s] qualification to serve in a position of public trust”

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<sup>396</sup> [Guard Publ’g Co. v. Lane County Sch. Dist. No. 4J](#), 310 Or 32, 42 (1990) (Fadeley, J., concurring).

<sup>397</sup> [Jordan](#), 308 Or at 441.

<sup>398</sup> *Id.* In earlier decisions, the Court of Appeals had interpreted personal information to mean information not normally shared with strangers; in light of the Supreme Court’s subsequent decisions, we do not think this interpretation is valid. See [Guard Publ’g](#), 310 Or at 36–37 & n 4 (noting that the Supreme Court’s decision in *Jordan* implicitly rejected the Court of Appeals test).

<sup>399</sup> [OHSU v. Oregonian Publ’g Co.](#), 278 Or App 189, 208–09 (2016). Of course, for specific types of tort claim notices there may be other public records exemptions that apply to claimants’ names. *E.g.*, [OHSU v. Oregonian Publ’g Co.](#), 362 Or 68, 93 (2017) (OHSU patient names in tort claim notices were exempt under ORS 192.558(1)).

and thus did “not affect him exclusively and [was] not peculiar to his private concerns.”<sup>400</sup>

**(b) Unreasonable Invasion of Privacy**

This exemption applies only when disclosure would constitute an unreasonable invasion of privacy. The biggest misconception about the exemption is that a public body merely needs to show that the requested information is personal in nature in order to shift the burden to the requester to show that disclosure would not be an unreasonable invasion of privacy. The Oregon Supreme Court has made clear that in order to sustain this exemption, *the public body* must first show that disclosure will unreasonably invade an individual’s privacy.<sup>401</sup>

That showing must be made on an individualized basis.<sup>402</sup> For example, the Oregon Supreme Court held that a school district’s blanket policy of nondisclosure of replacement teachers’ names and addresses was unenforceable.<sup>403</sup> In light of this decision, we have concluded that blanket nondisclosure policies with respect to hunting licensees’ phone numbers,<sup>404</sup> names of job applicants,<sup>405</sup> and dates of birth of DPSST licensees<sup>406</sup> were not consistent with the case law.

Whether disclosure will constitute an unreasonable invasion of privacy involves an objective test that will look to case-specific facts.<sup>407</sup> According

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<sup>400</sup> [City of Portland v. Anderson](#), 163 Or App 550, 556 (1999).

<sup>401</sup> [Jordan](#), 308 Or at 440, 443 & n 9; see [Guard Publ’g](#), 310 Or at 39–40 (teachers’ names and addresses were not exempt unless *public body* could make an individualized showing of an unreasonable invasion of privacy).

<sup>402</sup> [Guard Publ’g](#), 310 Or at 34, 40.

<sup>403</sup> *Id.* at 40; see also [Mail Tribune, Inc. v. Winters](#), 236 Or App 91, 96 (2010) (sheriff’s blanket policy of nondisclosure of names of concealed handgun licensees did not establish individualized bases for nondisclosure, and therefore did not support exemption), *superseded by statute*, ORS 192.374.

<sup>404</sup> Public Records Order, Sept 9, 1996, [Burns](#).

<sup>405</sup> Public Records Order, Nov 1, 2016, [Perkowski](#).

<sup>406</sup> Public Record Order, May 5, 2015, [Brosseau](#), *superseded by statute*, ORS 192.355(41).

<sup>407</sup> [Jordan](#), 308 Or at 442–43 (concluding, based on the affected individual’s affidavit, that disclosure would result in an unreasonable invasion of privacy).

to the court, the mere fact that “the information would not be shared with strangers is not enough to avoid disclosure.”<sup>408</sup> “A general desire ‘to be left alone’” is also insufficient grounds for a public body to assert this exemption.<sup>409</sup>

However, an individualized showing that “an ordinary reasonable person would deem [disclosure] highly offensive” will satisfy a finding of an unreasonable invasion of privacy.<sup>410</sup> For example, the Oregon Supreme Court held that an individual’s address was exempt from disclosure where disclosure would allow the requester to “harry [the individual] incessantly.”<sup>411</sup> The evidence showed that the requester had harassed the individual to such an extent that she established an unlisted phone number and post office box and rescheduled her day-to-day activities.<sup>412</sup>

The court’s analysis suggested that an unreasonable invasion of privacy can result not just from the initial disclosure, but also from the requester’s anticipated use of the records.<sup>413</sup> However, not all unwanted contact constitutes an unreasonable invasion of privacy. For example, we concluded that the names of a company’s shareholders related to a potential sale were not exempt despite assertions that the shareholders would become the “targets of uninvited media inquiries, critics of the transaction, and persons promoting investment vehicles or charitable causes.”<sup>414</sup> And in determining that the names of PERS retirees receiving more than \$100k in annual benefits were not exempt, we noted that receiving unwanted solicitations would be “an annoyance, but hardly ‘highly offensive’ to the ordinary

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<sup>408</sup> *Id.* at 441.

<sup>409</sup> *Id.* at 444–45 (Gillette, J., concurring).

<sup>410</sup> *Id.* at 442–43.

<sup>411</sup> *Id.*

<sup>412</sup> *Id.* at 435–36.

<sup>413</sup> *Id.* at 444 (Gillette, J., concurring) (court’s holding that individual’s address could be withheld was justified because public body could “reasonably anticipate that, should it release the \* \* \* information to [requester], that person would immediately and unreasonably invade the privacy of Citizen”).

<sup>414</sup> Public Records Order, July 14, 2015, [Baker](#), at 5.

reasonable person.”<sup>415</sup>

The Oregon Supreme Court has indicated that an individual may be permitted to explain to a public body why disclosure of information about that individual should be withheld from disclosure under this exemption.<sup>416</sup> Public bodies may want to solicit input from affected individuals before disclosing arguably private information. Ultimately, however, the decision to withhold any information must be made by the public body, which bears the burden of sustaining such an action.<sup>417</sup>

### (c) Balancing Disclosure and Nondisclosure

If disclosing personal information would constitute an unreasonable invasion of privacy, the public body must then determine whether the public interest by clear and convincing evidence requires disclosure in the particular instance. Only when there is no overriding public interest in disclosure may the public body lawfully withhold the information.<sup>418</sup>

### (d) Applying the Exemption

Frequently, similar factors are involved in determining whether disclosure would constitute an unreasonable invasion of privacy and whether there is an overriding public interest in disclosure. These include whether the information has been kept private, the connection of the information to a matter affecting a public body, the amount of harm that would result to the affected individual from disclosure, and the affected individual’s expectation of privacy.

Ordinarily, disclosure of a person’s name itself will not constitute an unreasonable invasion of privacy. For example, we concluded that the names of jurors from a specific case were not exempt where their names had been spoken in open court.<sup>419</sup> We also determined that the names of

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<sup>415</sup> Public Records Order, Oct 1, 2010, [Hinkle](#), at 4.

<sup>416</sup> [Guard Publ’g](#), 310 Or at 37 n 5.

<sup>417</sup> *Id.* at 37–38 (“An individual claiming an exemption from disclosure must initially show a public body that the exemption is legally and factually justified. \* \* \* If the public body is satisfied that a claimed exemption from disclosure is justified, it may, but is not required to, withhold disclosure of the information.”).

<sup>418</sup> [Jordan](#), 308 Or at 443.

<sup>419</sup> Public Records Order, Apr 2, 1991, [Williamson](#), at 3.

shareholders of a parent company that was selling a coordinated care organization were not exempt based on that information's connection to DCBS's statutory duty to review the proposed sale, and the organization's receipt of significant money from public programs.<sup>420</sup> And we found that the names of public employees involved in a particular high-profile matter were not exempt where there was no evidence that disclosure would cause physical harm to or harassment of the employees.<sup>421</sup> But we have suggested that names of nonfinalist job applicants would be exempt if disclosure would damage an applicant's relationship with a current employer.<sup>422</sup>

Disclosure by a public body of an individual's address, telephone number, or e-mail address generally would not be highly offensive so as to come within this exemption: reasonable persons routinely provide this information for a variety of purposes—they are imprinted on checks, placed on outgoing letters and e-mails, and found in telephone directories, land records, and voter registration records.<sup>423</sup>

However, even this information might be exempt if physical harm or harassment would be reasonably anticipated.<sup>424</sup> And there may be other exemptions that apply to this information without requiring an individualized showing of an unreasonable invasion of privacy. For example, various personal information about public employees and volunteers that is contained in a public employer's personnel records is exempt, unless there is clear and convincing evidence of a public interest requiring disclosure: this includes home addresses, home phone numbers, personal cell phone numbers, personal e-mail addresses, driver license numbers, dates of birth, and Social Security numbers.<sup>425</sup> And the Department of Transportation is prohibited, with certain exceptions, from

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<sup>420</sup> Public Records Order, July 14, 2015, [Baker](#), at 5.

<sup>421</sup> See Public Records Order, Apr 14, 1995, [Mayes](#), at 2–3.

<sup>422</sup> Public Records Order, Nov 1, 2016, [Perkowski](#).

<sup>423</sup> See [Jordan](#), 308 Or at 447 (Linde, J., dissenting) (discussing addresses).

<sup>424</sup> Public Records Order, May 31, 1990, [Boles](#), at 3–4 (employee home addresses were exempt where requester sought this information in order to harass the employees at their homes).

<sup>425</sup> ORS 192.355(3). For a more in-depth discussion of this exemption, and its exceptions, see its entry below.

disclosing names, addresses, telephone numbers, and driver license numbers contained in its motor vehicle records.<sup>426</sup>

Personal medical information is also potentially protected by this exemption, and is generally regarded as highly private. We have concluded that DMV information about a car accident that revealed an individual's diagnosis and treatment was exempt.<sup>427</sup> And we determined that the names of medical marijuana cardholders whose grower had been criminally investigated were exempt.<sup>428</sup>

However, we ordered disclosure of portions of the mental health records of a patient who had recently been released from the jurisdiction of the Psychiatric Security Review Board.<sup>429</sup> We explained that there was a diminished privacy interest where the records had been discussed at a public hearing and had been relied upon by the patient in arguing for release from the board's jurisdiction.<sup>430</sup> We also emphasized that the board had decided to release the patient based on evidence he had feigned mental disease for 20 years, and that the patient was arrested on new murder charges shortly after release.<sup>431</sup> These facts indicated a strong public interest in understanding the board's and state hospital's decisions.

Information concerning the manner in which any public officer or employee carries out the duties of the office or employment generally will not come within this exemption.<sup>432</sup> For example, the Oregon Court of Appeals concluded that disclosure of personal information regarding a public official's ostensibly private conduct did not constitute an unreasonable invasion of privacy where "the conduct involved directly [bore] on the possible compromise of a public official's integrity in the

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<sup>426</sup> [ORS 802.177](#).

<sup>427</sup> Public Records Order, Apr 3, 1989, [Harrison](#).

<sup>428</sup> Public Records Order, June 20, 2012, [Crombie](#), at 4 (also noting that there was no reason to believe that the cardholders were complicit in the criminal activity).

<sup>429</sup> Public Records Order, Mar 21, 2017, [Zaitz](#), at 5–8.

<sup>430</sup> *Id.* at 6.

<sup>431</sup> *Id.* at 7.

<sup>432</sup> 41 Op Atty Gen 437, 1981 WL 151688 (1981) (public employee's routine job performance evaluation material was not exempt).

context of his public employment.”<sup>433</sup>

And that court, in discussing a different exemption, explained that “any privacy rights that public officials have as to the performance of their public duties must generally be subordinated to the right of the citizens to monitor what elected and appointed officials are doing on the job.”<sup>434</sup>

Relying on that analysis, we have concluded that a manager’s performance evaluation was not exempt, noting that the substantial public interest in knowing how management functions were being performed outweighed the public interest in a candid evaluation process.<sup>435</sup> We have also decided that the names of PERS retirees receiving annual benefits above \$100k—and the specific benefit amount—were not exempt because, among other reasons, information about who is receiving money from a public body and how much they are receiving is of significant public interest.<sup>436</sup> Similarly, we determined that a public employee’s gross salary was not exempt because the public interest in knowing this information indicated the lack of a reasonable expectation of privacy.<sup>437</sup> And we have noted that information on employees’ leave time would not be exempt because coworkers are typically aware of the general reason and length of time that an employee is off from work.<sup>438</sup>

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<sup>433</sup> *City of Portland v. Anderson*, 163 Or App 550, 557 (1999) (records pertaining to investigation of police captain’s use of escort service that may have served as a front for prostitution); see *Oregonian Publ’g Co. v. Portland Sch. Dist. No. 1J*, 144 Or App 180, 188 (1996) (disclosure of information about the alleged misuse and theft of public property by public employees would not constitute an unreasonable invasion of privacy), *adh’d to as modified on recons*, 152 Or App 135 (1998).

<sup>434</sup> *Jensen v. Schiffman*, 24 Or App 11, 17 (1976) (discussing an exemption for criminal investigatory information, which allows a public body to withhold this information if disclosure would cause an unreasonable invasion of privacy).

<sup>435</sup> Public Records Order, May 25, 1994, *Laine*, at 3–5.

<sup>436</sup> Public Records Order, Oct 1, 2010, *Hinkle*, at 6–7.

<sup>437</sup> Public Records Order, Mar 27, 1992, *Leighty*, at 2–3.

<sup>438</sup> Public Records Order, May 5, 1994, *Wright*, at 2 (petition denied as moot because agency agreed to release requested records).

### (e) Related Exemptions

Several other exemptions apply to information of a personal nature. Here we discuss two that are codified in ORS chapter 192.

#### i. The Personal Safety Exemption

If an individual demonstrates to a public body that disclosing the individual's home address, personal telephone number, or personal e-mail address would endanger that individual's personal safety, or the personal safety of a family member residing with the individual, then the public body may not disclose that information.<sup>439</sup> In order to obtain this confidentiality, the individual must submit a written request to the relevant public body that specifies the public records(s) containing this information, and that presents evidence of the danger that disclosure would cause.<sup>440</sup> The public body must review such a request and notify the individual in writing whether the request is granted or denied;<sup>441</sup> the public body may not be held liable for its decision.<sup>442</sup> If confidentiality is granted, it lasts no more than five years.<sup>443</sup>

Examples of evidence that can be used to make the required showing include the fact that the individual has been a victim of domestic violence, or has obtained a temporary restraining order or other no contact order to protect against future physical abuse.<sup>444</sup>

The Attorney General has authority to adopt rules applicable to all public bodies that describe the procedures for submitting a request for confidentiality and the evidence that must be provided to establish the

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<sup>439</sup> ORS 192.368(1). However, this exemption does not apply to county property and lien records. ORS 192.368(6).

<sup>440</sup> ORS 192.368(1).

<sup>441</sup> [OAR 137-004-0800\(3\)](#).

<sup>442</sup> ORS 192.368(5).

<sup>443</sup> ORS 192.368(3)(a). Nothing expressly precludes an individual from renewing a request for confidentiality at the end of the five years. See [OAR 137-004-0800\(4\)\(b\)](#) (permitting individual to submit a new request after five years). With respect to voter registration records, the confidentiality lasts until the individual is required to update the registration. ORS 192.368(3)(b).

<sup>444</sup> ORS 192.368(2)(b).

validity of such a request.<sup>445</sup> Those rules are available at [OAR 137-004-0800](#), and in [Appendix G](#).

Even if confidentiality is granted, the affected public records may be disclosed in response to a court order, a request from a law enforcement agency, or with the individual's consent.<sup>446</sup>

When a state agency, following the requirements of the statute and the Attorney General's uniform rule, grants a confidentiality request, the Attorney General's office will not substitute its judgment for the agency's when responding to a petition to review the agency's decision.<sup>447</sup>

## ii. Concealed Handgun Licenses

All public bodies, except the Judicial Department,<sup>448</sup> are generally prohibited from disclosing records that identify a person as a current or former holder of, or applicant for, a concealed handgun license.<sup>449</sup>

However, there are several exceptions to this prohibition:

- when disclosing this information to another public body if necessary for criminal justice purposes;
- when a court orders disclosure; or
- when the affected individual provides written consent.<sup>450</sup>

In addition, the public body can disclose the name, age, and county of the holder or applicant if the public body determines that a compelling public interest requires disclosure in the particular instance.<sup>451</sup> Determining whether a compelling public interest requires disclosure should be based, at a minimum, on a written statement and/or supporting evidence submitted by the requester.<sup>452</sup>

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<sup>445</sup> ORS 192.368(2).

<sup>446</sup> ORS 192.368(4).

<sup>447</sup> Public Records Order, Nov 19, 1999, [Birhanzi](#), at 2.

<sup>448</sup> ORS 192.374(5).

<sup>449</sup> ORS 192.374(1).

<sup>450</sup> ORS 192.374(1)(a)–(c).

<sup>451</sup> ORS 192.374(1)(d).

<sup>452</sup> [OAR 137-004-0900\(2\)](#).

The public body can also confirm or deny that an individual convicted of certain crimes or subject to a protective order is a current holder of a concealed handgun license, as long as the requester is the victim of that crime or protected by the relevant protective order and has submitted the name and age of the potential licensee.<sup>453</sup>

And the public body can confirm or deny that a person convicted of a crime involving the use or possession of a firearm is a current holder of a concealed handgun license, but only to a bona fide representative of the news media.<sup>454</sup>

### (3) Public Employee Personal Information

ORS 192.355(3) exempts:

Upon compliance with ORS 192.363, public body employee or volunteer residential addresses, residential telephone numbers, personal cellular telephone numbers, personal electronic mail addresses, driver license numbers, employer-issued identification card numbers, emergency contact information, Social Security numbers, dates of birth and other telephone numbers contained in personnel records maintained by the public body that is the employer or the recipient of volunteer services. This exemption:

(a) Does not apply to the addresses, dates of birth and telephone numbers of employees or volunteers who are elected officials, except that a judge or district attorney subject to election may seek to exempt the judge's or district attorney's address or telephone number, or both, under the terms of ORS 192.368;

(b) Does not apply to employees or volunteers to the extent that the party seeking disclosure shows by clear and convincing evidence that the public interest requires disclosure in a particular instance

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<sup>453</sup> ORS 192.374(1)(e). The requester must also submit written proof that the requester is the victim of the crime or protected by the protective order. ORS 192.374(2)(a). The covered crimes are any "person felony" or "person Class A misdemeanor," as defined in the rules of the Oregon Criminal Justice Commission, *see* [OAR 213-003-001](#), and any crimes constituting domestic violence, *see* [ORS 135.230](#). ORS 192.374(6)(b) (defining "person crime").

<sup>454</sup> ORS 192.374(1)(f). The requester must submit written proof of this bona fide status. ORS 192.374(2)(b).

pursuant to ORS 192.363;

(c) Does not apply to a substitute teacher as defined in [ORS 342.815](#) when requested by a professional education association of which the substitute teacher may be a member; and

(d) Does not relieve a public employer of any duty under [ORS 243.650 to 243.782](#).

This provision exempts from disclosure various personal contact information and other personal information about a public employee or volunteer, as long as that information is contained in the public employer's personnel records. The exemption does not apply if the requester shows by clear and convincing evidence that the public interest requires disclosure.<sup>455</sup>

A unique procedure applies to requests for the covered information: the requester must specify which employees' personal information is being sought, which type of personal information is being sought, and must state why the public interest requires disclosure.<sup>456</sup> The public employer then must forward that information to the affected employees or to the representative of those employees, and must wait at least seven days before disclosing any of the requested information.<sup>457</sup>

Even though the Oregon Public Records Law typically gives a public body the discretion to disclose exempt public records, we note that under this exemption the public employer "shall disclose requested information *only if* [it] determines that the party seeking disclosure has demonstrated by clear and convincing evidence that the public interest requires disclosure."<sup>458</sup> Thus, any public employer considering exercising its discretion to disclose this type of information should first consult its legal counsel regarding whether it must first assess the relevant public interests.

While home care workers, personal support workers, operators of child

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<sup>455</sup> And the exemption does not override any obligations the public employer has to provide this information under the law on collective bargaining.

<sup>456</sup> ORS 192.363(1).

<sup>457</sup> ORS 192.363(3), (5). Presumably this seven-day period allows the affected employees (and representatives of the employees) to submit responses to the requester's statement on the public interest in disclosure.

<sup>458</sup> ORS 192.363(6) (emphasis added).

care facilities, exempt family child care providers, and operators of an adult foster home are not generally considered public employees, public bodies may not disclose certain personal information about these individuals, unless the requester shows by clear and convincing evidence that the public interest requires disclosure.<sup>459</sup> The covered information is similar to the information described in ORS 192.355(3). The procedures for submitting and processing a request for such information are the same as described above.<sup>460</sup>

#### **(a) Public Employee Photo ID**

A public body also may not disclose a public employee's identification badge or card without the employee's consent.<sup>461</sup> Disclosing a badge or card is prohibited only if it contains the employee's photograph and was prepared solely for the public body's internal use in identifying employees.<sup>462</sup>

### **(4) Confidential Submissions**

#### **(a) Generally**

ORS 192.355(4) exempts:

Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

The purpose of this exemption is to encourage voluntary submission of relevant information to public bodies, with some reasonable assurance that the information will be kept confidential. Just like the exemption protecting against unreasonable invasion of an individual's privacy, this exemption is

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<sup>459</sup> ORS 192.365(1) (2017), amended by [Or Laws 2018, ch 75, § 10](#). The Judicial Department and the Department of Transportation are not subject to this exemption. ORS 192.365(2).

<sup>460</sup> See ORS 192.365(1) (noting that a public body shall disclose the covered information "upon compliance with ORS 192.363").

<sup>461</sup> ORS 192.371(2).

<sup>462</sup> *Id.*

designed to protect the person submitting the information, not the public body. It clearly does not apply if the public body requests that information be submitted in confidence merely to avoid embarrassment to itself. And in determining whether this exemption applies, the public body must act “on an ‘individualized, case-by-case basis.’”<sup>463</sup>

There are no less than five conditions that must be met for the exemption to apply:

- The informant must have submitted the information on the condition that it would be kept confidential.
- The informant must not have been required by law to provide the information.
- The information itself must be of a nature that reasonably should be kept confidential.
- The public body must show that it has obliged itself in good faith not to disclose the information.
- Disclosure of the information must cause harm to the public interest.<sup>464</sup>

The first condition is whether the information was submitted in confidence. Many public bodies receive information that reasonably could be considered confidential, without any specific request for confidentiality. It is very difficult to justify nondisclosure in such a case. The public body must be able to present evidence that there was a condition or understanding at the time the information was provided that the information would be held in confidence.<sup>465</sup> For example, we found this condition absent, despite the public body’s promise of confidentiality, where the informants would have

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<sup>463</sup> [\*Hood Tech. Corp. v. Or.-OSHA\*](#), 168 Or App 293, 305 (2000) (quoting [\*Guard Publ’g Co. v. Lane County Sch. Dist. No. 4J\*](#), 310 Or 32, 40 (1990)).

<sup>464</sup> [\*Gray v. Salem-Keizer Sch. Dist.\*](#), 139 Or App 556, 563 (1996).

<sup>465</sup> [\*Sadler v. Or. State Bar\*](#), 275 Or 279, 283 (1976); [\*Gray\*](#), 139 Or App at 564 (this condition was satisfied where there was a clear understanding that the information would be kept confidential).

provided the information even without that promise.<sup>466</sup>

Therefore, public bodies should specifically discuss with the person submitting the information whether it is being submitted in confidence and, if so, document that in the file.<sup>467</sup>

The second condition is whether the informant is “not otherwise required by law” to provide the information. If the informant is required to submit the information pursuant to a governmental enactment such as a statute or rule, this exemption will not apply.<sup>468</sup> However, an informant whose legal obligation to submit information arises solely under the terms of a contract with a public body is not “required by law” to submit the information, unless the informant is required by law to sign a contract with those terms.<sup>469</sup> We note, however, that a contract’s lack of a confidentiality provision may affect the other conditions necessary to apply this exemption.

The third condition is whether the information itself should reasonably be considered confidential. This condition would generally be met if disclosure of the information is restricted by statute or is exempt from disclosure under other exemptions of the Public Records Law. If the information is publicly available, obtainable, or observable, it cannot reasonably be considered confidential.<sup>470</sup> Our discussion below on the public interest condition also informs the analysis here, as these two

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<sup>466</sup> Public Records Order, Nov 17, 1988, [Rae](#), at 2; see also [Jensen v. Schiffman](#), 24 Or App 11, 18 (1976) (distinguishing promise not to disclose from submission of information in confidence).

<sup>467</sup> Cf. [Hood Tech.](#), 168 Or App at 295 n 1 (discussing agency practice of asking each complainant whether confidentiality was being requested).

<sup>468</sup> See [Guard Publ’g Co. v. Lane County Sch. Dist. No. 4J](#), 96 Or App 463, 467–68 (1989) (this exemption did not apply to the names of replacement coaches because of state and federal laws requiring “that employe[e]s submit their names to their employers”).

<sup>469</sup> Public Records Order, Mar 3, 1997, [Poo-sa’-key](#), at 4–5.

<sup>470</sup> See [Guard Publ’g](#), 96 Or App at 467–68 (noting that names of public school teachers could not reasonably be considered confidential because teachers “are not anonymous or entitled to be”).

conditions can be closely related in certain cases.<sup>471</sup>

The fourth condition is whether the public body obliged itself in good faith not to disclose the information. An informant's request for confidentiality is not sufficient to satisfy this condition. For example, we determined that a private attorney's settlement offer that was marked "confidential" was not exempt because there was no indication that the public body had obliged itself to confidentiality or even discussed confidentiality with the attorney.<sup>472</sup> But the public body need not have given a written commitment as long as there was a clear statement or understanding that the public body would not disclose the information.<sup>473</sup> An explicit statement that the public body will not disclose the information unless required by law is sufficient, as long as the public body acts in good faith in making the promise.

The final condition is whether disclosing the information would harm the public interest. Even if all the other conditions are met, if the public interest would not suffer by disclosure, the exemption does not apply. This condition requires consideration not only of the impact of the disclosure on the particular informant providing the information but also of the likelihood that disclosure would discourage other informants from providing information in confidence in the future.

For example, the Oregon Court of Appeals found that this condition was met where disclosing information submitted by manufacturers of video terminal equipment to the State Lottery that contained bank account numbers, tax returns, and other personal information would discourage distributors "from applying for contracts[,] thereby reducing competition for video lottery terminals."<sup>474</sup>

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<sup>471</sup> E.g., [Hood Tech.](#), 168 Or App at 304 n 7 (noting that discussion of the public interest condition applied "equally" to whether the information was of a type that reasonably should be confidential).

<sup>472</sup> Public Records Order, Apr 5, 2002, [Meadowbrook](#), at 6–7; *see also* Public Records Order, Nov 8, 2004, [Anderson](#), at 2 (ordering disclosure of complaint, despite complainant's request for confidentiality, where public body had not obliged itself to confidentiality).

<sup>473</sup> *See* Public Records Order, Apr 5, 2002, [Meadowbrook](#), at 6.

<sup>474</sup> [Premier Tech. v. Or. State Lottery](#), 136 Or App 124, 134–35 (1995) (discussing whether these records were discoverable under ORCP 36 B).

And we have concluded that the public interest would suffer where disclosing the responses by a job applicant's employment references would harm the public employer's ability to "gather candid information" about job applicants, and could thus "hinder informed hiring decisions."<sup>475</sup> However, the public interest would not suffer if it is possible to redact the identifying information from the reference form.<sup>476</sup>

When false information is provided to a public body in bad faith, its disclosure will likely be required—even if the same type of information provided in good faith would be exempt.<sup>477</sup>

Even if not covered by this exemption, an informant's identity may be confidential when providing information to a law enforcement officer or legislative committee about a possible violation of law.<sup>478</sup>

### **(b) Personal Contact Information**

ORS 192.377 prohibits disclosing some personal contact information if it was submitted in confidence:

A public body that is the custodian of or is otherwise in possession of information that was submitted to the public body in confidence and is not otherwise required by law to be submitted, must redact all of the following information before making a disclosure described in ORS 192.355(4):

- (1) Residential address and telephone numbers;
- (2) Personal electronic mail addresses and personal cellular telephone numbers;
- (3) Social Security numbers and employer-issued identification card numbers; and
- (4) Emergency contact information.

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<sup>475</sup> Public Records Order, Jan 15, 1997, [Burr](#), at 4–5.

<sup>476</sup> *E.g.*, [Gray](#), 139 Or App at 566 (school district was not entitled to withhold employment reference forms where the requester did not seek identifying information).

<sup>477</sup> [Hood Tech.](#), 168 Or App at 306–07; Public Records Order, Apr 12, 1990, [Pettersen](#), at 2 (ordering disclosure of information that had been "submitted solely with an intent to harass" an individual).

<sup>478</sup> [ORS 40.275](#).

Information must qualify for the exemption of ORS 192.355(4) in order for this prohibition to apply.<sup>479</sup>

### **(5) Corrections and Parole Board Records**

ORS 192.355(5) exempts:

Information or records of the Department of Corrections, including the State Board of Parole and Post-Prison Supervision, to the extent that disclosure would interfere with the rehabilitation of a person in custody of the department or substantially prejudice or prevent the carrying out of the functions of the department, if the public interest in confidentiality clearly outweighs the public interest in disclosure.

For this exemption to apply to Corrections or Parole Board records, there must first be a showing that disclosure would interfere with the rehabilitation of a person in custody, or would substantially prejudice or prevent carrying out department or board functions. Even if one of these conditions is met, withholding is appropriate only if the public interest in confidentiality clearly outweighs the public interest in disclosure.

If disclosure would threaten or impair Corrections' ability to preserve internal order and discipline in its correctional facilities, to maintain facility security against escape or unauthorized entry, or to protect the public's safety, the public interest in confidentiality will, in most circumstances, clearly outweigh the public interest in disclosure.

For example, we concluded that portions of a security audit revealing specific security practices were exempt because this information could be used to circumvent security measures.<sup>480</sup> And we determined that both the medical screening criteria used in determining whether an inmate could be transferred out of state and the policy and procedures on the management of hunger strikes were exempt because disclosure would jeopardize the ability to manage and control the prison population.<sup>481</sup>

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<sup>479</sup> While ORS 192.377 expressly references only the conditions that the information be submitted in confidence and not otherwise required by law to be submitted, the express reference to ORS 192.355(4) indicates a legislative intent to incorporate all five conditions.

<sup>480</sup> Public Records Order, Jan 26, 1993, [Patten](#), at 4.

<sup>481</sup> Public Records Order, Jan 26, 1996, [Gutbezahl](#), at 4–5.

Although exempt public records generally become disclosable after 25 years,<sup>482</sup> Corrections and Parole records pertaining to a person who is or has been in custody or supervision remain exempt for 25 years after termination of custody or supervision, but only if disclosure would interfere with that person's rehabilitation and the public interest in confidentiality clearly outweighs the public interest in disclosure.<sup>483</sup>

#### **(6) Lending Institution Records**

ORS 192.355(6) exempts:

Records, reports and other information received or compiled by the Director of the Department of Consumer and Business Services in the administration of ORS chapters 723 and 725 not otherwise required by law to be made public, to the extent that the interests of lending institutions, their officers, employees and customers in preserving the confidentiality of such information outweighs the public interest in disclosure.

This exemption generally deals with DCBS records used in regulating credit unions<sup>484</sup> and consumer finance.<sup>485</sup>

#### **(7) Presentence and Probation Reports**

ORS 192.355(7) exempts:

Reports made to or filed with the court under [ORS 137.077](#) or [137.530](#).

This exemption applies to presentence reports on criminal defendants prepared by the Department of Corrections<sup>486</sup> or by parole or probation officers.<sup>487</sup> Although public bodies can typically disclose records that are exempt from disclosure, we note here that a separate statute provides that presentence reports are not public records and are available only to certain

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<sup>482</sup> ORS 192.390.

<sup>483</sup> ORS 192.398(3).

<sup>484</sup> See [ORS 723.002](#) (chapter 723 is known as the Oregon Credit Union Act).

<sup>485</sup> See [ORS 725.020](#) (chapter 725 is known as the Oregon Consumer Finance Act).

<sup>486</sup> See [ORS 144.791](#).

<sup>487</sup> See [ORS 137.530\(1\)](#).

parties.<sup>488</sup>

Presentence reports can be disclosed to the sentencing court; other judges who participate in a sentencing council discussion; the Department of Corrections and the Parole Board; persons or agencies with a legitimate professional interest; appellate or review courts; the district attorney; and the defendant or defendant's counsel.<sup>489</sup> These permitted recipients can disclose the presentence reports (or information from the reports) to certain persons and agencies in specified circumstances. For example, the Department of Corrections and Parole Board can provide the report to the victim.<sup>490</sup>

### **(8) Federal Law Exemption**

ORS 192.355(8) exempts:

Any public records or information the disclosure of which is prohibited by federal law or regulations.

The many federal laws and regulations that prohibit or limit disclosure of particular records (e.g., public assistance and unemployment insurance records, certain student records, and records containing "protected health information") in the possession of public bodies of this state are beyond the scope of this manual. Individual public bodies should be familiar with the laws and regulations applicable to any federal program with which they are involved.

To claim this exemption, public bodies must be able to point to a specific federal law or regulation that limits disclosure. For example, we concluded that federal regulations that permitted the Food and Drug Administration to disclose confidential records to certain state government officials, but provided that these recipients were subject to the same restrictions on disclosure, qualified as an exemption from disclosure under Oregon law.<sup>491</sup> And we determined that a federal law restricting the release of student records qualified as an exemption because it expressed a "clearly

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<sup>488</sup> [ORS 137.077](#).

<sup>489</sup> ORS 137.077(1)–(4).

<sup>490</sup> ORS 137.077(2).

<sup>491</sup> Public Records Order, May 2, 1989, [Facaros](#), at 2–3.

prohibitory policy” through the withholding of federal funds.<sup>492</sup>

However, the relevant federal law must apply to the Oregon public body at issue and must *prohibit* the contemplated disclosure. For example, we concluded that exemptions to federal public records law that applied to federal authorities and allowed, but did not require, those authorities to withhold records, could not be asserted by a state agency.<sup>493</sup>

### **(9) Other Oregon Statutes Establishing Specific Exemptions**

ORS 192.355(9)(a) exempts:

Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

This exemption incorporates any Oregon confidentiality law found outside of the Public Records Law, to the extent the law applies to the relevant public body. See [Appendix F](#) for a partial list of Oregon statutes exempting information from public disclosure. A full, searchable list is available at <https://justice.oregon.gov/PublicRecordsExemptions>.

While the attorney-client privilege recognized by ORS 40.225 is also incorporated as an exemption, its scope is narrowed in certain circumstances that are discussed below.

#### **(a) In General**

Statutes are incorporated as exemptions when, for example, they refer to information as confidential, exempt, privileged, or not subject to public inspection; or when they state that the information may or shall not be disclosed, or that it is unlawful to disclose the information. For instance, health professional regulatory boards “shall keep confidential and not disclose to the public” certain investigatory information.<sup>494</sup>

Whether the statute permits exceptions to confidentiality, or provides the public body with discretion to disclose, must be evaluated on a statute-

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<sup>492</sup> Public Records Order, Sept 20, 1999, [Michael](#), at 2 (discussing the Family Educational Rights and Privacy Act, known as FERPA).

<sup>493</sup> Public Records Order, Mar 20, 2014, [Arkin](#), at 1.

<sup>494</sup>

by-statute basis.

The general rules requiring that exemptions must be expressly stated and construed narrowly also apply to statutes that are incorporated by ORS 192.355(9).<sup>495</sup> For example, the Oregon Court of Appeals concluded that a statute affirmatively allowing the State Medical Examiner to disclose reports to specific people could not be used to infer a general prohibition against disclosing the same information to the public.<sup>496</sup>

**(b) Attorney-Client Privilege**

Records that are protected by the attorney-client privilege are also ordinarily exempt from disclosure under the Public Records Law.<sup>497</sup> However, for purposes of the Public Records Law, the privilege does not exempt factual information from disclosure if all of the following criteria are met:

- The information is not otherwise exempt from disclosure;
- The information was compiled by or at the direction of an attorney as part of an investigation on behalf of the public body in response to information of possible wrongdoing by the public body;
- The information was not compiled in preparation for litigation, arbitration, or an administrative proceeding likely to be initiated or actually initiated; and
- The holder of the privilege has made or authorized a public statement characterizing or partially disclosing the factual information.<sup>498</sup>

The initial step in the analysis is determining whether the factual information at issue is covered by the attorney-client privilege. If the information is privileged, the public body should next determine whether all the above criteria are met. If they are, the public body must either produce the factual information, or prepare and produce a condensation of the

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<sup>495</sup> [\*Colby v. Gunson\*](#), 224 Or App 666, 676 (2008).

<sup>496</sup> *Id.* at 675–66. The legislature subsequently enacted a conditional exemption for these reports, ORS 192.345(36).

<sup>497</sup> *E.g.*, [\*Klamath County Sch. Dist. v. Teamey\*](#), 207 Or App 250, 260–61 (2006).

<sup>498</sup> ORS 192.355(9)(b)

significant facts.<sup>499</sup> Producing a factual condensation does not waive the attorney-client privilege.<sup>500</sup>

A requester may seek review of this condensation in the same manner as if the records request had been denied.<sup>501</sup> The reviewing authority will, “in addition to reviewing the records to which access was denied, compare those records to the condensation to determine whether the condensation adequately describes the significant facts contained in the records.”<sup>502</sup>

### **(10) Transferred Records**

ORS 192.355(10) exempts:

Public records or information described in this section, furnished by the public body originally compiling, preparing or receiving them to any other public officer or public body in connection with performance of the duties of the recipient, if the considerations originally giving rise to the confidential or exempt nature of the public records or information remain applicable.

State and local public bodies regularly exchange records with each other in connection with their mutual functions and duties. It is possible that both the public body furnishing the records and the public body receiving the records are custodians of their respective copies because both bodies have the records for their own programmatic purposes.<sup>503</sup> That is, each public body would be responsible for responding to a request for those records. However, a public body is not the custodian of a record that it possesses as an agent of another public body, unless the public record is not otherwise available.<sup>504</sup> In these cases, the noncustodian may merely refer the requester to the actual custodian.

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<sup>499</sup> ORS 192.360(1). The likely intent of this condensation option is to allow a public body to avoid having to pore through all the relevant attorney-client privileged records to redact all the nonfactual information.

<sup>500</sup> *Id.*

<sup>501</sup> ORS 192.360(2).

<sup>502</sup> *Id.*

<sup>503</sup> See ORS 192.311(2) (defining “custodian”).

<sup>504</sup> ORS 192.311(2)(b).

When a public body receives exempt public records from another public body, the records remain exempt if the reasons for confidentiality remain applicable.<sup>505</sup> This analysis involves looking to both the reasons behind confidentiality in the originating public body's custody and the uses contemplated by the receiving public body. For example, in concluding that a state hospital patient's mental health records did not remain exempt when transferred from the hospital to the Psychiatric Security Review Board, we explained that the medical privacy underlying the confidentiality of these records in the hospital's custody was diminished when transferred to the board for use in deciding an issue of public safety at a public hearing.<sup>506</sup>

Before disclosing records that it has received from another public body, a public body should discuss with the originating public body whether redisclosure is prohibited, and may also want to discuss whether the records are exempt.<sup>507</sup> It is important to note that ORS 192.355(10) does not act as a prohibition on redisclosure; that is, the receiving public body has discretion whether to disclose the records, unless expressly prohibited.<sup>508</sup>

### **(11) Security Programs for Transporting Radioactive Material**

ORS 192.355(11) exempts:

Records of the Energy Facility Siting Council concerning the review or approval of security programs pursuant to [ORS 469.530](#).

This exemption deals with the Energy Facility Council's role in reviewing and approving security measures related to nuclear power plants, and to the transportation of radioactive material.<sup>509</sup> Because of the

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<sup>505</sup> If the relevant exemption expressly applies to the receiving public body as well, then there is no need to invoke ORS 192.355(10). For example, [ORS 419B.035\(7\)](#) expressly prohibits certain entities from redisclosing confidential child abuse records received from the originating public body.

<sup>506</sup> Public Records Order, Mar 21, 2017, [Zaitz](#), at 5.

<sup>507</sup> *Cf.* Public Records Order, Dec 9, 2004, [Redden](#), at 3 (State Archives consulted with governor's office regarding request for disclosure of a previous administration's records).

<sup>508</sup> Public Records Order, Sept 13, 2013, [Iboshi](#), at 4 (prohibition applying to DHS did not prohibit the Secretary of State's Audits Division from disclosing records received from DHS).

<sup>509</sup> See [ORS 469.530](#).

sensitivity surrounding such information, the council's review and approval of these security measures is not subject to Public Meetings Law.<sup>510</sup>

**(12) PERS Nonfinancial Information about Members**

ORS 192.355(12) exempts:

Employee and retiree address, telephone number and other nonfinancial membership records and employee financial records maintained by the Public Employees Retirement System pursuant to ORS chapters 238 and 238A.

This exemption applies to two categories of information maintained by PERS: nonfinancial membership records of employees and retirees, and employee financial records.

Nonfinancial membership records include employee and retiree addresses, telephone numbers, and other nonfinancial information "the disclosure of which would intrude on a member's privacy."<sup>511</sup>

Employee financial records are records containing financial information that relate to the person's role as an employee, not as a retiree.<sup>512</sup> For example, we concluded that a retiree's annual pay at the time of retirement was exempt because it qualified as financial information and was transmitted to PERS from the PERS member's employer.<sup>513</sup>

We have determined that the following PERS information is not exempt: the fact that a person is a PERS member;<sup>514</sup> the date a person became a member;<sup>515</sup> retiree names, employers at the time of retirement, years of service, and job classification;<sup>516</sup> a retiree's current monthly benefit,<sup>517</sup> the PERS plan under which the retiree retired;<sup>518</sup> which of the

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<sup>510</sup> ORS 192.690(2).

<sup>511</sup> Public Records Order, Oct 1, 2010, [Hinkle](#), at 11.

<sup>512</sup> Public Records Order, Dec 1, 2010, [Thompson](#), at 5.

<sup>513</sup> *Id.*

<sup>514</sup> Public Records Order, Oct 20, 2009, [Re](#), at 3.

<sup>515</sup> Public Records Order, Sept 27, 2010, [Re](#).

<sup>516</sup> Public Records Order, Oct 1, 2010, [Hinkle](#), at 8–11.

<sup>517</sup> *Id.* at 8.

three available formulas was used to compute each retiree's benefit;<sup>519</sup> the amount of accrued sick leave and vacation leave used to determine each retiree's benefits;<sup>520</sup> and whether a retiree obtained health benefits through PERS.<sup>521</sup>

**(13) Records Relating to the State Treasurer or OIC  
Publicly Traded Investments**

ORS 192.355(13) exempts:

Records of or submitted to the State Treasurer, the Oregon Investment Council or the agents of the treasurer or the council relating to active or proposed publicly traded investments under ORS chapter 293, including but not limited to records regarding the acquisition, exchange or liquidation of the investments. For the purposes of this subsection:

(a) The exemption does not apply to:

(A) Information in investment records solely related to the amount paid directly into an investment by, or returned from the investment directly to, the treasurer or council; or

(B) The identity of the entity to which the amount was paid directly or from which the amount was received directly.

(b) An investment in a publicly traded investment is no longer active when acquisition, exchange or liquidation of the investment has been concluded.

This exemption makes confidential the records provided to the State Treasurer or Oregon Investment Council by private businesses or individuals related to proposed or active acquisition, exchange, or liquidation of publicly traded investments.<sup>522</sup> The exemption does not apply to records related to concluded transactions.

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<sup>518</sup> Public Records Order, Dec 1, 2010, [Thompson](#), at 5.

<sup>519</sup> *Id.* at 6.

<sup>520</sup> *Id.* at 6–7.

<sup>521</sup> *Id.* at 8.

<sup>522</sup> *But see* ORS 192.586(2)(b) (certain records relating to state investments in commercial mortgages must remain open to public inspection).

These exemptions are intended to place the state on an equal footing with private investors in making investments, by maintaining the confidentiality of information concerning investments that are still under consideration. The provision also protects the public's right to know how public funds are invested by expressly stating that information regarding concluded investment transactions is not subject to the exemption. The exemption also does not apply to information regarding the amount of an investment, the return on an investment, or the identity of the entity with which the investment was placed.

**(14) Records Relating to the State Treasurer or OIC  
Investment in Private Fund or Asset**

ORS 192.355(14) exempts:

(a) Records of or submitted to the State Treasurer, the Oregon Investment Council, the Oregon Growth Board or the agents of the treasurer, council or board relating to actual or proposed investments under ORS chapter 293 or 348 in a privately placed investment fund or a private asset including but not limited to records regarding the solicitation, acquisition, deployment, exchange or liquidation of the investments including but not limited to:

(A) Due diligence materials that are proprietary to an investment fund, to an asset ownership or to their respective investment vehicles.

(B) Financial statements of an investment fund, an asset ownership or their respective investment vehicles.

(C) Meeting materials of an investment fund, an asset ownership or their respective investment vehicles.

(D) Records containing information regarding the portfolio positions in which an investment fund, an asset ownership or their respective investment vehicles invest.

(E) Capital call and distribution notices of an investment fund, an asset ownership or their respective investment vehicles.

(F) Investment agreements and related documents.

(b) The exemption under this subsection does not apply to:

(A) The name, address and vintage year of each privately placed

investment fund.

(B) The dollar amount of the commitment made to each privately placed investment fund since inception of the fund.

(C) The dollar amount of cash contributions made to each privately placed investment fund since inception of the fund.

(D) The dollar amount, on a fiscal year-end basis, of cash distributions received by the State Treasurer, the Oregon Investment Council, the Oregon Growth Board or the agents of the treasurer, council or board from each privately placed investment fund.

(E) The dollar amount, on a fiscal year-end basis, of the remaining value of assets in a privately placed investment fund attributable to an investment by the State Treasurer, the Oregon Investment Council, the Oregon Growth Board or the agents of the treasurer, council or board.

(F) The net internal rate of return of each privately placed investment fund since inception of the fund.

(G) The investment multiple of each privately placed investment fund since inception of the fund.

(H) The dollar amount of the total management fees and costs paid on an annual fiscal year-end basis to each privately placed investment fund.

(I) The dollar amount of cash profit received from each privately placed investment fund on a fiscal year-end basis.

This exemption is similar to ORS 192.355(13), but relates to investments in privately placed investment funds or a private asset, as opposed to publicly traded investments. It does not apply to concluded investments or to the name of the investment fund, the amount invested, or the amount of return on the investment.

**(15) Public Employees Retirement Fund and Industrial Accident Fund Monthly Reports**

ORS 192.355(15) provides that:

The monthly reports prepared and submitted under [ORS 293.761](#) and [293.766](#) concerning the Public Employees Retirement Fund and the Industrial Accident Fund may be uniformly treated as exempt from disclosure for a period of up to 90 days after the end of the calendar quarter.

This exemption applies to the monthly reports on investments concerning two specific funds that are submitted by the State Treasurer to the Oregon Investment Council. Release of the information in these monthly reports would give other investment managers information regarding investments and liquidations that would prevent the Oregon Investment Council from getting the best return for these funds. The exemption lasts only until 90 days after the end of the calendar quarter, which reflects the State Treasurer's practice prior to the enactment of this exemption.

**(16) Unclaimed Property Reports**

ORS 192.355(16) exempts:

Reports of unclaimed property filed by the holders of such property to the extent permitted by [ORS 98.352](#).

Persons holding unclaimed property are required to annually report the property to the Department of State Lands once it is presumed abandoned.<sup>523</sup> Such records are exempt from disclosure for 12 months from the time the property becomes reportable and for 24 months after the property has been remitted to the department.<sup>524</sup> For public bodies holding abandoned property, any list of those properties is exempt until 24 months after the property is remitted to the department.<sup>525</sup>

The intent of this exemption is to shield such information from professional "bounty hunters" (persons who, for a commission, help owners

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<sup>523</sup> [ORS 98.352\(1\)](#).

<sup>524</sup> ORS 98.352(4).

<sup>525</sup> *Id.*

recover unclaimed property) while the department attempts to find the owners.<sup>526</sup>

### (17) Economic Development Information

ORS 192.355(17)(a) exempts:

The following records, communications and information submitted to the Oregon Business Development Commission, the Oregon Business Development Department, the State Department of Agriculture, the Oregon Growth Board, the Port of Portland or other ports, as defined in [ORS 777.005](#), or a county or city governing body and any board, department, commission, council or agency thereof, by applicants for investment funds, grants, loans, services or economic development moneys, support or assistance including, but not limited to, those described in [ORS 285A.224](#):

(A) Personal financial statements.

(B) Financial statements of applicants.

(C) Customer lists.

(D) Information of an applicant pertaining to litigation to which the applicant is a party if the complaint has been filed, or if the complaint has not been filed, if the applicant shows that such litigation is reasonably likely to occur; this exemption does not apply to litigation which has been concluded, and nothing in this subparagraph shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation.

(E) Production, sales and cost data.

(F) Marketing strategy information that relates to applicant's plan to address specific markets and applicant's strategy regarding specific competitors.

ORS 192.355(17)(b) also exempts these same types of records, communications, and information submitted to the State Department of

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<sup>526</sup> See Public Records Order, Dec 1, 1999, [Nichol](#), at 3–4 (discussing legislative history of amendment to [ORS 98.352](#)).

Energy by applicants for tax credits or grants for renewable energy production systems.<sup>527</sup> We have interpreted, in the context of a different exemption, the phrase “financial statements of applicants” to encompass projected, or “pro-forma” financial statements of loan applicants, at least when derived from information specific to the project for which a loan is sought.<sup>528</sup>

### **(18) Transient Lodging Tax Records**

ORS 192.355(18) exempts:

Records, reports or returns submitted by private concerns or enterprises required by law to be submitted to or inspected by a governmental body to allow it to determine the amount of any transient lodging tax payable and the amounts of such tax payable or paid, to the extent that such information is in a form which would permit identification of the individual concern or enterprise. Nothing in this subsection shall limit the use which can be made of such information for regulatory purposes or its admissibility in any enforcement proceedings. The public body shall notify the taxpayer of the delinquency immediately by certified mail. However, in the event that the payment or delivery of transient lodging taxes otherwise due to a public body is delinquent by over 60 days, the public body shall disclose, upon the request of any person, the following information:

- (a) The identity of the individual concern or enterprise that is delinquent over 60 days in the payment or delivery of the taxes.
- (b) The period for which the taxes are delinquent.
- (c) The actual, or estimated, amount of the delinquency.

This exemption applies to records required to be submitted to or inspected by a “governmental body” in relation to determining the amount of transient lodging tax due, and requires disclosure of specified information when payment or delivery of taxes otherwise due is delinquent

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<sup>527</sup> See [ORS 469B.256\(1\)](#).

<sup>528</sup> Public Records Order, May 6, 2009, [Siemers](#), at 2–3 (analyzing ORS 470.065, a similarly worded exemption that applied to certain loans by the Department of Energy).

by over 60 days. Because similar information related to the *state* transient lodging tax is already confidential under other laws,<sup>529</sup> we think the intent of this exemption is to apply to transient lodging taxes assessed by *local* governments.<sup>530</sup>

### **(19) Information for Obtaining Court-Appointed Counsel**

ORS 192.355(19) exempts:

All information supplied by a person under [ORS 151.485](#) for the purpose of requesting appointed counsel, and all information supplied to the court from whatever source for the purpose of verifying the financial eligibility of a person pursuant to ORS 151.485.

The Public Defense Services Commission administers an indigent defense program under which defendants in certain types of cases may apply for court-appointed legal counsel. This exemption applies to all information supplied to the commission or to court personnel in order to request counsel or to verify indigency under this program. Because, with some exceptions, this information “shall not be used for any purpose other than determining financial eligibility,”<sup>531</sup> we recommend that a public body seek advice from its legal counsel before disclosing any of this information.

### **(20) Workers’ Compensation Claim Records**

ORS 192.355(20) exempts:

Workers’ compensation claim records of the Department of Consumer and Business Services, except in accordance with rules adopted by the Director of the Department of Consumer and Business Services, in any of the following circumstances:

(a) When necessary for insurers, self-insured employers and third party claim administrators to process workers’ compensation

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<sup>529</sup> See [ORS 320.340, 320.330](#) (making confidentiality provisions applying to taxes on net income applicable to the state transient lodging tax).

<sup>530</sup> See [Koennecke v. Lampert](#), 198 Or App 444, 453 (2005) (treating later-enacted statute as exception to earlier statute when the two potentially conflicted).

<sup>531</sup> [ORS 151.495\(1\)](#).

claims.

(b) When necessary for the director, other governmental agencies of this state or the United States to carry out their duties, functions or powers.

(c) When the disclosure is made in such a manner that the disclosed information cannot be used to identify any worker who is the subject of a claim.

(d) When a worker or the worker's representative requests review of the worker's claim record.

This exemption was created to prevent discrimination against persons previously injured on the job who have filed a workers' compensation claim. Disclosure is permitted under the following circumstances, in accordance with DCBS rules: when necessary to process claims, when necessary for governmental agencies to carry out their functions, when the disclosed information cannot be used to identify any worker who is the subject of a claim, or when a worker or representative requests review of the worker's claim record.<sup>532</sup> We have interpreted "claim records" to include both substantive information about a worker and a worker's claim and docketing information about a claim, such as the names of the claimant, the employer, and the insurer.<sup>533</sup>

#### **(21) OHSU Sensitive Business Records**

ORS 192.355(21) exempts:

Sensitive business records or financial or commercial information of the Oregon Health and Science University that is not customarily provided to business competitors.

The Oregon Court of Appeals has interpreted this exemption as generally applying to:

[R]ecords or information pertaining to activities of OHSU that are commercial in nature—including medical and scientific research activities if conducted for commercial purposes or in a commercial

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<sup>532</sup> See [OAR 436-060-0009](#) for DCBS's rules.

<sup>533</sup> Public Records Order, July 9, 1998, [Scheminske](#), at 2–3.

manner—where the records or information ordinarily would not be provided to either OHSU’s or its business partners’ competitors.<sup>534</sup>

The court understood “sensitive” to mean ““intended to be treated with a high degree of discretion.””<sup>535</sup>

Under this interpretation, the court held that the names of particular pharmaceutical companies with which OHSU had contracted to test their experimental drugs were exempt from disclosure, as were the names of the drugs being tested.<sup>536</sup>

### **(22) OHSU Candidates for University President**

ORS 192.355(22) exempts:

Records of Oregon Health and Science University regarding candidates for the position of president of the university.

### **(23) Library Records**

ORS 192.355(23) exempts:

The records of a library, including:

- (a) Circulation records, showing use of specific library material by a named person;
- (b) The name of a library patron together with the address or telephone number of the patron; and
- (c) The electronic mail address of a patron.

### **(24) Housing and Community Services Department Records**

ORS 192.355(24) exempts:

The following records, communications and information obtained by the Housing and Community Services Department in connection with the department’s monitoring or administration of financial assistance or of housing or other developments:

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<sup>534</sup> [\*In Defense of Animals v. OHSU\*](#), 199 Or App 160, 173 (2005).

<sup>535</sup> *Id.*

<sup>536</sup> *Id.* at 174–75.

- (a) Personal and corporate financial statements and information, including tax returns.
- (b) Credit reports.
- (c) Project appraisals, excluding appraisals obtained in the course of transactions involving an interest in real estate that is acquired, leased, rented, exchanged, transferred or otherwise disposed of as part of the project, but only after the transactions have closed and are concluded.
- (d) Market studies and analyses.
- (e) Articles of incorporation, partnership agreements and operating agreements.
- (f) Commitment letters.
- (g) Project pro forma statements.
- (h) Project cost certifications and cost data.
- (i) Audits.
- (j) Project tenant correspondence.
- (k) Personal information about a tenant.
- (L) Housing assistance payments.

This provision exempts from disclosure certain records obtained by the Housing and Community Services Department regarding individuals applying for government-subsidized housing or businesses applying for funding to develop affordable, government-subsidized housing and to maintain their ongoing operation of such housing. The purpose of the provision is to protect from public disclosure the detailed personal and business information that applicants and businesses must submit to the state as a condition of participating in the subsidized housing program.

**(25) Forestland Geographic Information System**

ORS 192.355(25) exempts:

Raster geographic information system (GIS) digital databases, provided by private forestland owners or their representatives, voluntarily and in confidence to the State Forestry Department, that is not otherwise required by law to be submitted.

The State Forestry Department, working with a variety of interests, has

developed a comprehensive database called Geographic Information Systems (GIS), which displays information about forestland conditions. This exemption addresses the concern of private landowners regarding their voluntary disclosure to the department of accurate and detailed information about their land for purposes of the GIS.

**(26) Public Sale or Purchase of Electric Power**

ORS 192.355(26) exempts:

Sensitive business, commercial or financial information furnished to or developed by a public body engaged in the business of providing electricity or electricity services, if the information is directly related to a transaction described in [ORS 261.348](#), or if the information is directly related to a bid, proposal or negotiations for the sale or purchase of electricity or electricity services, and disclosure of the information would cause a competitive disadvantage for the public body or its retail electricity customers. This subsection does not apply to cost-of-service studies used in the development or review of generally applicable rate schedules.

Under federal law, community-owned utilities are able to purchase their energy on a competitive open market basis. This exemption is designed to protect information the disclosure of which would adversely affect the public sale or purchase of electric power by public bodies engaged in providing electricity. The disclosure must create a competitive disadvantage to either the public body or its retail customers for the exemption to apply.

Public bodies should exercise caution before withholding entire documents under this exemption, absent a showing that *all* the information in the document qualifies as exempt. The Oregon Court of Appeals rejected the argument that an entire contract for the purchase of electricity was exempt, where the evidence was not specific to particular information contained in the contract.<sup>537</sup>

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<sup>537</sup> [Brown v. Guard Publ'g Co.](#), 267 Or App 552, 565–70 (2014).

**(27) Klamath Cogeneration Project**

ORS 192.355(27) exempts:

Sensitive business, commercial or financial information furnished to or developed by the City of Klamath Falls, acting solely in connection with the ownership and operation of the Klamath Cogeneration Project, if the information is directly related to a transaction described in [ORS 225.085](#) and disclosure of the information would cause a competitive disadvantage for the Klamath Cogeneration Project. This subsection does not apply to cost-of-service studies used in the development or review of generally applicable rate schedules.

This provision was added to the Public Records Law to address the same concerns that prompted the exemption in ORS 192.355(26), which are discussed above. The City of Klamath Falls has the authority to enter into certain transactions involving the provision of electricity or fuel in relation to the ownership and operation of the Klamath Cogeneration Project.<sup>538</sup> This exemption protects sensitive information pertaining to these transactions when the disclosure would cause a competitive disadvantage for the Project.

**(28) Public Utility Customer Information**

ORS 192.355(28) exempts:

Personally identifiable information about customers of a municipal electric utility or a people's utility district or the names, dates of birth, driver license numbers, telephone numbers, electronic mail addresses or Social Security numbers of customers who receive water, sewer or storm drain services from a public body as defined in [ORS 174.109](#). The utility or district may release personally identifiable information about a customer, and a public body providing water, sewer or storm drain services may release the name, date of birth, driver license number, telephone number, electronic mail address or Social Security number of a customer, if the customer consents in writing or electronically, if the disclosure is necessary for the utility, district or other public body to render

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<sup>538</sup> [ORS 225.085](#).

services to the customer, if the disclosure is required pursuant to a court order or if the disclosure is otherwise required by federal or state law. The utility, district or other public body may charge as appropriate for the costs of providing such information. The utility, district or other public body may make customer records available to third party credit agencies on a regular basis in connection with the establishment and management of customer accounts or in the event such accounts are delinquent.

**(29) Alternative Transportation Addresses**

ORS 192.355(29) exempts:

A record of the street and number of an employee's address submitted to a special district to obtain assistance in promoting an alternative to single occupant motor vehicle transportation.

This exemption encourages employers to turn over lists of employees and their addresses to mass transit districts, transportation districts, and metropolitan service districts so that the districts can contact employees about using alternative transportation. The exemption does not apply to an employee's city, state, and zip code.

**(30) Oregon Corrections Enterprises**

ORS 192.355(30) exempts:

Sensitive business records, capital development plans or financial or commercial information of Oregon Corrections Enterprises that is not customarily provided to business competitors.

Oregon Corrections Enterprises (OCE) is a semi-independent state agency<sup>539</sup> authorized to engage eligible inmates in state corrections institutions in work or on-the-job training.<sup>540</sup> OCE also has the authority to enter into contracts with private persons or governmental agencies to produce, market, and make available prison work products or services.<sup>541</sup>

This exemption allows OCE to withhold some information that its

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<sup>539</sup> [ORS 421.344](#).

<sup>540</sup> ORS 421.354(1).

<sup>541</sup> ORS 421.354(2).

competitors would typically not disclose. The Oregon Court of Appeals has interpreted “sensitive” in a similarly worded exemption to refer to information that is “intended to be treated with a high degree of discretion.”<sup>542</sup>

### **(31) Confidential Submissions to DCBS**

ORS 192.355(31) exempts:

Documents, materials or other information submitted to the Director of the Department of Consumer and Business Services in confidence by a state, federal, foreign or international regulatory or law enforcement agency or by the National Association of Insurance Commissioners, its affiliates or subsidiaries under [ORS 86A.095 to 86A.198](#), [697.005 to 697.095](#), 697.602 to 697.842, [705.137](#), [717.200 to 717.320](#), 717.900 or 717.905, ORS chapter [59](#), [723](#), [725](#) or [726](#), the Bank Act or the Insurance Code when:

- (a) The document, material or other information is received upon notice or with an understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or other information; and
- (b) The director has obligated the Department of Consumer and Business Services not to disclose the document, material or other information.

This exemption enables the Department of Consumer and Business Services to maintain the confidentiality of information received from certain entities under Oregon statutes related to the regulation of a variety of businesses offering consumer services, e.g., credit unions, debt consolidation agencies, and insurance companies.

### **(32) County Elections Security Plans**

ORS 192.355(32) exempts:

A county elections security plan developed and filed under [ORS 254.074](#).

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<sup>542</sup> [In Defense of Animals v. OHSU](#), 199 Or App 160, 173 (2005).

This provision exempts from disclosure a security plan filed by a county clerk that addresses election security issues, such as a county's security procedures for transporting and processing ballots.<sup>543</sup>

**(33) Security Programs**

ORS 192.355(33) exempts:

Information about review or approval of programs relating to the security of:

(a) Generation, storage or conveyance of:

(A) Electricity;

(B) Gas in liquefied or gaseous form;

(C) Hazardous substances as defined in [ORS 453.005\(7\)\(a\)](#), (b) and (d);

(D) Petroleum products;

(E) Sewage; or

(F) Water.

(b) Telecommunication systems, including cellular, wireless or radio systems.

(c) Data transmissions by whatever means provided.

Resulting from a review of Oregon laws after the terrorist attacks of September 11, 2001, this exemption provides for confidentiality of records that contain information about the review or approval of programs that relate to the security of the following: generating, storing, or conveying certain types of materials; telecommunication systems; and data transmissions. Records of the Energy Facility Siting Council concerning review or approval of security programs for nuclear power plants or the transportation of radioactive material are also exempt under a separate provision.<sup>544</sup>

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<sup>543</sup> See [ORS 254.074\(1\)](#) (describing contents of these security plans).

<sup>544</sup> ORS 192.355(11).

**(34) Personal Information in Paternity or Child Support Judgments or Orders**

ORS 192.355(34) exempts:

The information specified in [ORS 25.020\(8\)](#) if the Chief Justice of the Supreme Court designates the information as confidential by rule under [ORS 1.002](#).

This exemption applies to certain contact and other personal information of the parties and children involved in a judicial judgment or order establishing paternity or child support, as long as the Chief Justice designates the information as confidential by rule.

**(35) SAIF Corporation Employer Account Records**

ORS 192.355(35) exempts:

(a) Employer account records of the State Accident Insurance Fund Corporation.

(b) As used in this subsection, “employer account records” means all records maintained in any form that are specifically related to the account of any employer insured, previously insured or under consideration to be insured by the State Accident Insurance Fund Corporation and any information obtained or developed by the corporation in connection with providing, offering to provide or declining to provide insurance to a specific employer. “Employer account records” includes, but is not limited to, an employer’s payroll records, premium payment history, payroll classifications, employee names and identification information, experience modification factors, loss experience and dividend payment history.

(c) The exemption provided by this subsection may not serve as the basis for opposition to the discovery documents in litigation pursuant to applicable rules of civil procedure.

**(36) SAIF Corporation Claimant Records**

ORS 192.355(36) exempts:

(a) Claimant files of the State Accident Insurance Fund Corporation.

(b) As used in this subsection, “claimant files” includes, but is not limited to, all records held by the corporation pertaining to a person who has made a claim, as defined in [ORS 656.005](#), and all records

pertaining to such a claim.

(c) The exemption provided by this subsection may not serve as the basis for opposition to the discovery documents in litigation pursuant to applicable rules of civil procedure.

**(37) Military Discharge Records**

ORS 192.355(37) exempts:

Except as authorized by [ORS 408.425](#), records that certify or verify an individual's discharge or other separation from military service.

ORS 408.425 explains the conditions under which a county clerk is required to produce military discharge records that are recorded pursuant to ORS 408.420.

**(38) Domestic Violence Service or Resource Center Records**

ORS 192.355(38) exempts:

Records of or submitted to a domestic violence service or resource center that relate to the name or personal information of an individual who visits a center for service, including the date of service, the type of service received, referrals or contact information or personal information of a family member of the individual. As used in this subsection, "domestic violence service or resource center" means an entity, the primary purpose of which is to assist persons affected by domestic or sexual violence by providing referrals, resource information or other assistance specifically of benefit to domestic or sexual violence victims.

The purpose of this exemption is to protect victims of domestic violence, and encourage the use of domestic violence services or resource center by such victims, by ensuring confidentiality.

**(39) Prescription Drug Monitoring Records**

ORS 192.355(39) exempts:

Information reported to the Oregon Health Authority under [ORS 431A.860](#), except as provided in ORS 431A.860(2)(b) information disclosed by the authority under ORS 431A.865 and any information related to disclosures made by the authority under ORS 431A.865, including information identifying the recipient of the information.

This exemption relates to the prescription drug monitoring program, a state database that tracks prescriptions and is accessible to health care providers for the purpose of evaluating prescription options. Patient information in the database has been confidential since its inception.<sup>545</sup> This exemption, enacted in 2013,<sup>546</sup> also makes information about whether and to what extent individual health care providers use this service exempt from public disclosure.

**(40) E-mail Addresses**

ORS 192.355(40) exempts:

(a) Electronic mail addresses in the possession or custody of an agency or subdivision of the executive department, as defined in [ORS 174.112](#), the legislative department, as defined in ORS 174.114, a local government or local service district, as defined in ORS 174.116, or a special government body, as defined in ORS 174.117.

(b) This subsection does not apply to electronic mail addresses assigned by a public body to public employees for use by the employees in the ordinary course of their employment.

(c) This subsection and [ORS 244.040](#) do not prohibit the campaign office of the current officeholder or current candidates who have filed to run for that elective office from receiving upon request the electronic mail addresses used by the current officeholder's legislative office for newsletter distribution, except that a campaign office that receives electronic mail addresses under this paragraph may not make a further disclosure of those electronic mail addresses to any other person.

Although on its face this exemption seemingly applies to any e-mail address in a public record, the legislative history strongly suggests that the intent was to enable public bodies to refuse requests for e-mail lists that would then be used to send unsolicited group e-mails or spam. A public body applying the exemption literally to redact e-mail addresses that simply

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<sup>545</sup> [ORS 431A.865\(1\)](#).

<sup>546</sup> [Or Laws 2013, ch 550, § 5](#).

appear within e-mail correspondence would be applying the exemption in a manner not contemplated by the legislature. Our advice to state agencies is to assert this exemption only when it appears that the purpose of the request is to acquire e-mail addresses. Note that this exemption does not apply to the Judicial Department or to a public employee's work e-mail address.

**(41) Personal Information of DPSST Licensees**

ORS 192.355(41) exempts:

Residential addresses, residential telephone numbers, personal cellular telephone numbers, personal electronic mail addresses, driver license numbers, emergency contact information, Social Security numbers, dates of birth and other telephone numbers of individuals currently or previously certified or licensed by the Department of Public Safety Standards and Training contained in the records maintained by the department.

DPSST certifies or licenses public safety personnel,<sup>547</sup> such as corrections officers, police officers, and emergency medical dispatchers, as well as private security professionals and providers.<sup>548</sup> This exemption applies only to DPSST records.

**(42) Veterans' Personal Information**

ORS 192.355(42) exempts:

Personally identifiable information and contact information of veterans as defined in [ORS 408.225](#) and of persons serving on active duty or as reserve members with the Armed Forces of the United States, National Guard or other reserve component that was obtained by the Department of Veterans' Affairs in the course of performing its duties and functions, including but not limited to names, residential and employment addresses, dates of birth, driver license numbers, telephone numbers, electronic mail addresses, Social Security numbers, marital status, dependents, the character of discharge from military service, military rating or rank, that the person is a veteran or has provided military service, information

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<sup>547</sup> See [ORS 181A.355 to 181A.670](#).

<sup>548</sup> See ORS 181A.840 to 181A.891.

relating to an application for or receipt of federal or state benefits, information relating to the basis for receipt or denial of federal or state benefits and information relating to a home loan or grant application, including but not limited to financial information provided in connection with the application.

This exemption applies only to records of the Department of Veterans' Affairs.

## APPENDIX A – FREQUENTLY ASKED QUESTIONS

**Q. Does the Public Records Law require a public body to create a record by collecting information, recording oral statements, or otherwise?**

A. Generally, no. A public body is required to allow inspection of existing public records in its custody, unless an exemption applies.

However, the Public Records Law does require a public body to use its computer software or programs to retrieve and make available, to the extent possible, data or information the public body stores in electronic form.

**Q. Is a public body required to make public records available for inspection or copying on a periodic basis, or as records come into the possession of the public body, in response to a “continuing request” for records?**

A. No. A public body is only required to make available nonexempt records that are in the public body’s custody at the time the request is made. Persons seeking to inspect or to obtain copies of records of a public body on a continuing basis may be required to make successive requests for records. Of course, a public body may choose to honor a continuing request.

**Q. Is a public body required to provide copies of records for which someone else owns the copyright?**

A. Under federal law the owner of a copyright has the exclusive right to reproduce or distribute copyrighted work, although others may copy a limited amount of the work under the “fair use” doctrine.<sup>549</sup> The Public Records Law does not authorize public bodies to violate federal copyright law. A public body must permit a requester to inspect copyrighted materials, but should not make copies or allow someone else to make copies of such materials without the copyright owner’s consent or on advice of legal counsel.

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<sup>549</sup> 17 USC §§ 106, 107, 501.

**Q. May a public body establish a single “information officer” for all public records requests?**

A. Yes. In fact, it is a good idea to have one person responsible for coordinating public records requests, so long as that arrangement will not result in unnecessary delay.

**Q. Does the Public Records Law mandate that a public body require a requester to prepay the estimated cost of providing requested records?**

A. No. A public body may require prepayment of estimated fees, but the law does not mandate that it do so. However, a public body may charge a fee in excess of \$25 only if it first provides a written cost estimate and receives confirmation from the requester to continue processing the request. The public body has the option of requiring prepayment of the estimated fee or waiting to collect its actual costs of responding to the request.

In practice, some public bodies require an initial payment of 50% of the estimated amount, and then require payment of the remaining amount when the records are ready to be delivered and the public body’s actual cost has been finalized.

**Q. May a public body establish a charge of 50 cents per page for copies of public records?**

A. Yes, but only if that amount reasonably reflects its actual cost including the time of the person locating and copying the record, plus administrative overhead. A public body may not charge more than its actual cost of making the records available for inspection or for furnishing copies. State agencies subject to DAS Statewide Policy 107-001-030 on public records fees should make sure any copying charges comply with that policy.<sup>550</sup>

**Q. May a public body charge for time spent in reviewing records to determine which of them are exempt, and for time spent in separating exempt and nonexempt material?**

A. Yes. This activity is an essential part of making records available for inspection, and the public body is entitled to recover its actual cost. (If

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<sup>550</sup> The policy is available at <http://www.oregon.gov/das/Policies/107-001-030.pdf>.

the public body is a state agency, it must adopt a rule establishing the basis for its charges.) Although a public body may not charge for time its attorney spends determining how the Public Records Law applies to the requested records, it may recover the cost of time the attorney spends reviewing public records and separating exempt and nonexempt material at the public body's request.

**Q. Is an indigent person entitled to waiver of the fee for inspection of copies of records?**

A. Not automatically. While indigence is a factor that a public body may consider in deciding whether to grant a request for a fee waiver under ORS 192.324(5), the overriding factor is whether disclosure to the requester will primarily benefit the general public.

**Q. Is a public body obligated to disclose the personal addresses, personal telephone numbers, or dates of birth of its public employees?**

A. Generally no. For most public employees, certain personal information contained in their personnel records is exempt from disclosure under ORS 192.355(3). The exemption can be overcome, however, if the requester provides clear and convincing evidence that the public interest clearly requires disclosure under the particular circumstances. This information about elected officials *generally* is not exempt.

**Q. May I obtain names, addresses, and telephone numbers of individuals doing business with, licensed by, or seeking to be licensed by public bodies?**

A. Generally, yes. In some cases, however, the information may be exempt from disclosure.

**Q. Are an outside consultant's report and recommendations paid for by a public body subject to disclosure?**

A. Yes, although various exemptions may apply to all or parts of the report.

**Q. Is a calendar, planner, or phone message notepad maintained by a public employee subject to the Public Records Law?**

A. If a public employee's calendar, planner, or phone message notepad contains information relating to the conduct of the public's business, it is a public record subject to the disclosure provisions of the Public Records Law. If a calendar or planner contains both information relating to the

conduct of the public's business and personal information about the employee, such as social activities outside of regular working hours or doctor's appointments, that information possibly can be redacted under the personal privacy exemption, ORS 192.355(2).

**Q. Can I get a transcript of material that is on tape?**

A. In general, you are entitled only to listen to the tape, and to make (or be furnished) a copy of the tape. The public body is not required by Public Records Law to make a transcript of the tape, although of course it may. If you have a disability that prevents you from listening to a tape, you may be entitled to the record in an alternative format.

**Q. What if I am an inmate of the state penitentiary and the rules do not permit me to possess a public record that I am seeking?**

A. The Public Records Law does not authorize inmates to possess materials that are forbidden by the rules of the Oregon Department of Corrections. It may be possible to arrange for public records to be delivered to someone on your behalf who is not incarcerated.

**Q. Do I have the right to actually inspect the original records, or can the public body require me to accept copies?**

A. You have the right to inspect original records, except for particular documents that contain exempt material, or where the public body has justifiably adopted a requirement that only copies will be furnished because this is necessary to protect the records or to prevent interference with its work.

**Q. Are records collected for the purpose of a pending contested case administrative proceeding exempt?**

A. Not as such. An administrative proceeding is not "litigation," and therefore ORS 192.345(1) (exempting records prepared for ongoing or anticipated litigation) does not apply. The fact that the ultimate order may lead to litigation is not a ground for nondisclosure. Some of the records also may be exempt for other reasons.

**Q. Must a city release a police report to a victim who is filing a civil lawsuit after the criminal prosecution has been concluded?**

A. Generally yes, although certain sensitive information may be redacted on a case-by-case basis, such as information where disclosure would interfere with future investigations.

**Q. Must police officer notebooks be disclosed? Must access be given to police logs?**

A. Notebooks and logs are public records. Specific exemptions, such as those for criminal investigation information, ORS 192.345(3), and information submitted in confidence, ORS 192.355(4), may apply. Any information that is not exempt must be made available.

**Q. May I inspect a draft of a report in process of preparation?**

A. Maybe, maybe not. The fact that a document is currently a draft generally is not, in itself, a basis for withholding. But it might be withheld if one or more specific exemptions apply to it. For example, the exemption for internal advisory communications, ORS 192.355(1), applies to frank, internal discussions if the public body shows that the public interest in encouraging such discussions clearly outweighs the public interest in disclosure.

**Q. Does a “policy or procedure” of nondisclosure by a federal agency justify nondisclosure under ORS 192.355(8)?**

A. No. This exemption justifies nondisclosure only when the Oregon public body’s disclosure is *prohibited* by federal law or regulation. We have concluded that this prohibition requirement is satisfied by federal laws cutting off federal funding if the state discloses specified information.

**Q. Are birth and death records public records?**

A. Abstracts (summaries) of birth and death records are open to public inspection. With several exceptions, birth records for births occurring within 100 years of the request and death records for deaths occurring within 50 years of the request (other than abstracts) are exempt from disclosure under [ORS 432.350](#). A subject of the record or the subject’s spouse, child, parent, sibling, or legal guardian may inspect a birth or death record, as may the authorized representative of any of those persons, or a person who can demonstrate that he or she intends to use the information solely for research purposes. A person also may inspect a death record upon demonstrating that the record is needed to determine or protect a personal or property right.

A requester wishing to appeal a decision by a custodian of vital records

to deny access to information may proceed under the judicial review provisions of the Administrative Procedures Act for orders other than contested cases, ORS 183.484.<sup>551</sup>

**Q. Are bids and proposals submitted in response to Invitations to Bid (ITB) and Requests for Proposals (RFP) confidential?**

A. Bids are confidential, but only prior to the close of the invitation to bid and the time set for bid opening.<sup>552</sup> Once bids have been opened, they are available for public inspection, unless certain information is exempt either as a trade secret under ORS 192.345(2) or as confidential information under ORS 192.355(4).<sup>553</sup>

Proposals are confidential until after the notice of intent to award a contract is issued.<sup>554</sup> Thereafter a contracting agency may withhold from disclosure those parts of a proposal for a goods or services contract that qualify as exempt under any provision of ORS 192.345 or 192.355.<sup>555</sup> The contracting agency may withhold from disclosure those parts of a proposal for a public improvement contract that qualify as exempt either as a trade secret under ORS 192.345(2) or as confidential information under ORS 192.355(4).<sup>556</sup>

**Q. Are the records on juveniles who have been taken into custody available for inspection?**

A. Juvenile court records, as well as reports and other materials relating to a juvenile's history and prognosis, generally are exempt from disclosure because they are made confidential or privileged under the

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<sup>551</sup> [ORS 432.350\(8\)](#); Public Records Order, Apr 7, 1995, [Pittman](#) (interpreting previous version of ORS 432.350).

<sup>552</sup> See [ORS 279B.055\(5\)\(a\)](#) (contracts for goods or services); [279C.365\(3\)\(c\)](#), (4) (public improvement contracts).

<sup>553</sup> [ORS 279B.055\(5\)\(c\)](#).

<sup>554</sup> [ORS 279B.060\(6\)\(a\)](#) (contracts for goods and services); [279C.410\(1\)](#) (public improvement contracts).

<sup>555</sup> [ORS 279B.060\(6\)\(b\)](#).

<sup>556</sup> [ORS 279C.410\(3\)](#).

Juvenile Code.<sup>557</sup>

However, unless there is a need to delay disclosure in the course of an investigation, the Juvenile Code expressly provides for disclosure of the following information when a youth is taken into custody in circumstances where, if the youth were an adult, the youth could be arrested without a warrant: the youth's name and age, whether the youth is employed or in school, the offense for which the youth was taken into custody, the name and age of the adult complaining party and the adult victim, the identity of the investigating and arresting agency, the time and place the youth was taken into custody, and whether there was resistance, pursuit, or a weapon used.<sup>558</sup>

In addition, the Juvenile Code provides for disclosure of the youth's name and birth date; the basis for the juvenile court's jurisdiction; the date, time, and place of any juvenile court proceeding in which the youth is involved; the act alleged in the petition if it is one that if committed by an adult would constitute a crime; the portion of the juvenile court order providing for the legal disposition of the youth if the youth is within the juvenile court's jurisdiction for an act that if committed by an adult would constitute a crime; and the names and addresses of the youth's parents or guardians.<sup>559</sup>

**Q. Are medical records subject to the public records law?**

A. Medical records in the custody of public bodies are subject to the Public Records Law. [ORS 179.505](#) addresses the disclosure of medical records maintained by certain publicly operated institutions and programs, such as Oregon State Hospital and the Department of Corrections. Other state or federal laws may also restrict or prohibit disclosure of records to the extent they contain health information.<sup>560</sup> Such information may also be exempt from disclosure under the personal privacy exemption,

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<sup>557</sup> [ORS 419A.255](#).

<sup>558</sup> ORS 419A.255(6).

<sup>559</sup> ORS 419A.255(5).

<sup>560</sup> For example, HIPAA is a federal law dealing with the disclosure of protected health information by certain entities, while ORS 192.553 to 192.581 deal with the disclosure of this information by health care providers and state health plans.

ORS 192.355(2).

Medical records maintained by private physicians or hospitals are not covered by the public records law because they are not in the possession of public bodies. Some guidance on the disclosure of such records may be found in ORS 192.553 to 192.581.

**Q. Should a public body redact an individual's Social Security number (SSN) from records that otherwise are not exempt from disclosure?**

A. We recommend that public bodies should not disclose any SSNs without advice from their legal counsel. Public employees' SSNs contained in the public employer's personnel records are exempt from disclosure under ORS 192.355(3), absent clear and convincing evidence of a public interest. And various other exemptions expressly exempt the SSNs of certain individuals. SSNs may also be exempt under the personal privacy exemption, ORS 192.355(2).

The Oregon Court of Appeals has held that SSNs of a city's employees were not exempt under the personal privacy exemption.<sup>561</sup> However, the court reached that result without discussion, and the decision came before the express exemption for SSNs of public employees in ORS 192.355(3); before the Oregon Supreme Court had interpreted the personal privacy exemption; and before various federal courts had interpreted the federal version of the personal privacy exemption to apply to SSNs.<sup>562</sup> In addition, the Court of Appeals opinion predated the 1990 amendments to the Social Security Act that prohibit disclosure of SSNs in certain instances.<sup>563</sup>

**Q. Is it a crime to tamper with public records?**

A. Yes. Under [ORS 162.305\(1\)](#), a person commits the crime of tampering with public records if, without lawful authority, the person

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<sup>561</sup> [AFSCME v. City of Albany](#), 81 Or App 231, 233 (1986).

<sup>562</sup> See, e.g., [Sheet Metal Workers Int'l Assoc. v. U.S. Dep't of Veterans Affairs](#), 135 F3d 891, 905 (3d Cir 1998); [Painting Industry of Hawaii Market Recovery Fund v. US Dep't of the Air Force](#), 751 F Supp 1410, 1418 (D Haw 1990), *rev'd on other grounds*, 26 F3d 1479 (9th Cir 1994); [Oliva v. United States](#), 756 F Supp 105, 107 (EDNY 1991); [United Ass'n of Journeymen v. Dep't of the Army](#), 841 F2d 1459, 1466 (9th Cir 1988).

<sup>563</sup> 42 USC § 405(c)(2)(C)(viii).

knowingly destroys, mutilates, conceals, removes, makes a false entry in, or falsely alters any public record. Tampering with Oregon State Lottery records is a Class C felony, while tampering with other public records is a Class A misdemeanor.

**Q. Who do I petition to review the denial of access to records in the custody of public universities, OHSU, special districts, Tri-Met, the Port of Portland, or community colleges?**

A. The district attorney of the county in which the public body is located.

**Q. May a business sell public database information for profit?**

A. Generally, yes.<sup>564</sup> For example, a private business may obtain public database information from a public body, transfer it to CD-ROM (or some other format that makes the information easy to access) and then sell the CD-ROM for a profit. While members of the public could obtain the information directly from the public body, they may be willing to pay for the information if it is in a more easily accessible format. Although public bodies may only recover their actual costs in making records available, a private business may charge whatever the market will bear.

**Q. How can a public body be expected to determine within five business days of receiving a records request whether or not it is the custodian of the records?**

A. If a public body is unable to determine within five business days whether or not it is the custodian of the requested records, it can notify the requester of this uncertainty. We recommend that a public body responding this way provide the requester with the estimated date by which the public body will be able to provide a substantive update on the request. One of the driving purposes of the deadlines at five and fifteen business days is to keep requesters updated on the progress of their requests.

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<sup>564</sup> Some statutes may specifically address the disclosure of public records to persons who intend to use the information for commercial purposes. *See, e.g.,* [ORS 247.955](#) (prohibiting use of voter registration lists for commercial purposes).

Q. How can a public body be expected to fulfill all public records requests within 15 business days, given the complexity and scope of some requests?

A. If a public body is still processing a request after 15 business days, the deadline can be satisfied by providing written notice to the requester of this continued processing and of a reasonable estimated date when the request will be completed. Of course, public bodies complying with the deadline must still complete requests as soon as practicable and without unreasonable delay.

In addition, the 15 business-day deadline is tolled while the public body is awaiting payment or clarification from the requester. For public bodies struggling to monitor compliance with the deadline, we recommend sending a reasonable estimated date of completion to the requester as soon as payment is received, or as soon as the public body decides to process the request for no charge.

**Q. Is a public body permitted to negotiate the scope of the records request with the requester?**

A. Yes. For broad, complex, or costly requests, we recommend that a public body discuss scope with the requester. These conversations can be particularly constructive when the public body first determines the extent of its responsive records, likely exemptions, and alternatives that will allow the requester to obtain substantive information in a less costly manner.

Some possible ways to limit the scope of the request are to agree on search terms, a date range to search, and which public employees' records to search. Public bodies that have electronic records management systems can offer to limit the scope of the request to specific matters, or to searches within specific matters.

While a requester is not obligated to modify the scope of the request, many requesters appreciate the opportunity to figure out ways to get the most informative records in a more timely manner and at a reduced cost.

**Q. How much information should be provided by a public body that is denying all or part of a records request?**

A. A public body is generally required to provide the specific statute it is relying on to deny the request. However, it is good practice to also provide a brief description of the exemption.<sup>565</sup> And in certain circumstances a public body may want to provide additional information: for example, if the public body is asserting several exemptions or dealing with a broad records request, it can provide a brief description for each exemption of what records are being withheld.<sup>566</sup>

The goal is to provide the requester with enough information to understand why access was denied and to determine whether or not to appeal the denial. Providing the requester with more information than the bare minimum can help avoid disputes over the denial.

A public body is also required to direct the requester to the process for appealing the denial.<sup>567</sup>

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<sup>565</sup> For example, “We have redacted portions of these records that contain personal medical information under ORS 192.355(2), the personal privacy exemption.”

<sup>566</sup> For example, “Your request for all records containing the term “hospital” turned up some consumer complaints containing personal medical information; we redacted this information under the personal privacy exemption, ORS 192.355(2).”

<sup>567</sup> See ORS 192.329(2)(f) for the specific wording to use.



## **APPENDIX B – SAMPLES, FORMS**

Sample Request for Disclosure of Public Records	B-2
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**Sample Request for Disclosure of Public Records**

\_\_\_\_\_ (Date)

(Requester's Name)

(Requester's Address)

(Other contact information: E.g., requester's telephone no., e-mail address, fax no.)

(Name of public body)

(Address of public body)

Attn: (Officer or employee responsible for processing requests)

I (we), \_\_\_\_\_ (name(s)), request that (public body) and its employees (make available for inspection) (provide a copy or copies of) the following records:

1. \_\_\_\_\_ (Name or description of record)

2. \_\_\_\_\_ (Name or description of record)

I wish to arrange an opportunity to personally inspect the requested records.

I wish to receive copies of the requested records.

\_\_\_\_\_  
(Requester's Signature)

## Sample Written Procedure for Public Records Request

### Making a Public Records Request

A request for public records that are in the custody of [public body] may be made by submitting a written request to:

[Name of individual]

[Title or position]

[Address]

[Other pertinent contact information, e.g., fax number, e-mail address]

The request may be submitted in person, by mail, by fax, or by e-mail.

- The request must
  - Include the name and contact information of the person requesting the public record; and
  - Include a sufficiently detailed description of the record(s) requested to allow [public body] to search for and identify responsive records.
- The request should be dated.

### Calculation of Fees

[Public body] calculates fees for responding to public records requests in the following manner:

- \$0.xx per page for photocopies.
- The cost of records transmitted by fax is \$x.xx for the first page and \$x.xx for each additional page, limited to an xx-page maximum, not including the cover page.
- Actual cost for use of material and equipment for producing copies of nonstandard records.
- Upon request, copies of public records may also be provided on a compact disc (CD) if the document(s) are stored in the [public body's] computer system. Discs will be provided at a cost of \$5.00 per disc and may contain as much information as the disc will hold. Due to the threat of computer viruses, the [public body] will not

permit requesters to provide discs for electronic reproduction of computer records.

- Labor charges that include researching, locating, compiling, editing or otherwise processing information and records:
  - No charge for the first xx minutes of staff time.
  - Beginning with the xxth minute, the charge per total request is \$xx.xx per hour or \$xx.xx per quarter-hour. A prorated fee is not available for less than a quarter-hour.
- The actual cost for delivery of records such as postage and courier fees.
- \$x.xx for each true copy certification.
- Actual attorney fees charged to the [public body] for the cost of time spent by an attorney in reviewing the public records, redacting material from the public records, or segregating the public records into exempt and nonexempt records.

[Public body] may require prepayment of estimated fees before taking further action on a request.

**Sample Response Acknowledging Public Records Request**

To: [Requester]

In accordance with ORS 192.324(2), this is to acknowledge our receipt on [date] of your request for the following record[s]:

[Describe records requested.]

Having reviewed your request, we are able to inform you that:

We are the custodian of the requested records.

We are not the custodian of the requested records. [You should consider submitting a public records request to (appropriate public body)].

We are uncertain whether or not we are the custodian of the requested records. We expect to make this determination and provide you with an update by [date].

We are prohibited by [insert specific federal/state law] from acknowledging whether any requested records exist.

Acknowledging whether any requested records exist would result in the loss of federal benefits or imposition of another sanction under [insert specific federal/state law].

[If the public body determines it is the custodian of the requested records, it should consider also including one of the following:]

We need more information to clarify what records you're requesting:  
[insert clarifying questions].

We expect to be able to review and produce the requested records without cost, and produce them to you by [insert date].

The cost to fulfill your records request is [\$x amount, providing breakdown of costs]. Please send payment to [insert payment procedure].

We expect to provide you with an estimated cost to fulfill your records request by [insert date].

**Sample Response Completing Public Records Request**

To: [Requester]

In accordance with ORS 192.329(2), this is to complete our response to your public records request of [date] for the following record[s]:

[Describe records requested.]

We have enclosed copies of all the requested records in our custody that are not exempt from disclosure.

The requested records are publicly available at [insert internet link to records].

We are not the custodian of [and do not possess] the requested records.

We have withheld or redacted [some/all] of the requested records based on [insert specific cites to statutes exempting material]. You may seek review of this denial pursuant to ORS 192.401, 192.411, 192.415, 192.418, 192.422, 192.427 and 192.431. Our position is that you may seek review by submitting a petition to the [Attorney General/\_\_\_\_\_ County District Attorney].

We are prohibited by [insert specific federal/state law] from acknowledging whether any requested records exist.

Acknowledging whether any requested records exist would result in the loss of federal benefits or imposition of another sanction under [insert specific federal/state law].

**Certification of True Copy (Paper Records)**

I certify that I have compared the attached \_\_\_\_\_

\_\_\_\_\_ consisting of \_\_\_\_\_ page(s) with the original in this office, that I am the custodian, and that the attached is a true and correct copy.

\_\_\_\_\_, Oregon \_\_\_\_\_, 20\_\_\_\_  
City Date

\_\_\_\_\_  
Signature Name / Title

Subscribed and sworn to before me  
this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public for Oregon

My commission expires: \_\_\_\_\_

**Certification of True Copy (Electronic Records)**

I certify that I have compared the \_\_\_\_\_  
\_\_\_\_\_ contained on the  
attached \_\_\_\_\_ with the  
original in this office, that I am the custodian, and that the  
attached \_\_\_\_\_ document is a true and  
correct copy of the original. However, because of the nature of the  
electronic medium on which the attached record is provided, I cannot ensure  
that its contents will not be modified after its release from my custody.

\_\_\_\_\_, Oregon

City

\_\_\_\_\_, 20\_\_

Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name / Title

Subscribed and sworn to before me this  
\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public for Oregon

My commission expires: \_\_\_\_\_

**Petition for Attorney General’s or District Attorney’s Review**

\_\_\_\_\_ (date)

I (we), \_\_\_\_\_ (name(s)), the undersigned, request the Attorney General (or District Attorney of \_\_\_\_\_ County) to order \_\_\_\_\_ (name of governmental body) and its employees to (make available for inspection) (produce a copy or copies of) the following records:

1. \_\_\_\_\_  
(Name or description of record)

2. \_\_\_\_\_  
(Name or description of record)

I (we) asked to inspect and/or copy these records on \_\_\_\_\_ (date) at \_\_\_\_\_ (address). The request was denied by the following person(s):

1. \_\_\_\_\_  
(Name of public officer or employee; title or position, if known)

2. \_\_\_\_\_  
(Name of public officer or employee; title or position, if known)

\_\_\_\_\_  
(Signature(s))

**Note:** If a state agency has denied the records request, this petition can be submitted to the Attorney General at 1162 Court Street N.E., Salem, Oregon 97301-4096 or by e-mail to [PublicRecordsOrder@doj.state.or.us](mailto:PublicRecordsOrder@doj.state.or.us). An online version is available at [https://www.doj.state.or.us/wp-content/uploads/2017/07/public\\_records\\_petition.pdf](https://www.doj.state.or.us/wp-content/uploads/2017/07/public_records_petition.pdf).  
If a public body other than a state agency has denied the records request, this petition can be submitted to the district attorney of the county where the public body is located.

### Helpful Hints for Responding to Public Records Requests

- Consider designating one person to coordinate responses to public records requests. This will ensure consistent and, generally, more timely responses.
- Upon receiving a records request, review the request to see if it is ambiguous, overly broad, or misdirected. If so, contact the requester for clarification. A brief conversation with a requester can save considerable time and expense in responding to records requests.
  - Remember that a public body must complete its response to a request as soon as practicable and without unreasonable delay, and must also complete its response within 15 business days or notify the requester in writing of the reasonable estimated date of completion. A public body does not need to follow any deadlines that a requester attempts to impose.
  - Notify the requester if the public body intends to charge for the “actual cost” of making the records available. To charge a fee greater than \$25.00, the public body must provide written notice of the estimated amount and receive confirmation that the requester wants the public body to process the request. For particularly expensive requests, consider requiring payment in advance of working on a request.
  - At this stage, the public body may receive a request for a fee waiver. Review this manual’s discussion of this subject before responding.
- Consider whether there is any reason why the public body may not want to disclose the record. If so, consider whether any exemptions apply to the requested records. If any “conditional” exemptions appear to be applicable, remember to consider whether the public interest in disclosure outweighs the interest in nondisclosure. The public body may delay release of records to consult with legal counsel about exemptions or other relevant provisions of the law.
- If no exemptions apply to the requested records, coordinate release of the records to the requester in as timely a manner as possible.

- If one or more exemptions apply to a requested record, and the public body plans to claim the exemption(s), review each requested record to determine whether the entire record or only specific portions of the record are exempt. If only portions of a record are exempt, redact the exempt portions and disclose the remaining portions of the record.
- When denying a public records request, cite the specific exemption(s) on which the public body relies.



## APPENDIX C – SUMMARIES OF OREGON APPELLATE COURT DECISIONS

**Note:** The legislature significantly renumbered the Public Records Law in 1987 and 2017. The below summaries refer to the numbering in the 2017 edition of the Oregon Revised Statutes.

### 1961–1980

[MacEwan v. Holm](#), 226 Or 27, 359 P2d 413 (1961).

This case, decided 12 years before enactment of the present Public Records Law, is nevertheless perhaps the leading case in terms of the approach the Oregon courts take with respect to the public’s “right to know.” The court stated the following:

Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants.\* \* \*

And the public interest in making such writings accessible extends beyond the concern for the honest and efficient operation of public agencies. The [information] \* \* \* may be sought by persons who propose to use it for their own personal gain. Thus they may wish to obtain names and addresses for use as a mailing list, or the record of transfers of property to conduct a title insurance plant.\*\*\* The data gathered by government are available to its citizens for such private purposes. \* \* \*

In balancing the interests referred to above, the scales must reflect the fundamental right of a citizen to have access to public records as contrasted with the incidental right of the agency to be free from unreasonable interference. \* \* \* *[T]he burden is cast upon the agency to explain why the records sought should not be furnished.*

(Emphasis added.)

In the particular case, the court held that records “in a raw or tentative state” preliminary to the making of a final report were subject to disclosure.

[Turner v. Reed](#), 22 Or App 177, 538 P2d 373 (1975).

Plaintiff (former inmate) sought various prison and parole records related to his incarceration. The court held that the literal findings by the inmate's prison psychiatrist and psychologist, as well as very personal information about the inmate's marriage and family life, were exempt from disclosure under ORS 192.355(5) because they would substantially prejudice the Department of Corrections' and the Parole Board's functions, and the public interest in confidentiality clearly outweighed the public interest in disclosure. The court explained that trial testimony supported the idea that disclosure of a psychiatrist's or psychologist's literal findings (as opposed to summaries of those findings by laymen) could have a chilling effect on the candor of those reports; and Corrections had a legitimate and substantial interest in learning about an inmate's family life in planning and implementing a rehabilitation program, while the public interest in disclosure of very personal information about the inmate was nonexistent or de minimis.

The court also held that the subjective portions of evaluations and recommendations (as opposed to the purely factual portions) to the Parole Board on whether to grant, deny, or revoke parole were exempt under ORS 192.355(1) as internal advisory communications. The court explained that disclosure of this information might make the records less candid and therefore less valuable to the board in making its difficult and often unpopular decisions.

However, the court held that records monitoring the requester's public criticisms of the corrections system were not exempt as internal advisory communications because they were no different than the records already disclosed except that they contained information that would potentially embarrass public officials. The court also noted that many of these records were purely factual, and therefore not exempt as advisory communications.

[Sadler v. Oregon State Bar](#), 275 Or 279, 550 P2d 1218 (1976).

The court held that State Bar records related to an attorney's conduct were not exempt as confidential information under ORS 192.355(4) because the information was not submitted to the Bar in confidence and the Bar could not oblige itself in good faith not to disclose the information. There was no evidence in the record that any complainants submitted information only on the condition or with the understanding that the information would be kept confidential. And a Supreme Court rule provided that disciplinary

records would become public under certain circumstances designed to protect the attorneys whose conduct was at issue, not the complainants.

The court also held that the Public Records Law did not violate the constitutional separation of powers because it did not unreasonably encroach upon the judicial function of disciplining lawyers. The Public Records Law did not affect the Bar's rules for admitting, suspending, or disbarring attorneys, and affected the Bar's disciplinary process only by making records available to the public.

[Jensen v. Schiffman](#), 24 Or App 11, 544 P2d 1048 (1976).

The court rejected both the requester's position that all investigatory information compiled for criminal law purposes was no longer exempt under ORS 192.345(3) once the criminal proceeding ended, and the district attorney's position that this information was permanently exempt.

Instead, the court explained that "investigations connected with pending or contemplated proceedings w[ould] ordinarily remain secret because disclosure would likely 'interfere with enforcement proceedings,'" while "investigations not connected with pending or contemplated proceedings w[ould] remain secret only" upon a showing that disclosure would cause certain negative consequences.

The court remanded the case so that the trial court could apply this standard, but noted that if the district attorney continued to rely only on the report itself as evidence of the exemption, the report would not be exempt from disclosure as the criminal proceeding had concluded and no negative consequences from disclosure were apparent.

#### **1981–1990**

[Morrison v. School District No. 48](#), 53 Or App 148, 631 P2d 784 (1981).

The court held that the school district's substitute teacher roster was not exempt as confidential information under ORS 192.355(4) because the teachers' names had not been submitted in confidence. Even though the school district had, in response to the records request, surveyed the teachers on whether their names should be kept confidential, the court explained that the district did not establish that the information had been submitted in confidence at the outset. The court also held that the roster was not exempt under the personal privacy exemption, ORS 192.355(2), but note that later cases abandoned the definition of "information of a personal nature" used by the court here.

[Lane County School District No. 4J v. Parks](#), 55 Or App 416, 637 P2d 1383 (1981).

The court held that the school district's substitute teacher roster (and other related records) were not exempt under ORS 192.345(1) as litigation records. The court explained that this exemption applied only "when the records contain information compiled or acquired by the public body for use in ongoing litigation \* \* \* or when such litigation 'is reasonably likely to occur.'" Even though the trial court found that disclosure might reveal a cause of action against the district and would materially assist the plaintiffs in that action, the records were not compiled *because of* the litigation.

[Kotulski v. Mt. Hood Community College](#), 62 Or App 452, 660 P2d 1083 (1983).

The court held that addresses of the college's part-time faculty were not exempt as confidential information under ORS 192.355(4). Even though the college produced evidence that it treated these addresses as confidential, the court explained that the college had not shown that the faculty submitted the information in confidence; for example, applicants for these positions were not told that their addresses would be kept confidential. The court also held that the addresses were not exempt under the personal privacy exemption, ORS 192.355(2); however, the court relied on a definition of "information of a personal nature" no longer in use.

[Smith v. School District No. 45](#), 63 Or App 685, 666 P2d 1345 (1983).

The court held that the requester's right of access to public records was not dependent on need or motivation and that the school district could not refuse to produce nonexempt records just because the requester already possessed them.

The court also held that the requester was entitled to attorney fees even though the records were provided before trial, but that the pretrial production should be taken into account in determining the amount of the fees.

[Pace Consultants, Inc. v. Roberts](#), 297 Or 590, 687 P2d 779 (1984).

The court held that names and addresses of employers against whom unlawful employment practice complaints were pending were not exempt under ORS 192.345(8) as investigatory information relating to a complaint. The court explained that the ordinary meaning of the exemption distinguished between the (nonexempt) initial complaint and the (exempt)

subsequent investigation, and that the statutory process for receiving and resolving such complaints supported that distinction.

[Bay Area Health District v. Griffin](#), 73 Or App 294, 698 P2d 977 (1985).

The court held that a consultant's subjective observations and recommendations on hospital staffing levels were not exempt as internal advisory communications under ORS 192.355(1). The court explained that the portions of the consultant's report at issue resulted from existing factual data, not from frank communications with hospital staff, and that therefore the public interest in nondisclosure did not clearly outweigh the public interest in disclosure.

[Portland Adventist Medical Center v. Sheffield](#), 303 Or 197, 735 P2d 371 (1987).

The court held that Multnomah County was justified in refusing to promise confidentiality of information submitted by the medical center. The court explained that no specific authority provided for the confidentiality of the information and that even if the information were exempt as a trade secret under ORS 192.345(2), the county still had discretion to disclose.

[Coos County v. Oregon Department of Fish and Wildlife](#), 86 Or App 168, 739 P2d 47 (1987).

The court held that ODFW biologists' responses to a questionnaire on the effectiveness of a state law were not exempt as internal advisory communications under ORS 192.355(1). The court dismissed ODFW's argument that disclosure would have a chilling effect on the free flow of information and opinions within the agency, noting that a chilling effect based on potential embarrassment to the agency and its employees was not sufficient on its own to overcome the presumption favoring disclosure. The court added that disclosing a summary of the requested records to the county did not affect the analysis of the competing interests in disclosure and nondisclosure.

[State ex rel. Frohmayer v. Oregon State Bar](#), 307 Or 304, 767 P2d 893 (1989), *aff'g* [91 Or App 690](#), 756 P2d 689 (1988).

The court held that the Attorney General's role in reviewing the State Bar's denial of a public records request did not violate the constitutional separation of powers. The court explained that in enforcing the Public Records Law, the Attorney General did not exercise judicial power, perform a judicial function, or alter the rules governing the admission, suspension, or

disbarment of attorneys. The court similarly held that requiring the Bar to process a records request from an attorney subject to pending disciplinary action did not violate the Oregon Constitution by burdening or unduly interfering with the administration of the disciplinary rules. The court also held that the Bar was a “state agency” under ORS 192.311(6), signifying that the Attorney General, rather than the local district attorney, had the authority to review the Bar’s denial of the records request.

[City of Portland v. Rice](#), 308 Or 118, 775 P2d 1371 (1989), *aff’g* [94 Or App 292](#) (1988).

The court held that an internal investigation of police officers that did not result in any disciplinary action was not exempt from disclosure as a personnel discipline action under ORS 192.345(12). The court explained that the exemption’s plain meaning and context indicated that a “discipline action” referred to the imposition of a sanction, not to the disciplinary process that resulted in no sanction.

[Jordan v. Motor Vehicles Division](#), 308 Or 433, 781 P2d 1203 (1989), *aff’g* [93 Or App 651](#) (1988).

The court held that an individual’s home address contained in vehicle registration records was exempt from disclosure under the personal privacy exemption, ORS 192.355(2). Disclosure of the address would constitute an unreasonable invasion of privacy because it would allow the requester to harass the individual to an extent that an ordinary reasonable person would find highly offensive: the individual had explained that in response to the requester’s harassment, she used an unlisted phone number and PO Box, did not keep utilities under her name, and rescheduled her day-to-day activities. The requester had not introduced any evidence showing that the public interest required disclosure by clear and convincing evidence.

[Guard Publishing Co. v. Lane County School District No. 4J](#), 310 Or 32, 791 P2d 854 (1990), *rev’g in part* [96 Or App 463](#), 774 P2d 494 (1989).

The Supreme Court held that the names and addresses of the school district’s replacement coaches were not exempt under the personal privacy exemption, ORS 192.355(2), absent an individualized showing that disclosure would constitute an unreasonable invasion of privacy. The school’s blanket policy of nondisclosure was therefore unenforceable.

The Court of Appeals held (in the portion of its opinion that wasn’t reversed) that the names of the replacement coaches were not exempt as

confidential information under ORS 192.355(4) because their names could not reasonably be considered confidential given their disclosure to, for example, parents of children at the school, and because various state and federal laws required that employees submit their names to their employers; that the names were not exempt under [ORS 342.850\(8\)](#), which allowed school districts to restrict access to personnel files, because that restriction was not intended to cover information that was as widely disseminated and commonly used as teachers' names; and that disclosure did not violate the Oregon Constitution by depriving public teachers of the privileges and immunities enjoyed by private teachers because facilitating the public's understanding of how public business was conducted was a legitimate justification for treating public teachers differently.

[AA Ambulance Co., Inc. v. Multnomah County](#), 102 Or App 398, 794 P2d 813 (1990).

The court affirmed the trial court's decision that records in the possession of the county's out-of-state consultant were "public records" under ORS 192.311(5) even though the county's contract with the consultant provided for the confidentiality of certain records. The court explained that the "the contract, in and of itself" could not create an exception to Public Records Law, and that the county had not met its burden to show that the exemption for confidential information, ORS 192.355(4), applied.

[Morse Bros., Inc. v. Oregon Department of Economic Development](#), 103 Or App 619, 798 P2d 719 (1990).

The requester filed suit against the agency four days after making the records request, and one day after submitting a petition to the Attorney General. The court held that the requester's complaint should be dismissed because it was filed before the Attorney General had taken any action on the petition and before the Attorney General was required to act. The court added that Public Records Law "clearly contemplates that agencies have the opportunity to review the requested records and to act on the request before the Attorney General or courts can review the matter."

#### **1991–2000**

[Davis v. Walker](#), 108 Or App 128, 814 P2d 547 (1991).

The court held that the Portland Police Bureau had failed to show that its public records fees were reasonably calculated to reimburse it for its actual costs as it had provided no specific support for its fees for labor time.

The court also held that the bureau's regulation allowing access to only photocopies of redacted records was valid because the right of access to public records did not require access to an original document that contained some exempt information.

[Marks v. McKenzie High School Fact-Finding Team](#), 319 Or 451, 878 P2d 417 (1994), *rev'g* [121 Or App 146](#), 854 P2d 488 (1993).

The court held that a fact-finding team charged by a school board with investigating a school's operations was not a "public body" and therefore not subject to Public Records Law. The court adopted a six-factor test to determine whether the team was the functional equivalent of a public body. Although the team was created at the behest of the board and was performing a governmental function in investigating the school, factors supporting a status as public body, the team did not have authority to make decisions for the school district, did not receive any financial support from the district, and was not supervised by the district. The court emphasized that because the school district retained all authority to act on the team's investigation and findings, the team could have affected matters of public concern only through the report submitted to the school board, which would have been subject to Public Records Law in the board's possession.

[Laine v. City of Rockaway Beach](#), 134 Or App 655, 896 P2d 1219 (1995).

The court held that the city's fire department had been a functional agency or department of the city such that the city could be ordered to disclose the department's records. In reaching this conclusion, the court applied the six-factor balancing test from *Marks v. McKenzie High School Fact-Finding Team*. The court explained that most of the facts weighed in favor of the fire department being a part of the city: the city council had appointed the initial fire chief and directed him to organize a fire department; firefighting was traditionally seen as a governmental function; the city was the primary financial support for the department; the department had authority to enter into certain indemnity agreements binding the city; and the city exercised significant control over the department through its ability to approve or remove the elected fire chief, to define the department's powers and duties, and to set its operating budget. The only factor weighing against the court's conclusion was that the department's leaders received only nominal salaries and the firefighters were volunteers.

[Gray v. Salem-Keizer School District](#), 139 Or App 556, 912 P2d 938 (1996).

The court held that the portions of employment references that didn't reveal the references' identities were not exempt under ORS 192.355(4) as confidential information because the public interest wouldn't suffer by disclosure. The court explained that the school district's argument that disclosure would have a chilling effect on future references did not apply if the references' identities were not revealed, and that disclosure would serve the public interest by "reducing the potential for basing hiring decisions on secret, un rebuttable allegations or innuendo."

The court also held that the requester was entitled to attorney fees because the district did not provide him with the other nonexempt records within seven days of the order of the Marion County District Attorney. The court explained that the seven-day timeline to comply with an order was unambiguous, and therefore that whether the school district had acted in good faith in providing the records in 11 days was immaterial.

[Oregon AFSCME Council 75 v. DAS](#), 150 Or App 87, 945 P2d 102 (1997).

AFSCME sought a declaratory judgment that records revealing which state employees were major users of sick leave were exempt under the personal privacy exemption, ORS 192.355(2). The court held that the trial court had lacked jurisdiction over the proceeding because AFSCME had failed to join all affected parties, namely the individual who submitted the records request. The court explained that the requester had a right to put on proof in order to defeat the claimed exemption.

[Oregonian Publishing Co. v. Portland School District No. 1J](#), 329 Or 393, 987 P2d 480 (1999), *aff'g on other grounds* [152 Or App 135](#), 952 P2d 66 (1998), *modifying on recons* [144 Or App 180](#), 925 P2d 591 (1996).

The Supreme Court held that an investigative report by school police into the misuse and theft of school property was not exempt under [ORS 342.850\(8\)](#), which allowed school districts to restrict access to a teacher's personnel file. The court explained that although the report had been placed in a personnel file and was titled "Personnel Investigation," the report did not address any individual employee's terms and conditions of employment or recommend any employment decision regarding any individual employees, and the report's recommendations related to the adoption of new policies and more stringent inventory controls.

The Court of Appeals, on reconsideration of its initial opinion, held that assuming the report was exempt under [ORS 342.850\(8\)](#), the school district had waived the exemption through the school police officer's testimony at an unemployment compensation hearing for one of the affected employees. The court explained that the officer's testimony had disclosed substantially all of the information in the report, and that the testimony was publicly available as a transcript from the Employment Department. The court also noted that the ability to waive the exemption belonged to the school district, not to the affected employees.

The Court of Appeals initially, in the portion of its opinion not modified on reconsideration, held that one of the school employee's resignation letters was not exempt under ORS 342.850(8) because the letter had been widely distributed to faculty, staff, and school parents, and had been quoted at length in a newspaper article. The court also had held that the letter and report were not exempt under ORS 192.345(12) as a personnel discipline action because the public interest required disclosure. The court explained that the public interest in disclosure was significant because the records involved alleged misuse and theft of public property by public employees, while the matter had already received publicity, indicating a lesser intrusion into the employees' privacy. The court also held that the letter and report were not exempt under the personal privacy exemption, ORS 192.355(2), because the records did not contain information of a personal nature and disclosure would not constitute an unreasonable invasion of privacy.

And finally, the court held that the requester was not entitled to full attorneys' fees. The court explained that the requester had not fully prevailed as the trial court had determined several documents to be exempt from disclosure, and that the trial court did not abuse its discretion in not awarding fees for time spent pursuing the letter as the requester had already received it.

**(Note:** The Court of Appeals has confirmed that it will adhere to the analysis of ORS 192.355(2) and 192.345(12) it applied in its initial opinion because the Supreme Court's affirming opinion did not call that analysis into question. [City of Portland v. Anderson](#), 163 Or App 550, 556 n 3 (1999).)

[Springfield School District #19 v. Guard Publishing Co.](#), 156 Or App 176, 967 P2d 510 (1998).

The court held that the school district waived the exemption for teacher personnel files, [ORS 342.850\(8\)](#), over documents related to the discipline of a former principal by disclosing the charging letter. The court explained that the letter revealed many of the same facts contained in the withheld records. However, the court held that the school district did not waive the exemption over documents related to the discipline of a teacher by disclosing the principal's charging letter; the court explained that even though the letter described many of the same events contained in the exempt documents, the context was different: the letter focused on the discipline of the principal, and only referred to the teacher in passing and not for the purpose of implicating the teacher's conduct.

[City of Portland v. Anderson](#), 163 Or App 550, 988 P2d 402 (1999).

The court held that records pertaining to an investigation and disciplinary action against a police captain were not exempt as a personnel discipline action under ORS 192.345(12). The court explained that records pertaining to allegations that did not result in discipline of the captain did not qualify as a personnel discipline action. And the public interest required disclosure of the records relating to the alleged conduct that the captain was disciplined for: allegations that the captain engaged in sexual conduct through an escort service that may have been a front for prostitution bore materially on his integrity and his ability to enforce the law evenhandedly.

The court also held that these records were not exempt under the personal privacy exemption, ORS 192.355(2). The court explained that information related to the captain's qualification to serve in a position of public trust was not personal in nature, and that the implications of the captain's conduct transcended any claims to privacy.

[Hood Technology Corp. v. Oregon OSHA](#), 168 Or App 293, 7 P3d 564 (2000).

The court held that there was a disputed issue of material fact as to whether a complainant had submitted his identity in confidence to OSHA, and thus reversed the trial court's summary judgment ruling that this information was exempt under ORS 192.355(4) as confidential information. Because the complainant provided his name to OSHA before being asked about confidentiality, it was unclear whether he intended and believed from the outset that OSHA would keep his name confidential.

The court also held that the trial court had not erred in denying the requester's motion for summary judgment. Whether disclosing the complainant's identity would cause harm to the public interest turned not on the truth or falsity of the complaint, but on the complainant's good faith or bad faith in submitting the information. Disclosing the identity of a person who acted in good faith would be contrary to the public interest, even if the submitted information was false, while there was no public interest in protecting the identity of persons who "intentionally and knowingly ma[de] false complaints for malicious and vindictive/harassment purposes."

#### **2001–2010**

[Kluge v. Oregon State Bar](#), 172 Or App 452, 19 P3d 938 (2001).

The court held that the trial court erred in relying solely on the State Bar's description of the records, rather than reviewing the records *in camera* to determine whether they were exempt as internal advisory communications under ORS 192.355(1). The court explained that "[s]omething more than mere assertions concerning the contents of exempted records [was] needed in order protect the public's right of disclosure." The court added that the Bar's affidavit and brief did not show that the public interest in encouraging frank communications clearly outweighed the public interest in disclosure because they did not analyze the public interest in disclosure.

[Oregonians for Sound Economic Policy, Inc. v. SAIF](#), 187 Or App 621, 69 P3d 742 (2003).

The court held that the trial court did not err in denying SAIF's motion to dismiss the requester's declaratory judgment claim. The court explained that a statute providing for the public inspection of SAIF's records provided an alternative means of access to the records; therefore, the review provisions of the Public Records Law were not the only way to obtain the requested records.

Because of this independent right to inspect SAIF's records, the court also held that SAIF could not rely on the exemptions found in Public Records Law.

(**Note:** The legislature subsequently amended the statute at issue, [ORS 656.702\(1\)](#), by deleting the provision that SAIF's records were available for public inspection, providing instead that these records are subject to the Public Records Law. [Or Laws 2009, ch 57, § 1.](#))

[In Defense of Animals v. OHSU](#), 199 Or App 160, 112 P3d 336 (2005).

The court held that names of OHSU staff involved in particular animal testing were exempt from disclosure under ORS 192.345(30) because the public interest didn't require disclosure. The court explained that the relevant staff had received threats and had a general concern about harassment and threats from animal rights groups. The court added that the requester's asserted public interest in disclosure, ensuring that OHSU was treating the animals humanely, did not depend on receiving the names of specific staff.

The court also held that the names of drug companies for which OHSU conducted research, as well as the names of the experimental drugs being tested, were exempt under ORS 192.355(21) as sensitive business records of OHSU not customarily provided to business competitors. The court explained that the evidence showed that even information that a particular company was using OHSU's research center would be useful information to the company's competitors, and companies would not use the center for research if this information were disclosed. The records qualified as "business records" because the research was conducted for commercial purposes or in a commercial manner.

Turning to a dispute over fees, the court held that the trial court, in the context of an action for declaratory or injunctive relief, had jurisdiction to determine whether OHSU's assessed fees were reasonably calculated to reimburse the actual costs in making the records available. The trial court had erred in concluding that the fees were reasonable because redactions of the names of companies, the medications being tested, and OHSU staff names did not require review by highly paid professional staff, and OHSU had calculated some personnel costs at overtime rates without showing why it could not have hired additional, perhaps temporary, staff at a regular rate of pay.

Finally, the court provided guidelines for determining whether OHSU's denial of the request for fee waiver or reduction was proper. The court explained that the first step is determining whether "the furnishing of the record has utility—indeed its greatest utility—to the community of society as a whole." If that standard is satisfied, then the public body's decision not to grant a waiver or reduction must be reasonable under the totality of the circumstances.

[City of Portland v. Oregonian Publishing Co.](#), 200 Or App 120, 112 P3d 457 (2005).

The court held that records related to the investigation and discipline of a police officer who killed a civilian during a traffic stop were not exempt from disclosure under ORS 192.355(1) as internal advisory communications because the public interest in nondisclosure did not clearly outweigh the public interest in disclosure. The court explained that the public interest in “determining whether a full, frank, and thorough investigation of this highly inflammatory and widely reported incident occurred” was significant, while a review of the withheld records indicated they contained clinical and detached judgments made by supervisors pursuant to their duties. The court added that “although people may be more candid when they know that their statements will not be disclosed to the public[,] \* \* \* they are also more likely to be vindictive, careless, or speculative—and therefore unreliable.”

[Jury Service Resource Center v. De Muniz](#), 340 Or 423, 429, 134 P3d 948 (2006), *rev'g* [Jury Service Resource Center v. Carson](#), 199 Or App 106, 110 P3d 594 (2005).

The court held that the First Amendment to the U.S. Constitution did not provide a right of access to a court’s jury pool records (source lists, master lists, and term lists). The court also affirmed the Court of Appeal’s conclusion that assuming these records were “public records,” they were exempt from disclosure under [ORS 10.215\(1\)](#).

[Klamath County School District v. Teamey](#), 207 Or App 250, 140 P3d 1152 (2006).

The court held that an auditor’s and private investigator’s factual investigations carried out at the direction of an attorney in order to provide legal advice to the school district were exempt as attorney-client confidential communications under [ORS 40.225](#). The court explained that the school district contacted the attorney for legal advice, and that the subsequent factual investigations were recommended by the attorney in order to help facilitate the rendition of that advice.

(**Note:** The legislature subsequently amended ORS 192.355(9) to narrow the availability of the attorney-client privilege as an exemption for factual information developed in response to allegations of public body wrongdoing. Or Laws 2007, ch 513, § 5.)

[Colby v. Gunson](#), 224 Or App 666, 199 P3d 350 (2008).

The court held that an autopsy and laboratory test results requested from the state medical examiner were not exempt under [ORS 146.035\(5\)](#), which granted access to these records to specific persons. The court explained that this statute was not incorporated as an exemption by ORS 192.355(9) because it did not explicitly restrict access to the records, and could plausibly be read to act only as an affirmative grant of access to certain persons.

(**Note:** The legislature responded to this case by enacting ORS 192.345(36), which conditionally exempts “[a] medical examiner’s report, autopsy report or laboratory report ordered by a medical examiner under ORS 146.117.” [Or Laws 2009, ch 222, § 2.](#))

[Mail Tribune, Inc. v. Winters](#), 236 Or App 91, 237 P3d 831 (2010).

The court held that a list of all concealed handgun licenses issued in a particular county was not exempt under the personal privacy exemption, ORS 192.355(2), or the exemption for security measures, ORS 192.345(23). The court explained that the sheriff had not met his burden to show on an individualized basis that disclosing this information would be an unreasonable invasion of privacy or that the handgun licenses were obtained for security purposes.

(**Note:** The legislature responded to this case by enacting ORS 192.374, which prohibits a public body from disclosing information that identifies a person as a holder of or applicant for a concealed handgun license, subject to certain exceptions. [Or Laws 2012, ch 93, §§ 2, 5.](#))

[Port of Portland v. Oregon Center for Environmental Health](#), 238 Or App 404, 243 P3d 102 (2010).

The court held that a joint defense agreement between a number of entities potentially responsible for costs associated with cleaning up the Portland Harbor was exempt under the common-interest attorney-client privilege. The court explained that the confidential agreement qualified as a communication made for the purpose of facilitating the rendition of legal services because it would help to make easier the entities’ joint investigation to prepare for potential litigation related to the cleanup. And the court noted that the entities shared a common interest through their potential liability for cleanup costs, despite the possibility that the entities might also have adverse interests.

**2012–Current**

[Pfizer Inc. v. Oregon Department of Justice](#), 254 Or App 144, 294 P3d 496 (2012).

The court held that various exhibits produced by Pfizer to DOJ in the course of a DOJ investigation were exempt as trade secrets under the Uniform Trade Secrets Act, and that DOJ was therefore bound by a confidentiality agreement not to disclose them in response to public records requests. However, the court held that some exhibits were not exempt either as trade secrets or as confidential information under ORS 192.355(4) because they were already available in public documents, such as a federal information against Pfizer.

The court also held, without discussion, that the three individuals who submitted the records requests to DOJ were not necessary parties to the action. The trial court had reasoned that Pfizer was seeking a declaration of its rights under its confidentiality agreements with DOJ, not a declaration of its rights under the Public Records Law.

[Brown v. Guard Publishing Co.](#), 267 Or App 552, 341 P3d 145 (2014).

The court held that it was inappropriate to conclude on summary judgment that a public utility's contract to purchase electricity was exempt in its entirety under ORS 192.355(26) as sensitive business, commercial, or financial information that would cause a competitive disadvantage. The court explained that because the exemption was phrased in terms of *information* as opposed to the entire public record, only information within the contract that met the elements of the exemption could be withheld. The court concluded that the various information in the contract was not described with enough specificity to warrant summary judgment for the utility.

[ACLU of Oregon, Inc. v. City of Eugene](#), 360 Or 269, 380 P3d 281 (2016), *rev'g* [271 Or App 276](#), 350 P3d 507 (2015).

The Supreme Court held that portions of an internal police investigation of alleged misconduct that were reviewed by a civilian review board were not exempt under [ORS 181A.830](#) because the public interest required disclosure. The court explained that the interest in disclosure was particularly significant in cases of alleged misuse of force by police officers, and that evidence established the public had a particular interest in whether the civilian review board properly oversaw the internal investigation. The

court added that the city's interest in protecting its officers' privacy was substantially diminished where the officers' names and alleged conduct were already public, and that there was no evidence that disclosure would affect the city's ability to discipline, evaluate, and train officers. The court also noted that the Court of Appeals had erred in concluding that the statutory scheme indicated there was no public interest in reviewing the effectiveness of the civilian review board.

[International Longshore & Warehouse Union v. Port of Portland](#), 285 Or App 222, 396 P3d 235 (2017).

The court held that the trial court had jurisdiction over a public records suit, even though the port had not formally denied the records request. The court explained that the only statutory requirement for filing a suit under ORS 192.431 was the Attorney General's or district attorney's denial of a public records petition (or the failure of the Attorney General or district attorney to issue an order within seven days of receiving a petition).

[OHSU v. Oregonian Publishing Co.](#), 362 Or 68, 403 P3d 732 (2017), *rev'g in part* [278 Or App 189](#), 373 P3d 1233 (2016).

The Supreme Court held that, in combination, the names of patients who had filed tort claim notices with OHSU, the dates of the alleged torts, and the names of the patients' attorneys were exempt from disclosure under ORS 192.558(1) as protected health information. The court rejected the requester's argument that the information was not exempt if the records did not identify which claimants were patients.

The Court of Appeals held (in the portion of its opinion not reviewed by the Supreme Court) that the name of a claimant who was an OHSU employee was not exempt under the personal privacy exemption, ORS 192.355(2). The court explained that the statutory scheme surrounding tort claim notices indicated that the name was not information of a personal nature as it was not peculiar to the claimant's private concerns. The court also held that the name of a claimant who was an OHSU faculty member was not exempt under [ORS 353.260\(6\)](#), protecting personnel records, because the evidence showed that tort claim notices were regularly kept by claims managers in the risk management department, and not in the faculty member's personnel file.

**Pamplin Media Group v. City of Salem**, 293 Or App 755 (2018).

The court held that arrest information in a child abuse case was not exempt from disclosure under [ORS 419B.035](#), which protects certain records related to a report of child abuse. The court explained that the arrest information was not compiled under the statutes dealing with reports of child abuse, but rather under the police's general authority in criminal matters.

## APPENDIX D – SUMMARIES OF OREGON ATTORNEY GENERAL OPINIONS

**Note:** The legislature significantly renumbered the Public Records Law in 1987 and 2017. The below summaries refer to the numbering in the 2017 edition of the Oregon Revised Statutes.

### 1976–1980

#### **38 Op Atty Gen 467** (1976).

The Employment Relations Board could not lawfully adopt a rule restricting access to nonexempt public records. Note that the investigatory information discussed in this opinion is now conditionally exempt from disclosure under ORS 192.345(9).

#### **Letter of Advice to Kathleen M. Straughan** (OP-3928) (June 7, 1977).

Disclosing a patient’s medical file to the patient would generally not constitute an unreasonable invasion of privacy under ORS 192.355(2).

#### **38 Op Atty Gen 945** (1977), 1977 WL 31257.

Attempting to alter public records to reflect a student’s name change could be construed as tampering with public records (in violation of [ORS 162.305\(1\)](#)) or as disposing of public records without authority (in violation of ORS 192.105).

#### **38 Op Atty Gen 1318** (1977), 1977 WL 31305.

Elections officer could not refuse inspection of a poll book solely because inspection might disclose how a particular elector voted. Note that this opinion analyzed [ORS 260.650\(1\)](#), which has since been repealed but exists in similar form in ORS 260.695(7).

#### **38 Op Atty Gen 1761** (1978), 1978 WL 29465.

Background materials concerning agenda matters given to governing body members in advance of a public hearing were public records, subject to disclosure unless exempt. The governing body could condition release of exempt information to the press on a stipulation that the material would not be disclosed until a certain date, but the governing body could not enforce that agreement. The governing body could not condition release of nonexempt information on such a stipulation.

**39 Op Atty Gen 61** (1978), 1978 WL 29400.

Motor Vehicles Division was constitutionally required to charge other government agencies and private individuals for record information, since its expense otherwise would be an unlawful diversion of the constitutionally dedicated Highway Fund. It could charge for its expenses in conducting a search even if it did not find the requested information. Note that recent public records orders (Sept 12, 2016, [Friedman](#); and Oct 15, 2016, [Harden](#)) call the conclusion on the constitutional issue into question.

**39 Op Atty Gen 480** (1979), 1979 WL 35604.

A written personnel evaluation of a community college president was exempt from disclosure under [ORS 341.290\(17\)](#), except with the consent of the college president involved.

**39 Op Atty Gen 721** (1979), 1979 WL 35665.

A county could not refuse to allow a person to use the person's own equipment to copy records, subject to reasonable rules and regulations for protection of the records and to prevent interference with county business. A home-rule county could not charge a fee exceeding the actual cost of making a record available.

**40 Op Atty Gen 96** (1979), 1979 WL 35569.

The Governor could inspect confidential child abuse records to the extent required to determine that laws relating to child abuse were being faithfully carried out. The Attorney General could inspect such records to the extent required to provide proper legal representation to the agency.

**40 Op Atty Gen 155** (1979), 1979 WL 35585.

DHS was prohibited by [ORS 441.671\(1\)](#) from disclosing any reports and records compiled under its duties to investigate certain reports of elder abuse, not just the reports of abuse. Note that this statute has since been amended, but the wording at issue remains in similar form. The remainder of the opinion was based on an administrative structure that is no longer in place.

**1981–1990****41 Op Atty Gen 437** (1981), 1981 WL 151688.

A school board's evaluation forms on a local superintendent were not exempt because disclosure would not constitute an unreasonable invasion of privacy under ORS 192.355(2). A public employee had "little reason \* \* \*

to believe that how effectively he or she performs official duties will be kept confidential” and there was “a clear public interest in knowing how public employees are performing their official duties,” especially administrative personnel. Because these forms were not exempt, the school board could not meet in executive session. Note that ORS 192.660(2)(i) now allows public bodies to meet in executive session to discuss this type of information.

**41 Op Atty Gen 455** (1981), 1981 WL 151694.

The Department of Revenue could not, under [ORS 314.835](#) and 314.840, divulge the names or other particulars of taxpayers who had paid a fraud penalty in connection with income tax returns, except to the Attorney General or a district attorney to enable them to advise and represent the department.

**42 Op Atty Gen 17** (1981), 1981 WL 152257.

Police agencies were not prohibited by [ORS 419A.255](#) from releasing, at the time of arrest, a juvenile arrestee’s name and the grounds for arrest. Police agencies probably would not incur civil liability for releasing this information, and news agencies would not incur civil liability for releasing this information if lawfully obtained.

**42 Op Atty Gen 382** (1982), 1982 WL 183049.

The names, business addresses, and home addresses of the Board of Nursing’s licensees were not exempt because disclosure would not constitute an unreasonable invasion of privacy under ORS 192.355(2). The Board could sell this information, but not for more than an amount reasonably calculated to recover its actual costs.

**42 Op Atty Gen 392** (1982), 1982 WL 183052.

The Oregon Investment Council could employ executive sessions to consider records exempt by law from public inspection. Stock and stock market appraisals submitted in confidence by its money managers, written evaluations of its money managers, and technical reports prepared by consultants and money managers could be kept confidential and discussed in executive session if the requirements of ORS 192.355(4) were met.

**Letter of Advice to Wendy L. Greenwald** (OP-6087) (Feb 26, 1987), 1987 WL 278312.

Checklists showing which employees had voted in representation elections conducted by the Employment Relations Board were public records and not exempt from disclosure. That information was not exempt under ORS 192.355(2) because disclosure would not constitute an unreasonable invasion of privacy: the statutory and regulatory context indicated that public access to those lists was necessary to file with the board a challenge to the conduct of an election.

In addition, this information was not exempt as confidential information under ORS 192.355(4) . The information could not reasonably be considered confidential because the board's responsibility to regulate representation elections showed a need for public access to these lists in order to challenge election results.

**Letter of Advice to Jim Kenney** (OP-6126) (June 1, 1987), 1987 WL 278343.

The Lane County Department of Assessment and Taxation was not required to use computer programs that generated appraisal reports on specific properties to produce such reports in response to a public records request. While the raw data used by the programs was a public record, the appraisal reports that analyzed the raw data did not yet exist.

**Letter of Advice to Wanda Clinton** (OP-6049) (June 26, 1987), 1987 WL 278262.

The Department of Revenue could not use Public Records Law to obtain financial data from local governments. The definition of the "person[s]" entitled to access to records did not include public bodies, which was a separately defined term. However, the department could ask the local governments to voluntarily provide that information.

**Letter of Advice to W.T. Lemman** (OP-6217) (Mar 29, 1988), 1988 WL 416244.

Oregon State University did not waive the exemption for pre-publication research, ORS 192.345(14), by disclosing raw data and preliminary reports to other participants in the research cooperative. The disclosures would be made to ensure the accuracy of the research, and thus was consistent with the purposes underlying the exemption, that is, to protect against piracy of research ideas and data collected by faculty

members, and to protect against the risks associated with the release of incomplete and inaccurate data pending its verification and correction.

**Letter of Advice to W.T. Lemman** (OP-6248) (Oct 13, 1988), 1988 WL 416293.

The University of Oregon could withhold the identities of candidates for university president during the selection process under ORS 192.355(2). Disclosing the names would constitute an unreasonable invasion of privacy due to the potential professional threat to candidates. The public interest did not require disclosure because disclosure would discourage potential candidates from applying, which would make it more difficult to recruit talented applicants.

**46 Op Atty Gen 155** (1989), 1989 WL 439806.

The Oregon Medical Insurance Pool was not a “public body” subject to the Public Records Law. In particular, the organization was not subject to management and control by the state as the board of directors was selected by the organization’s members, which were insurers.

#### **1991–Current**

**49 Op Atty Gen 210** (2000), 2000 WL 101166.

The Treasurer was required under ORS 192.324(3) to provide a paper copy of a record maintained in electronic form if the paper copy could be generated by simply pressing a “print” button on a computer.

**Letter of Advice to Dianne Middle** (OP-2000-1) (July 11, 2000), 2000 WL 992134.

Public records that referred to a set-aside conviction, but that were not themselves sealed by court order under [ORS 137.225\(3\)](#), were not exempt from disclosure.



**APPENDIX E – SUMMARIES OF SELECTED PUBLIC  
RECORDS ORDERS ISSUED BY THE OREGON ATTORNEY  
GENERAL**

**Note:** The legislature significantly renumbered the Public Records Law in 1987 and 2017. The below summaries refer to the numbering in the 2017 edition of the Oregon Revised Statutes. Full copies of public records orders issued since 1981 can be found at <http://cdm17027.contentdm.oclc.org/cdm/landingpage/collection/pl7027coll2>.

**1981–1985**

**March 6, 1981, [Don Bishoff](#).** Petition granted for the number of public employee signatures on petitions for union representation. ORS 192.345(7) exempted only the names and signatures of petitioners, not the number of signatures. And the National Labor Relation Board’s practice of not disclosing this information was not a prohibition and thus did not justify nondisclosure under ORS 192.355(8).

**April 30, 1981, [Julie Lou Tripp](#).** Petition granted for the names of unsuccessful bidders for a state contract, and the bid amounts. This information was not exempt as trade secret under ORS 192.345(2), and was not exempt as confidential information under ORS 192.355(4) because it should not reasonably be considered confidential.

**May 15, 1981, [Leslie Zaitz](#).** Petition granted for a state senator’s financial statement submitted to the State Ethics Commission, and the transcript of the commission’s interview with the senator. Because the senator had invited interested parties to examine the records during a speech on the floor of the Senate, the requester had shown that no unreasonable invasion of privacy would occur under ORS 192.355(2).

**May 19, 1982, [Henry Kane](#).** Attorney General lacked jurisdiction under ORS 192.427 to consider a petition for Insurance Commissioner records. The commissioner had obtained these records as a court-appointed receiver and was thus subject to the direction of the judge, an elected official.

**July 6, 1982, [Leslie Zaitz](#).** Petition denied for investigatory report compiled by DOJ. The report was prepared by DOJ at the request of its client, and was exempt under the attorney-client privilege, ORS 40.225.

**January 12, 1984, [John Snell](#).** Petition granted for the income tax return and financial statement from a license application to the Oregon Racing Commission. These records were not exempt under the personal privacy exemption, ORS 192.355(2), because the public interest required disclosure. The public interest in the integrity and financial competence of licensees was great considering the circumstances of the industry at the time.

**June 12, 1985, [Les Ruark](#).** Petition granted for a sign-up sheet used to record attendance at a public forum on toxic waste disposal. This record was not exempt under ORS 192.355(4) as confidential information: names and addresses were not generally the type of information reasonably considered to be confidential, the public body did not oblige itself to keep this information confidential, and the public interest would not suffer by disclosure.

#### **1986–1990**

**April 4, 1986, [Michael J. Martinis](#).** Petition denied for the identity of a police informant. This information was exempt under the privilege for an informant's identity, ORS 40.275; as confidential information under ORS 192.355(4) ; and as criminal investigatory information under ORS 192.345(3). The informant provided information under a promise of confidentiality, and there was an obvious public interest in encouraging citizens to report suspected crimes.

**August 21, 1986, [David R. Maier](#).** Petition denied for portions of records related to a business development loan. Certain detailed information on the applicant corporation's customers, marketing, and finances were exempt under ORS 192.355(4) as confidential information. This information was not required as part of the application process, would give competitors a business advantage, and the public body promised applicants that loan information would be kept confidential to the extent permitted by Public Records Law. Disclosure would harm the public interest because it would discourage other applicants from applying for loans that the state had determined would promote industry and create employment

**April 13, 1987, [Chris Bristol](#).** Petition denied for a public university's payroll records for the student body president. This information was exempt under FERPA because it related to a student's employment in a position

that could be filled only by a student. FERPA was incorporated as a public records exemption under ORS 192.355(8) because violations resulted in the loss of federal funds.

**August 6, 1987, [Lars Larson](#).** Petition denied for advertising materials created by private ad agencies for a public body. These materials were not public records because they were not prepared, owned, used, or retained by the public body. These materials were the property of the ad agencies, and the public body had not yet decided which materials would be used in the planned ad campaign. Although some of the materials may have been reviewed by state officials, that alone was not sufficient to convert private records into public ones.

**August 13, 1987, [Bennett Hall and Chris Bristol](#).** Petition denied as premature where the public body had not yet denied the records request. The public body was in the process of responding to the request and was entitled to time to gather the requested records and seek legal advice on disclosure.

**December 16, 1987, [Steven Boyd](#).** Petition denied for an inmate to possess a copy of his medical test. The Department of Corrections had allowed him to inspect the record, but would not allow him to possess the record within the prison due to security concerns. Neither Public Records Law nor ORS 179.505 conferred upon an inmate an unfettered right to possess confidential medical records within a prison.

**December 30, 1987, [Patrick O'Neill](#).** Petition denied for prices OHSU was paid by Blue Cross Blue Shield as part of a preferred provider plan contract. This information was trade secret under ORS 192.345(2) because providers competing with OHSU to be preferred providers could use the prices to undercut OHSU rates; and both Blue Cross and OHSU took steps to limit access to this information.

**April 22, 1988, [Robert Joondeph](#).** Petition denied for an Oregon State Hospital report about a patient's suicide. The information relating to the patient's medical history and treatment was exempt under ORS 179.505(2), while the quality assurance information relating to that patient was exempt under ORS 41.675. While the requester was an advocacy center that had statutory rights to certain confidential patient information, that did not affect the requester's rights under Public Records Law.

**April 22, 1988, [Peter Murphy](#).** Petition granted for the PSU Foundation's annual budgets. Although the foundation was not a public body, the budgets were "public records" under ORS 192.311(5) because they were prepared by a PSU official, approved by another PSU official (and therefore was "used" by that official), and were directly related to the activities of two state officials performing functions in their official capacities.

**April 28, 1988, [Paul Koberstein](#).** Petition granted for a letter to PSU from an accrediting committee. The letter was not exempt as an internal advisory communication under ORS 192.355(1) because the sender was not a public body under ORS 192.311(4) even if it was a federal agency; the letter contained many purely factual statements; the letter described a final action of the committee, rather than discussions preliminary to that action; and PSU had not explained how disclosing the letter would deter candid communications from the committee. In addition, PSU's claim that adverse publicity would result from disclosure was not sufficient to justify the exemption.

**September 2, 1988, [Greg Smith](#).** Petition mostly denied for Board of Nursing records related to a patient's death. ORS 678.126 made confidential not just information provided to the board but also any documents generated by the board that contained that information.

**October 21, 1988, [Charles L. Best](#).** Petition denied for records prepared by the Public Utility Commission for a pending contested case proceeding. The records were exempt as internal advisory communications under ORS 192.355(1) because pre-hearing access to the candid evaluations of the commission would undermine its ability to properly discharge its regulatory duties.

**November 17, 1988, [Max Rae](#).** Petition granted for an investigation file regarding a public body's employee. The records were not exempt as confidential information under ORS 192.355(4) because although the investigator promised confidentiality to the witnesses, they would have cooperated regardless of that promise.

**January 20, 1989, [Greg Needham](#).** Petition denied for portions of Portland State University's daily log of arrests and criminal reports that would reveal student identities. That information was exempt under FERPA as information directly related to a student.

**January 24, 1989, [Eleanor J. Parsons](#).** Petition granted for an individual's answers to an exam conducted by the Board of Psychologist Examiners.

The answers were not exempt under ORS 192.345(4) because the board did not assert that disclosure would threaten the integrity of future exams by indirectly revealing the questions used.

**February 1, 1989, [Lars K. Larson](#).** Petition denied for court exhibits from a bail hearing. Regardless of who was the custodian of these exhibits, the circuit court judge—an elected official—had denied the records request; therefore, the Attorney General could not consider the petition under ORS 192.427.

**February 24, 1989, [Richard A. Weill](#).** Petition granted for a proposed opinion and order in a Department of Revenue hearing. The records were not exempt as internal advisory communications under ORS 192.355(1) because the public interest in nondisclosure was insubstantial: the department had already shared with the requester records discussing the proposed order in detail.

**March 28, 1989, [Anthony M. Chapman](#).** Petition denied for an Oregon State Hospital patient's diagnostic records and reports pertaining to psychiatric treatment and counseling. These records were exempt under ORS 179.505.

**March 30, 1989, [Thomas C. Howser](#).** Petition denied for the Oregon State Bar's internal analysis of a pending disciplinary proceeding. The records were exempt as internal advisory communications under ORS 192.355(1). Disclosure would substantially prejudice the Bar's ability to discharge its disciplinary responsibilities.

**April 7, 1989, [Darrell Martin](#).** Petition denied as premature where request was not specific enough to enable the public body to respond in a reasonable or knowledgeable fashion, and where the requester did not respond to public body's attempt to clarify the request.

**May 2, 1989, [Nickolas Facaros](#).** Petition denied for records received by the Department of Agriculture from the federal Food & Drug Administration concerning an FDA investigation. Federal regulations prohibited the disclosure of FDA law enforcement investigation records in the possession of certain state and local governments until the federal case was closed or until the FDA Commissioner authorized disclosure.

**May 9, 1989, [Paul R. Hribernick](#).** Petition denied where the public body had not yet denied the records request. The public body was consulting its

attorneys, and had not denied the request by failing to meet a deadline imposed by the requester.

**July 7, 1989, [P. Scott McCleery](#).** Petition denied for records prepared under the direction of an Oregon State University instructor from interviews with particular subjects. The records were exempt as faculty research under ORS 192.345(14) because even though some preliminary results had been released, research was continuing and the instructor planned subsequent publications.

**July 14, 1989, [David A. Rhoten](#).** Petition denied for public employee interviews conducted to evaluate a division. The records were exempt as confidential information under ORS 192.355(4) : the interviewed employees were promised confidentiality to encourage candor, and disclosure would undermine the review process by discouraging such candor.

**December 7, 1989, [Steven C. Baldwin](#).** Petition denied for fee schedules and price lists submitted to OHSU by unsuccessful bidders on a contract. The records were exempt as trade secrets under ORS 192.345(2) and the Uniform Trade Secrets Act: the pricing information could be used by competitors to undercut the bidders' prices, and the bidders restricted access to this information. The public interest didn't require disclosure because OHSU didn't award any points based on these price lists, and because disclosure would discourage future bidders.

**January 12, 1990, [Susan G. Bischoff](#).** Petition denied for interviews conducted by the Department of Corrections in response to a complaint of sexual harassment. The records were exempt as pertaining to litigation under ORS 192.345(1): the interviews were conducted in response to a notice of tort claim, which indicated that litigation was reasonably likely to occur.

**April 12, 1990, [Marcus A. Petterson](#).** Petition granted for a letter to the Motor Vehicle Division reporting an individual's poor driving. The record was not exempt as confidential information under ORS 192.355(4) because the public interest would not suffer by disclosure: information from several sources indicated that the letter was sent solely with the intent to harass the individual, and thus disclosure would discourage such false reports.

**October 2, 1990, [Harry Esteve](#).** Petition granted for a draft report written by the Public Utility Commission and the Department of Energy on the cost of an early shutdown of a nuclear power plant. The report was not exempt

as an internal advisory communication under ORS 192.355(1) because the public interest in encouraging frank communication did not clearly outweigh the public interest in disclosure: the draft report was essentially the same as the publicly released final report, and it concerned the possible economic effects of a controversial ballot measure.

**November 26, 1990, [Dave Hogan](#).** Petition granted for a disciplinary letter to a Motor Vehicles Division employee. The record was not exempt as a personnel discipline action under ORS 192.345(12) because the public interest required disclosure: the employee had been criminally charged with misusing a public office for financial gain, and some of the details of the alleged conduct had been published in a newspaper article.

#### **1991–1995**

**April 2, 1991, [Chris Williamson](#).** Petition granted for the names, addresses, and telephone numbers of jurors in a particular case in circuit court. This information was not exempt under ORS 10.215 because it came directly from the jurors, not from the source lists used to select jurors. And the information was not exempt under the personal privacy exemption, ORS 192.355(2), because the jurors' names had already been disclosed in open court, and there was no individualized showing that disclosing the contact info would constitute an unreasonable invasion of privacy.

**July 8, 1991, [Jim Marr](#).** Petition for a fee waiver of \$837.51 denied where the public body had waived the fee to locate and edit the records, and had waived 25% of its legal costs in reviewing the records. In view of the public body's substantial costs in fulfilling the request, its decision not to completely waive the fee was reasonable.

**August 1, 1991, [Lars Larson](#).** Petition for a fee waiver of \$116.08 denied where the public body agreed to waive the \$31.83 in cost to search for, edit, and sort the records. The decision to waive only 27% of the fee was not arbitrary or capricious where the volume of the request was substantial and not routine.

**December 23, 1991, [Steve Mayes](#).** Petition denied for Treasury records that had been gathered by DOJ's Criminal Justice Division as part of an ongoing criminal investigation. The records were exempt as criminal investigatory info under ORS 192.345(3) even though they had not originally been created for law enforcement purposes. The public interest did not require disclosure because disclosure would create a significant risk and burden to the ongoing criminal investigation. In addition, the petition for other records

was premature as the public body had not yet denied the request but was reviewing the records in consultation with its attorneys.

**January 27, 1992, [Robert Moody](#).** Petition granted for Oregon State Police disciplinary actions taken against two lieutenants for federal game law violations. The records were not exempt as personnel discipline actions under ORS 192.345(12) because the public interest required disclosure: the employees were law enforcement officers with supervisory responsibilities; the basis for the discipline resulted in criminal prosecution and sanction; the criminal proceedings had completed; and the criminal allegations and disposition had been made public.

**February 25, 1992, [Lex Loeb](#).** Petition denied for records in the custody of the Columbia River Gorge Commission. The commission was not an Oregon public body because it was a bi-state regional agency governed by federal law and an interstate compact.

**March 27, 1992, [Dwight Leighty](#).** Petition granted in part for the gross pay of a Public Utility Commission employee and the number of years the employee had worked for the commission. This information was not exempt because disclosure would not constitute an unreasonable invasion of privacy under ORS 192.355(2): public employees did not have a reasonable expectation that their salaries would be kept confidential, and the public had an important interest in knowing these salaries. However, information on whether the employee was providing insurance for a named minor child through a payroll deduction was exempt.

**December 11, 1992, [Bruce Smith](#).** Petition denied for a statewide student survey conducted by a contractor for the Office of Alcohol & Drug Abuse. The survey results were public records despite not being prepared, used, or retained by the office because the office owned the results under the terms of the contract. However, the reports were exempt from disclosure as confidential information under ORS 192.355(4): the school administrators and students had been assured of confidentiality, the survey asked for highly personal information about alcohol and drug use that reasonably should be considered confidential, and the public interest would suffer if students were discouraged from responding.

**January 26, 1993, [Joanna Patten](#).** Petition denied for portions of a Department of Corrections security audit of a prison. These portions were exempt under ORS 192.355(5) as information that would substantially prejudice the department's functions. The audit detailed the specifics of the

prison's security practices and procedures, as well as evaluations of the adequacy of these practices. Public knowledge of this information could be used by inmates to circumvent security measures to escape or receive contraband.

**May 19, 1993, [Bruce E. Smith](#).** Petition denied for fee waiver of \$715.34 where the public body waived \$170.13. Although there was a public interest in the circumstances of care in a foster home where a child had recently died, the records contained a substantial amount of exempt information, and the requester's payment of the fee indicated that the cost was not a barrier to access.

**June 22, 1993, [Andrew Hyman](#).** Petition denied for the Department of Forestry's marbled murrelet survey forms. The records were exempt as information regarding threatened species under ORS 192.345(13). The murrelet was a threatened species, and the records contained information about its habitat, location, and population. The public interest didn't require disclosure where it would be nearly impossible to protect the animals from disturbance or harm. Although the requester offered to restrict re-disclosure of the records, Public Records Law provided no mechanism to enforce such a stipulation.

**February 7, 1994, [Bruce Smith](#).** Petition denied for medical records of certain patients at a state hospital. The records were exempt under the psychotherapist-patient privilege, and the physician-patient privilege. These privileges applied even though the patients were deceased.

**May 4, 1994, [Frank Dixon](#).** Petition denied for fee waiver of \$230.52 where the public body agreed to reduce the fee by 25%. Even though the requester was a charitable organization with the goal to educate the public about animal protection issues and did not have substantial resources to pay the fee, the denial was not unreasonable because of legitimate concerns that the requester would not actually disseminate the records to the general public.

**May 5, 1994, [Connie Wright](#).** Petition denied as moot where the public body agreed to produce information on leave time for certain of its employees. The records were not exempt because disclosure would not constitute an unreasonable invasion of privacy under ORS 192.355(2): an employee's co-workers are usually aware of the general reason that an employee is off from work and the length of leave time. And even if the collective bargaining contract limited disclosure of this information, that

contract could not override Public Records Law.

**May 25, 1994, [David Laine](#).** Petition granted for the performance evaluation of the manager of the local office of the Employment Department. The evaluation was not exempt under the personal privacy exemption, ORS 192.355(2), because clear and convincing evidence indicated that the public interest required disclosure: the public had a definite interest in knowing how well the manager performed his duties as this had a significant effect in determining how well the office provided public services.

**December 2, 1994, [Timothy M. Parks](#).** Petition denied for portions of a property appraisal obtained by the Department of Transportation. These portions were exempt as appraisal information under ORS 192.345(6). Even though the property at issue had been acquired by the time of the petition, the portions were relevant to planned appraisals of similarly situated properties that had yet to be acquired.

**April 3, 1995, [Lars Larson](#).** Petition denied for records relating to a pending personnel disciplinary matter. Because the exemption for personnel discipline actions applied only to completed discipline actions, it was reasonable for the public body to wait until the conclusion of the process to determine if any discipline action would be taken.

**April 14, 1995, [Steve Mayes](#).** Petition denied for a list of all the employees involved in a high-profile matter because the public body agreed to disclose this information: the list was not exempt because disclosure would not constitute an unreasonable invasion of privacy under ORS 192.355(2).

**June 19, 1995, [Sheri A. Speede](#).** Petition denied for videotapes that served as data for an article published by an OHSU faculty member. These records were exempt as faculty research under ORS 192.345(14): even though some preliminary results of the research project had been released, continuing publications based on these records were planned. The public interest didn't require disclosure because premature disclosure would have a chilling effect on faculty publications.

**August 30, 1995, [Spencer Heinz](#).** Petition denied for a public body's investigation of allegations of sexual misconduct involving a child protective service worker. The records were exempt as criminal investigatory info under ORS 192.345(3) because the district attorney had obtained the records for use in a pending criminal prosecution.

**November 22, 1995, [Lars K. Larson](#).** Petition denied for evidence admitted in a criminal trial. The Attorney General did not have jurisdiction to consider the petition under ORS 192.427 as the circuit court judge had denied the request. Even though this particular judge had been appointed to office, the fact that the office was elective in nature precluded consideration of the petition.

**1996–2000**

**January 26, 1996, [John E. Gutbezahl](#).** Petition denied for the portion of an agreement between the Department of Corrections and a Texas county for the housing of inmates that discussed the medical criteria used in screening inmates with the county, and that discussed the management of hunger strikes. These portions were exempt under ORS 192.355(5) as disclosure would substantially prejudice the department's functions. Inmates seeking to avoid transfer to Texas would be able to use the medical screening criteria to feign medical conditions. And inmate knowledge of the specific intervention procedures for hunger strikes could lead to prolonged hunger strikes.

**May 10, 1996, [John G. Kelley](#).** Petition denied for modem access to the DMV's records. DMV had no way to protect records from modification if this access were granted, and had no way to limit access to only nonexempt information.

**September 9, 1996, [Justin Burns](#).** Petition granted for telephone numbers of hunting license holders from the Department of Fish and Wildlife. These records were not exempt under ORS 192.355(2) because the department had not determined on an individualized basis that disclosure would constitute an unreasonable invasion of privacy.

**September 18, 1996, [Larry Tuttle](#).** Petition denied for fee waiver where the public body had agreed to reduce the fee by 25%. The public body did not abuse its discretion in denying full waiver because the size and complexity of the request were extraordinarily large, large numbers of the records would likely be exempt from disclosure, and waiving the fee would interfere with the public body's ability to fulfill its other duties.

**October 11, 1996, [J. Todd Foster](#).** Petition granted in part for disciplinary records of a captain at the Board on Public Safety Standards & Training. The records dealing with a complaint for making insensitive comments about a student's religious beliefs and ethnicity were not exempt as a personnel discipline action under ORS 192.345(12) because the public

interest required disclosure: the public had a legitimate interest in monitoring the effectiveness of the instruction given to law enforcement officers, and the conduct at issue was contrary to the minimum standards of moral fitness set by the board. In addition, much of the substance of the discipline had already been publicized. The petition was denied in part for any other disciplinary records concerning the captain as they were unrelated to his training responsibilities and did not involve the captain exercising law enforcement functions.

**January 15, 1997, [Nonalee Burr](#).** Petition denied in part for a background investigation report prepared by the State Police on an applicant to the Board on Public Safety Standards & Training. Information provided by the applicant's former employers regarding the applicant's separation of employment was exempt as confidential information under ORS 192.355(4). The employers provided this information on the condition of confidentiality, and another statute making employer references confidential indicated that this information was of a confidential nature. The public interest would suffer by disclosure because the state's ability to gather candid information about job applicants would be hindered.

**March 3, 1997, [Poo-sa'key](#).** Petition denied in part for a State Police report reviewing whether a tribe was complying with a compact regulating the tribe's gaming. Portions of the report were exempt as confidential information under ORS 192.355(4): The tribe agreed under the compact to allow the state to review its records and have access to nonpublic areas of the gaming facility on the condition of confidentiality. And the tribe would not have been required by law to allow access and inspection absent the compact. The public interest would suffer by disclosure because the State Police needed access to the records in order to properly monitor the tribe's compliance with the compact.

**May 2, 1997, [David A. Bledsoe](#).** Petition denied for scoring sheets and evaluation materials used by the Housing & Community Services Department in awarding tax credits. These records were exempt as data used to administer an examination under ORS 192.345(4). The department used essentially similar materials from cycle to cycle, and disclosure would allow applicants to tailor their responses to the methodology.

**August 6, 1997, [Carlton Scott Parrish](#).** Petition denied for proposed budget cuts being considered by Oregon State University. The records were exempt as internal advisory communications under ORS 192.355(1). The

public interest in disclosure was clearly outweighed by the public interest in frank communications by public officials: university managers would be reluctant to engage in frank discussions of potentially unpopular decisions if those discussions were made public, particularly where the final decision on which cuts to implement had not yet been made.

**September 19, 1997, [James Long](#).** Petition denied for investigatory records of the Occupational Safety & Health Division relating to a steelwork collapse at the airport. These records were exempt under ORS 192.345(17) as investigatory information relating to a violation of the Safe Employment Act. The public interest didn't require disclosure because disclosure would interfere with the integrity of the pending investigation, and the records would become disclosable when the final administrative decision was made or when a citation was issued.

**June 26, 1998, [Bradley Scheminske](#).** Petition granted in part for records related to the Workers' Compensation Board's investigation of a former administrative law judge. Letters supporting the judge that were submitted by the judge were not exempt under the personal privacy exemption, ORS 192.355(2), because the information related to the judge's job performance. These letters were not exempt as confidential information under ORS 192.355(4) despite a cover letter asserting confidentiality because the board did not promise confidentiality. And the letters were not exempt as a personnel discipline action under ORS 192.345(12) because no discipline was ever imposed.

The petition was denied in part for notes made by the presiding administrative law judge in reviewing various records. The portions of these notes that were merely objective descriptions of the content of the records were not exempt as internal advisory communications under ORS 192.355(1), but the portions that interpreted and evaluated the materials were so exempt. Disclosing these portions would undermine the board's ability to obtain a frank appraisal from the presiding judge.

**July 9, 1998, [Bradley Scheminske](#).** Petition denied for Workers' Compensation Board records that would identify the names of claimants in active cases, as well as the relevant employer, insurer, and attorneys. This information was exempt as workers' compensation claim records under ORS 192.355(20). "Claim records" was broadly interpreted to mean any information that would establish that a worker had filed a claim.

**September 4, 1998, [Dan Spatz](#).** Petition denied for lightning strike data made available to the Department of Forestry under a licensing agreement with a private company. The information was exempt as a trade secret under ORS 192.345(2) and the Uniform Trade Secrets Act: the company restricted internal access, the information had real commercial value as it was created by the company and sold to customers, and no other competitor had access to such complete and detailed information. The public interest didn't require disclosure as losing access to this information would hamper the department's ability to quickly detect and suppress fires caused by lightning; in addition it wasn't apparent how disclosure would assist the public in monitoring the department's business.

The data was also exempt as a confidential information under ORS 192.355(4): the contract with the private company promised that the department would keep the information confidential; and the information was reasonably considered confidential because it had significant commercial value that would be diminished by disclosure.

**August 2, 1999, [Damon L. Vickers](#).** Petition denied for a Department of Justice memo regarding the Occupational Safety & Health Division's proposed revision of its rules. This memo, and the division's internal communications reflecting advice from the memo, were exempt under the attorney-client privilege, ORS 40.225. A reference to the advice in the division's notice of proposed rulemaking did not waive the privilege as the fact that the division had sought legal services did not reveal a significant part of the privileged memo.

**September 20, 1999, [Brian Michael](#).** Petition denied for a list of students' grades from a course at Oregon State University. The list was exempt under FERPA, even with the student names redacted, because the requester had knowledge that likely could be used to easily trace some of the grades to specific students.

**December 1, 1999, [Anne L. Nichol](#).** Petition denied for a list of all outstanding and uncashed warrants issued by the state in the amount of \$2,000 or greater in the previous two years. This information was exempt as a report of unclaimed property under ORS 192.355(16), even though the warrants weren't yet reportable. The intent behind the exemption was to allow public bodies time to locate the owners before providing the information to researchers who charged the owners for their services.

**December 17, 1999, [Charles Sheketoff](#).** Petition denied for employment reports prepared by the Employment Department for the Adult & Family Services Division. The Employment Department was not the custodian of these reports under ORS 192.311(2) because it was acting as a limited agent for the division. The division, not the department, determined the parameters and distribution of the reports. Because the department wasn't the custodian, it wasn't obligated to produce the records, unless they weren't otherwise available from the division.

**March 10, 2000, [Steve Suo & Steve Mayes](#).** Petition denied for a fee waiver for Department of Transportation records relating to Y2K computer repairs. The department was constitutionally prohibited from using its Highway Fund to fulfill records requests, and therefore could not waive its fee. While the department had access to other funds, these were all statutorily dedicated for specific uses that did not involve making public records available.

**July 17, 2000, [Pat Forgey](#).** Petition denied for the State Police's sex offender database in electronic form. Because some of this information was exempt, and the software did not permit just the nonexempt information to be exported electronically, the public body was permitted to produce the nonexempt information via screen prints.

**September 5, 2000, [Herbert D. Riley](#).** Petition denied for records generated by the Department of Veterans' Affairs in the course of investigating a complaint of discrimination. The records were created solely at the request of the department's attorneys in order to facilitate the rendition of legal services, and were not intended to be disclosed to third persons. Therefore, the records were exempt under the attorney-client privilege, ORS 40.225.

**November 9, 2000, [Don S. Simpson](#).** Petition granted for a report prepared by the Building Codes Division for the City of Silverton in response to a complaint against the city. The record was not exempt as pertaining to litigation under ORS 192.345(1) because it wasn't prepared in conjunction with any pending litigation. And the record was not exempt as a personnel discipline action under ORS 192.345(12): even though the report included information about Silverton employees, the division compiled the report to regulate the city's building inspection program, not to discipline employees.

**2001–2005**

**January 31, 2001, [Charles Hinkle](#).** Petition denied for records of the Oregon School Activities Association because the association was not a state agency and therefore its denial was not subject to review by the Attorney General. The association was a voluntary consortium of public and private school districts, none of which were state agencies. Its role in regulating high school competition was not an activity traditionally performed by state agencies. The association did not have authority to make binding decisions for state government, did not receive any financial support from state government, and was not subject to supervision or control on a day-to-day basis from state government.

**February 1, 2001, [Leslie L. Zaitz](#).** Petition denied for the director of the Office of Emergency Management's candid assessment of the potential administrative consequences resulting from the accidental activation of a public warning system. This information was exempt as an internal advisory communication under ORS 192.355(1) as the public interest in encouraging frank communications between public officials clearly outweighed the public interest in disclosure: the assessment would not help the public understand the causes contributing to the incident, and disclosure could harm the office's ability to work as part of a cooperative effort with the other entities that oversaw the warning system.

**June 28, 2001, [Leslie L. Zaitz](#).** Petition denied for correspondence between the Department of Education and the Government Standards & Practices Commission related to an ethics investigation. The correspondence possessed by the public officials in the department were not public records as the investigations concerned the officials in their personal capacities.

**August 15, 2001, [Vincent Padgett and Pamela Eller](#).** Petition denied for the results of a State Police polygraph test because the records were exempt as criminal investigatory information under ORS 192.345(3). Although the criminal trial was completed, the public interest didn't require disclosure because public disclosure of the inadmissible polygraph results could affect a jury at a potential re-trial.

**October 31, 2001, [William Miller](#).** Petition denied for fee waiver of \$1,150 where the public body had waived \$1,500 from a related records request from the same requester and the search for records would require hand searching tens of thousands of documents.

**November 13, 2001, [Pat Forgey](#).** Petition denied for the names of undercover law enforcement officers contained in a police report. This information was exempt under ORS 181A.825 as information about an employee while assigned to undercover investigative duties.

**April 5, 2002, [Paul B. Meadowbrook](#).** Petition granted in part for investigatory information gathered by the Teacher Standards & Practices Commission. Information submitted by students was not exempt under ORS 342.176(4) as material not related to disciplinary action even though the information was not factually related to the charges under investigation: the publicly disclosed investigative report that resulted in discipline referred to this information and the commission obtained the information during the investigation that led to discipline.

Some of this same information was not exempt under ORS 192.355(2) because disclosure would not constitute an unreasonable invasion of privacy: the investigator had advised the student providing the information that public disclosure might result during the disciplinary process.

The information subpoenaed from the school district that came from confidential personnel files and that was publicly disclosed in the commission's final order of suspension was not exempt as a transferred record under ORS 192.355(10) because the considerations giving rise to the confidentiality no longer applied. However, the petition was denied in part for the information that had not been publicly disclosed.

And the teacher's settlement offer to the commission was not exempt as confidential information under ORS 192.355(4) : even though the offer was labeled as confidential, the commission never promised confidentiality.

**September 3, 2002, [James Long](#).** Petition denied for records of Oregon Public Broadcasting because it was not a state agency and thus its denial could not be reviewed by the Attorney General. Creating and broadcasting television and radio programs was not traditionally associated with state government; OPB was a private, not-for-profit corporation that had no ability to make decisions binding state agencies; its employees were not public employees; and the governor-appointed members of OPB's board were a minority and subject to removal by the board, not by the governor.

**October 7, 2002, [Jeanyse R. Snow](#).** Petition denied where the requester was the City of Warrenton. Public Records Law provided access only to persons, which did not include public bodies.

**November 19, 2002, [Scott Forrester](#).** Petition denied for records of the Citizens' Utility Board because the board was not a public body. The board advocated for utility consumers, an activity not exclusive to government. The board did not have the authority to resolve or decide any issue of public policy or make binding decisions for government, and was privately funded. And the state had little control over the board: its members were elected by utility consumers, and the board was exempt from many statutes governing public contracting and state financial administration.

**March 29, 2004, [Jim Redden](#).** Petition denied for records of the Oregon Historical Society because the society was not a public body. The society's mission of operating a regional research library was not exclusive to activities traditionally performed by government. The society did not have any authority to make binding governmental decisions, and was largely financed by membership fees, contributions, and publication sales. While the society was statutorily required to perform certain tasks with respect to the Oregon Trail, it was not subject to government oversight and control, and board members were not appointed by the state.

**April 22, 2004, [William Joseph Birhanzi](#).** Petition denied for the records of a Multnomah County Circuit Court proceeding. The court had agreed to provide the stenographic tape of the proceeding, but had never ordered a transcription of the tape and was not required to do so by Public Records Law.

**October 13, 2004, [Gary Johansen](#).** Petition denied for information on the Real Estate Agency's licensees. The agency had already agreed to provide the requester with a CD-ROM containing some of this information, and producing the remaining information would have required IT staff to prepare extensive custom programs.

**October 14, 2004, [Sarah Jeans](#).** Petition denied for fee waiver where the requester's interest in obtaining the record was for personal use in court. This personal interest was not sufficient to show that disclosure would primarily benefit the general public. And the requester's inability to pay was insufficient on its own to require fee waiver.

**December 3, 2004, [Naseem Rakha](#).** Petition denied for records of a state representative. The Attorney General did not have authority under ORS 192.427 to consider a petition for records in the custody of an elected official.

**December 9, 2004, [Jim Redden](#).** Petition denied for governor's office records that had been transferred to the State Archives as the archives had not yet denied the records request. The petition had been filed only ten days after the records request had been submitted, and the archives was permitted reasonable time to consult with the governor's office to determine which records were exempt from disclosure.

**March 23, 2005, [Janie Har](#).** Petition denied for subcontracts executed on behalf of the state by a Department of Transportation contractor. These subcontracts were not public records because the department had not prepared, used, or retained them. And the department's contractual right to access the subcontracts did not give the department ownership.

**May 26, 2005, [Bryan Andrade](#).** Petition denied for the DMV to identify and disclose the state law referenced in a DMV record. Public Records Law did not require the DMV to answer questions about its records by engaging in legal research.

**June 30, 2005, [William J. Mills](#).** Petition denied where the public body had not yet denied the records request: providing a fee estimate to the requester did not constitute a denial, and therefore the Attorney General did not have authority to order disclosure.

#### **2006–2010**

**January 27, 2006, [James W. Laws](#).** Petition denied for the State Police's operations plan that had been used at a state park on Memorial Day weekend. This plan was exempt under ORS 192.345(18) as a specific operational plan in connection with an anticipated threat to individual or public safety. The plan was going to be used again the next year, and disclosure would allow individuals to figure out how to defeat the plan's procedures and methods.

**February 21, 2007, [Lemuel Hentz](#).** Petition denied for records of the Legislative Counsel Committee. While the legislature was in session, it did not qualify as a state agency under Public Records Law, and thus the Attorney General lacked the authority to consider the petition.

**August 8, 2007, [Karen Kirsch](#).** Petition denied for portions of a health insurer's proposed rates and supporting materials that had been submitted to the Insurance Division. This information was exempt as a trade secret under ORS 192.345(2) and the Uniform Trade Secrets Act. The information had been compiled from specialized knowledge about the insurer's business that

was known only by the insurer's actuaries. And disclosing the information would allow the insurer's competitors to formulate their own rates without having to spend the amounts the insurer did, and otherwise obtain a competitive advantage.

**November 21, 2007, [Allen Van Dyke](#).** Petition denied for a report prepared by the Department of Fish & Wildlife's attorneys in response to complaints filed with BOLI. The report was exempt under the attorney-client privilege, ORS 40.225. Although ORS 192.355(9)(b) provided an exception to the privilege for certain factual information, that exception did not apply because the report had been compiled for an administrative hearing initiated against the department, and the department had not made any public statement partially disclosing information from the report.

**November 23, 2007, [Amy Hsuan](#).** Petition granted in part for a settlement agreement between the Teacher Standards & Practices Commission and a teacher. The settlement was not exempt under ORS 342.176(4) because it reflected a final decision by the commission, and was therefore not a part of the underlying investigation.

**January 16, 2008, [William Harbaugh](#).** Petition granted for the salaries of college presidents contained in a consultant's report to the Oregon University System. This information was not exempt as confidential information under ORS 192.355(4). Even though the consultant had assured surveyed colleges that this information would be kept confidential, the information could not reasonably be considered confidential: public colleges' executive compensation information was publicly available through the public records laws of the various states, private colleges' information was publicly available from the IRS, and at least one source compiled and published this information on an annual basis.

**February 20, 2008, [Ryan Frank](#).** Petition denied for records provided to the State Treasurer's office by a private investment vehicle. These records were exempt under ORS 192.355(14)(a) as relating to actual or proposed investments in a privately placed investment fund.

**March 4, 2008, [Brent Walth](#).** Petition granted for records documenting a meeting between a Portland State University professor and a state senator. These documents qualified as public records: even though the professor was acting as the head of a nonprofit, not in his public capacity with PSU, the documents related to the conduct of the public's business because the state senator may have been acting as a public official during the meeting. And

PSU had “used” the documents because the professor acted for PSU in reliance on this information by resigning from the nonprofit in order to insulate PSU from potential negative consequences.

**March 13, 2008, [William Harbaugh](#).** Petition denied for fee waiver where the fee had already been paid and a previous order had addressed the same issue. Although the Attorney General had authority to reconsider previously issued public records orders, and the authority to order public bodies to refund fees previously collected, the petition did not present any new information that would be relevant to assessing the reasonableness of the denial at the time the denial was made.

**April 11, 2008, [Jerry Dusenberry](#).** Petition denied for the release date of an inmate. This information, when requested by another inmate, was exempt under ORS 192.355(5) as disclosure would substantially prejudice or prevent the Department of Corrections from carrying out its functions. Inmates used information about the nature of other inmates’ crimes as extortion or to target certain inmates.

**May 20, 2008, [William Harbaugh](#).** Petition denied where the delay in the public body’s response was partly due to the requester failing to comply with the publicly available procedure for making a public records request.

**July 11, 2008, [Michael Moradian](#).** In order to sustain a denial of a request for the number of students receiving specific grades in particular classes, the University of Oregon would have the burden of showing that disclosure would allow the students’ identities to be easily traceable (and therefore exempt under FERPA).

**July 24, 2008, [Tom Rios](#).** Petition denied for payroll records of a subcontractor of the Oregon Bridge Delivery Partnership, which itself was a contractor of the Department of Transportation. Even if the partnership were a public body with respect to some of its functions, it did not possess the payroll records pursuant to any governmental functions. The partnership was a private entity formed by two private entities, reporting certified payroll information was not a role traditionally exclusive to governmental entities, and the partnership was not subject to ODOT control relevant to the reporting of this payroll data.

**September 3, 2008, [Jacob Barrett](#).** Petition denied for records of the Oklahoma Department of Corrections requested by an inmate. The Oklahoma DOC was not an Oregon public body and therefore was not subject to Public Records Law, despite a provision in the Interstate

Corrections Compact that an inmate transferred across state lines did not lose legal rights they would have enjoyed had they remained in Oregon.

**October 27, 2008, [William Harbaugh](#).** Petition denied where the public body had not yet issued any denial. Regardless of whether the public body had complied with the requirement to acknowledge public records requests “as soon as practicable and without unreasonable delay,” a lapse of approximately two weeks did not support a finding of constructive denial.

**November 7, 2008, [Frank Mussell](#).** Petition denied for investigatory records of the Board of Nursing. The records were exempt under ORS 676.175 because the board had not yet decided whether to pursue disciplinary action. The fact that the requester was the attorney of the licensee under investigation did not affect the analysis.

**February 24, 2009, [Charlie Ringo](#).** Petition denied as premature where the underlying request was reasonably perceived by the public body as a request for discovery in an administrative matter, not as a public records request. The two types of requests required agencies to weigh different considerations, and public bodies were not obligated to treat every apparent discovery request as a request for records under the Public Records Law.

**April 24, 2009, [William Harbaugh](#).** Petition denied for fee waiver where the public body had reduced its fee by 25%. Under circumstances specific to this petition, the fact that the public body had initially provided a cost estimate that turned out to be based on an incomplete set of records did not affect the analysis; therefore, the requester would be required to pay the additional cost to obtain the remaining records.

**May 19, 2009, [George Miller](#).** Petition denied for investigatory records of the Veterinary Medical Examining Board. The records were exempt under ORS 676.175 as the board had not issued a notice of intent to impose discipline on the licensee, and the requester failed to show by clear and convincing evidence that the public interest required disclosure. The interest in learning about the death of the requester’s animal was a personal interest, not a public one. And the interest in ensuring that the board properly handled the investigation was common to all investigations, and thus could not be used to distinguish this particular investigation.

**September 10, 2009, [Will Rogers](#).** Petition denied for fee waiver of \$622.01 where the public body had agreed to reduce its fee by 25%. There was a substantial public interest in records related to Oregon State University’s decision to remove a campus newspaper’s distribution bins

from campus, but the volume of records was large and because the requester was the campus newspaper affected, at least some of its interest in these records was a private interest, not a public one.

**October 20, 2009, [Daniel C. Re](#).** Petition granted in part for PERS records showing whether former Governor Goldschmidt was a member on a certain date, and whether then-Governor Kulongoski was a PERS member. This information was not exempt under ORS 192.355(12) because the fact of being a PERS member did not qualify as a nonfinancial membership record. This information was not exempt ORS 192.355(2) because disclosure would not constitute an unreasonable invasion of privacy: the fact of PERS membership was automatic and involuntary for most members, and thus membership could be inferred based on an individual's employer. The petition was denied in part for information on whether the state or another employer picked up contributions on behalf of Governor Kulongoski: this information was exempt as employee financial records under ORS 192.355(12).

**March 26, 2010, [Les Zaitz and Ted Sickinger](#).** Petition denied for records of travel expenses incurred by an investment LLC in sending a Treasury employee to the LLC's annual meeting. These records were not owned, prepared, used, or retained by the Treasury and therefore were not public records. The Treasury's right of access to these records under a partnership agreement did not constitute ownership.

**April 8, 2010, [Tom Dimitre](#).** Petition granted for the Department of Fish and Wildlife to reconsider its decision to deny a fee waiver. The department could not rely on a "budget crisis" to deny every request for a fee waiver. Rather, it had to assess each waiver or reduction request independently.

**April 26, 2010, [Rachel Bachman](#).** Petition granted for the consideration Nike agreed to pay the University of Oregon in exchange for the rights to use the university's sports programs in Nike's marketing. Even if this information were exempt as a trade secret under ORS 192.345(2) and the Uniform Trade Secrets Act, the public interest required disclosure. Without access to this information about the sale of a public asset, the public would have no way of evaluating whether the university had received adequate consideration.

**May 17, 2010, [Peter Ferris](#).** Petition granted for the Housing and Community Services Department to reconsider its decision to deny a fee waiver. Disclosure of records to an organization that publicly distributed

news and policy proposals related to manufactured homes, and that would enable homeowners to evaluate a dispute resolution program, would primarily benefit the general public. Therefore, the department was required to assess whether denial of the fee waiver was reasonable under the totality of the circumstances.

**June 8, 2010, [Les Zaitz](#).** Petition granted in part for the public body to provide a cost estimate that did not include the time to contact third parties to secure their permission to disclose the records; that time was not connected to the public body's determination of whether the records were exempt or not, and therefore could not be charged to the requester.

**June 16, 2010, [Ross Day](#).** Petition granted for PERS records showing the effective date of former Governor Kitzhaber's retirement, and the amount of the retirement benefit. This information was not exempt under ORS 192.355(2) because disclosure would not constitute an unreasonable invasion of privacy: the former governor was running for election as governor, which indicated a diminished expectation of privacy; and he was required as a candidate to file a statement of economic interest, which would reveal information about any PERS payments.

**September 27, 2010, [Daniel Re](#).** Petition granted for the date that a state representative joined PERS. This information was not exempt under ORS 192.355(12) as a PERS nonfinancial membership record.

**October 1, 2010, [Charlie Hinkle](#).** Petition granted for records showing all the PERS retirees whose annual retirement benefits exceeded \$100,000. This information was not exempt under ORS 192.355(2) because disclosure would not constitute an unreasonable invasion of privacy: the fact that these retirees might receive unwanted solicitations was not sufficient to show such an invasion, and there was no empirical evidence linking disclosure of this information to identify theft. This information was not exempt under ORS 192.355(12) as PERS employee financial information because it pertained to retirees, not current employees.

**October 19, 2010, [Lee Van der Voo](#).** Petition granted in part for investigatory records of the Board of Dentistry relating to a licensee. Most of the records were not exempt under ORS 676.175 because the requester had shown by clear and convincing evidence that the public interest required disclosure: the details underlying the investigation had already been publicly disclosed through a detailed ruling by an arbitration panel in a civil suit.

**November 3, 2010, [Erin Mills](#).** Petition granted for a tort claim notice filed with the City of Hermiston. The notice was not exempt as a litigation record under ORS 192.345(1) because the notice was submitted by a potential adversary in litigation and therefore was “not remotely analogous” to the attorney-client privilege or the work product protection. The notice was not exempt as criminal investigatory information under ORS 192.345(3) because the city’s investigation was being done for insurance purposes, not as part of a criminal investigation.

#### **2012–Current**

**June 20, 2012, [Noelle Crombie](#).** Petition granted in part for the addresses of a marijuana grow site and the locations where cash was recovered on the property, information that was contained in State Police reports related to criminal charges brought against the grower. This information was not covered by the personal privacy exemption, ORS 192.355(2): the grower plead guilty to charges related to his marijuana production, and his privacy did not extend to criminal conduct. While such information with respect to an operating grow site could subject the site to criminal victimization, this particular grower was disqualified from further participation in growing under the medical marijuana program.

The petition was denied in part for the identities of medical marijuana patients connected to that grow site, as that information was exempt under ORS 192.355(2). Individual medical information was generally regarded as highly private, and there was no reason to believe that the patients were complicit in the unlawful activity.

**June 22, 2012, [John Tollefsen](#).** Petition granted where the records request had been pending for ten months. This delay constituted a constructive denial, and therefore the public body had to produce all nonexempt records.

**December 14, 2012, [Patrick Webb](#).** Petition granted for the results of a toxicology test requested by the State Medical Examiner. This information was not exempt as a medical examiner’s report under ORS 192.345(36) because the public interest required disclosure: the public had a significant interest in determining the causes of a car accident that killed the subject of the toxicology test and seriously injured another person.

**March 11, 2013, [Celeste Meiffren](#).** Petition granted for annual employment reports submitted by recipients of property tax abatements to Business Oregon in order to demonstrate compliance with the job-creation obligations they undertook in exchange for the incentives. This information

was not exempt under ORS 285C.615(4) because that provision's grant of permission for disclosure of aggregate figures could not be construed to imply that all other types of figures were exempt from disclosure. The information was not exempt under ORS 285C.615(5) as specific data concerning the financial performance of individual firms because this exemption applied to information that could be meaningfully applied to evaluate a firm's overall financial performance, not specific information about labor costs.

This information was also not exempt under ORS 192.345(2) as trade secret because the public interest required disclosure: the public had a significant interest in learning about the return on the public's investment in these companies through tax incentives. In addition, the information was not trade secret with respect to any submitting firms that had failed to check a box requesting confidential treatment of the materials.

**April 15, 2013, [Celeste Meiffren](#).** Petition granted in part for Department of Revenue records related to tax incentives in designated enterprise zones. The number of a business's employees both before and after the zone was established were not exempt under ORS 192.345(2) as trade secrets because the public interest required disclosure: the public had a significant interest in learning about the large public investment in these zones. The petition was denied in part for the average annual compensation a business paid its employees and the investment cost of property placed in service in a given year. This information was exempt from disclosure under ORS 285C.145(4).

**September 13, 2013, [Kyle Iboshi](#).** Petition granted for information regarding an audit finding that an individual had continued to receive food stamps after winning more than \$900,000 in the lottery. Information on the specific amount of winnings, how long the individual continued to collect food stamps, and how much in food stamp benefits had been paid to the individual following the winnings were not exempt under federal regulations governing the food stamp program because this information did not originate from the client household. This information was not exempt under ORS 411.320 because that statute applied only to DHS, not to the Audits Division of the Secretary of State. And this information was not exempt under ORS 192.355(2) because it was not an unreasonable invasion of privacy for the public to learn details about public benefits paid to an individual who clearly did not require them.

**January 29, 2014, [Robert MacKay](#).** Petition granted for the State Board of Bar Examiners' meeting minutes. An Oregon Supreme Court Rule for Admission of Attorneys that prohibited the board from disclosing its records was not incorporated as a public records exemption by ORS 192.355(9)(a). However, the order acknowledged the possibility that information in the minutes might unduly hinder the ability of the judiciary to control admission to the Bar, and noted that this type of information could be redacted.

**March 14, 2014, [Rob Davis](#).** Petition granted for hazardous materials movements forms submitted to the Department of Transportation. This information was not exempt under ORS 192.345(22) as information that would permit unlawful disruption or interference with services because the public interest required disclosure: there was a significant public interest given the number of accidental explosions of crude oil trains; and the records dealt with past shipments and were relatively nonspecific, indicating a low risk of disruption to future shipments.

**March 20, 2014, [Lisa Arkin](#).** Petition granted for records relating to an incident of overspray of pesticides. These records were not exempt under two federal statutes because those statutes did not prohibit the records from being disclosed, and thus were not incorporated as exemptions under ORS 192.355(8).

**April 25, 2014, [Molly Young](#).** Petition denied for the identities of complainants to BOLI about a City of Portland sick leave ordinance. This information was covered by the personal privacy exemption, ORS 192.355(2): disclosure would create the risk that the complainants' employers would retaliate, and thus would constitute an unreasonable invasion of privacy.

**July 3, 2014, [Everton Bailey, Jr.](#)** Petition denied for portions of a State Lottery report that came from a probable cause affidavit filed by a police officer investigating child abuse. This information came from a law enforcement record generated in investigating child abuse, and therefore was exempt under ORS 419B.035.

**November 17, 2014, [Patrick Braatz](#).** Petition granted in part for portions of a complaint submitted to the Board of Dentistry that addressed concerns about the business practices of managed care organizations, and for the corresponding discussion by the board in executive session. That information was not exempt under ORS 676.175 because clear and

convincing evidence showed that the public interest required disclosure. Disclosing this information with the complainant's and licensees' names redacted would not implicate the interests that the exemption is designed to protect, and there was a high public interest in understanding how managed care organizations were affecting the field of dentistry.

**July 1, 2015, [Carli Brosseau](#).** Petition granted in part for the name, age, date of death, and cause of death of homicide victims maintained by the State Medical Examiner. This information was not exempt under ORS 192.345(36) because the public interest required disclosure: reliable data on homicide victims would contribute to policy discussions on public health, public safety, and criminal justice issues related to homicide, and this information is typically publicly disclosed by law enforcement. The petition was denied in part for all the information included in these medical examiner reports. Much of this information was sensitive and/or medical in nature, and disclosure would deter future victims' families from cooperating with medical examiner investigations.

**July 14, 2015, [Wendy Baker](#).** Petition granted for individual shareholder records that had been obtained by the Department of Consumer & Business Services in the course of reviewing the proposed acquisition of the corporation. This information was not exempt under ORS 192.355(2) because disclosure would not constitute an unreasonable invasion of privacy: the public interest in learning about a transaction related to the treatment of Medicare and Medicaid patients was significant, and the department obtained the records in the course of its statutory duty to review the transaction. The general desire of the shareholders to remain anonymous was not sufficient to show an unreasonable invasion of privacy, and the alleged harms that disclosure would cause were unsubstantiated.

**April 11, 2016, [William T. Harbaugh](#).** Petition denied for records of PURMIT, a risk management and insurance trust among public universities, because it was not a state agency and therefore any denial was not subject to review by the Attorney General. None of the individual members of PURMIT were state agencies, it was not created by state statute, and it was not administered or directed by a state agency.

**July 8, 2016, [Rob Davis](#).** Petition for fee waiver granted in part for the \$120 cost to retrieve files from a private storage facility. The public body's denial was unreasonable under the totality of the circumstances because it could have contracted with a state-run file center that did not charge to retrieve files.

**September 12, 2016, [Gordon Friedman](#).** Petition granted for PERS to consider a request for fee waiver. A statute prohibiting PERS from diverting its fund for “any use that is not for the exclusive benefit of members and their beneficiaries,” did not prohibit PERS from waiving or reducing a fee when required by Public Records Law. The statutory prohibition did not require noncompliance with laws that applied to PERS on the same terms as other public bodies. In addition, PERS was permitted to use part of its fund to pay for administrative expenses, which included complying with such generally applicable laws as Public Records Law.

**March 21, 2017, [Les Zaitz](#).** Petition granted in part for the mental health records of an Oregon State Hospital patient that were in the custody of the Psychiatric Security Review Board for use in a public hearing on whether the patient should remain under the board’s jurisdiction.

The records were not exempt as transferred records under ORS 192.355(10) because the reasons for the privacy of medical records in the hospital’s custody did not apply to the board’s duties, which were concerned with ensuring public safety.

And the records were not exempt under ORS 192.355(2) because disclosure would not constitute an unreasonable invasion of privacy and there was clear and convincing evidence that the public interest required disclosure: The patient had admitted at the board’s hearing to faking mental illness for 20 years, and shortly after being released from the board’s jurisdiction was arrested and indicted on murder charges. In addition, the records had been partially described through testimony at the public hearing, and had been used by the patient’s attorney as evidence that the patient was not actually mentally ill.

**May 16, 2018, [Shasta Kearns Moore](#).** Petition granted for information from a Teacher Standards and Practices Commission investigation into a teacher. The executive director’s recommendation on discipline was not exempt as an internal advisory communication under ORS 192.355(1): Portions of the recommendation were purely factual in nature and therefore had to be disclosed. For the portions that contained frank opinions, the commission did not show that disclosure would chill candid discussions. In particular, the recommendation was “largely clinical and detached” and did not “contain any controversial opinions or conclusions.”

Personal health information about the teacher was not exempt under HIPAA or ORS 192.558 because the commission was not a covered entity for

purposes of those laws. And that information was not exempt under ORS 192.355(2) because disclosure would not constitute an unreasonable invasion of privacy: the information did not reveal any diagnoses, intimate or embarrassing medical details, medications, or treatment plans, and the teacher voluntarily offered this information to the commission in order to help resolve the complaint in his favor. In addition, clear and convincing evidence demonstrated that the public interest required disclosure: the complaint involved serious allegations implicating student safety, and the health information may have influenced the commission's decision on discipline.

## APPENDIX F – STATUTES AFFECTING DISCLOSURE

This appendix lists some of the Oregon statutes outside of ORS 192.345 and 192.355 that may be incorporated as public records exemptions by ORS 192.355(9). The Attorney General maintains a comprehensive list at <https://justice.oregon.gov/PublicRecordsExemptions/>. Some of these statutes are applicable only under certain circumstances; some are conditional on the public interest; and some give discretion to the public body on whether or not to disclose. Check the language of the specific statute to determine the scope of any potential exemption.

ORS	PROTECTED MATERIAL	AGENCY
1.180(9)	Court security plans	Judicial Department (OJD)
1.303(6)	Documents related to complaint about judge's disability	Judicial Fitness & Disability Comm'n
1.425(2)	Testimony and evidence in hearing on judge's temporary disability	Judicial Fitness & Disability Comm'n
1.440(1)	Investigation of a judge's conduct or disability	Judicial Fitness & Disability Comm'n
3.450(3)	Drug court program records	OJD
9.080(2)(a)	Professional Liability Fund claims	Oregon State Bar (OSB)
9.568(3)	Information provided to certain assistance committees	OSB
10.215(1)	Jury lists, source lists	OJD
18.048(2)	Name and address of the person to whom criminal restitution is ordered, upon request	OJD
25.020(8)	Certain personal information in a paternity judgment, upon finding of risk	OJD; Dep't of Justice (DOJ); District Attorneys
25.260(2)	Child support records	DOJ, District Attorneys
25.792	Employer reports on hiring	DOJ
36.224(6)	Mediation communications	State agencies
36.226(1)	Mediation communications	Local public bodies
40.225	Attorney-client communications	General
40.230	Psychotherapist-patient communications	General
40.235	Physician-patient communications	General
40.240	Nurse-patient communications	General
40.245	School employee-student communications	General

40.250	Social worker-client communications	General
40.262	Counselor-client communications	General
40.275	Identity of informant in criminal investigation	Law Enforcement; Legislature
41.675	Records of a peer review body	Health care providers
41.685	Records obtained or prepared in evaluating EMS system	General
56.100	EDP programs and media used to store business registry information	Secretary of State (SOS)
56.203(4)	Communications with the Office and records prepared by the Office	Office of Small Business Assistance
90.771	Information regarding landlord/tenant disputes	Housing & Community Services Department
94.974	List of campground members	Real Estate Agency
97.977(4)	Anatomical donor registry	Oregon Dep't of Transportation (ODOT) ; Oregon Health Authority (OHA)
106.041	Social Security numbers on a marriage application or license	County Clerks
107.179(4)	Child custody communications during mediation	General
107.600	Domestic relations conciliation communications	OJD
107.785	Domestic relations mediation records/proceedings	OJD
107.840	Social Security Numbers in petitions for marital annulment, dissolution, or separation	OJD
109.308	Names and addresses of petitioners for adoption	OJD
109.315	Petition for adoption of a minor	OJD
109.319	Record of an adoption case	OJD; Department of Human Services (DHS)
109.445	Information acquired by any voluntary adoption registry	DHS
109.503	Adoption information used in search for birth parents	DHS
109.767(5)	Identifying information in a child custody proceeding	OJD

118.525	Estate tax returns	Department of Revenue (DOR)
124.075	Identity of person reporting elder abuse	DHS; Law Enforcement
124.085	Elder abuse complaints and investigative reports	DHS
124.090	Elder abuse investigative reports and records	DHS
125.240(2)	Professional fiduciary criminal records checks	OJD
132.270	Recordings of grand jury proceedings	District Attorneys
133.723	Application for wiretap	OJD
135.139	Communicable disease test results for criminal defendants	District Attorneys
135.155	Record of preliminary hearing and statement of criminal defendant	OJD
137.077	Presentence reports	OJD
146.184	Identifying information about a missing person received from medical professional	Law Enforcement
146.780	Required reports of nonaccidental injuries suffered by a patient	Law Enforcement
147.115	Crime victim compensation records	DOJ; Worker's Compensation Board
151.495	Information from person requesting appointed counsel to verify indigency	OJD
163A.225	Sex offender information	OSP
165.673	Phone numbers obtained from pin register or trap and trace device	Law Enforcement
166.412(7)	Information used to conduct criminal history record check on firearm purchase	Oregon State Police (OSP)
171.778	Preliminary review phase of proceeding	Government Ethics Comm'n (OGEC)
173.230	Matters submitted in confidence to legislative counsel	Legislature
173.455	Confidential draft measures provided by legislative counsel	Legislature
173.850	Individually identifiable information from income tax returns	Legislature

173.855	Confidential draft measures provided to legislative revenue officer	Legislature
176.309	Records of a disability evaluation panel on the governor	Disability Evaluation Panel
176.765	Energy resource information compiled for emergency plan	Governor
177.180	Investigation of a report to the government waste hotline, until completed	SOS
179.495	Individually identifiable health information of inmates	Dep't of Corrections (DOC)
179.505	Individually identifiable health information of patients	Public Health Care Providers
180.075	Information obtained by subpoena	DOJ
180.320	Information necessary to establish child support obligation or paternity	DOJ
181A.155	Blood samples	OSP
181A.195	Criminal offender information	OSP
181A.200	Criminal records compiled for authorized agencies doing background checks	DHS ; OHA
181A.220	Fingerprints, photos, records, reports compiled under specific provisions	OSP
181A.670	Photo of public safety officers	Department of Public Safety Standards & Training (DPSST)
181A.825	Information about undercover law enforcement officers	Law Enforcement
181A.830(2)	Photo of public safety employee	General
181A.830(3)	Personnel investigation of public safety employees	General
181A.835	Peer support counseling information	Law Enforcement
190.050	Geographic databases of intergovernmental groups	Intergovernmental Groups
192.365	Personal contact info of home care workers, operators of child care facilities or adult foster homes, and exempt family child care providers	DHS; Office of Child Care
192.371	Public employee ID card or badge	General
192.385	Recordings of internal investigation interviews of public safety officers	Law Enforcement

192.472	Communications during facilitated dispute resolution	Public Records Advocate
192.537	Genetic information and DNA sample	General
192.539	Identity of subject of genetic test	General
192.558	Individually identifiable health information	Health Care Providers; State Health Plan
192.586	Private loan records provided to Treasurer in connection with state investment	Treasurer
192.650	Minutes of executive session	General
192.844	Address Confidentiality Program applicant information	General
242.722	Examination papers of firefighter applicants	Civil Service Commissions
243.960	Information re applicant for benefits under Public Safety Memorial Fund	DPSST
244.260	Case-related materials while preliminary review is pending	OGEC
247.965	Voter's home address , if personal safety is in danger	Counties
247.973	Copying the signatures on voter registration cards	SOS; ODOT
251.145	Voters' pamphlet material (for limited duration)	SOS
251.430	Voters' pamphlet material (for limited duration)	Counties
268.357	Software product programming source codes, object codes, and geographic databases or systems	Metropolitan Service Districts
279B.060(6)	Competitive sealed proposals	General
279C.410(1)	Contract proposals	General
279C.815	Reports and returns used to determine prevailing rates of wages	Bureau of Labor & Industries (BOLI)
279C.850	Contractor/subcontractor payroll records	BOLI
285C.615	Individual performance of a firm re strategic investment program	Business Oregon
285C.620	Application and negotiations re participating in strategic investment program	Business Oregon
286A.190	Records of bond ownership	Treasurer

291.223	Governor's budget materials	Legislature
295.018(8)	Collateralization requirement for bank depository, and amount of collateral	Treasurer
297.060	Tax returns used in audits	SOS
305.192	Records uses to appraise or assess industrial property	DOR
308.290	Personal property tax returns	DOR
308.411(4)	Info used to determine real market value of industrial plants	DOR; County Assessor
308.413	Info used to determine real market value of industrial plants	DOR; County Assessor
308A.074	Application for farm use special assessment	County Assessor
308A.077	Proof of authority to apply for farm use special assessment	County Assessor
314.835(1)	Particulars of income tax returns	DOR
319.190(2)	Info received re motor vehicle fuel tax	ODOT
320.340	State transient lodging tax records	DOR
321.682(1)	Forest products harvest tax information	DOR
326.565	Student records	Department of Education (ODE); School Districts
329A.390	Identifying info of complainant on child care facility	Office of Child Care
332.061(2)	Confidential student information used in hearing to expel minor student	District School Boards
339.239	Identity of reporter to tip line for student safety	OSP
339.323(1)	Info about youth offenders	School Districts
339.326(6)	Info about juvenile court proceedings or transfer student's history	School Districts
339.378	Info about substantiated abuse reports in job applicant's history	School Districts
339.388(5)	Substantiated report of abuse against a school employee	School Districts
339.388(9)	Personally identifiable student information in school employee disciplinary record	School Districts

341.290(17)	Faculty records relating to conduct, personal and academic evaluations, disciplinary actions	Community College Districts
342.176	Investigation information	Teacher Standards & Practices Comm'n (TSPC)
342.850	Teacher's personnel file	School Districts
344.530	Vocational rehabilitation records	DHS
344.600	Info on persons receiving vocational rehabilitation	DHS
346.165	Register of persons who are blind	Comm'n for the Blind
350.278	Student's Social Security number	Universities
350.280	Social Security number of community college student	Community Colleges
352.226	Personnel records	Universities
367.804(5)	Oregon Innovation Partnership records - information related to transportation project	ODOT
367.804(6)	Oregon Innovation Partnership records - sensitive business, commercial or financial information	ODOT
383.025	Sensitive business information related to study of tollway projects	ODOT
403.135	Automatic telephone number identifications received by public safety answering points	Office of Emergency Management
409.225	Child welfare records containing individually identifiable information	DHS
410.150	Records on recipients of public assistance	DHS
410.480	Home health services recipient information	DHS
410.535	Long-term care client information	DHS
411.320	Public assistance records	DHS
411.335	Names of persons receiving public assistance	DHS
412.094	Info on parents of children receiving public assistance	DHS
418.250	Records of child-care agencies pertaining to children under custody of the state	DHS

418.642	Identifying information about person who maintains foster home	DHS
418.714(10)	Information held/used by Domestic Violence Fatality Review Team	DHS
418.747(5)	Info obtained in investigating child abuse	DHS
418.794	Videotapes produced in investigating child abuse	DHS
418.795	Child Fatality Review Team records	DHS
419A.100	Information reviewed for action/recommendation by local Citizens Review Boards	Local citizens review boards
419A.255	Record of juvenile case	OJD
419A.257	Record on a youth's history and prognosis	Oregon Youth Authority
419A.262	Expunged information from juvenile record	General
419B.035	Child abuse records	DHS
421.213	Inmate transfer records	DOC
423.430	Ombudsman complaints/information	DOC
426.160	Commitment hearing records	OJD
426.370	Commitment investigation information	Community Mental Health Programs
430.763	Mentally ill or developmentally disabled abuse reports	DHS
431A.090	Data received or compiled by the State Trauma Advisory Board	OHA
431A.865	Information in Prescription Monitoring Program	OHA
432.350	Vital records and reports in the custody of the State Registrar of the Center for Health Statistics	OHA
432.530	Cancer registry system information	OHA
433.008	Info obtained in investigating reportable disease or disease outbreak	OHA; Local Public Health Administrators
433.045(3)	Subject of HIV related test	Health Care Providers
433.123	Information related to a petition for quarantine	OHA; Local Public Health Administrators
433.423(2)	Identity of persons with infectious diseases	OHA

441.055	Info obtained by peer review committee	Oregon Medical Board (OMB)
441.057	Info obtained in investigating standard of care in health care facility	OHA; DHS
441.407	Long-term care resident names and complainant names	DHS
441.650(7)	Names related to complaint of abuse of a resident in long-term care facility	DHS
441.660	Long-term care patient abuse investigation photos	DHS
441.671	Long-term care patient abuse records	DHS
442.846(1)	Patient safety data and reports	Oregon Patient Safety Comm'n
443.355(3)	Info obtained in investigating home health agencies	OHA
444.330	Identities of children reported to diabetes database	OHA
459A.050(7)	Customer lists and specific amounts of materials collected by recycling facilities	Dep't of Environmental Quality (DEQ)
461.180(6)	Specific recommendations from report on security procedures	State Lottery
465.015(6)	Hazardous waste reduction plans	DEQ
465.250(5)	Hazardous waste trade secrets	DEQ
465.300	Financial assistance request records for cleanup costs	DEQ
466.060(2)	Certain information in waste treatment or disposal permit application	DEQ
466.090	Certain hazardous waste information	DEQ
466.800	Certain information regarding underground storage tanks	DEQ
468.095(2)	Pollution control information	DEQ
468.963	Environmental audit report	DOJ; District Attorneys
469.090	Energy producer records	Dep't of Energy (DOE)
469.560(2)	Certain information on regulation of energy facilities	DOE
475B.541	Security plans of marijuana producers, processors, wholesalers, or retailers; addresses where marijuana is produced, processed, or stored	Oregon Liquor Control Comm'n (OLCC)

475B.882	Names of marijuana registry cardholders and their caregivers	OHA
475B.885	Personally identifiable info on medical marijuana grow sites, processing sites, or dispensaries	OHA
476.090	Info obtained in certain fire investigations	State Fire Marshal
517.705	Mineral production records	Dep't of Geology & Mineral Industries (DOGAMI)
520.097	Well reports	DOGAMI
522.365	Geothermal well reports	DOGAMI
537.762(4)	Well reports	Water Resources Dep't
571.057(2)	Nursery license application	Dep't of Agriculture (ODA)
618.506(2)	Security seal violation notice	DOJ; District Attorneys
633.077(2)	Commercial feed tests	ODA
633.364	Fertilizer registration information	ODA
634.550	Medical information of Pesticide Analytical & Response Center	ODA
646.574	Do-not-call list registrant information	DOJ
646.632(2)	Trade practice violation notice	DOJ
646.836	Antitrust investigation records	DOJ
646A.164	Investigation re service contracts	DCBS
654.062(4)	Identity of complainant of workplace safety & health violation	DCBS
654.120	Trade secrets obtained in investigating workplace safety matters	DCBS
656.248(5)	Health insurer info used to develop fee schedules	DCBS
656.327(4)	Worker's compensation treatment review records	DCBS
657.665	Records on unemployment insurance, employment service, and labor market information programs	Employment Department (OED)
657.734	Individual record information in workforce reporting system	OED
659A.218	Whistleblower identity	General
660.318	Workforce investment records	Community Colleges & Workforce Development

660.339	Workforce investment records	Local Workforce Investment Boards
671.550(2)	Landscape contractor investigation records	Landscape Contractors Board
673.415	Signature block of income tax return	Board of Accountancy
673.710	Names and addresses in tax returns	Board of Tax Practitioners
673.730(3)	Investigation information	Board of Tax Practitioners
675.075	Investigatory information	Board of Psychology
675.300	Investigatory information	Occupational Therapy Licensing Board
675.540(4)	Investigatory information	Board of Licensed Social Workers (BLSW)
675.580	Client communications	BLSW
675.583	Violation of professional standards information	BLSW
675.585	Investigatory information	BLSW
675.745	Investigatory information	Board of Licensed Professional Counselors & Therapists
675.765	Client communications	Board of Licensed Professional Counselors & Therapists
676.165	Investigatory information	Health professional regulatory boards
676.175	Investigatory information	Health professional regulatory boards
676.405(2)	Personal contact info of health professionals	Health professional regulatory boards; Health Licensing Office
676.410(4)	Healthcare workforce information	OHA
676.595	Investigatory information	Health Licensing Office
677.425	Investigatory information	OMB
678.126(1)	Investigatory information	Board of Nursing
679.140(9)	Investigatory information	Board of Dentistry
679.280(1)	Reports on condition of dental treatment	Board of Dentistry
679.320	Investigatory information	Board of Dentistry
682.220	Investigatory information regarding ambulance services	OHA

683.165(1)	Investigatory information	Board of Optometry
683.335(2)	Reports of suspected violations	Board of Optometry
684.100(10)	Investigatory information	Board of Chiropractic Examiners (OBCE)
684.185(7)	Peer review information	OBCE
685.115	Investigatory information	Board of Naturopathic Medicine (OBNM)
685.205(6)	Peer review information	OBNM
686.135 (3)	Investigatory information	Veterinary Medical Examining Board
687.081(9)	Investigatory information	Board of Massage Therapists
688.230	Reports of suspected violations	Physical Therapist Licensing Board
688.525(3)	Investigatory information	Board of Medical Imaging
688.605	Investigatory information	Board of Medical Imaging
689.455	Investigatory information	Board of Pharmacy
692.180(5)	Investigatory information	Mortuary & Cemetery Board
692.230(4)	Investigatory information	Mortuary & Cemetery Board
697.732	Debt consolidator investigations	DCBS
701.246	Identifying information in license application	Construction Contractors Board
703.473	Investigator client files and personal information	DPSST
703.480	Investigatory info on investigators	DPSST
705.137	Regulatory records	DCBS
706.720	Records obtained in administering the Bank Act	DCBS
706.730	Depositor names and amounts	DCBS
723.118	Records obtained in regulating credit unions	DCBS
731.264	Investigatory info on insurers	DCBS
731.312	Records obtained in examining or analyzing an insurer	DCBS
731.750	Records re material acquisitions	DCBS
731.752	Records re adequate capital or surplus	DCBS

731.762	Insurance compliance self-evaluative audit record	DCBS
732.586	Records used to determine an insurer's financial condition or compliance with the Insurance Code	DCBS
732.230	Order re curing an impairment	DCBS
734.650	Reports by the Insurance Guaranty Ass'n re insolvency	DCBS
734.830	Request by Life & Health Insurance Guarantee Ass'n to examine insurer	DCBS
735.425	Required info from surplus line licensees	DCBS
735.430(1)	Examination of surplus lines licensees	DCBS
743.018	Trade secrets in life and health insurance rate filings	DCBS
744.079(9)	Info re termination of insurer's relationship with producer	DCBS
744.087	Compensation agreements for insurance producers	DCBS
744.346	Names of policyholders and certificate holders re life settlement contracts	DCBS
756.075(4)	Utility and carrier investigation records	Public Utility Comm'n
777.793	Commercial or financial information	Export trading corporations
777.795	Trade secrets and sensitive business info of private entity	Export trading corporations
802.177	Personal information in motor vehicle records	ODOT
802.195	Social security numbers in motor vehicle records	ODOT
802.220(1)	Records on undercover law enforcement vehicles	ODOT
807.115	Duplicate images of DMV photographs	ODOT
807.710(5)	Medical impairments and health care provider reports	ODOT
807.725	Info on fictitious driver licenses used by undercover law enforcement	ODOT
824.082(2)	Hazardous material transport	ODOT



**APPENDIX G – ATTORNEY GENERAL’S UNIFORM RULE  
FOR THE PERSONAL SAFETY EXEMPTION**

137-004-0800(1) (1) An individual may request that a public body not disclose the information in a specified public record that indicates the home address, personal telephone number or personal electronic mail address of the individual. If the individual demonstrates to the satisfaction of the public body that the personal safety of the individual or the personal safety of a family member residing with the individual is in danger if the home address, personal telephone number or personal electronic mail address remains available for public inspection, the public body may not disclose that information from the specified public record, except in compliance with a court order, to a law enforcement agency at the request of the law enforcement agency, or with the consent of the individual.

(2) A request under subsection (1) of this rule shall be submitted to the custodian of public records for the public record that is the subject of the request. The request shall be in writing, signed by the requestor, and shall include:

(a) The name or a description of the public record sufficient to identify the record;

(b) A mailing address for the requestor;

(c) Evidence sufficient to establish to the satisfaction of the public body that disclosure of the requestor's home address, personal telephone number or personal electronic mail address would constitute a danger to the personal safety of the requestor or of a family member residing with the requestor. Such evidence may include the following documents:

(A) Documentary evidence, including a written statement, that establishes to the satisfaction of the public body that disclosure of the requestor's home address, personal telephone number or personal electronic mail address would constitute a danger to the personal safety of the requestor or of a family member residing with the requestor;

(B) A citation or an order issued under ORS 133.055 for the protection of the requestor or a family member residing with the requestor;

(C) An affidavit or police reports showing that a law enforcement officer has been contacted concerning domestic violence, other physical abuse or threatening or harassing letters or telephone calls directed at the requestor or a family member residing with the requestor;

(D) A temporary restraining order or other no-contact order to protect the requestor or a family member residing with the requestor from future physical abuse;

(E) Court records showing that criminal or civil legal proceedings have been filed regarding physical protection for the requestor or a family member residing with the requestor;

(F) A citation or a court's stalking protective order pursuant to ORS 163.735 or 163.738, issued or obtained for the protection of the requestor or a family member residing with the requestor;

(G) An affidavit or police reports showing that the requestor or a family member residing with the requestor has been a victim of a person convicted of the crime of stalking or of violating a court's stalking protective order;

(H) A conditional release agreement issued under ORS 135.250–260 providing protection for the requestor or a family member residing with the requestor;

(I) A protective order issued pursuant to ORS 135.873 or 135.970 protecting the identity or place of residence of the requestor or a family member residing with the requestor;

(J) An affidavit from a district attorney or deputy district attorney stating that the requestor or a family member residing with the requestor is scheduled to testify or has testified as a witness at a criminal trial, grand jury hearing or preliminary hearing and that such testimony places the personal safety of the witness in danger;

(K) A court order stating that the requestor or a family member residing with the requestor is or has been a party, juror, judge, attorney or involved in some other capacity in a trial, grand jury proceeding or other court proceeding and that such involvement places the personal safety of that individual in danger; or

(L) An affidavit, medical records, police reports or court records showing that the requestor or a family member residing with the requestor has been a victim of domestic violence.

(3) A public body receiving a request under this rule promptly shall review the request and notify the requestor, in writing, whether the evidence submitted is sufficient to demonstrate to the satisfaction of the public body that the personal safety of the requestor or of a family member residing with the requestor would be in danger if the home address, personal telephone

number or personal electronic mail address remains available for public inspection. The public body may request that the requestor submit additional information concerning the request.

(4) If a public body grants the request for exemption with respect to records other than a voter registration record, the public body shall include a statement in its notice to the requestor that:

(a) The exemption remains effective for five years from the date the public body received the request, unless the requestor submits a written request for termination of the exemption before the end of the five years; and

(b) The requestor may make a new request for exemption at the end of the five years. If a public body grants the request for exemption with respect to a voter registration record, the public body shall include a statement in its notice to the requestor that:

(A) The exemption remains effective until the requestor must update the individual's voter registration, unless the requestor submits a written request for termination of the exemption before that time; and

(B) The requestor may make a new request for exemption from disclosure at that time.

(5) A person who has requested that a public body not disclose his or her home address, personal telephone number or personal electronic mail address may revoke the request by notifying, in writing, the public body to which the request was made that disclosure no longer constitutes a danger to personal safety. The notification shall be signed by the person who submitted the original request for nondisclosure of the home address, personal telephone number or personal electronic mail address.

(6) This rule does not apply to county property and lien records.

(7) As used in this rule:

(a) "Custodian" has the meaning given that term in ORS 192.410(1);

(b) "Public body" has the same meaning given that phrase in ORS 192.410(3).



## APPENDIX H – OREGON REVISED STATUTES

### INSPECTION OF PUBLIC RECORDS

(Definitions)

**192.311 Definitions for ORS 192.311 to 192.478.** As used in ORS 192.311 to 192.478:

(1) “Business day” means a day other than Saturday, Sunday or a legal holiday and on which at least one paid employee of the public body that received the public records request is scheduled to and does report to work. In the case of a community college district, community college service district, public university, school district or education service district, “business day” does not include any day on which the central administration offices of the district or university are closed.

(2) “Custodian” means:

(a) The person described in ORS 7.110 for purposes of court records; or

(b) A public body mandated, directly or indirectly, to create, maintain, care for or control a public record. “Custodian” does not include a public body that has custody of a public record as an agent of another public body that is the custodian unless the public record is not otherwise available.

(3) “Person” includes any natural person, corporation, partnership, firm, association or member or committee of the Legislative Assembly.

(4) “Public body” includes every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.

(5)(a) “Public record” includes any writing that contains information relating to the conduct of the public’s business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.

(b) “Public record” does not include any writing that does not relate to the conduct of the public’s business and that is contained on a privately owned computer.

(6) “State agency” means any state officer, department, board, commission or court created by the Constitution or statutes of this state but does not include the Legislative Assembly or its members, committees,

officers or employees insofar as they are exempt under section 9, Article IV of the Oregon Constitution.

(7) "Writing" means handwriting, typewriting, printing, photographing and every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings. [Formerly 192.410]

(Public Records Request Processing)

**192.314 Right to inspect public records; notice to public body attorney.** (1) Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.338, 192.345 and 192.355.

(2)(a) If a person who is a party to a civil judicial proceeding to which a public body is a party, or who has filed a notice under ORS 30.275 (5)(a), asks to inspect or to receive a copy of a public record that the person knows relates to the proceeding or notice, the person must submit the request in writing to the custodian and, at the same time, to the attorney for the public body.

(b) For purposes of this subsection:

(A) The attorney for a state agency is the Attorney General in Salem.

(B) "Person" includes a representative or agent of the person. [Formerly 192.420]

**192.318 Functions of custodian of public records; rules.** (1) The custodian of any public records, including public records maintained in machine readable or electronic form, unless otherwise expressly provided by statute, shall furnish proper and reasonable opportunities for inspection and examination of the records in the office of the custodian and reasonable facilities for making memoranda or abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them. If the public record is maintained in machine readable or electronic form, the custodian shall furnish proper and reasonable opportunity to assure access.

(2) The custodian of the records may adopt reasonable rules necessary for the protection of the records and to prevent interference with the regular discharge of duties of the custodian. [Formerly 192.430]

**192.324 Copies or inspection of public records; public body response; fees; procedure for records requests.** (1) A public body that is the custodian of any public record that a person has a right to inspect shall give the person, upon receipt of a written request:

(a) A copy of the public record if the public record is of a nature permitting copying; or

(b) A reasonable opportunity to inspect or copy the public record.

(2) If an individual who is identified in a public body's procedure described in subsection (7)(a) of this section receives a written request to inspect or receive a copy of a public record, the public body shall within five business days after receiving the request acknowledge receipt of the request or complete the public body's response to the request. An acknowledgment under this subsection must:

(a) Confirm that the public body is the custodian of the requested record;

(b) Inform the requester that the public body is not the custodian of the requested record; or

(c) Notify the requester that the public body is uncertain whether the public body is the custodian of the requested record.

(3) If the public record is maintained in a machine readable or electronic form, the public body shall provide a copy of the public record in the form requested, if available. If the public record is not available in the form requested, the public body shall make the public record available in the form in which the public body maintains the public record.

(4)(a) The public body may establish fees reasonably calculated to reimburse the public body for the public body's actual cost of making public records available, including costs for summarizing, compiling or tailoring the public records, either in organization or media, to meet the request.

(b) The public body may include in a fee established under paragraph (a) of this subsection the cost of time spent by an attorney for the public body in reviewing the public records, redacting material from the public records or segregating the public records into exempt and nonexempt records. The public body may not include in a fee established under paragraph (a) of this subsection the cost of time spent by an attorney for the

public body in determining the application of the provisions of ORS 192.311 to 192.478.

(c) The public body may not establish a fee greater than \$25 under this section unless the public body first provides the requester with a written notification of the estimated amount of the fee and the requester confirms that the requester wants the public body to proceed with making the public record available.

(d) Notwithstanding paragraphs (a) to (c) of this subsection, when the public records are those filed with the Secretary of State under ORS chapter 79 or ORS 80.100 to 80.130, the fees for furnishing copies, summaries or compilations of the public records are the fees established by the Secretary of State by rule under ORS chapter 79 or ORS 80.100 to 80.130.

(5) The custodian of a public record may furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public.

(6) A requester who believes that there has been an unreasonable denial of a fee waiver or fee reduction may petition the Attorney General or the district attorney in the same manner as a requester who petitions when inspection of a public record is denied under ORS 192.311 to 192.478. The Attorney General, the district attorney and the court have the same authority in instances when a fee waiver or reduction is denied as when inspection of a public record is denied.

(7) A public body shall make available to the public a written procedure for making public records requests that includes:

(a) The name of one or more individuals within the public body to whom public records requests may be sent, with addresses; and

(b) The amounts of and the manner of calculating fees that the public body charges for responding to requests for public records.

(8) This section does not apply to signatures of individuals submitted under ORS chapter 247 for purposes of registering to vote as provided in ORS 247.973. [Formerly 192.440]

**192.329 Public body's response to public records request.** (1) A public body shall complete its response to a written public records request that is received by an individual identified in the public body's procedure described in ORS 192.324 as soon as practicable and without unreasonable delay.

(2) A public body's response to a public records request is complete when the public body:

(a) Provides access to or copies of all requested records within the possession or custody of the public body that the public body does not assert are exempt from public disclosure, or explains where the records are already publicly available;

(b) Asserts any exemptions from disclosure that the public body believes apply to any requested records and, if the public body cites ORS 192.355 (8) or (9), identifies the state or federal law that the public body relied on in asserting the exemptions;

(c) Complies with ORS 192.338;

(d) To the extent that the public body is not the custodian of records that have been requested, provides a written statement to that effect;

(e) To the extent that state or federal law prohibits the public body from acknowledging whether any requested record exists or that acknowledging whether a requested record exists would result in the loss of federal benefits or imposition of another sanction, provides a written statement to that effect, citing the state or federal law that the public body relies on, unless the written statement itself would violate state or federal law; and

(f) If the public body asserts that one or more requested records are exempt from public disclosure, includes a statement that the requester may seek review of the public body's determination pursuant to ORS 192.401, 192.411, 192.415, 192.418, 192.422, 192.427 and 192.431.

(3)(a) If a public body has informed a requester of a fee permitted under ORS 192.324 (4), the obligation of the public body to complete its response to the request is suspended until the requester has paid the fee, the fee has been waived by the public body pursuant to ORS 192.324 (5) or the fee otherwise has been ordered waived.

(b) If the requester fails to pay the fee within 60 days of the date on which the public body informed the requester of the fee, or fails to pay the fee within 60 days of the date on which the public body informed the requester of the denial of the fee waiver, the public body shall close the request.

(4)(a) A public body may request additional information or clarification from a requester of public records for the purpose of expediting the public body's response to the request. If the public body has requested additional

information or clarification in good faith, the public body's obligation to further complete its response to the request is suspended until the requester provides the requested information or clarification or affirmatively declines to provide that information or clarification.

(b) If the requester fails to respond within 60 days to a good faith request from the public body for information or clarification, the public body shall close the request.

(5) As soon as reasonably possible but not later than 10 business days after the date by which a public body is required to acknowledge receipt of the request under ORS 192.324, a public body shall:

(a) Complete its response to the public records request; or

(b) Provide a written statement that the public body is still processing the request and a reasonable estimated date by which the public body expects to complete its response based on the information currently available.

(6) The time periods established by ORS 192.324 and subsection (5) of this section do not apply to a public body if compliance would be impracticable because:

(a) The staff or volunteers necessary to complete a response to the public records request are unavailable;

(b) Compliance would demonstrably impede the public body's ability to perform other necessary services; or

(c) Of the volume of public records requests being simultaneously processed by the public body.

(7) For purposes of this section, staff members or volunteers who are on leave or are not scheduled to work are considered to be unavailable.

(8) A public body that cannot comply with the time periods established by ORS 192.324 and subsection (5) of this section for a reason listed in subsection (6) of this section shall, as soon as practicable and without unreasonable delay, acknowledge a public records request and complete the response to the request. [2017 c.456 §4]

**Note:** 192.329, 192.335 and 192.340 were added to and made a part of 192.311 to 192.478 by legislative action but were not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

**192.335 Immunity from liability for disclosure of public record; effect of disclosure on privilege.** (1) A public body that, acting in good faith, discloses a public record in response to a request for public records is not liable for any loss or damages based on the disclosure unless the disclosure is affirmatively prohibited by state or federal law or by a court order applicable to the public body. Nothing in this subsection shall be interpreted to create liability on the part of a public body, or create a cause of action against a public body, based on the disclosure of a public record.

(2) A public body that discloses any information or record in response to a written request for public records under ORS 192.311 to 192.478 that is privileged under ORS 40.225 to 40.295 does not waive its right to assert the applicable privilege to prevent the introduction of the information or record as evidence pursuant to ORS 40.225 to 40.295. [2017 c.456 §8]

**Note:** See note under 192.329.

**192.338 Exempt and nonexempt public record to be separated.** If any public record contains material which is not exempt under ORS 192.345 and 192.355, as well as material which is exempt from disclosure, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination. [Formerly 192.505]

**Note:** 192.338, 192.345 and 192.355 were made a part of 192.311 to 192.478 by legislative action but were not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

(Exemptions)

**192.340 Attorney General catalog of exemptions from disclosure.**

(1) The Attorney General shall maintain and regularly update a catalog of exemptions created by Oregon statute from the disclosure requirements of ORS 192.311 to 192.478. The catalog must be as comprehensive as reasonably possible and must be freely available to the public in an electronic format that facilitates sorting and searching of the catalog.

(2) The catalog required by subsection (1) of this section must include the following information for each exemption:

(a) A citation to the Oregon statute or statutes creating the exemption from the disclosure requirements of ORS 192.311 to 192.478;

(b) The relevant text of each statute creating the exemption;

(c) If the exemption has been construed by a decision of the Oregon Supreme Court or Court of Appeals, a citation to that decision;

(d) To the extent that the exemption is specific to a particular public body or particular types of public bodies, a description of the public body or bodies to which the exemption relates; and

(e) Additional information as the Attorney General deems appropriate.

(3) To help ensure that the catalog required by subsection (1) of this section is as comprehensive as possible:

(a) The Legislative Counsel shall provide the Attorney General with an electronic copy of any Act passed by the Legislative Assembly that, in the judgment of the Legislative Counsel, creates an exemption from the disclosure requirements of ORS 192.311 to 192.478; and

(b) When a district attorney issues an order pursuant to ORS 192.415, the district attorney shall send the Attorney General an electronic copy of that order.

(4) The purpose of the catalog required by subsection (1) of this section is to assist public officials and members of the public in ascertaining what information is exempt from the public disclosure requirements of ORS 192.311 to 192.478. The catalog is not intended to provide legal advice to public bodies or to members of the public.

(5) A public body may assert that an Oregon statute exempts a public record in the custody of the public body from disclosure even if that statute is not listed in the catalog or the catalog does not include that public body in the catalog's description of the public bodies to which that exemption applies. [2017 c.456 §7]

**Note:** See note under 192.329.

**192.345 Public records conditionally exempt from disclosure.** The following public records are exempt from disclosure under ORS 192.311 to 192.478 unless the public interest requires disclosure in the particular instance:

(1) Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or

opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation.

(2) Trade secrets. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

(3) Investigatory information compiled for criminal law purposes. The record of an arrest or the report of a crime shall be disclosed unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim. Nothing in this subsection shall limit any right constitutionally guaranteed, or granted by statute, to disclosure or discovery in criminal cases. For purposes of this subsection, the record of an arrest or the report of a crime includes, but is not limited to:

(a) The arrested person's name, age, residence, employment, marital status and similar biographical information;

(b) The offense with which the arrested person is charged;

(c) The conditions of release pursuant to ORS 135.230 to 135.290;

(d) The identity of and biographical information concerning both complaining party and victim;

(e) The identity of the investigating and arresting agency and the length of the investigation;

(f) The circumstances of arrest, including time, place, resistance, pursuit and weapons used; and

(g) Such information as may be necessary to enlist public assistance in apprehending fugitives from justice.

(4) Test questions, scoring keys, and other data used to administer a licensing examination, employment, academic or other examination or testing procedure before the examination is given and if the examination is to be used again. Records establishing procedures for and instructing persons administering, grading or evaluating an examination or testing procedure are included in this exemption, to the extent that disclosure would

create a risk that the result might be affected.

(5) Information consisting of production records, sale or purchase records or catch records, or similar business records of a private concern or enterprise, required by law to be submitted to or inspected by a governmental body to allow it to determine fees or assessments payable or to establish production quotas, and the amounts of such fees or assessments payable or paid, to the extent that such information is in a form that would permit identification of the individual concern or enterprise. This exemption does not include records submitted by long term care facilities as defined in ORS 442.015 to the state for purposes of reimbursement of expenses or determining fees for patient care. Nothing in this subsection shall limit the use that can be made of such information for regulatory purposes or its admissibility in any enforcement proceeding.

(6) Information relating to the appraisal of real estate prior to its acquisition.

(7) The names and signatures of employees who sign authorization cards or petitions for the purpose of requesting representation or decertification elections.

(8) Investigatory information relating to any complaint filed under ORS 659A.820 or 659A.825, until such time as the complaint is resolved under ORS 659A.835, or a final order is issued under ORS 659A.850.

(9) Investigatory information relating to any complaint or charge filed under ORS 243.676 and 663.180.

(10) Records, reports and other information received or compiled by the Director of the Department of Consumer and Business Services under ORS 697.732.

(11) Information concerning the location of archaeological sites or objects as those terms are defined in ORS 358.905, except if the governing body of an Indian tribe requests the information and the need for the information is related to that Indian tribe's cultural or religious activities. This exemption does not include information relating to a site that is all or part of an existing, commonly known and publicized tourist facility or attraction.

(12) A personnel discipline action, or materials or documents supporting that action.

(13) Information developed pursuant to ORS 496.004, 496.172 and

498.026 or ORS 496.192 and 564.100, regarding the habitat, location or population of any threatened species or endangered species.

(14) Writings prepared by or under the direction of faculty of public educational institutions, in connection with research, until publicly released, copyrighted or patented.

(15) Computer programs developed or purchased by or for any public body for its own use. As used in this subsection, "computer program" means a series of instructions or statements which permit the functioning of a computer system in a manner designed to provide storage, retrieval and manipulation of data from such computer system, and any associated documentation and source material that explain how to operate the computer program. "Computer program" does not include:

(a) The original data, including but not limited to numbers, text, voice, graphics and images;

(b) Analyses, compilations and other manipulated forms of the original data produced by use of the program; or

(c) The mathematical and statistical formulas which would be used if the manipulated forms of the original data were to be produced manually.

(16) Data and information provided by participants to mediation under ORS 36.256.

(17) Investigatory information relating to any complaint or charge filed under ORS chapter 654, until a final administrative determination is made or, if a citation is issued, until an employer receives notice of any citation.

(18) Specific operational plans in connection with an anticipated threat to individual or public safety for deployment and use of personnel and equipment, prepared or used by a public body, if public disclosure of the plans would endanger an individual's life or physical safety or jeopardize a law enforcement activity.

(19)(a) Audits or audit reports required of a telecommunications carrier. As used in this paragraph, "audit or audit report" means any external or internal audit or audit report pertaining to a telecommunications carrier, as defined in ORS 133.721, or pertaining to a corporation having an affiliated interest, as defined in ORS 759.390, with a telecommunications carrier that is intended to make the operations of the entity more efficient, accurate or compliant with applicable rules, procedures or standards, that may include self-criticism and that has been filed by the telecommunications carrier or

affiliate under compulsion of state law. "Audit or audit report" does not mean an audit of a cost study that would be discoverable in a contested case proceeding and that is not subject to a protective order; and

(b) Financial statements. As used in this paragraph, "financial statement" means a financial statement of a nonregulated corporation having an affiliated interest, as defined in ORS 759.390, with a telecommunications carrier, as defined in ORS 133.721.

(20) The residence address of an elector if authorized under ORS 247.965 and subject to ORS 247.967.

(21) The following records, communications and information submitted to a housing authority as defined in ORS 456.005, or to an urban renewal agency as defined in ORS 457.010, by applicants for and recipients of loans, grants and tax credits:

(a) Personal and corporate financial statements and information, including tax returns;

(b) Credit reports;

(c) Project appraisals, excluding appraisals obtained in the course of transactions involving an interest in real estate that is acquired, leased, rented, exchanged, transferred or otherwise disposed of as part of the project, but only after the transactions have closed and are concluded;

(d) Market studies and analyses;

(e) Articles of incorporation, partnership agreements and operating agreements;

(f) Commitment letters;

(g) Project pro forma statements;

(h) Project cost certifications and cost data;

(i) Audits;

(j) Project tenant correspondence requested to be confidential;

(k) Tenant files relating to certification; and

(L) Housing assistance payment requests.

(22) Records or information that, if disclosed, would allow a person to:

(a) Gain unauthorized access to buildings or other property;

(b) Identify those areas of structural or operational vulnerability that

would permit unlawful disruption to, or interference with, services; or

(c) Disrupt, interfere with or gain unauthorized access to public funds or to information processing, communication or telecommunication systems, including the information contained in the systems, that are used or operated by a public body.

(23) Records or information that would reveal or otherwise identify security measures, or weaknesses or potential weaknesses in security measures, taken or recommended to be taken to protect:

(a) An individual;

(b) Buildings or other property;

(c) Information processing, communication or telecommunication systems, including the information contained in the systems; or

(d) Those operations of the Oregon State Lottery the security of which are subject to study and evaluation under ORS 461.180 (6).

(24) Personal information held by or under the direction of officials of the Oregon Health and Science University or a public university listed in ORS 352.002 about a person who has or who is interested in donating money or property to the Oregon Health and Science University or a public university, if the information is related to the family of the person, personal assets of the person or is incidental information not related to the donation.

(25) The home address, professional address and telephone number of a person who has or who is interested in donating money or property to a public university listed in ORS 352.002.

(26) Records of the name and address of a person who files a report with or pays an assessment to a commodity commission established under ORS 576.051 to 576.455, the Oregon Beef Council created under ORS 577.210 or the Oregon Wheat Commission created under ORS 578.030.

(27) Information provided to, obtained by or used by a public body to authorize, originate, receive or authenticate a transfer of funds, including but not limited to a credit card number, payment card expiration date, password, financial institution account number and financial institution routing number.

(28) Social Security numbers as provided in ORS 107.840.

(29) The electronic mail address of a student who attends a public university listed in ORS 352.002 or Oregon Health and Science University.

(30) The name, home address, professional address or location of a person that is engaged in, or that provides goods or services for, medical research at Oregon Health and Science University that is conducted using animals other than rodents. This subsection does not apply to Oregon Health and Science University press releases, websites or other publications circulated to the general public.

(31) If requested by a public safety officer, as defined in ORS 181A.355:

(a) The home address and home telephone number of the public safety officer contained in the voter registration records for the officer.

(b) The home address and home telephone number of the public safety officer contained in records of the Department of Public Safety Standards and Training.

(c) The name of the public safety officer contained in county real property assessment or taxation records. This exemption:

(A) Applies only to the name of the public safety officer and any other owner of the property in connection with a specific property identified by the officer in a request for exemption from disclosure;

(B) Applies only to records that may be made immediately available to the public upon request in person, by telephone or using the Internet;

(C) Applies until the public safety officer requests termination of the exemption;

(D) Does not apply to disclosure of records among public bodies as defined in ORS 174.109 for governmental purposes; and

(E) May not result in liability for the county if the name of the public safety officer is disclosed after a request for exemption from disclosure is made under this subsection.

(32) Unless the public records request is made by a financial institution, as defined in ORS 706.008, consumer finance company licensed under ORS chapter 725, mortgage banker or mortgage broker licensed under ORS 86A.095 to 86A.198, or title company for business purposes, records described in paragraph (a) of this subsection, if the exemption from disclosure of the records is sought by an individual described in paragraph

(b) of this subsection using the procedure described in paragraph (c) of this subsection:

(a) The home address, home or cellular telephone number or personal electronic mail address contained in the records of any public body that has received the request that is set forth in:

(A) A warranty deed, deed of trust, mortgage, lien, deed of reconveyance, release, satisfaction, substitution of trustee, easement, dog license, marriage license or military discharge record that is in the possession of the county clerk; or

(B) Any public record of a public body other than the county clerk.

(b) The individual claiming the exemption from disclosure must be a district attorney, a deputy district attorney, the Attorney General or an assistant attorney general, the United States Attorney for the District of Oregon or an assistant United States attorney for the District of Oregon, a city attorney who engages in the prosecution of criminal matters or a deputy city attorney who engages in the prosecution of criminal matters.

(c) The individual claiming the exemption from disclosure must do so by filing the claim in writing with the public body for which the exemption from disclosure is being claimed on a form prescribed by the public body. Unless the claim is filed with the county clerk, the claim form shall list the public records in the possession of the public body to which the exemption applies. The exemption applies until the individual claiming the exemption requests termination of the exemption or ceases to qualify for the exemption.

(33) The following voluntary conservation agreements and reports:

(a) Land management plans required for voluntary stewardship agreements entered into under ORS 541.973; and

(b) Written agreements relating to the conservation of greater sage grouse entered into voluntarily by owners or occupiers of land with a soil and water conservation district under ORS 568.550.

(34) Sensitive business records or financial or commercial information of the State Accident Insurance Fund Corporation that is not customarily provided to business competitors. This exemption does not:

(a) Apply to the formulas for determining dividends to be paid to employers insured by the State Accident Insurance Fund Corporation;

(b) Apply to contracts for advertising, public relations or lobbying services or to documents related to the formation of such contracts;

(c) Apply to group insurance contracts or to documents relating to the formation of such contracts, except that employer account records shall remain exempt from disclosure as provided in ORS 192.355 (35); or

(d) Provide the basis for opposing the discovery of documents in litigation pursuant to the applicable rules of civil procedure.

(35) Records of the Department of Public Safety Standards and Training relating to investigations conducted under ORS 181A.640 or 181A.870 (6), until the department issues the report described in ORS 181A.640 or 181A.870.

(36) A medical examiner's report, autopsy report or laboratory test report ordered by a medical examiner under ORS 146.117.

(37) Any document or other information related to an audit of a public body, as defined in ORS 174.109, that is in the custody of an auditor or audit organization operating under nationally recognized government auditing standards, until the auditor or audit organization issues a final audit report in accordance with those standards or the audit is abandoned. This exemption does not prohibit disclosure of a draft audit report that is provided to the audited entity for the entity's response to the audit findings.

(38)(a) Personally identifiable information collected as part of an electronic fare collection system of a mass transit system.

(b) The exemption from disclosure in paragraph (a) of this subsection does not apply to public records that have attributes of anonymity that are sufficient, or that are aggregated into groupings that are broad enough, to ensure that persons cannot be identified by disclosure of the public records.

(c) As used in this subsection:

(A) "Electronic fare collection system" means the software and hardware used for, associated with or relating to the collection of transit fares for a mass transit system, including but not limited to computers, radio communication systems, personal mobile devices, wearable technology, fare instruments, information technology, data storage or collection equipment, or other equipment or improvements.

(B) "Mass transit system" has the meaning given that term in ORS 267.010.

(C) “Personally identifiable information” means all information relating to a person that acquires or uses a transit pass or other fare payment medium in connection with an electronic fare collection system, including but not limited to:

(i) Customer account information, date of birth, telephone number, physical address, electronic mail address, credit or debit card information, bank account information, Social Security or taxpayer identification number or other identification number, transit pass or fare payment medium balances or history, or similar personal information; or

(ii) Travel dates, travel times, frequency of use, travel locations, service types or vehicle use, or similar travel information.

(39)(a) If requested by a civil code enforcement officer:

(A) The home address and home telephone number of the civil code enforcement officer contained in the voter registration records for the officer.

(B) The name of the civil code enforcement officer contained in county real property assessment or taxation records. This exemption:

(i) Applies only to the name of the civil code enforcement officer and any other owner of the property in connection with a specific property identified by the officer in a request for exemption from disclosure;

(ii) Applies only to records that may be made immediately available to the public upon request in person, by telephone or using the Internet;

(iii) Applies until the civil code enforcement officer requests termination of the exemption;

(iv) Does not apply to disclosure of records among public bodies as defined in ORS 174.109 for governmental purposes; and

(v) May not result in liability for the county if the name of the civil code enforcement officer is disclosed after a request for exemption from disclosure is made under this subsection.

(b) As used in this subsection, “civil code enforcement officer” means an employee of a public body, as defined in ORS 174.109, who is charged with enforcing laws or ordinances relating to land use, zoning, use of rights-of-way, solid waste, hazardous waste, sewage treatment and disposal or the state building code.

(40) Audio or video recordings, whether digital or analog, resulting

from a law enforcement officer's operation of a video camera worn upon the officer's person that records the officer's interactions with members of the public while the officer is on duty. When a recording described in this subsection is subject to disclosure, the following apply:

(a) Recordings that have been sealed in a court's record of a court proceeding or otherwise ordered by a court not to be disclosed may not be disclosed.

(b) A request for disclosure under this subsection must identify the approximate date and time of an incident for which the recordings are requested and be reasonably tailored to include only that material for which a public interest requires disclosure.

(c) A video recording disclosed under this subsection must, prior to disclosure, be edited in a manner as to render the faces of all persons within the recording unidentifiable. [Formerly 192.501]

**Note:** See note under 192.338.

**192.355 Public records exempt from disclosure.** The following public records are exempt from disclosure under ORS 192.311 to 192.478:

(1) Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

(2)(a) Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

(b) Images of a dead body, or parts of a dead body, that are part of a law enforcement agency investigation, if public disclosure would create an unreasonable invasion of privacy of the family of the deceased person, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

(3) Upon compliance with ORS 192.363, public body employee or volunteer residential addresses, residential telephone numbers, personal cellular telephone numbers, personal electronic mail addresses, driver license numbers, employer-issued identification card numbers, emergency contact information, Social Security numbers, dates of birth and other telephone numbers contained in personnel records maintained by the public body that is the employer or the recipient of volunteer services. This exemption:

(a) Does not apply to the addresses, dates of birth and telephone numbers of employees or volunteers who are elected officials, except that a judge or district attorney subject to election may seek to exempt the judge's or district attorney's address or telephone number, or both, under the terms of ORS 192.368;

(b) Does not apply to employees or volunteers to the extent that the party seeking disclosure shows by clear and convincing evidence that the public interest requires disclosure in a particular instance pursuant to ORS 192.363;

(c) Does not apply to a substitute teacher as defined in ORS 342.815 when requested by a professional education association of which the substitute teacher may be a member; and

(d) Does not relieve a public employer of any duty under ORS 243.650 to 243.782.

(4) Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

(5) Information or records of the Department of Corrections, including the State Board of Parole and Post-Prison Supervision, to the extent that disclosure would interfere with the rehabilitation of a person in custody of the department or substantially prejudice or prevent the carrying out of the functions of the department, if the public interest in confidentiality clearly outweighs the public interest in disclosure.

(6) Records, reports and other information received or compiled by the Director of the Department of Consumer and Business Services in the administration of ORS chapters 723 and 725 not otherwise required by law

to be made public, to the extent that the interests of lending institutions, their officers, employees and customers in preserving the confidentiality of such information outweighs the public interest in disclosure.

(7) Reports made to or filed with the court under ORS 137.077 or 137.530.

(8) Any public records or information the disclosure of which is prohibited by federal law or regulations.

(9)(a) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

(b) Subject to ORS 192.360, paragraph (a) of this subsection does not apply to factual information compiled in a public record when:

(A) The basis for the claim of exemption is ORS 40.225;

(B) The factual information is not prohibited from disclosure under any applicable state or federal law, regulation or court order and is not otherwise exempt from disclosure under ORS 192.311 to 192.478;

(C) The factual information was compiled by or at the direction of an attorney as part of an investigation on behalf of the public body in response to information of possible wrongdoing by the public body;

(D) The factual information was not compiled in preparation for litigation, arbitration or an administrative proceeding that was reasonably likely to be initiated or that has been initiated by or against the public body; and

(E) The holder of the privilege under ORS 40.225 has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction.

(10) Public records or information described in this section, furnished by the public body originally compiling, preparing or receiving them to any other public officer or public body in connection with performance of the duties of the recipient, if the considerations originally giving rise to the confidential or exempt nature of the public records or information remain applicable.

(11) Records of the Energy Facility Siting Council concerning the review or approval of security programs pursuant to ORS 469.530.

(12) Employee and retiree address, telephone number and other

nonfinancial membership records and employee financial records maintained by the Public Employees Retirement System pursuant to ORS chapters 238 and 238A.

(13) Records of or submitted to the State Treasurer, the Oregon Investment Council or the agents of the treasurer or the council relating to active or proposed publicly traded investments under ORS chapter 293, including but not limited to records regarding the acquisition, exchange or liquidation of the investments. For the purposes of this subsection:

(a) The exemption does not apply to:

(A) Information in investment records solely related to the amount paid directly into an investment by, or returned from the investment directly to, the treasurer or council; or

(B) The identity of the entity to which the amount was paid directly or from which the amount was received directly.

(b) An investment in a publicly traded investment is no longer active when acquisition, exchange or liquidation of the investment has been concluded.

(14)(a) Records of or submitted to the State Treasurer, the Oregon Investment Council, the Oregon Growth Board or the agents of the treasurer, council or board relating to actual or proposed investments under ORS chapter 293 or 348 in a privately placed investment fund or a private asset including but not limited to records regarding the solicitation, acquisition, deployment, exchange or liquidation of the investments including but not limited to:

(A) Due diligence materials that are proprietary to an investment fund, to an asset ownership or to their respective investment vehicles.

(B) Financial statements of an investment fund, an asset ownership or their respective investment vehicles.

(C) Meeting materials of an investment fund, an asset ownership or their respective investment vehicles.

(D) Records containing information regarding the portfolio positions in which an investment fund, an asset ownership or their respective investment vehicles invest.

(E) Capital call and distribution notices of an investment fund, an asset ownership or their respective investment vehicles.

(F) Investment agreements and related documents.

(b) The exemption under this subsection does not apply to:

(A) The name, address and vintage year of each privately placed investment fund.

(B) The dollar amount of the commitment made to each privately placed investment fund since inception of the fund.

(C) The dollar amount of cash contributions made to each privately placed investment fund since inception of the fund.

(D) The dollar amount, on a fiscal year-end basis, of cash distributions received by the State Treasurer, the Oregon Investment Council, the Oregon Growth Board or the agents of the treasurer, council or board from each privately placed investment fund.

(E) The dollar amount, on a fiscal year-end basis, of the remaining value of assets in a privately placed investment fund attributable to an investment by the State Treasurer, the Oregon Investment Council, the Oregon Growth Board or the agents of the treasurer, council or board.

(F) The net internal rate of return of each privately placed investment fund since inception of the fund.

(G) The investment multiple of each privately placed investment fund since inception of the fund.

(H) The dollar amount of the total management fees and costs paid on an annual fiscal year-end basis to each privately placed investment fund.

(I) The dollar amount of cash profit received from each privately placed investment fund on a fiscal year-end basis.

(15) The monthly reports prepared and submitted under ORS 293.761 and 293.766 concerning the Public Employees Retirement Fund and the Industrial Accident Fund may be uniformly treated as exempt from disclosure for a period of up to 90 days after the end of the calendar quarter.

(16) Reports of unclaimed property filed by the holders of such property to the extent permitted by ORS 98.352.

(17)(a) The following records, communications and information submitted to the Oregon Business Development Commission, the Oregon Business Development Department, the State Department of Agriculture, the Oregon Growth Board, the Port of Portland or other ports as defined in

ORS 777.005, or a county or city governing body and any board, department, commission, council or agency thereof, by applicants for investment funds, grants, loans, services or economic development moneys, support or assistance including, but not limited to, those described in ORS 285A.224:

(A) Personal financial statements.

(B) Financial statements of applicants.

(C) Customer lists.

(D) Information of an applicant pertaining to litigation to which the applicant is a party if the complaint has been filed, or if the complaint has not been filed, if the applicant shows that such litigation is reasonably likely to occur; this exemption does not apply to litigation which has been concluded, and nothing in this subparagraph shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation.

(E) Production, sales and cost data.

(F) Marketing strategy information that relates to applicant's plan to address specific markets and applicant's strategy regarding specific competitors.

(b) The following records, communications and information submitted to the State Department of Energy by applicants for tax credits or for grants awarded under ORS 469B.256:

(A) Personal financial statements.

(B) Financial statements of applicants.

(C) Customer lists.

(D) Information of an applicant pertaining to litigation to which the applicant is a party if the complaint has been filed, or if the complaint has not been filed, if the applicant shows that such litigation is reasonably likely to occur; this exemption does not apply to litigation which has been concluded, and nothing in this subparagraph shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation.

(E) Production, sales and cost data.

(F) Marketing strategy information that relates to applicant's plan to

address specific markets and applicant's strategy regarding specific competitors.

(18) Records, reports or returns submitted by private concerns or enterprises required by law to be submitted to or inspected by a governmental body to allow it to determine the amount of any transient lodging tax payable and the amounts of such tax payable or paid, to the extent that such information is in a form which would permit identification of the individual concern or enterprise. Nothing in this subsection shall limit the use which can be made of such information for regulatory purposes or its admissibility in any enforcement proceedings. The public body shall notify the taxpayer of the delinquency immediately by certified mail. However, in the event that the payment or delivery of transient lodging taxes otherwise due to a public body is delinquent by over 60 days, the public body shall disclose, upon the request of any person, the following information:

(a) The identity of the individual concern or enterprise that is delinquent over 60 days in the payment or delivery of the taxes.

(b) The period for which the taxes are delinquent.

(c) The actual, or estimated, amount of the delinquency.

(19) All information supplied by a person under ORS 151.485 for the purpose of requesting appointed counsel, and all information supplied to the court from whatever source for the purpose of verifying the financial eligibility of a person pursuant to ORS 151.485.

(20) Workers' compensation claim records of the Department of Consumer and Business Services, except in accordance with rules adopted by the Director of the Department of Consumer and Business Services, in any of the following circumstances:

(a) When necessary for insurers, self-insured employers and third party claim administrators to process workers' compensation claims.

(b) When necessary for the director, other governmental agencies of this state or the United States to carry out their duties, functions or powers.

(c) When the disclosure is made in such a manner that the disclosed information cannot be used to identify any worker who is the subject of a claim.

(d) When a worker or the worker's representative requests review of the worker's claim record.

(21) Sensitive business records or financial or commercial information of the Oregon Health and Science University that is not customarily provided to business competitors.

(22) Records of Oregon Health and Science University regarding candidates for the position of president of the university.

(23) The records of a library, including:

(a) Circulation records, showing use of specific library material by a named person;

(b) The name of a library patron together with the address or telephone number of the patron; and

(c) The electronic mail address of a patron.

(24) The following records, communications and information obtained by the Housing and Community Services Department in connection with the department's monitoring or administration of financial assistance or of housing or other developments:

(a) Personal and corporate financial statements and information, including tax returns.

(b) Credit reports.

(c) Project appraisals, excluding appraisals obtained in the course of transactions involving an interest in real estate that is acquired, leased, rented, exchanged, transferred or otherwise disposed of as part of the project, but only after the transactions have closed and are concluded.

(d) Market studies and analyses.

(e) Articles of incorporation, partnership agreements and operating agreements.

(f) Commitment letters.

(g) Project pro forma statements.

(h) Project cost certifications and cost data.

(i) Audits.

(j) Project tenant correspondence.

(k) Personal information about a tenant.

(L) Housing assistance payments.

(25) Raster geographic information system (GIS) digital databases, provided by private forestland owners or their representatives, voluntarily and in confidence to the State Forestry Department, that is not otherwise required by law to be submitted.

(26) Sensitive business, commercial or financial information furnished to or developed by a public body engaged in the business of providing electricity or electricity services, if the information is directly related to a transaction described in ORS 261.348, or if the information is directly related to a bid, proposal or negotiations for the sale or purchase of electricity or electricity services, and disclosure of the information would cause a competitive disadvantage for the public body or its retail electricity customers. This subsection does not apply to cost-of-service studies used in the development or review of generally applicable rate schedules.

(27) Sensitive business, commercial or financial information furnished to or developed by the City of Klamath Falls, acting solely in connection with the ownership and operation of the Klamath Cogeneration Project, if the information is directly related to a transaction described in ORS 225.085 and disclosure of the information would cause a competitive disadvantage for the Klamath Cogeneration Project. This subsection does not apply to cost-of-service studies used in the development or review of generally applicable rate schedules.

(28) Personally identifiable information about customers of a municipal electric utility or a people's utility district or the names, dates of birth, driver license numbers, telephone numbers, electronic mail addresses or Social Security numbers of customers who receive water, sewer or storm drain services from a public body as defined in ORS 174.109. The utility or district may release personally identifiable information about a customer, and a public body providing water, sewer or storm drain services may release the name, date of birth, driver license number, telephone number, electronic mail address or Social Security number of a customer, if the customer consents in writing or electronically, if the disclosure is necessary for the utility, district or other public body to render services to the customer, if the disclosure is required pursuant to a court order or if the disclosure is otherwise required by federal or state law. The utility, district or other public body may charge as appropriate for the costs of providing such information. The utility, district or other public body may make customer records available to third party credit agencies on a regular basis

in connection with the establishment and management of customer accounts or in the event such accounts are delinquent.

(29) A record of the street and number of an employee's address submitted to a special district to obtain assistance in promoting an alternative to single occupant motor vehicle transportation.

(30) Sensitive business records, capital development plans or financial or commercial information of Oregon Corrections Enterprises that is not customarily provided to business competitors.

(31) Documents, materials or other information submitted to the Director of the Department of Consumer and Business Services in confidence by a state, federal, foreign or international regulatory or law enforcement agency or by the National Association of Insurance Commissioners, its affiliates or subsidiaries under ORS 86A.095 to 86A.198, 697.005 to 697.095, 697.602 to 697.842, 705.137, 717.200 to 717.320, 717.900 or 717.905, ORS chapter 59, 723, 725 or 726, the Bank Act or the Insurance Code when:

(a) The document, material or other information is received upon notice or with an understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or other information; and

(b) The director has obligated the Department of Consumer and Business Services not to disclose the document, material or other information.

(32) A county elections security plan developed and filed under ORS 254.074.

(33) Information about review or approval of programs relating to the security of:

(a) Generation, storage or conveyance of:

(A) Electricity;

(B) Gas in liquefied or gaseous form;

(C) Hazardous substances as defined in ORS 453.005 (7)(a), (b) and (d);

(D) Petroleum products;

(E) Sewage; or

(F) Water.

(b) Telecommunication systems, including cellular, wireless or radio systems.

(c) Data transmissions by whatever means provided.

(34) The information specified in ORS 25.020 (8) if the Chief Justice of the Supreme Court designates the information as confidential by rule under ORS 1.002.

(35)(a) Employer account records of the State Accident Insurance Fund Corporation.

(b) As used in this subsection, “employer account records” means all records maintained in any form that are specifically related to the account of any employer insured, previously insured or under consideration to be insured by the State Accident Insurance Fund Corporation and any information obtained or developed by the corporation in connection with providing, offering to provide or declining to provide insurance to a specific employer. “Employer account records” includes, but is not limited to, an employer’s payroll records, premium payment history, payroll classifications, employee names and identification information, experience modification factors, loss experience and dividend payment history.

(c) The exemption provided by this subsection may not serve as the basis for opposition to the discovery documents in litigation pursuant to applicable rules of civil procedure.

(36)(a) Claimant files of the State Accident Insurance Fund Corporation.

(b) As used in this subsection, “claimant files” includes, but is not limited to, all records held by the corporation pertaining to a person who has made a claim, as defined in ORS 656.005, and all records pertaining to such a claim.

(c) The exemption provided by this subsection may not serve as the basis for opposition to the discovery documents in litigation pursuant to applicable rules of civil procedure.

(37) Except as authorized by ORS 408.425, records that certify or verify an individual’s discharge or other separation from military service.

(38) Records of or submitted to a domestic violence service or resource center that relate to the name or personal information of an individual who

visits a center for service, including the date of service, the type of service received, referrals or contact information or personal information of a family member of the individual. As used in this subsection, “domestic violence service or resource center” means an entity, the primary purpose of which is to assist persons affected by domestic or sexual violence by providing referrals, resource information or other assistance specifically of benefit to domestic or sexual violence victims.

(39) Information reported to the Oregon Health Authority under ORS 431A.860, except as provided in ORS 431A.860 (2)(b) information disclosed by the authority under ORS 431A.865 and any information related to disclosures made by the authority under ORS 431A.865, including information identifying the recipient of the information.

(40)(a) Electronic mail addresses in the possession or custody of an agency or subdivision of the executive department, as defined in ORS 174.112, the legislative department, as defined in ORS 174.114, a local government or local service district, as defined in ORS 174.116, or a special government body, as defined in ORS 174.117.

(b) This subsection does not apply to electronic mail addresses assigned by a public body to public employees for use by the employees in the ordinary course of their employment.

(c) This subsection and ORS 244.040 do not prohibit the campaign office of the current officeholder or current candidates who have filed to run for that elective office from receiving upon request the electronic mail addresses used by the current officeholder’s legislative office for newsletter distribution, except that a campaign office that receives electronic mail addresses under this paragraph may not make a further disclosure of those electronic mail addresses to any other person.

(41) Residential addresses, residential telephone numbers, personal cellular telephone numbers, personal electronic mail addresses, driver license numbers, emergency contact information, Social Security numbers, dates of birth and other telephone numbers of individuals currently or previously certified or licensed by the Department of Public Safety Standards and Training contained in the records maintained by the department.

(42) Personally identifiable information and contact information of veterans as defined in ORS 408.225 and of persons serving on active duty or as reserve members with the Armed Forces of the United States, National

Guard or other reserve component that was obtained by the Department of Veterans' Affairs in the course of performing its duties and functions, including but not limited to names, residential and employment addresses, dates of birth, driver license numbers, telephone numbers, electronic mail addresses, Social Security numbers, marital status, dependents, the character of discharge from military service, military rating or rank, that the person is a veteran or has provided military service, information relating to an application for or receipt of federal or state benefits, information relating to the basis for receipt or denial of federal or state benefits and information relating to a home loan or grant application, including but not limited to financial information provided in connection with the application. [Formerly 192.502]

**Note:** See note under 192.338.

**192.360 Condensation of public record subject to disclosure; petition to review denial of right to inspect public record; adequacy of condensation.** (1) When a public record is subject to disclosure under ORS 192.355 (9)(b), in lieu of making the public record available for inspection by providing a copy of the record, the public body may prepare and release a condensation from the record of the significant facts that are not otherwise exempt from disclosure under ORS 192.311 to 192.478. The release of the condensation does not waive any privilege under ORS 40.225 to 40.295.

(2) The person seeking to inspect or receive a copy of any public record for which a condensation of facts has been provided under this section may petition for review of the denial to inspect or receive a copy of the records under ORS 192.311 to 192.478. In such a review, the Attorney General, district attorney or court shall, in addition to reviewing the records to which access was denied, compare those records to the condensation to determine whether the condensation adequately describes the significant facts contained in the records. [Formerly 192.423]

**Note:** 192.360 was added to and made a part of 192.311 to 192.478 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

(Records Containing Personal Information)

**192.363 Contents of certain requests for disclosure.** (1) A request for the disclosure of records described in ORS 192.355 (3) or 192.365 must include the following information:

(a) The names of the individuals for whom personal information is sought;

(b) A statement describing the personal information being sought; and

(c) A statement that satisfies subsection (2) of this section.

(2) The party seeking disclosure shall show by clear and convincing evidence that the public interest requires disclosure in a particular instance.

(3) Upon receiving a request described in subsection (1) of this section, a public body shall forward a copy of the request and any materials submitted with the request to the individuals whose personal information is being sought or to any representatives of each class of persons whose personal information is the subject of the request.

(4) For purposes of subsection (3) of this section, the public body has sole discretion to determine the classes of persons whose personal information is the subject of the request and to identify the representatives for each class.

(5) The public body may not disclose information pursuant to the request for at least seven days after forwarding copies of the request under subsection (3) of this section.

(6) The public body shall consider all information submitted under this section and shall disclose requested information only if the public body determines that the party seeking disclosure has demonstrated by clear and convincing evidence that the public interest requires disclosure in a particular instance. [Formerly 192.437]

**Note:** 192.363 was added to and made a part of 192.311 to 192.478 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

**192.365 Disclosure of information pertaining to home care worker, operator of child care facility, exempt child care provider or operator of adult foster home.** (1) Upon compliance with ORS 192.363, a public body that is the custodian of or is otherwise in possession of the following information pertaining to a home care worker as defined in ORS 410.600, an operator of a child care facility as defined in ORS 329A.250, an exempt family child care provider as defined in ORS 329A.430 or an operator of an adult foster home as defined in ORS 443.705 shall disclose that information in response to a request to inspect public records under ORS 192.311 to 192.478:

- (a) Residential address and telephone numbers;
- (b) Personal electronic mail addresses and personal cellular telephone numbers;
- (c) Social Security numbers and employer-issued identification card numbers; and
- (d) Emergency contact information.

(2) Subsection (1) of this section does not apply to the Judicial Department or the Department of Transportation or to any records in the custody of the Judicial Department or the Department of Transportation. [Formerly 192.435]

**Note:** 192.365 was added to and made a part of 192.311 to 192.478 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

**192.368 Nondisclosure on request of home address, home telephone number and electronic mail address; rules of procedure; duration of effect of request; liability; when not applicable.** (1) An individual may submit a written request to a public body not to disclose a specified public record indicating the home address, personal telephone number or electronic mail address of the individual. A public body may not disclose the specified public record if the individual demonstrates to the satisfaction of the public body that the personal safety of the individual or the personal safety of a family member residing with the individual is in danger if the home address, personal telephone number or electronic mail address remains available for public inspection.

(2) The Attorney General shall adopt rules describing:

(a) The procedures for submitting the written request described in subsection (1) of this section.

(b) The evidence an individual shall provide to the public body to establish that disclosure of the home address, telephone number or electronic mail address of the individual would constitute a danger to personal safety. The evidence may include but is not limited to evidence that the individual or a family member residing with the individual has:

- (A) Been a victim of domestic violence;
- (B) Obtained an order issued under ORS 133.055;
- (C) Contacted a law enforcement officer involving domestic violence or

other physical abuse;

(D) Obtained a temporary restraining order or other no contact order to protect the individual from future physical abuse; or

(E) Filed other criminal or civil legal proceedings regarding physical protection.

(c) The procedures for submitting the written notification from the individual that disclosure of the home address, personal telephone number or electronic mail address of the individual no longer constitutes a danger to personal safety.

(3) A request described in subsection (1) of this section remains effective:

(a) Until the public body receives a written request for termination but no later than five years after the date that a public body receives the request; or

(b) In the case of a voter registration record, until the individual must update the individual's voter registration, at which time the individual may apply for another exemption from disclosure.

(4) A public body may disclose a home address, personal telephone number or electronic mail address of an individual exempt from disclosure under subsection (1) of this section upon court order, on request from any law enforcement agency or with the consent of the individual.

(5) A public body may not be held liable for granting or denying an exemption from disclosure under this section or any other unauthorized release of a home address, personal telephone number or electronic mail address granted an exemption from disclosure under this section.

(6) This section does not apply to county property and lien records. [Formerly 192.445]

**Note:** 192.368 was added to and made a part of 192.311 to 192.478 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

**192.371 Nondisclosure of public employee identification badge or card.** (1) As used in this section, "public body" has the meaning given that term in ORS 174.109.

(2) A public body may not disclose the identification badge or card of an employee of the public body without the written consent of the employee if:

(a) The badge or card contains the photograph of the employee; and

(b) The badge or card was prepared solely for internal use by the public body to identify employees of the public body.

(3) The public body may not disclose a duplicate of the photograph used on the badge or card. [Formerly 192.447]

**Note:** 192.371 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 192 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

**192.374 Nondisclosure of concealed handgun license records or information; exceptions; limitations; rules.** (1) A public body may not disclose records or information that identifies a person as a current or former holder of, or applicant for, a concealed handgun license, unless:

(a) The disclosure is made to another public body and is necessary for criminal justice purposes;

(b) A court enters an order in a criminal or civil case directing the public body to disclose the records or information;

(c) The holder of, or applicant for, the concealed handgun license consents to the disclosure in writing;

(d) The public body determines that a compelling public interest requires disclosure in the particular instance and the disclosure is limited to the name, age and county of residence of the holder or applicant;

(e)(A) The disclosure is limited to confirming or denying that a person convicted of a person crime, or restrained by a protective order, is a current holder of a concealed handgun license; and

(B) The disclosure is made to a victim of the person crime or to a person who is protected by the protective order, in response to a request for disclosure that provides the public body with the name and age of the person convicted of the person crime or restrained by the protective order; or

(f)(A) The disclosure is limited to confirming or denying that a person convicted of a crime involving the use or possession of a firearm is a current holder of a concealed handgun license; and

(B) The disclosure is made to a bona fide representative of the news media in response to a request for disclosure that provides the name and age

of the person convicted of the crime involving the use or possession of a firearm.

(2) A public body may not confirm or deny that a person described in subsection (1)(e)(A) or (f)(A) of this section is a current holder of a concealed handgun license unless the person seeking disclosure:

(a) Under subsection (1)(e) of this section provides the public body with written proof that the person is a victim of the person crime or is protected by the protective order.

(b) Under subsection (1)(f) of this section provides the public body with written proof that the person is a bona fide representative of the news media.

(3) Notwithstanding any other provision of law, a public body that receives a request for disclosure under subsection (1)(e) or (f) of this section may conduct an investigation, including a criminal records check, to determine whether a person described in subsection (1)(e)(A) or (f)(A) of this section has been convicted of a person crime or a crime involving the use or possession of a firearm or is restrained by a protective order.

(4) The Attorney General shall adopt rules to carry out the provisions of this section. The rules must include a description of:

(a) The procedures for submitting the written request described in subsection (1)(d) of this section; and

(b) The materials an individual must provide to the public body to establish a compelling public interest that supports the disclosure of the name, age and county of residence of the holder or applicant.

(5) The prohibition described in subsection (1) of this section does not apply to the Judicial Department.

(6) As used in this section:

(a) "Convicted" does not include a conviction that has been reversed, vacated or set aside or a conviction for which the person has been pardoned.

(b) "Person crime" means a person felony or person Class A misdemeanor, as those terms are defined in the rules of the Oregon Criminal Justice Commission, or any other crime constituting domestic violence, as defined in ORS 135.230.

(c) "Protective order" has the meaning given that term in ORS 135.886.

(d) "Victim" has the meaning given that term in ORS 131.007. [Formerly 192.448]

**Note:** 192.374 was added to and made a part of 192.311 to 192.478 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

**192.377 Required redaction of certain personal information.**

A public body that is the custodian of or is otherwise in possession of information that was submitted to the public body in confidence and is not otherwise required by law to be submitted, must redact all of the following information before making a disclosure described in ORS 192.355 (4):

(1) Residential address and telephone numbers;

(2) Personal electronic mail addresses and personal cellular telephone numbers;

(3) Social Security numbers and employer-issued identification card numbers; and

(4) Emergency contact information. [Formerly 192.504]

**Note:** 192.377 was added to and made a part of 192.311 to 192.478 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

**192.380 Immunity from liability for disclosure of certain personal information; recovery of costs.** (1) A public body or any official of the public body that determines that a party requesting information under ORS 192.355 (3), 192.363 or 192.365 has demonstrated by clear and convincing evidence that the public interest requires disclosure in a particular instance is immune from civil or criminal liability associated with the disclosure.

(2) A public body that receives a request for disclosure of records under ORS 192.355 (3) or 192.365 is entitled to recover the cost of complying with ORS 192.363 without regard to whether the public body determines that the party requesting disclosure has demonstrated by clear and convincing evidence that the public interest requires disclosure in a particular instance. [Formerly 192.497]

**Note:** 192.380 was added to and made a part of 192.311 to 192.478 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

(Investigation Records)

**192.385 Nondisclosure of certain public safety officer investigation records; exceptions.** (1) As used in this section:

(a) “Law enforcement unit” has the meaning given that term in ORS 181A.355.

(b) “Public body” has the meaning given that term in ORS 192.311.

(c) “Public safety officer” has the meaning given that term in ORS 181A.355.

(2) A public body may not disclose audio or video records of internal investigation interviews of public safety officers.

(3) Subsection (2) of this section does not prohibit disclosure of the records described in subsection (2) of this section to:

(a) A law enforcement unit for purposes of the investigation;

(b) An attorney representing a public safety officer who is the subject of the investigation;

(c) The Department of Public Safety Standards and Training as required by ORS 181A.670;

(d) A district attorney, as defined in ORS 131.005;

(e) A public safety officer who is the subject of the investigation;

(f) An attorney for a defendant in a criminal proceeding related to the investigation, for use in preparation for the criminal proceeding;

(g) A labor organization, as defined in ORS 243.650, for use in an action by an employer against a member of the labor organization for the purpose of punishing the member;

(h) A public body responsible for civilian oversight or a citizen review body designated by the public body for the purposes of fulfilling the investigative and oversight functions of the body;

(i) A federal law enforcement agency for purposes of the investigation;  
or

(j) The Attorney General.

(4) The disclosure of records under subsection (3) of this section does not make the records subject to further disclosure. [Formerly 192.405]

**Note:** 192.385 was enacted into law by the Legislative Assembly but

was not added to or made a part of ORS chapter 192 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

(Old Records)

**192.390 Inspection of records more than 25 years old.**

Notwithstanding ORS 192.338, 192.345 and 192.355 and except as otherwise provided in ORS 192.398, public records that are more than 25 years old shall be available for inspection. [Formerly 192.495]

**Note:** 192.390 was added to and made a part of 192.311 to 192.478 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

(Health Records)

**192.395 Health services costs.** A record of an agency of the executive department as defined in ORS 174.112 that contains the following information is a public record subject to inspection under ORS 192.314 and is not exempt from disclosure under ORS 192.345 or 192.355 except to the extent that the record discloses information about an individual's health or is proprietary to a person:

(1) The amounts determined by an independent actuary retained by the agency to cover the costs of providing each of the following health services under ORS 414.631, 414.651 and 414.688 to 414.745 for the six months preceding the report:

- (a) Inpatient hospital services;
- (b) Outpatient hospital services;
- (c) Laboratory and X-ray services;
- (d) Physician and other licensed practitioner services;
- (e) Prescription drugs;
- (f) Dental services;
- (g) Vision services;
- (h) Mental health services;
- (i) Chemical dependency services;
- (j) Durable medical equipment and supplies; and
- (k) Other health services provided under a coordinated care

organization contract under ORS 414.651 or a contract with a prepaid managed care health services organization, as defined in ORS 414.025;

(2) The amounts the agency and each contractor have paid under each coordinated care organization contract under ORS 414.651 or prepaid managed care health services organization contract for administrative costs and the provision of each of the health services described in subsection (1) of this section for the six months preceding the report;

(3) Any adjustments made to the amounts reported under this section to account for geographic or other differences in providing the health services; and

(4) The numbers of individuals served under each coordinated care organization contract or prepaid managed care health services organization contract, listed by category of individual. [Formerly 192.493]

**Note:** 192.395 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 192 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

**192.398 Medical records; sealed records; records of individual in custody or under supervision; student records.** The following public records are exempt from disclosure:

(1) Records less than 75 years old which contain information about the physical or mental health or psychiatric care or treatment of a living individual, if the public disclosure thereof would constitute an unreasonable invasion of privacy. The party seeking disclosure shall have the burden of showing by clear and convincing evidence that the public interest requires disclosure in the particular instance and that public disclosure would not constitute an unreasonable invasion of privacy.

(2) Records less than 75 years old which were sealed in compliance with statute or by court order. Such records may be disclosed upon order of a court of competent jurisdiction or as otherwise provided by law.

(3) Records of a person who is or has been in the custody or under the lawful supervision of a state agency, a court or a unit of local government, are exempt from disclosure for a period of 25 years after termination of such custody or supervision to the extent that disclosure thereof would interfere with the rehabilitation of the person if the public interest in confidentiality clearly outweighs the public interest in disclosure. Nothing

in this subsection, however, shall be construed as prohibiting disclosure of the fact that a person is in custody.

(4) Student records required by state or federal law to be exempt from disclosure. [Formerly 192.496]

**Note:** 192.398 was added to and made a part of 192.311 to 192.478 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

**192.401 Records of health professional regulatory boards, Health Licensing Office.** (1)(a) A person denied the right to inspect or to receive a copy of a public record of a health professional regulatory board, as defined in ORS 676.160, that contains information concerning a licensee or applicant, and petitioning the Attorney General to review the public record shall, on or before the date of filing the petition with the Attorney General, send a copy of the petition by first class mail to the health professional regulatory board. Not more than 48 hours after the board receives a copy of the petition, the board shall send a copy of the petition by first class mail to the licensee or applicant who is the subject of a public record for which disclosure is sought. When sending a copy of the petition to the licensee or applicant, the board shall include a notice informing the licensee or applicant that a written response by the licensee or applicant may be filed with the Attorney General not later than seven days after the date that the notice was sent by the board. Immediately upon receipt of any written response from the licensee or applicant, the Attorney General shall send a copy of the response to the petitioner by first class mail.

(b) A person denied the right to inspect or to receive a copy of a public record of the Health Licensing Office that contains information concerning an individual who holds, or an applicant for, an authorization to practice a profession to which ORS 676.595 applies, and petitioning the Attorney General to review the public record shall, on or before the date of filing the petition with the Attorney General, send a copy of the petition by first class mail to the office. Not more than 48 hours after the office receives a copy of the petition, the office shall send a copy of the petition by first class mail to the holder of the authorization or the applicant who is the subject of a public record for which disclosure is sought. When sending a copy of the petition to the holder of the authorization or the applicant, the office shall include a notice informing the holder of the authorization or the applicant that a written response by the holder of the authorization or the applicant may be

filed with the Attorney General not later than seven days after the date that the notice was sent by the office. Immediately upon receipt of any written response from the holder of the authorization or the applicant, the Attorney General shall send a copy of the response to the petitioner by first class mail.

(2)(a) The person seeking disclosure of a public record of a health professional regulatory board, as defined in ORS 676.160, that is confidential or exempt from disclosure under ORS 676.165 or 676.175 shall have the burden of demonstrating to the Attorney General by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including but not limited to the public interest in nondisclosure. The Attorney General shall issue an order denying or granting the petition, or denying or granting it in part, not later than the 15th day following the day that the Attorney General receives the petition. A copy of the Attorney General's order granting a petition or part of a petition shall be served by first class mail on the health professional regulatory board, the petitioner and the licensee or applicant who is the subject of a public record ordered to be disclosed. The health professional regulatory board shall not disclose a public record prior to the seventh day following the service of the Attorney General's order on a licensee or applicant entitled to receive notice under this paragraph.

(b) The person seeking disclosure of a public record of the Health Licensing Office that is confidential or exempt from disclosure as described in ORS 676.595 shall have the burden of demonstrating to the Attorney General by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including but not limited to the public interest in nondisclosure. The Attorney General shall issue an order denying or granting the petition, or denying or granting the petition in part, not later than the 15th day following the day that the Attorney General receives the petition. A copy of the Attorney General's order granting a petition or part of a petition shall be served by first class mail on the office, the petitioner and the holder of the authorization or the applicant who is the subject of a public record ordered to be disclosed. The office shall not disclose a public record prior to the seventh day following the service of the Attorney General's order on a holder of an authorization or an applicant entitled to receive notice under this paragraph.

(3)(a) If the Attorney General grants or denies the petition for a public record of a health professional regulatory board, as defined in ORS 676.160, that contains information concerning a licensee or applicant, the board, a person denied the right to inspect or receive a copy of the public record or the licensee or applicant who is the subject of the public record may institute proceedings for injunctive or declaratory relief in the circuit court for the county where the public record is held. The party seeking disclosure of the public record shall have the burden of demonstrating by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including but not limited to the public interest in nondisclosure.

(b) If the Attorney General grants or denies the petition for a public record of the Health Licensing Office that contains information concerning a holder of an authorization to practice a profession or an applicant, the office, a person denied the right to inspect or receive a copy of the public record or the holder of the authorization or the applicant who is the subject of the public record may institute proceedings for injunctive or declaratory relief in the circuit court for the county where the public record is held. The party seeking disclosure of the public record shall have the burden of demonstrating by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including but not limited to the public interest in nondisclosure.

(4) The Attorney General may comply with a request of a health professional regulatory board or the Health Licensing Office to be represented by independent counsel in any proceeding under subsection (3) of this section. [Formerly subsections (4) to (7) of 192.450]

**192.405** [2011 c.485 §1; renumbered 192.385 in 2017]

(Appeals)

**192.407 Review of public body's failure to respond or review of public body's estimated response time; timeline for response.** (1) A person who has submitted a written public records request in compliance with a public body's policy may seek review of the following, in the same manner as a person petitions when inspection of a public record is denied under ORS 192.311 to 192.478:

(a) The failure of a public body to provide the response required by ORS 192.329 within the prescribed period. A failure of the public body to timely respond shall be treated as a denial of the request unless the public

body demonstrates that compliance was not required under ORS 192.329.

(b) An estimate of time provided by a public body pursuant to ORS 192.329, if the person believes that the estimated time frame for the response is unreasonably long and will result in undue delay of disclosure.

(c) Any other instance in which the person believes that the public body has failed to comply with ORS 192.329.

(2) Except as provided in subsection (3) of this section, the Attorney General, the district attorney and the court have the same authority with respect to petitions under this section as when inspection of a public record is denied.

(3) If the Attorney General, district attorney or a court grants a petition filed under this section, the order granting the petition may require disclosure of nonexempt material responsive to the request within seven days, or within any other period that the Attorney General, district attorney or court concludes is appropriate to comply with ORS 192.329. [2017 c.456 §5]

**Note:** 192.407 was added to and made a part of 192.311 to 192.478 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

**192.410** [1973 c.794 §2; 1989 c.377 §1; 1993 c.787 §4; 2001 c.237 §1; 2005 c.659 §4; 2017 c.456 §2; renumbered 192.311 in 2017]

**192.411 Petition to review denial of right to inspect state public record; appeal from decision of Attorney General denying inspection.**

(1) Subject to ORS 192.401 (1) and 192.427, any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection. Except as provided in ORS 192.401 (2), the burden is on the agency to sustain its action. Except as provided in ORS 192.401 (2), the Attorney General shall issue an order denying or granting the petition, or denying it in part and granting it in part, within seven days from the day the Attorney General receives the petition.

(2) If the Attorney General grants the petition and orders the state agency to disclose the public record, or if the Attorney General grants the petition in part and orders the state agency to disclose a portion of the public record, the state agency shall comply with the order in full within seven days after issuance of the order, unless within the seven-day period it issues

a notice of its intention to institute proceedings for injunctive or declaratory relief in the Circuit Court for Marion County or, as provided in ORS 192.401 (3), in the circuit court of the county where the public record is held. Copies of the notice shall be sent to the Attorney General and by certified mail to the petitioner at the address shown on the petition. The state agency shall institute the proceedings within seven days after it issues its notice of intention to do so. If the Attorney General denies the petition in whole or in part, or if the state agency continues to withhold the public record or a part of it notwithstanding an order to disclose by the Attorney General, the person seeking disclosure may institute such proceedings.

(3) The Attorney General shall serve as counsel for the state agency in a suit filed under subsection (2) of this section if the suit arises out of a determination by the Attorney General that the public record should not be disclosed, or that a part of the public record should not be disclosed if the state agency has fully complied with the order of the Attorney General requiring disclosure of another part or parts of the public record, and in no other case. In any case in which the Attorney General is prohibited from serving as counsel for the state agency, the agency may retain special counsel. [Formerly subsections (1) to (3) of 192.450]

**192.415 Procedure to review denial of right to inspect other public records; effect of disclosure.** (1) ORS 192.401 and 192.411 apply to the case of a person denied the right to inspect or to receive a copy of any public record of a public body other than a state agency, except that:

(a) The district attorney of the county in which the public body is located, or if it is located in more than one county the district attorney of the county in which the administrative offices of the public body are located, shall carry out the functions of the Attorney General;

(b) Any suit filed must be filed in the circuit court for the county described in paragraph (a) of this subsection; and

(c) The district attorney may not serve as counsel for the public body, in the cases permitted under ORS 192.411 (3), unless the district attorney ordinarily serves as counsel for the public body.

(2) Disclosure of a record to the district attorney in compliance with subsection (1) of this section does not waive any privilege or claim of privilege regarding the record or its contents.

(3) Disclosure of a record or part of a record as ordered by the district

attorney is a compelled disclosure for purposes of ORS 40.285. [Formerly 192.460]

**192.418 Effect of failure of Attorney General, district attorney or elected official to take timely action on inspection petition.** (1) The failure of the Attorney General or district attorney to issue an order under ORS 192.401, 192.411 or 192.415 denying, granting, or denying in part and granting in part a petition to require disclosure within seven days from the day of receipt of the petition shall be treated as an order denying the petition for the purpose of determining whether a person may institute proceedings for injunctive or declaratory relief under ORS 192.401, 192.411 or 192.415.

(2) The failure of an elected official to deny, grant, or deny in part and grant in part a request to inspect or receive a copy of a public record within seven days from the day of receipt of the request shall be treated as a denial of the request for the purpose of determining whether a person may institute proceedings for injunctive or declaratory relief under ORS 192.401, 192.411 or 192.415. [Formerly 192.465]

**192.420** [1973 c.794 §3; 1999 c.574 §1; 2003 c.403 §1; renumbered 192.314 in 2017]

**192.422 Petition form; procedure when petition received.** (1) A petition to the Attorney General or district attorney requesting the Attorney General or district attorney to order a public record to be made available for inspection or to be produced shall be in substantially the following form, or in a form containing the same information:

(Date) \_\_\_\_\_

I (we), \_\_\_\_\_(name(s)), the undersigned, request the Attorney General (or District Attorney of \_\_\_\_\_ County) to order \_\_\_\_\_ (name of governmental body) and its employees to (make available for inspection) (produce a copy or copies of) the following records:

1. \_\_\_\_\_  
(Name or description of record)

2. \_\_\_\_\_  
(Name or description of record)

I (we) asked to inspect and/or copy these records on \_\_\_\_\_ (date) at \_\_\_\_\_ (address). The request was denied by the following person(s):

1. \_\_\_\_\_

(Name of public officer or employee;  
title or position, if known)

2. \_\_\_\_\_

(Name of public officer or employee;  
title or position, if known)

\_\_\_\_\_

(Signature(s))

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This form should be delivered or mailed to the Attorney General's office in Salem, or the district attorney's office in the county courthouse.

(2) Promptly upon receipt of such a petition, the Attorney General or district attorney shall notify the public body involved. The public body shall thereupon transmit the public record disclosure of which is sought, or a copy, to the Attorney General, together with a statement of its reasons for believing that the public record should not be disclosed. In an appropriate case, with the consent of the Attorney General, the public body may instead disclose the nature or substance of the public record to the Attorney General. [Formerly 192.470]

**192.423** [2007 c.513 §2; renumbered 192.360 in 2017]

**192.427 Procedure to review denial by elected official of right to inspect public records.** In any case in which a person is denied the right to inspect or to receive a copy of a public record in the custody of an elected official, or in the custody of any other person but as to which an elected official claims the right to withhold disclosure, no petition to require disclosure may be filed with the Attorney General or district attorney, or if a petition is filed it shall not be considered by the Attorney General or district attorney after a claim of right to withhold disclosure by an elected official. In such case a person denied the right to inspect or to receive a copy of a public record may institute proceedings for injunctive or declaratory relief in the appropriate circuit court, as specified in ORS 192.401, 192.411 or 192.415, and the Attorney General or district attorney may upon request serve or decline to serve, in the discretion of the Attorney General or district attorney, as counsel in such suit for an elected official for which the Attorney General or district attorney ordinarily serves as counsel. Nothing

in this section shall preclude an elected official from requesting advice from the Attorney General or a district attorney as to whether a public record should be disclosed. [Formerly 192.480]

**192.430** [1973 c.794 §4; 1989 c.546 §1; renumbered 192.318 in 2017]

**192.431 Court authority in reviewing action denying right to inspect public records; docketing; costs and attorney fees.** (1) In any suit filed under ORS 192.401, 192.411, 192.415, 192.422 or 192.427, the court has jurisdiction to enjoin the public body from withholding records and to order the production of any records improperly withheld from the person seeking disclosure. The court shall determine the matter de novo and the burden is on the public body to sustain its action. The court, on its own motion, may view the documents in controversy in camera before reaching a decision. Any noncompliance with the order of the court may be punished as contempt of court.

(2) Except as to causes the court considers of greater importance, proceedings arising under ORS 192.401, 192.411, 192.415, 192.422 or 192.427 take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(3) If a person seeking the right to inspect or to receive a copy of a public record prevails in the suit, the person shall be awarded costs and disbursements and reasonable attorney fees at trial and on appeal. If the person prevails in part, the court may in its discretion award the person costs and disbursements and reasonable attorney fees at trial and on appeal, or an appropriate portion thereof. If the state agency failed to comply with the Attorney General's order in full and did not issue a notice of intention to institute proceedings pursuant to ORS 192.411 (2) within seven days after issuance of the order, or did not institute the proceedings within seven days after issuance of the notice, the petitioner shall be awarded costs of suit at the trial level and reasonable attorney fees regardless of which party instituted the suit and regardless of which party prevailed therein. [Formerly 192.490]

**192.435** [2015 c.26 §3; 2015 c.805 §2; renumbered 192.365 in 2017]

**192.437** [2015 c.805 §3; renumbered 192.363 in 2017]

**192.440** [1973 c.794 §5; 1979 c.548 §4; 1989 c.111 §12; 1989 c.377 §2; 1989 c.546 §2; 1999 c.824 §5; 2001 c.445 §168; 2005 c.272 §1; 2007 c.467 §1; 2017 c.456 §3; renumbered 192.324 in 2017]

**192.445** [1993 c.787 §5; 1995 c.742 §12; 2003 c.807 §1; renumbered 192.368 in 2017]

**192.447** [2003 c.282 §1; renumbered 192.371 in 2017]

**192.448** [2012 c.93 §2; 2012 c.93 §5; renumbered 192.374 in 2017]

**192.450** [1973 c.794 §6; 1975 c.308 §2; 1997 c.791 §8; 1999 c.751 §4; 2017 c.101 §4; subsections (1) to (3) renumbered 192.411 and subsections (4) to (7) renumbered 192.401 in 2017]

**192.460** [1973 c.794 §7; 2007 c.513 §4; renumbered 192.415 in 2017]

#### PUBLIC RECORDS ADVOCATE

**192.461 Public Records Advocate.** (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, chapter 728, Oregon Laws 2017, 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. [2017 c.728 §1]

**Note:** The amendments to 192.461 by section 16, chapter 728, Oregon Laws 2017, become operative January 1, 2021. See section 17, chapter 728, Oregon Laws 2017. The text that is operative on and after January 1, 2021, is set forth for the user's convenience.

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

(2) The Public Records Advocate shall be appointed by the Governor 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. 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.

**192.464 Facilitated dispute resolution services of Public Records Advocate.** (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 192.324 (5) that a fee waiver or reduction of fees is in the public interest; or

(c) Received a written fee estimate under ORS 192.324 (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 192.324, 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 192.311 to 192.478:

(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. [2017 c.728 §2]

**192.465** [1975 c.308 §5; renumbered 192.418 in 2017]

**192.468 Discretion of Public Records Advocate in dispute resolution services.** Consistent with ORS 192.464 and rules adopted thereunder, the Public Records Advocate possesses sole discretion over the conduct of

facilitated dispute resolution sessions. [2017 c.728 §3]

**192.470** [1973 c.794 §10; renumbered 192.422 in 2017]

**192.472 Confidentiality of Public Records Advocate records.**

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 192.311 to 192.478 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. [2017 c.728 §4]

**192.475 Public records request training.** (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 ORS 192.464. [2017 c.728 §5]

**192.478 Exemption for Judicial Department.** The Judicial Department is not subject to ORS 192.464 and 192.475. [2017 c.728 §6]

# PUBLIC MEETINGS





## II. PUBLIC MEETINGS

### SPECIAL NOTE: ROLE OF THE ATTORNEY GENERAL

At the outset of this discussion of the Public Meetings Law, we note an important distinction between the Public Meetings Law and the Public Records Law. The Attorney General and district attorneys have a special statutory role to enforce the Public Records Law's requirements. In contrast, neither the Attorney General nor district attorneys have such a role under the Public Meetings Law.

The Attorney General's only role under the Public Meetings Law is to provide legal advice to the state agencies, boards, and commissions that are subject to the law, and to the Oregon Government Ethics Commission in its role under [ORS 244.260](#). Most district attorneys do not have a role in interpreting the Public Meetings Law. The exception is where a district attorney also serves as legal counsel to a county governing body. If a citizen wishes to compel compliance with the meetings law, or believes that a governing body has violated the law, the citizen may file a private civil lawsuit against the governing body. A citizen who believes that a governing body has violated the provisions permitting an executive session may file a complaint with the Oregon Government Ethics Commission. Neither the Attorney General nor any district attorney may assist a citizen in such a suit or complaint.

Nevertheless, as a public service, the Attorney General's office frequently responds to questions from citizens or the news media about the Public Meetings Law. *These responses do not constitute formal or informal legal opinions of the Attorney General.* This office may issue legal opinions or give legal advice only to state agencies and officers, including members of the legislature. We *can* point out what the law says, and inform interested persons of the construction of the law adopted in the many published opinions we have written on the subject. We are committed to providing this informational assistance to promote better public understanding of the Public Meetings Law.

### A. POLICY OF THE PUBLIC MEETINGS LAW

"The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information

upon which such decisions were made. It is the intent of [the Public Meetings Law] that decisions of governing bodies be arrived at openly.”<sup>568</sup>

This policy statement is given effect by the law’s substantive provisions, which, among other things, provide that a governing body’s meetings and deliberations are open to the public,<sup>569</sup> that the public has notice of the time and place of these meetings,<sup>570</sup> and that the meetings are accessible to persons wishing to attend.<sup>571</sup>

All substantive provisions of the Public Meetings Law should be read in light of this policy statement. When applying the law to particular circumstances, that policy ordinarily will require an interpretation favoring openness.<sup>572</sup>

We have acknowledged that strict compliance with the substantive requirements of the Public Meetings Law frequently may “sacrifice[] speed and spontaneity for more process and formality.”<sup>573</sup> Nonetheless, we believe that the law’s requirements generally will not interfere with a public body’s administration.

## **B. BODIES SUBJECT TO THE LAW**

### **1. Governing Bodies of Public Bodies**

The Public Meetings Law applies to any governing body of a public body. A “public body” is the state, any regional council, county, city or district, or any municipal or public corporation; or any agency of those entities, such as a board, department, commission, council, bureau, committee, subcommittee, or advisory group.<sup>574</sup> A key indicator of whether

<sup>568</sup> ORS 192.620.

<sup>569</sup> ORS 192.630(1)–(2).

<sup>570</sup> ORS 192.640.

<sup>571</sup> ORS 192.630(4)–(5).

<sup>572</sup> *E.g.*, [\*TriMet v. Amalgamated Transit Union Local 757\*](#), 362 Or 484, 497 (2018) (rejecting interpretation that would “severely undermine” the policy that decisions of governing bodies be arrived at openly); [\*Oregonian Publ’g Co. v. Board of Parole\*](#), 95 Or App 501, 506 (1989) (this policy requires courts to “analyze coverage of the act broadly and its exemptions narrowly”).

<sup>573</sup> Letter of Advice to Ron Eachus, at 7, 1988 WL 416300 (OP-6292) (Sept 12, 1988).

<sup>574</sup> ORS 192.610(4).

an entity is a public body is whether it was created by or pursuant to the state constitution, a statute, administrative rule, order, intergovernmental agreement, bylaw, or other official act.<sup>575</sup> However, a single official, such as the governor, is *not* a public body for purposes of meetings law.<sup>576</sup>

If two or more members of any public body have “the authority to make decisions for or recommendations to a public body on policy or administration,” they are a “governing body.”<sup>577</sup> For example, a five-member city council and a seven-member licensing board are both governing bodies. In addition, a three-member committee of a seven-member board is itself a “governing body” if it is authorized to make decisions for or to advise the full board or another public body. Conversely, a department headed by an individual public officer, such as the office of the State Treasurer, is not a “governing body.”

**a. Authority to Make Decisions for a Public Body**

A body that has authority to make decisions for a public body on “policy or administration” is a governing body.<sup>578</sup> A body meets this standard if its decision-making authority is equivalent to the authority to exercise governmental power, that is, is integral to the movement of the government in an area where it has the power and authority to act. Thus, a three-member subcommittee that has authority only to gather information for the full committee is not a governing body.<sup>579</sup> Even though the subcommittee decides when to meet and determines what procedures it will use to gather and report information, it is not vested with the authority to

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<sup>575</sup> Letter of Advice to Rep. Larry Hill and William L. Miles, at 11, 1986 WL 228236 (OP-5885, OP-5986) (May 28, 1986) (private, nonprofit corporation whose board included public officials serving in their individual capacities was not a public body).

<sup>576</sup> 42 Op Atty Gen 187, 189, 1981 WL 152293 (1981) (governor was not a public body under meetings law); see *Indep. Contractors Research Inst. v. DAS*, 207 Or App 78, 92–94 (2006) (no violation of meetings law for advisory committee reporting to DAS’s Chief Procurement Officer).

<sup>577</sup> ORS 192.610(3).

<sup>578</sup> *Id.*

<sup>579</sup> 42 Op Atty Gen at 188 (multi-state panel formed to assess the economic consequences of the construction of nuclear power plants was not a governing body where it did not have the power to decide policy or make recommendations).

decide the direction in which the government will move on an issue of policy or administration. In contrast, if the subcommittee possesses the authority to make policy or hiring decisions for a public body, then it is a governing body.

**b. Authority to Make Recommendations to a Public Body**

A body that has authority to make recommendations to a public body on policy or administration is a governing body.<sup>580</sup> However, because “public body” does not include an individual official, an advisory body that makes recommendations to an individual official, and does not exercise other governmental powers, is not subject to Public Meetings Law.

For example, an advisory committee appointed by an individual official, such as the governor,<sup>581</sup> individual head of a department,<sup>582</sup> or a school principal, is *not* ordinarily a governing body if it reports only to the individual appointing official.<sup>583</sup> If, however, that single official lacks authority to act on the advisory group’s recommendations, and must pass those recommendations on unchanged to a public body, the Public Meetings Law applies to the advisory group’s meetings.<sup>584</sup>

As long as the advisory body is itself a governing body of a public body, the fact that its members may all be private citizens is irrelevant. Thus, the scope of the Public Meetings Law extends even to private citizens, employees, and others without any decision-making authority, when they serve on a group that is authorized to furnish advice to a public

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<sup>580</sup> ORS 192.610(3).

<sup>581</sup> 42 Op Atty Gen at 189.

<sup>582</sup> See [\*Indep. Contractors Research Inst.\*](#), 207 Or App at 92–94 (DAS’s Chief Procurement Officer).

<sup>583</sup> Meetings of an advisory committee addressing administration and policy issues related to the Oregon Health Plan must comply with the Public Meetings Law when two or more committee members in attendance are not employed by a public body. [ORS 414.227](#). This requirement applies even if the committee makes recommendations only to an individual official, e.g., the Administrator of the Office for Oregon Health Plan Policy and Research.

<sup>584</sup> Letter of Advice to W.T. Lemman, at 3–5, 1988 WL 416293 (OP-6248) (Oct 13, 1988) (search committee for university president that reported to chancellor was a governing body where the chancellor had limited role other than forwarding the committee’s recommendations to the State Board of Higher Education).

body. For example, a school board advisory committee consisting of private citizens who meet with and make recommendations to the board on school matters is a governing body.

## 2. Private Bodies

Private bodies are not covered by the Public Meetings Law.<sup>585</sup> Whether a private body becomes subject to the meetings law by virtue of assuming public functions is an unsettled area of the law. A private body does not become subject to the meetings law merely because it receives public funds, contracts with governmental bodies, or performs public services.

State agencies periodically contract with privately established bodies, such as nonprofit corporations, to carry out public purposes. For example, the Oregon Health Authority and counties are encouraged by statute to contract with private bodies to furnish community mental health services.<sup>586</sup> Typically, the private body's entire budget consists of public money. Other groups, such as the Oregon Parks Foundation, may have public officers on their boards, receive public funds, and carry out public purposes to such an extent that their records are subject to state audit.<sup>587</sup> Such bodies are not subject to the Public Meetings Law.

As discussed in Part I of this manual, the Oregon Supreme Court has developed a test for determining whether an entity is the "functional equivalent" of a public body for purposes of the Public Records Law.<sup>588</sup>

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<sup>585</sup> See 46 Op Atty Gen 155, 166–67, 1989 WL 439806 (1989) (Oregon Medical Insurance Pool was, at the time of this opinion, essentially a private entity and, therefore, not a "public body" subject to the Public Meetings Law).

<sup>586</sup> [ORS 430.610–430.695](#).

<sup>587</sup> See 38 Op Atty Gen 2105, 1978 WL 29512 (1978).

<sup>588</sup> The six factors are: 1) The entity's origin—Was it created by government or was it created independently? 2) The nature of the function(s) assigned and performed by the entity—Are the functions traditionally performed by government or are they commonly performed by a private entity? 3) The scope of authority granted to and exercised by the entity—Does it have authority to make binding decisions for the government? 4) The nature and level of governmental financial and nonfinancial support. 5) The scope of governmental control over the entity. 6) The status of the entity's officers and employees—Are they public employees? [Marks v. McKenzie High School Fact-Finding Team](#), 319 Or 451, 464–65 (1994).

Although the definition of “public body” in the Public Meetings Law is similar to the definition in the Public Records Law, they are sufficiently different that the applicability of that test to the Public Meetings Law is questionable. Nevertheless, the court’s test may have implications for the meetings of private entities that contract with, or perform services at the request of, public bodies if the private entity has been given authority to make decisions for or recommendations to a public body. A public body or private entity in this situation may wish to consult its legal counsel concerning possible application of the Public Meetings Law to the private entity and the relevance of the six factors identified by the Supreme Court.

One example where a private body’s assumption of public functions results in the body being subject to the Public Meetings Law is county alcohol and drug prevention and treatment programs. County governing bodies can designate already existing bodies to act as the local planning committee in identifying needs and establishing priorities for prevention and treatment services.<sup>589</sup> A private body performing advisory functions for a governing body would be subject to the Public Meetings Law.

In addition, the legislature may expressly subject a private entity to Public Meetings Law. For example, the governing body of a recipient of grant funds from the Oregon prekindergarten program must comply with the law.<sup>590</sup>

### **3. Federal and Multi-Jurisdictional Bodies**

Federal agencies are not subject to the Oregon Public Meetings Law. By its terms, the law covers only Oregon state and local governing bodies.

Multi-jurisdictional commissions, whose members are appointed by several different governments (such as federal agencies, the governors of Oregon and Washington, and county governing bodies) and whose Oregon members do not constitute a majority, are not subject to the Public Meetings Law. However, if such a multi-jurisdictional commission has committees consisting of solely, or a majority of, Oregon appointees that are authorized

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<sup>589</sup> [ORS 430.342](#).

<sup>590</sup> [ORS 329.175\(6\)](#). In addition, records created or presented at a meeting of such a governing body, as well as the meeting minutes, are subject to Public Records Law. ORS 329.175(6)(a).

to make decisions for the commission, or that are authorized to deliberate and make recommendations to the state or any other public body within the state, the meetings of those committees may be subject to the Public Meetings Law. In some cases, the federal enabling legislation may provide that the multi-jurisdictional commission and its committees must comply with state public records and meetings laws.

### C. MEETINGS AND DELIBERATIONS SUBJECT TO THE LAW

#### 1. Public Meetings

All meetings of a governing body must be open to the public, unless Public Meetings Law permits the body to meet in executive session or otherwise provides an exception.<sup>591</sup> A “meeting” is the convening of any governing body “for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter.”<sup>592</sup>

In addition, a quorum of a governing body may not meet in private for the purpose of deciding on or deliberating toward a decision on any matter, unless an exception applies.<sup>593</sup>

While at first blush these restrictions may seem complementary, in fact the prohibition on a quorum meeting in private “reach[es] some decision-making of a governing body that does not occur in a meeting.”<sup>594</sup> That is, “Public Meetings Law applies not only to formal ‘meetings’ of governing bodies \* \* \* but also to circumstances in which a quorum \* \* \* ‘meets’ to deliberate toward or make a decision outside of the context of a ‘meeting.’”<sup>595</sup>

#### a. Quorum Requirements

Every governing body has a quorum.<sup>596</sup> That is, “there is some minimum number of members that must participate in order for the

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<sup>591</sup> ORS 192.630(1).

<sup>592</sup> ORS 192.610(5).

<sup>593</sup> ORS 192.630(2).

<sup>594</sup> [\*TriMet v. Amalgamated Transit Union Local 757\*](#), 362 Or 484, 497 (2018).

<sup>595</sup> [\*TriMet v. Amalgamated Transit Union Local 757\*](#), 276 Or App 513, 525 (2016), *aff’d*, 362 Or 484 (2018).

<sup>596</sup> [\*TriMet\*](#), 362 Or at 500.

[governing] body to be competent to transact business.”<sup>597</sup>

While “quorum” is not defined in the Public Meetings Law, the default quorum appears to be a majority of the governing body, unless otherwise expressly provided by law.<sup>598</sup> In addition, special statutes often define “quorum” for state governing bodies. Local city and county governing bodies may have “quorum” defined by charter, bylaws, or rules of order.

A governing body may only make a decision at a meeting at which a quorum is present, unless a vote by proxy or by mail is specifically authorized under Oregon law. See [Appendix K](#) for further discussion of quorum.

A gathering of less than a quorum of a governing body is not a “meeting.”<sup>599</sup> However, members of a governing body should not gather as a group or groups composed of less than a quorum for the purpose of conducting business outside the Public Meetings Law. Such a gathering creates the appearance of impropriety, and runs contrary to the policy of the Public Meetings Law, which supports keeping the public informed of the deliberations of governing bodies. In addition, such a gathering creates a risk of violating ORS 192.630(2) through serial communications, as discussed below.

If each member of a governing body is charged to form recommendations individually rather than deliberatively through a quorum requirement, the Public Meetings Law does not apply. Because this is unquestionably a difficult area of interpretation, governing bodies are cautioned not to misuse the committee appointment process to subvert the policy of the law.

Ordinarily, staff meetings are not covered by the Public Meetings Law because no quorum is required. A staff meeting called by a single official is not covered by the Public Meetings Law because the staff do not make decisions for or recommendations to a “public body.” If, however, a quorum of a governing body, such as a three-member commission, meets with the

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<sup>597</sup> *Id.*

<sup>598</sup> *Id.* at 500–01 (citing [ORS 174.130](#)).

<sup>599</sup> [Handy v. Lane County](#), 274 Or App 644, 658 (2015) (ORS 192.630(1) applies to “contemporaneous gatherings of a quorum”), *rev’d on other grounds*, 360 Or 605 (2016).

body's staff to deliberate on matters of "policy or administration," or to clarify collegially a decision for staff, the meeting is within the scope of the law; this includes "receiv[ing] information from staff on topics related to particular substantive or administrative matters that a quorum of the governing body will or may be called upon to decide."<sup>600</sup>

Many governing bodies have authority to conduct some official business through means other than decision-making by quorum and thus may have latitude to conduct business outside of the Public Meetings Law's requirements by not convening a quorum of the governing body. For example, the Public Utility Commission has authority to delegate some duties to a single commissioner or to staff.<sup>601</sup> Therefore, "a process of decision-making on day-to-day matters of agency administration legally may be conducted in private by a single commissioner or agency staffer to whom the commission properly has delegated administrative responsibility."<sup>602</sup> However, even in these situations, the governing body should consult its legal counsel before a quorum of the governing body meets to discuss the delegated subject matter.

#### **b. Subject of Meetings and Social Gatherings**

The Public Meetings Law applies to all meetings of a quorum of a governing body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter.<sup>603</sup> The law also applies to a quorum's private decision-making or deliberations on any matter on which a vote of a governing body is required.<sup>604</sup>

Even if a meeting is for the sole purpose of gathering information to serve as the basis for a subsequent decision or recommendation by the

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<sup>600</sup> Letter of Advice to Ron Eachus, at 6, 1988 WL 416300 (OP-6292) (Sept 12, 1988).

<sup>601</sup> [ORS 756.055](#).

<sup>602</sup> Letter of Advice to Ron Eachus, at 7-8.

<sup>603</sup> See ORS 192.630(1) (referring to "meetings," which are defined in ORS 192.610(5)).

<sup>604</sup> See ORS 192.630(2) (referring to "decision," which is defined in ORS 192.610(1)).

governing body, the meetings law will apply.<sup>605</sup> This requirement serves the legislative policy that an informed public must be aware not only of the decisions of government, but also of “the information upon which such decisions were made.”<sup>606</sup> Hence, except for on-site inspections, which are discussed below, information gathering and investigative activities of a governing body are subject to the law. If the requirements of the law would unduly hamper an investigation, the body could direct members to make individual reports to the governing body as discussed above in the section on quorums.

If a quorum of a governing body gathers to discuss matters outside its jurisdiction, it is not “meeting” within the purview of the Public Meetings Law.<sup>607</sup> In making this determination, the focus typically will be on the authority granted to the particular governing body and any written policies or directives governing that authority.

Purely social gatherings of the members of a governing body are not covered by the law. For example, the Court of Appeals held that social gatherings of a school board, at which members sometimes discussed “what’s going on at the schools,” did not constitute a violation.<sup>608</sup> The *purpose* of the meeting triggers the requirements of the law. However, a purpose to deliberate on any matter of official policy or administration may arise *during* a social gathering and lead to a violation. Members constituting a quorum must avoid any discussions of official business during such a gathering.<sup>609</sup> And they should be aware that some citizens may perceive social gatherings as merely a subterfuge for avoiding the Public Meetings Law.

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<sup>605</sup> 38 Op Atty Gen 1471, 1977 WL 31327 (1977); see [Oregonian Publ’g Co. v. Bd. of Parole](#), 95 Or App 501, 505–06 (1989) (Board of Parole had to open the information-gathering portions of its meetings to the public); Letter of Advice to Ron Eachus, at 6 (a quorum of the Public Utility Commission could not meet with staff in private to receive informational briefings on public utility regulation and agency administration).

<sup>606</sup> See ORS 192.620.

<sup>607</sup> 38 Op Atty Gen at 1474.

<sup>608</sup> [Harris v. Nordquist](#), 96 Or App 19, 24–25 (1989).

<sup>609</sup> Letter of Advice to Ron Eachus, at 7.

Governing bodies sometimes want to have retreats or goal-setting sessions. These types of meetings are nearly always subject to the Public Meetings Law because the governing body is deliberating toward a decision on official business or gathering information for making a decision. For example, members of a commission may wish to have an informal, long-range planning session to help guide (in general terms) the future priorities of the commission. Because the discussion at such a session is very likely to lay the foundation for subsequent decisions, whether a decision on which general issues to pursue over the next year or a decision on how to approach a particular issue, it would be subject to the meetings law. Even an informal “get together” between a state commission and state legislators or the governor would be subject to all of the requirements of the meetings law (notice, minutes, etc.), if a quorum of the commission discusses matters that are within the authority granted to that body. It does not matter that the discussion is “informal” or that no decisions are made.

Whether a governing body’s training sessions are subject to the Public Meetings Law will depend on whether any substantive issues are discussed. For example, a governing body may receive training on improving personal interaction among its members. If that training is carefully structured to avoid any discussion of official business, and no such discussion occurs, the training would not be subject to the meetings law. This is a very sensitive area, however, and public bodies should contact their legal counsel for advice.

### c. Serial Communications

A governing body risks violating meetings law through a series of private communications, even if a quorum isn’t involved in any single communication. For example, the Court of Appeals held that a county administrator’s e-mails and phone calls with various board members deliberating towards the resolution of a public records request could be a violation, even though no single e-mail or phone call involved a quorum.<sup>610</sup> The court explained that “the determinative factors are whether a sufficient number of officials are involved, what they discuss, and the purpose for

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<sup>610</sup> *Handy v. Lane County*, 274 Or App 644, 666–67 (2015), *rev’d on other grounds*, 360 Or 605 (2016). A dissenting opinion concluded to the contrary. *Id.* at 683–84 (Devore, J., concurring in part and dissenting in part).

which they discuss it—not the time, place, or manner of their communications.”<sup>611</sup>

While the Supreme Court reversed the Court of Appeals decision,<sup>612</sup> it did not resolve the issue of whether serial communications can violate the law.<sup>613</sup> As noted above, we recommend that members of a governing body should not meet in private to discuss business, or exchange private communications about business, even if those involved constitute less than a quorum.

#### **d. Electronic Communications**

The Public Meetings Law expressly recognizes that meetings may be conducted by telephonic conference calls or “other electronic communication.”<sup>614</sup> Such meetings are subject to the Public Meetings Law.

Notice and opportunity for public access must be provided when meetings are conducted by electronic means. For nonexecutive session meetings held by telephone or other electronic means of communication, the public must be provided at least one place where its members may listen to the meeting by speakers or other devices.<sup>615</sup> In the alternative, the public may be provided with the access code or other means to attend the meeting using electronic means. If electronic access is provided, the technology used must be sufficient to accommodate all attendees, and any costs associated with providing access may not be passed on to the public.

As discussed in more detail below, special accommodations may be necessary to ensure accessibility for persons with disabilities. And even if the meeting occurs in executive session, the media must be provided access, unless the executive sessions are held under ORS 192.660(2)(d) (to deliberate with persons designated by the governing body to carry on labor

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<sup>611</sup> *Id.* at 664–65.

<sup>612</sup> [\*Handy v. Lane County\*](#), 360 Or 605, 623–26 (2016).

<sup>613</sup> *Id.* at 616–17 (noting that both the Court of Appeals majority and dissent “offered persuasive \* \* \* interpretations”). The court based its reversal on the lack of evidence that all three board members deliberated towards a decision, explaining that one member’s passive receipt of a communication could not by itself rise to the level of a deliberation. *Id.* at 624.

<sup>614</sup> ORS 192.670(1).

<sup>615</sup> ORS 192.670(2).

negotiations) or [ORS 332.061](#) (hearings concerning the expulsion of a minor student from a public elementary or secondary school, or pertaining to examination of a student's confidential medical records).

A state board or commission is not required to compensate or reimburse a member for expenses when that member attends a meeting electronically.<sup>616</sup> However, if a member is not also a member of the Legislative Assembly, the state board or commission, at its discretion, may choose to provide compensation or reimbursement.<sup>617</sup>

## 2. Statutorily Exempt Public Meetings

A "meeting" does not include an on-site inspection of any project or program or a gathering of any national, regional, or state association to which the public body or its members belong.<sup>618</sup>

In addition, the following meetings are exempt from the requirements of the Public Meetings Law:

- meetings of the state lawyers assistance committee or personal and practice management assistance committees operating under [ORS 9.568](#);
- meetings of medical peer review committees under [ORS 441.055](#);
- meetings of county multidisciplinary child abuse teams that review child abuse cases under [ORS 418.747](#);
- meetings of child fatality review teams that review child fatality cases under [ORS 418.785](#);
- any judicial proceedings;<sup>619</sup>

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<sup>616</sup> ORS 192.672(2)(a).

<sup>617</sup> ORS 192.672(2)(b).

<sup>618</sup> ORS 192.610(5).

- deliberations of the Board of Parole or the Psychiatric Security Review Board;
- deliberations of state agencies in contested case hearings under [ORS chapter 183](#), or review by the Workers' Compensation Board or Employment Appeals Board of similar hearings on contested cases;
- meetings of the Oregon Health and Science University Board of Directors or subcommittee regarding:
  - candidates for president of the university, or
  - sensitive business, financial or commercial matters of the university not customarily provided to competitors related to financings, mergers, acquisitions or joint ventures or related to the sale or other disposition of, or substantial change in use of, significant real or personal property, or related to health system strategies;
- meetings of Oregon Health and Science University faculty or staff committees;
- mediation conducted pursuant to the agricultural mediation service program; and
- meetings of the Energy Facility Siting Council to review and approve security programs.<sup>620</sup>

The exemption for “deliberations” of certain agencies does not remove the entire meeting from the law’s coverage. For instance, when the Board of Parole gathers information in order to deliberate and then deliberates at the

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<sup>619</sup> This exemption applies to proceedings that are initiated in the judicial branch, are part of an adjudicative process, and potentially culminate in a judicial decision. [Letter of Advice to David F. White](#), at 5, 2014 WL 7150430 (OP-2014-2) (Dec 10, 2014). We have concluded that meetings of the Board of Bar Examiners regarding whether an applicant has sufficient moral character or fitness to practice law are exempt, but not the board’s meetings to discuss the bar examination, *id.* at 5–7; and that meetings of the Bar’s State Professional Review Board are exempt, [Letter of Advice to L. Patrick Hearn](#), 1997 WL 469004 (OP-1997-4) (Aug 13, 1997).

<sup>620</sup> ORS 192.690.

same meeting, the information-gathering portion of the meeting is subject to the law's requirements.<sup>621</sup>

The exemption covering "deliberations" of state agencies in contested case hearings under the Administrative Procedures Act encompasses deliberations following the information-gathering portion of the contested case hearing and prior to a decision in the case. It does not encompass deliberations by a governing body about whether to initiate a contested case. Although state board or commission "deliberations" in contested case hearings are exempt from the meetings law, any information gathering by the governing body and the final decision of the governing body must be conducted in compliance with the meetings law, unless otherwise exempted by statute.

Note that a state agency contested case proceeding conducted by a single hearings officer is *not* subject to the Public Meetings Law, because a single hearings officer is not a "governing body." The right of the public to attend such contested case proceedings depends on provisions of law outside the Public Meetings Law.

Local government officials should note, however, that the Public Meetings Law exemption provided in ORS 192.690(1) for *state* agency contested case hearings does *not* apply to hearings conducted by local governing bodies, even though those local government hearings may be remarkably similar to state agency contested case proceedings.<sup>622</sup>

## **D. REQUIREMENTS OF THE LAW**

### **1. Notice**

The Public Meetings Law requires that public notice be given of the time and place of meetings.<sup>623</sup> The public notice requirements apply to *any* "meeting" of a governing body subject to the law, including committees, subcommittees, and advisory groups. A governing body's public notice must also be reasonably calculated to provide actual notice to the persons

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<sup>621</sup> [\*Oregonian Publ'g Co. v. Bd. of Parole\*](#), 95 Or App 501, 506 (1989).

<sup>622</sup> 40 Op Atty Gen 388, 389-90, 1980 WL 112751 (1980).

<sup>623</sup> ORS 192.640(1).

and the news media that have stated in writing that they wish to be notified of every meeting.<sup>624</sup>

If a meeting will consist only of an executive session, notice must be given to the members of the governing body, to the general public, and to news media that have requested notice.<sup>625</sup> The notice also must state the specific legal provision authorizing the executive session.<sup>626</sup>

Notices for meetings that will include both an executive session and a nonexecutive session should give notice of both and state the statutory authority for the executive session.

Special meetings require at least 24 hours' notice to the general public, any news media who have requested notice, and the members of the governing body.<sup>627</sup> An "emergency meeting" is a type of special meeting called on less than 24 hours' notice. The governing body must be able to point to some reason why the meeting could not be delayed to allow at least 24 hours' notice. An "actual emergency" must exist, and the minutes of the meeting must describe the emergency justifying less than 24 hours' notice.<sup>628</sup> "Such notice as is appropriate to the circumstances" must be given for emergency meetings.<sup>629</sup> The governing body must attempt to contact the media and other interested persons to inform them of the meeting. Generally, such contacts would be by telephone or e-mail.

The Oregon Court of Appeals has indicated that it will scrutinize closely any claim of an actual emergency. Any claimed actual emergency must relate to the matter to be discussed at the emergency meeting. An actual emergency on one matter does not "justify a public body's emergency treatment of all business coming before it at approximately the

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<sup>624</sup> *Id.* Members of the governing body, of course, should also receive actual notice. *Cf.* [ORS 182.020\(1\)](#) (state boards and commissions shall give members ten days' notice, in writing).

<sup>625</sup> ORS 192.640(2).

<sup>626</sup> *Id.*

<sup>627</sup> ORS 192.640(3).

<sup>628</sup> *Id.*

<sup>629</sup> *Id.*

same time.”<sup>630</sup> Nor do the work schedules of board members provide justification for an emergency meeting.<sup>631</sup>

**a. Contents of Notice**

In addition to providing the date, time, and place of the meeting, the notice should provide the name and telephone number (including TTY number if the public body has such equipment in service) of a person at the public body to contact to request an interpreter for the hearing impaired or for other communication aids.<sup>632</sup> As an alternative, governing bodies that know their audience is likely to require a sign language interpreter or other communication aids and services should simply make those services available and so state in their notice.

The notice must also “include a list of the principal subjects anticipated to be considered at the meeting.”<sup>633</sup> This list should be specific enough to permit members of the public to recognize the matters in which they are interested. For example, “public works contract” probably is not a sufficient description when the governing body intends to let a contract for demolition of a landmark building.

A governing body may take up additional subjects arising too late to be mentioned in the notice.<sup>634</sup> But, if an executive session is being held, the discussion must be limited to the topic(s) listed in the statutory provision(s) identified as authority for the executive session.<sup>635</sup> Of course, if the subject matter is governed by the rulemaking requirements of the Administrative

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<sup>630</sup> *Or. Ass’n of Classified Employees v. Salem-Keizer Sch. Dist. 24J*, 95 Or App 28, 32 (1989) (actual emergency concerning budget and levy problems did not “convert the contract approval deliberations into an emergency”).

<sup>631</sup> *Id.* at 33–34 (“An actual emergency, within the contemplation of the statute, must be dictated by events and cannot be predicated solely on the convenience or inconvenience of members of the governing body.”).

<sup>632</sup> See ORS 192.630(5)(a) (“It is discrimination[,] \* \* \* upon request of a person who is deaf or hard of hearing, to fail to make a good faith effort to have an interpreter \* \* \* provided at a regularly scheduled meeting.”).

<sup>633</sup> ORS 192.640(1). This requirement ordinarily would be met by disseminating an agenda.

<sup>634</sup> *Id.*

<sup>635</sup> See ORS 192.640(2).

Procedures Act (ORS chapter 183), the notice requirements of that statute must be met.

**b. Methods of Notice**

The goal of notice for any meeting is two-fold: to provide general notice to the public at large and to provide *actual* notice to specifically interested persons. The following are suggested methods of meeting the notice requirements:

**Oregon Transparency Website**—State agencies must post notices to the Oregon transparency website, maintained at <https://www.oregon.gov/transparency/Pages/Index.aspx>.<sup>636</sup> Local or special government bodies can also post notices to this site.<sup>637</sup>

**Press Releases**—Press releases should be given to the appropriate publications and news services. The following list of publications and news services is commonly used.

- Wire Service—Associated Press. Notices can be directed to this service at its main offices at the Press Room, State Capitol Bldg., Salem, Oregon 97301 (Phone (503) 363-5358; Fax (503) 363-9502) or 121 S.W. Salmon Street, Suite 1450, Portland, Oregon 97204-2924 (Phone (503) 228-2169; Fax (503) 228-5514). In other areas of the state, notices directed to subscribing news media should reach the service.
- Local Media Representatives—If a meeting involves matters that affect a particular geographic area, press releases should be sent to the local media.
- Trade Papers, Special Interest Publications and Professional Journals—Agencies regulating matters affecting trades, occupations, professions, and special interest groups that have regularly scheduled publications directed to affected persons should provide these publications with notices of the agencies' public meetings.

*Paid display advertising is not required. A governing body is not*

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<sup>636</sup> [ORS 276A.253\(4\)\(a\)](#).

<sup>637</sup> ORS 276A.253(7)(c).

required to ensure that the release is published. News media requesting notice of meetings *must* be given notice.

**Mailing Lists**—Agencies maintaining mailing lists of licensees or other persons or groups for notice purposes, either as a regular practice or under the requirements of [ORS 183.335\(8\)](#), should mail, e-mail, or fax notices of regular meetings to persons on those lists.

**Interested Persons**—If a governing body is aware of persons having a special interest in a particular action, those persons generally should be notified, unless doing so would be unduly burdensome or expensive.

**Notice Boards**—Some smaller communities have a designated area or bulletin board for posting notices. Governing bodies may want to post notices of meetings in such areas.

## 2. Space and Location

For any meeting, the governing body should consider the probable public attendance and should meet where there is sufficient room for that expected attendance. If the regular meeting room is adequate for the usual attendance, a governing body probably is not required to seek larger quarters for a meeting that unexpectedly attracts an overflow crowd; but the governing body may take reasonable steps to accommodate the unexpected attendance.

### a. Geographic Location

Meetings of the governing body of a public body must be held within the geographic boundaries of the area over which the public body has jurisdiction; at the public body's administrative headquarters; or at "the other nearest practical location."<sup>638</sup> State, county, or city entities can also hold the meeting within Indian country of a federally recognized Oregon Indian Tribe that is within Oregon's geographic boundaries.<sup>639</sup>

A joint meeting of two or more governing bodies must be held within the geographic boundaries of the area over which one of the public bodies

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<sup>638</sup> ORS 192.630(4)(a)(A)–(C). These alternatives are available because some small districts may maintain administrative offices outside the boundaries of the district, or have offices that lack meeting space.

<sup>639</sup> ORS 192.630(4)(D).

has jurisdiction, or at the nearest practical location.<sup>640</sup> If the meeting is with the elected officials of one or more federally recognized Oregon Indian tribes, the meeting can also be held within the tribe's geographic boundaries.<sup>641</sup>

There are exceptions to these requirements for meetings held “in the event of an actual emergency necessitating immediate action,”<sup>642</sup> and for training sessions that do not involve deliberations towards a decision.<sup>643</sup>

#### **b. Nondiscriminatory Site**

A governing body may not hold a meeting at any place where discrimination on the basis of race, color, creed, sex, sexual orientation, national origin, age, or disability is practiced.<sup>644</sup> However, the fact that organizations with restricted membership hold meetings at the place does not restrict its use by a public body if use of the place by a restricted membership organization is not the primary purpose of the place or its predominant use.<sup>645</sup>

### **3. Accessibility to Persons with Disabilities**

Meetings must be held in places accessible to individuals with disabilities, and a governing body must make a good faith effort to have an interpreter for persons who are deaf or hard of hearing (upon request by such a person).<sup>646</sup> A “good faith effort” includes contacting any state or

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<sup>640</sup> ORS 192.630(4)(c).

<sup>641</sup> *Id.*

<sup>642</sup> ORS 192.630(4)(d).

<sup>643</sup> ORS 192.630(4)(b).

<sup>644</sup> ORS 192.630(3).

<sup>645</sup> *Id.*; *see also* Americans with Disabilities Act, [42 USC § 12131](#) *et seq.* (prohibiting discrimination against persons with disabilities by public entities and by places of public accommodation, applicable to meeting sites owned by private entities).

<sup>646</sup> ORS 192.630(5)(a). The interpreter requirement applies only to a regularly scheduled meeting. *Id.* If a meeting is held upon less than 48 hours' notice, the governing body must make a “reasonable effort” to have an interpreter present upon request; and the requirement does not apply to emergency meetings. ORS 192.630(5)(c).

local agency that maintains a list of qualified interpreters,<sup>647</sup> and arranging for the referral of one or more such persons to provide interpreter services.<sup>648</sup> An individual's request for an interpreter must be made with at least 48 hours' notice, and include the requester's name, sign language preference, and any other relevant information the governing body may request.<sup>649</sup>

The sole remedy under state law for violating the interpreter requirement is found in Public Meetings Law.<sup>650</sup> However, the Americans with Disabilities Act (ADA) may impose requirements and remedies beyond state law. The ADA requires public bodies to ensure that their communications with persons with disabilities are as effective as communications with others.<sup>651</sup> For deaf or hard-of-hearing individuals who do not use sign language, other means of communication, such as assistive listening devices, may be necessary. If the meeting is held by electronic means, the needs of persons with vision or hearing impairments may need to be considered. Also, if written materials will be used during the public meeting, the governing body must make the material available, when requested by individuals with vision impairments, in a form usable to them, such as large print, Braille, or audiotapes. A public body cannot charge a person with a disability to cover the cost of providing such additional aids and services.

#### **4. Public Attendance**

The right of public attendance guaranteed by the Public Meetings Law does not include the right to participate by public testimony or comment.

Other statutes, rules, charters, ordinances, and bylaws outside the Public Meetings Law may require governing bodies to hear public testimony or

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<sup>647</sup> Requests for interpreters can be made through the Department of Human Services at <http://www.oregon.gov/dhs/business-services/odhhs/pages/index.aspx>.

<sup>648</sup> ORS 192.630(5)(e).

<sup>649</sup> ORS 192.630(5)(b).

<sup>650</sup> See ORS 192.630(5)(a) (the sole remedy for a violation is provided by ORS 192.680).

<sup>651</sup> [42 USC §§ 12131\(2\), 12132](#); [28 CFR § 35.160](#).

comment on certain matters.<sup>652</sup> But in the absence of such a requirement, a governing body may conduct a meeting without any public participation. Governing bodies voluntarily may allow limited public participation at their meetings.

In addition, some permissions to meet in executive session apply only if the governing body has offered an opportunity for public comment: the authority to consider in private the employment of a public officer exists only if the public has had the opportunity to comment on that officer's employment;<sup>653</sup> and the authority to consider in private the employment of a chief executive officer exists only if the public has had the opportunity to comment on the hiring standards, criteria, and policy directives that were adopted in open meetings.<sup>654</sup>

## 5. Control of Meetings

The presiding officer has inherent authority to keep order and to impose any reasonable restrictions necessary for the efficient and orderly conduct of a meeting. If public participation is to be a part of the meeting, the presiding officer may regulate the order and length of appearances and limit appearances to presentations of relevant points. Any person who fails to comply with reasonable rules of conduct or who causes a disturbance may be asked or required to leave, and upon failure to do so becomes a trespasser.<sup>655</sup> The law's requirement that "all persons be permitted to attend

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<sup>652</sup> See, e.g., [ORS 215.060](#) (requiring public hearings on actions regarding a county comprehensive plan).

<sup>653</sup> ORS 192.660(7)(d)(C).

<sup>654</sup> ORS 192.660(7)(d)(D).

<sup>655</sup> Letter of Advice to Sen. Margie Hendricksen, at 7 (OP-5468) (July 13, 1983) (violating commission's rules on order, decorum, and time allowed for presentations, and disturbing a lawful assembly would provide grounds for ejection); see [State v. Marbet](#), 32 Or App 67, 73–76 (1978) (affirming criminal conviction for trespass for refusing to leave a hearing after being ordered by the hearings officer); [OAR 137-004-0010](#) (model rule stating that "[a] presiding officer may expel a person from an agency proceeding if that person engages in conduct that disrupts the proceeding").

any meeting” does not prevent governing bodies from maintaining order at meetings.<sup>656</sup>

The authority to keep order extends to control over equipment such as cameras, tape recorders, and microphones, but only to the extent of reasonable regulation. We have concluded that members of the public cannot be prohibited from unobtrusively recording the proceedings of a public meeting.<sup>657</sup> We believe the logic supporting the public’s right to make an audio record of a meeting also extends to video recording, subject to reasonable regulation to the extent necessary to prevent disruption of the meeting. Some concern has been expressed that criminal law might prohibit the recording of public meetings. But the criminal law prohibition on electronically recording conversations without the consent of participants expressly does not apply to the unconcealed recording of “[p]ublic or semipublic meetings such as hearings before governmental or quasi-governmental bodies.”<sup>658</sup>

It is questionable whether a governing body may exclude a member of the public because the person engaged in misconduct at a *previous* public meeting. It may be possible to obtain an injunction against a person who habitually has been disruptive, but an arrest and prosecution for trespass or disorderly conduct on the occasion of the subsequent disruption would be a simpler and probably more effective procedure. In case of an announced threat to disrupt a controversial meeting, it would be permissible to exclude the public from the meeting room if the public were allowed to view and hear the meeting by television in another room.

**Smoking at Meetings** - Smoking is prohibited in any public place.<sup>659</sup> Because “public place” means “an enclosed area open to the public” or a “place of employment,” this prohibition generally applies to public

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<sup>656</sup> [State v. Seidel](#), 294 Or App 389, 394 (2018) (affirming conviction for disruptive citizen who failed to obey police officer’s order to leave a city council meeting).

<sup>657</sup> 38 Op Atty Gen 50, 1976 WL 451475 (1976).

<sup>658</sup> [ORS 165.540\(6\)\(a\)](#).

<sup>659</sup> [ORS 433.845\(1\)](#). The exceptions to this prohibition generally aren’t relevant to public meetings. *See* ORS 433.850.

meetings and executive sessions.<sup>660</sup> The prohibition extends to smoking, vaping, or aerosolizing any nicotine or cannabinoid product,<sup>661</sup> or to even carrying a lit cigar, cigarette, pipe, or other smoking instrument.<sup>662</sup> And smoking is prohibited not just inside the enclosed area, but also within 10 feet of any entrances, exits, windows that open, or ventilation intakes that serve an enclosed area.<sup>663</sup>

The person presiding at a meeting will avoid embarrassment to members of the public and the governing body by reminding them of the no-smoking rule at the beginning of the meeting.

## 6. Voting

All official actions by governing bodies must be taken by public vote.<sup>664</sup> Results of all votes must be recorded.<sup>665</sup> In addition, the vote of each member must be recorded, although individual votes for governing bodies with more than 25 members do not need to be recorded unless a member makes a request.<sup>666</sup> While written ballots are not prohibited, the ballot must identify the member voting and the vote must be announced. *Secret ballots are prohibited.*<sup>667</sup> This prohibition supersedes and nullifies any local government charter that authorizes a secret ballot.<sup>668</sup>

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<sup>660</sup> A place of employment is “an enclosed area under the control of a public or private employer, including \* \* \* conference rooms [and] meeting rooms.” [ORS 433.835\(4\)\(a\)](#).

<sup>661</sup> See ORS 433.845(1) (referring to an “inhalant,” defined at ORS 433.835(3)).

<sup>662</sup> See *id.* (referring to a “smoking instrument,” defined at ORS 433.835(7)).

<sup>663</sup> ORS 433.845(2).

<sup>664</sup> 37 Op Atty Gen 183, 1974 WL 187704 (1974); see ORS 192.660(6) (“No executive session may be held for the purpose of taking any final action or making any final decision.”).

<sup>665</sup> ORS 192.650(1)(c).

<sup>666</sup> *Id.*

<sup>667</sup> 39 Op Atty Gen 525, 526, 1979 WL 35618 (1979).

<sup>668</sup> *Id.* at 526–28 (Springfield City Charter’s requirement of a secret vote to choose the presiding member was preempted by Public Meetings Law).

A governing body's failure to record a vote is not, in and of itself, grounds for reversing a decision.<sup>669</sup> Without a showing that the failure to record a vote was related to a manipulation of the vote, a court will presume that public officials lawfully performed their duties.<sup>670</sup>

## 7. Minutes and Recordkeeping

A governing body must provide for written minutes of its meetings and executive sessions, or sound, video, or digital recording.<sup>671</sup> The written minutes or recording must include at least the following information:

- members present;
- motions, proposals, resolutions, orders, ordinances and measures proposed and their disposition;
- results of all votes; and, the vote of each member by name, except for public bodies consisting of more than 25 members unless recording by name is requested by a member of that body;
- the substance of any discussion on any matter; and
- a reference to any document discussed at the meeting, unless even a reference to the document is exempt under Public Records Law.<sup>672</sup>

Written minutes need not be a verbatim transcript, and a sound, video, or digital recording is not required to contain a full recording of the meeting, except as otherwise provided by law.<sup>673</sup> However, the minutes or recording must contain the above information and must give "a true reflection of the matters discussed at the meeting and the views of the

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<sup>669</sup> [\*Gilmore v. Bd. of Psychologist Examiners\*](#), 81 Or App 321, 324 (1986) ("The absence of a recorded vote alone is not reversible error.").

<sup>670</sup> *Id.*

<sup>671</sup> ORS 192.650(1)–(2) Some governing bodies may be subject to additional requirements: for example, the Oregon Investment Council must make "full sound recordings" of its meetings and maintain a written log of each recording. [ORS 293.714](#).

<sup>672</sup> ORS 192.650(1)(a)–(e). A reference to an exempt document does not affect the public body's ability to assert the exemption, ORS 192.650(3), but open discussion of the document's contents might result in a waiver.

<sup>673</sup> ORS 192.650(1).

participants.”<sup>674</sup> See [Appendix J-9](#) for sample minutes.

**a. Public Availability of Minutes**

Any minutes or recording of a public meeting that does not take place in executive session must be made available to the public “within a reasonable time after the meeting.”<sup>675</sup> Draft written minutes cannot be withheld from the public merely because they have not yet been approved; however, the governing body can identify the minutes as being in draft form when producing them to the requester. Any completed minutes or sound, video, or digital recordings are public records subject to disclosure under the Public Records Law.<sup>676</sup>

We assume that a governing body generally should be able to make a sound, video, or digital recording of a meeting available to the public within a few days following the meeting. However, we are told that the preparation of written minutes takes up to three weeks in the usual course of business: small bodies may not have the staff to prepare the minutes in just a few days, and larger bodies that do have substantial staff typically meet more often or for longer amounts of time. Three weeks arguably is within the “reasonable time” allowed by the statute, but a reviewing court may reach a different conclusion.

The minutes or recording of an executive session may be withheld from public disclosure if disclosing the information would be “inconsistent with the purpose” of the executive session.<sup>677</sup> Depending on the circumstances, this may mean that only a portion of the minutes or recording is exempt,

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<sup>674</sup> *Id.*

<sup>675</sup> *Id.*

<sup>676</sup> A governing body is generally not required to transcribe a recording, but may choose to do so and may charge a requester a fee for that work, ORS 192.650(4).

<sup>677</sup> ORS 192.650(2). Disclosing minutes or recordings that relate to the substance and disposition of licensee or applicant conduct investigated by a health professional regulatory board or by the State Landscape Architect Board is governed instead by [ORS 676.175](#) and [ORS 671.338](#), respectively. ORS 192.660(9).

Also, the written minutes of an executive session held by a district school board regarding expulsion of a minor student from a public school or a student’s confidential medical records should not contain any information excluded under [ORS 332.061\(2\)](#). ORS 192.650(2).

and that the remainder must be produced.<sup>678</sup> Even though the news media has the right to attend executive sessions, they have no statutory right of access to any minutes or records that are exempt from disclosure.

Minutes and records available to the public must be made available to persons with disabilities in a form usable by them, such as large print, Braille, or audiotape. However, the public body is entitled to consider the resources available for use in the funding and operation of the program from which the records are sought in responding to a request for alternative format, and may conclude that compliance with the request would result in a fundamental alteration of the nature of the program or in undue financial or administrative burdens.<sup>679</sup> Public bodies should consult with legal counsel if they are uncertain of their obligation to honor the requester's choice.

A public body may not charge a person with a disability to cover the costs of providing records in an alternative print form, although the public body may charge a fee for all other "actual costs" that may be recovered under the Public Records Law just as it would for any other requester.

#### **b. Retaining Minutes**

A governing body's obligation to preserve minutes or a recording can come from multiple sources. Currently, the State Archivist's rules generally provide that public meeting minutes must be retained permanently.<sup>680</sup> Audio or video recordings must generally be retained until one year after minutes have been prepared and approved.<sup>681</sup> However, a public body should consult the rules in Chapter 166 of the Oregon Administrative Rules that are specific to it, as well any special retention schedule approved by the

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<sup>678</sup> See Public Records Order, Nov 17, 2014, [Budnick](#), at 4 (granting petition for only portions of an audio recording of an executive session).

<sup>679</sup> [28 CFR § 35.164](#); [Nelson v. Thornburgh](#), 567 F Supp 369 (ED Pa 1983), *aff'd*, 732 F2d 146 (3rd Cir 1984).

<sup>680</sup> *E.g.*, [OAR 166-150-0005\(17\)](#) (county and special district governing bodies). Most public bodies are subject to retention schedules approved by the Archivist. See ORS 192.005(4), (6) (defining the state and local entities that are subject to ORS 192.108).

<sup>681</sup> *E.g.*, [OAR 166-150-0005\(17\)](#). This suggests that if a county or special district governing body (or other governing bodies with similar schedules) keeps only a video or audio recording, it must retain that recording on a permanent basis.

Archivist.

In addition to the obligations imposed by retention laws, the Court of Appeals has construed Public Meetings Law to require minutes to be preserved for a reasonable time, and has held that a one-year retention met that standard for a school board in a particular instance.<sup>682</sup>

We recommend that, to comply with the Public Meetings Law and the retention laws, public bodies follow the relevant Archivist approved schedule, which generally calls for permanent retention.

#### **E. Executive (Closed) Sessions**

The Public Meetings Law authorizes governing bodies to meet in executive session in certain limited situations.<sup>683</sup> An “executive session” is defined as “any meeting or part of a meeting of a governing body which is *closed* to certain persons for deliberation on certain matters.”<sup>684</sup>

Executive sessions should not be confused with meetings that are exempt from the Public Meetings Law altogether. An executive session is a type of public meeting and must conform to all applicable provisions of the Public Meetings Law (e.g., providing public notice and keeping minutes or recordings). Conversely, exempt meetings need not.

##### **1. Permissible Purposes of Executive Sessions**

A governing body may hold an open session even when the law permits it to hold an executive session. However, the governing body has the authority to hold closed sessions regarding the following topics.

###### **a. Employment of Public Officers, Employees, and Agents**

A governing body may hold an executive session to consider the employment of a public officer, employee, staff member, or individual agent, if the body has satisfied certain prerequisites.<sup>685</sup>

This provision applies for a chief executive officer, public officer, employee, or staff member only if the vacancy for the position has been

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<sup>682</sup> [\*Harris v. Nordquist\*](#), 96 Or App 19, 25–26 (1989).

<sup>683</sup> ORS 192.660(1).

<sup>684</sup> ORS 192.610(2) (emphasis added).

<sup>685</sup> ORS 192.660(2)(a).

advertised; if regular procedures for hiring have been adopted; and, for a public officer, if the public has had opportunity to comment on the employment.<sup>686</sup> For a chief executive officer, the governing body must have adopted hiring standards, criteria, and policy directives at meetings open to the public in which the public had the opportunity to comment.<sup>687</sup>

This authority to hold an executive session does not apply to consideration of general employment policies,<sup>688</sup> or to discussions of an officer's salary in connection with the hiring of that officer.<sup>689</sup> This authority also does not apply to filling a vacancy in an elective office,<sup>690</sup> public committee, commission, or other advisory group.<sup>691</sup>

**b. Discipline of Public Officers and Employees**

A governing body may hold an executive session to consider the dismissal or disciplining of a public officer, employee, staff member, or individual agent, or hear complaints or charges brought against such a person, if that person does not request an open hearing.<sup>692</sup>

In order to permit the affected person to request an open hearing, that person must have sufficient advance notice of the purpose of the meeting and the right to choose between an executive session and an open session. Although the provision requires an "open hearing" if the person involved so requests, we do not construe this provision to require an adversarial hearing, but only an open session. The affected person need not be present and has no right to postpone the hearing to permit an attorney to attend or to have a formal hearing unless another law, a contract, or a collective bargaining agreement provides those rights.

Regarding discipline of public officers and employees, we note the partial symmetry between the Public Meetings Law and the Public Records

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<sup>686</sup> ORS 192.660(7)(d)(A)-(C).

<sup>687</sup> ORS 192.660(7)(d)(D).

<sup>688</sup> ORS 192.660(7)(c).

<sup>689</sup> 42 Op Atty Gen 362, 1982 WL 183044 (1982).

<sup>690</sup> ORS 192.660(7)(a).

<sup>691</sup> ORS 192.660(7)(b).

<sup>692</sup> ORS 192.660(2)(b).

Law. Under the Public Meetings Law, a governing body may discuss discipline of an employee in executive session. Under the Public Records Law, records of a personnel discipline action and supporting materials and documents are conditionally exempt from disclosure if a disciplinary sanction has been imposed.<sup>693</sup>

**c. Public Hospital Medical Staff**

Executive sessions are authorized for considering matters pertaining to the function of the medical staff of a public hospital licensed under [ORS chapter 441](#).<sup>694</sup> This authorization includes consideration of all matters relating to medical competency in the hospital.<sup>695</sup> In addition, meetings of medical peer review committees held under [ORS 441.055](#) are exempt from the requirements of the Public Meetings Law.<sup>696</sup>

**d. Labor Negotiator Consultations**

A governing body may hold an executive session “[t]o conduct deliberations with persons designated by the governing body to carry on labor negotiations.”<sup>697</sup> This subsection allows a governing body to confer in executive session with its labor negotiator(s).<sup>698</sup> Unlike most other executive sessions, the media may be excluded from these deliberations.<sup>699</sup>

The authority of a governing body to conduct labor negotiations with the employees’ negotiator in executive session is found in ORS 192.660(3), discussed below.

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<sup>693</sup> ORS 192.345(12); [City of Portland v. Rice](#), 308 Or 118, 124 (1989) (this exemption does not apply to records of an investigation that does not result in any disciplinary sanction).

<sup>694</sup> ORS 192.660(2)(c).

<sup>695</sup> *Id.*

<sup>696</sup> ORS 192.690(1). Because the exemption of these meetings was enacted after the executive session provision, we conclude that these meetings are entirely exempt from the Public Meetings Law.

<sup>697</sup> ORS 192.660(2)(d).

<sup>698</sup> 42 Op Atty Gen 362, 363–64, 1982 WL 183044 (1982).

<sup>699</sup> ORS 192.660(4).

**e. Real Property Transactions**

A governing body may go into executive session to deliberate with persons designated by the governing body to negotiate real property transactions.<sup>700</sup> Real property transactions are not limited to the purchase or sale of real property. For example, negotiations for a long-term lease transaction undoubtedly would be included within this provision.

The executive session must be limited to discussions of negotiations regarding specific real property and may not include discussion of a public body's long-term space needs or general policies concerning lease sites.<sup>701</sup>

**f. Exempt Public Records**

A governing body may go into executive session to consider "information or records that are exempt by law from public inspection."<sup>702</sup> Thus, information or records that are exempt from public inspection under the Public Records Law may be considered in private.

Whether a particular record is exempt from public disclosure, and may therefore be considered in executive session, may depend not just on the exemptions listed in ORS 192.345 and ORS 192.355, but also on other federal and state statutes on confidentiality.<sup>703</sup>

However, a governing body has the cart before the horse if it attempts to withhold disclosure of a public record merely because the record was discussed, or might be discussed, in an executive session. The body's authority to refuse to disclose a record depends on provisions of the Public Records Law, not of the Public Meetings Law.<sup>704</sup>

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<sup>700</sup> ORS 192.660(2)(e).

<sup>701</sup> Letter of Advice to Rep. Carl Hosticka, 1990 WL 519211 (OP-6376) (May 18, 1990).

<sup>702</sup> ORS 192.660(2)(f).

<sup>703</sup> See ORS 192.355(8) (public records are exempt if federal law or regulation prohibits disclosure); ORS 192.355(9)(a) (public records are exempt if disclosure "is prohibited or restricted or otherwise made confidential or privileged under Oregon Law").

<sup>704</sup> However, the Public Meetings Law provision permitting the withholding of the minutes or recordings of an executive session if disclosure would be "inconsistent with the purpose" of the session, ORS 192.650(2), is incorporated as a public records exemption by ORS 192.355(9).

### **g. Trade Negotiations**

Preliminary negotiations involving matters of trade or commerce in which the governing body is competing with governing bodies in other states or nations may be conducted in executive session.<sup>705</sup> Use of this provision is permissible when the governing body knows or has good reason to believe it is competing with other governing bodies or nations regarding the matter to be discussed.<sup>706</sup>

### **h. Legal Counsel**

Executive sessions are appropriate for consulting with legal counsel concerning legal rights and duties regarding current litigation or litigation likely to be filed.<sup>707</sup> This authorization parallels the Public Records Law exemption for records pertaining to ongoing or anticipated litigation.<sup>708</sup> Any member of the news media that is a party to the litigation or is an employee, agent, or contractor of a news media organization that is a party, should be barred from attending.<sup>709</sup>

We believe that this provision is intended to put public bodies on an equal footing with private litigants. This means that the governing body should be able to engage in a private and candid discussion with counsel about the legal issues raised by the litigation. Such discussion may include not only procedural options, but also substantive analysis of the legal merits, risks, and ramifications of the litigation.

Our interpretation is consistent with the provision's use of the fairly broad phrase "legal rights and duties," and with the sensible public policies that we believe were part of the legislature's intent. First, if a governing body and its counsel were compelled to discuss their litigation position in public, it could result in denying the public body its fair day in court. Any weaknesses in the public body's position would undoubtedly be brought to the court's attention and could affect the court's objectivity. Second, our

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<sup>705</sup> ORS 192.660(2)(g).

<sup>706</sup> 42 Op Atty Gen 392, 397, 1982 WL 183052 (1982).

<sup>707</sup> ORS 192.660(2)(h).

<sup>708</sup> See ORS 192.345(1).

<sup>709</sup> ORS 192.660(5).

experience suggests that private and candid consultation with a governing body promotes quick resolution of inadvisable litigation. In executive session, counsel is in a better position to provide the frank advice that the governing body's case is weak and that the litigation should be dismissed or settled.

The discussion in executive session may proceed even to the point at which the governing body has reached an informal consensus as to its course of action. However, any final decision must be made in open session.<sup>710</sup>

#### *Attorney-Client Privilege*

A governing body also has the authority to meet in executive session to obtain other professional legal services from its legal counsel. For example, confidential written legal advice from counsel is a privileged record that is typically exempt from disclosure under Public Records Law.<sup>711</sup> Considering records that are so exempt provides authority to meet in executive session.<sup>712</sup> Accordingly, if a governing body takes appropriate steps, it may use an executive session to discuss any legal matter of a confidential nature absent the existence or likelihood of litigation. The governing body should return to public session for any discussion of policy.

Some might argue that allowing executive session to discuss privileged matters is an open invitation to evade the purposes of the Public Meetings Law. But when a need for confidential discussion of legal issues arises, even in the absence of a threat of litigation, we see no reason why a governing body should not take advantage of the attorney-client privilege. Because it is unclear whether the ability to meet in executive discussion to discuss exempt records or information applies absent the existence of an exempt physical record, a governing body should not cite the privilege as a basis for executive session unless there is a written record of a privileged

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<sup>710</sup> ORS 192.660(6).

<sup>711</sup> See ORS 192.355(9)(a) (incorporating as exemptions any Oregon laws that make records privileged).

<sup>712</sup> ORS 192.660(2)(f). *But see* ORS 192.355(9)(b) (noting a specific set of circumstances in which the attorney-client privilege does not exempt factual information from disclosure).

attorney-client communication, or the body's legal counsel has advised that the executive session is appropriate.

A governing body does not waive the privilege by discussing the privileged information at executive session, even if the news media is present; and the privilege is not waived if the news media publicly discloses the information discussed in executive session, as long as the governing body made clear that the privileged information should not be re-disclosed.<sup>713</sup>

**i. Performance Evaluations of Public Officers and Employees**

A governing body may hold an executive session “[t]o review and evaluate” the job performance of a chief executive officer, other officers, employees, and staff, if the person whose performance is being reviewed and evaluated does not request an open hearing.<sup>714</sup> This does not allow discussion of an officer's salary to be conducted in executive session in connection with the job performance evaluation of that officer.<sup>715</sup>

In order to permit the affected person to request an open hearing, the governing body must give sufficient advance notice to the person of the right to decide whether the performance evaluation will be conducted in open session. Despite the use of the term “hearing,” the affected person need not be present and has no right to postpone the hearing in order to attend or to permit an attorney to attend. Nor does the affected person have a right, under the Public Meetings Law, to have an attorney present evidence or to have a formal adversarial hearing. Other law, a contract, or a collective bargaining agreement, however, may provide such rights.

Disclosure of a public officer's or employee's performance evaluation generally is not an unreasonable invasion of privacy for purposes of exemption from the Public Records Law.<sup>716</sup> This is in contrast to a record of the disciplining of a public officer or employee, which is conditionally

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<sup>713</sup> [ORS 40.280](#).

<sup>714</sup> ORS 192.660(2)(i).

<sup>715</sup> 42 Op Atty Gen 362, 1982 WL 183044 (1982).

<sup>716</sup> 41 Op Atty Gen 437 (1981).

exempt from disclosure under another provision of the records law.<sup>717</sup> Notwithstanding Public Records Law requirements, under the Public Meetings Law a governing body may go into executive session to discuss an officer's or employee's performance. Also, the minutes of such an executive session may be withheld from disclosure as long as disclosure would be inconsistent with the session's purpose,<sup>718</sup> even though some of the underlying personnel records may not be exempt from disclosure.

A governing body may not use an executive session held for purposes of evaluating a chief executive officer or other officer, employee, or staff member "to conduct a general evaluation of an agency goal, objective or operation or any directive to personnel concerning agency goals, objectives, operations or programs."<sup>719</sup>

#### **j. Public Investments**

An executive session may be called "[t]o carry on negotiations under ORS chapter 293 with private persons or businesses regarding proposed acquisition, exchange or liquidation of public investments."<sup>720</sup> This is the counterpart to the exemption from disclosure of public records relating to proposed investments of state funds.<sup>721</sup> The authority to negotiate with private parties in executive session does not permit the governing body to take final action or to make a final decision in executive session.<sup>722</sup>

#### **k. School Safety Threats**

A public body may go into executive session to consider matters relating to school safety or to a plan that responds to safety threats being made towards a school.<sup>723</sup>

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<sup>717</sup> See ORS 192.345(12).

<sup>718</sup> See ORS 192.650(2).

<sup>719</sup> ORS 192.660(8).

<sup>720</sup> ORS 192.660(2)(j).

<sup>721</sup> See ORS 192.355(13).

<sup>722</sup> ORS 192.660(6).

<sup>723</sup> ORS 192.660(2)(k).

### L. Health Professional Licensee Investigation

A health professional regulatory board may go into executive session to consider information obtained as part of an investigation of licensee or applicant conduct.<sup>724</sup> These boards generally must keep confidential and not disclose any information obtained as part of an investigation into a licensee or applicant.<sup>725</sup> This prohibition extends to the disclosure of executive session minutes or other recordings.<sup>726</sup> However, these boards must disclose a notice of intent to impose a disciplinary sanction that has been issued by vote of the board, a final order that results from such a notice, and any consent order or stipulated agreement.<sup>727</sup>

Confidential information must be protected even when the board convenes in public session for purposes of deciding whether or not to issue a notice of intent to impose a disciplinary sanction on a licensee or to deny or to approve an application for licensure.<sup>728</sup> As a matter of general practice, boards should refer to the case by number and not disclose the name of the licensee or applicant or any other information that would permit the licensee or applicant to be identified.<sup>729</sup>

While the news media are permitted to attend these executive sessions, they are prohibited from re-disclosing any confidential information to any other member of the public.<sup>730</sup>

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<sup>724</sup> ORS 192.660(2)(L).

<sup>725</sup> [ORS 676.175\(1\)](#).

<sup>726</sup> See ORS 192.660(9)(a) (noting that ORS 676.175 governs the disclosure of these minutes and recordings); [49 Op Atty Gen 32](#), 75–76, 1998 WL 223374 (1998).

<sup>727</sup> [ORS 676.175\(5\)\(a\)](#). And when the board votes not to issue a notice of intent to impose a disciplinary action, it shall disclose investigatory information if the requester demonstrates by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure. ORS 676.175(2)(a). See ORS 676.175 for more exceptions to the general prohibition.

<sup>728</sup> [49 Op Atty Gen at 74](#).

<sup>729</sup> *Id.*

<sup>730</sup> [ORS 676.175\(8\)\(a\)](#).

### **m. Landscape Architect Registrant Investigation**

The State Landscape Architect Board, or an advisory committee to the board, may go into executive session to consider information obtained as part of an investigation of registrant or applicant conduct.<sup>731</sup> Investigatory information is generally confidential unless a notice is issued for a contested case hearing or the matter is finally resolved by board action or a consent order.<sup>732</sup> This confidentiality extends to the disclosure of meeting minutes and recordings.<sup>733</sup> However, the public may obtain information confirming that an investigation is being conducted and describing the general nature of the matter.<sup>734</sup>

If any news media attend these executive sessions, they are prohibited from re-disclosing any confidential information to any other member of the public, until the information ceases to be confidential.<sup>735</sup>

### **n. Security Programs**

A governing body may go into executive session to “discuss information about review or approval of programs relating to the security” of a number of specified structures, activities, and materials relevant to the operation of the state’s infrastructure:

- A nuclear-powered thermal power plant or nuclear installation;
- Transportation of radioactive material derived from or destined for a nuclear-fueled thermal power plant or nuclear installation;
- Generation, storage or conveyance of electricity; gas in liquefied or gaseous form; hazardous substances as defined in [ORS 453.005\(7\)\(a\), \(b\), and \(d\)](#); petroleum products; sewage; or water;
- Telecommunication systems, including cellular, wireless, or radio

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<sup>731</sup> ORS 192.660(2)(m).

<sup>732</sup> [ORS 671.338\(1\)\(b\)](#).

<sup>733</sup> See ORS 192.660(9)(b) (noting that ORS 671.338 governs the disclosure of these minutes and recordings).

<sup>734</sup> [ORS 671.338\(1\)\(b\)](#).

<sup>735</sup> [ORS 671.338\(3\)](#).

systems; or

- Data transmissions by whatever means provided.<sup>736</sup>

**o. Labor Negotiations**

A governing body can conduct labor negotiations in executive session if negotiators for both sides request that negotiations be conducted in private.<sup>737</sup> If an executive session is held, the governing body does not need to provide the typical notice to the general public and to news media that have requested notice.<sup>738</sup>

However, this permission to meet in executive session does not mean that all labor negotiations are necessarily subject to Public Meetings Law.<sup>739</sup> For example, if an individual negotiator were retained by the governing body, the resulting negotiations would not be subject to the meetings law because the individual would not be a governing body.<sup>740</sup> Even negotiations conducted by multiple retained labor negotiators are not subject to meetings law because those negotiators do not qualify as members of a public body, and therefore do not constitute a governing body.<sup>741</sup>

**q. Other Executive Session Statutes**

The Public Meetings Law list of matters appropriate for executive session is not exclusive. Statutes outside the meetings law authorize governing bodies to hold executive or closed sessions, sometimes without cross-referencing the Public Meetings Law. For example, district school boards are authorized to meet in executive session to hold a hearing regarding expulsion of a student from a public school or a student's confidential medical records.<sup>742</sup> The Teacher Standards and Practices

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<sup>736</sup> ORS 192.660(2)(n).

<sup>737</sup> ORS 192.660(3).

<sup>738</sup> *Id.*

<sup>739</sup> [\*TriMet v. Amalgamated Transit Union Local 757\*](#), 362 Or 484, 503 (2018).

<sup>740</sup> [\*SW Or. Publ'g Co. v. SW Or. Comm. Coll. Dist.\*](#), 28 Or App 383, 386 (1977).

<sup>741</sup> *See id.*

<sup>742</sup> [ORS 332.061\(1\)](#). The hearing should be conducted in executive session unless the student, student's parent, or student's guardian requests a public hearing. *Id.*

Commission may meet in executive session to receive the executive director's findings and recommendations on the investigation of a licensee,<sup>743</sup> and to make its own findings.<sup>744</sup> And the Commission on Judicial Fitness and Disability may hold closed hearings to inquire into allegations of a judge's temporary disability.<sup>745</sup>

## 2. Final Decision Prohibition

“No executive session may be held for the purpose of taking any final action or making any final decision.”<sup>746</sup> It is quite likely that the governing body may reach a consensus in executive session, and its members of course will know of that consensus. The purpose of the “final decision” requirement is to allow the public to know the *result* of the discussions. Taking a formal vote in open session satisfies that requirement, even if the public vote merely confirms a tentative decision reached in an executive session.

The statute does not define “final action” or “final decision.” We recommend that the governing body choose a public decision unless a final public decision clearly is not required. The relevant criteria are the nature of the decision or action, and whether publicly announcing the decision would frustrate the purpose behind the statutory authorization for the particular executive session.

For example, the nature of decisions authorizing expenditure of funds makes it highly unlikely that these decisions could be made in executive session. But the decision to reduce a slate of 30 candidates for chief executive officer to 10 candidates or to three finalists is likely not a final decision or action. The legislative policy behind the executive session for such discussions would be undermined by disclosing the names of candidates who might not have applied if their candidacy would

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<sup>743</sup> [ORS 342.176\(3\)\(a\)](#).

<sup>744</sup> [ORS 342.176\(7\)](#).

<sup>745</sup> [ORS 1.425\(2\)](#). However, the subject judge has the right to request a public hearing. *Id.*

<sup>746</sup> ORS 192.660(6). At least one public body has a specific statute requiring a final decision to be made in executive session: the Government Ethics Commission must make its decision at the conclusion of the Preliminary Review Phase in executive session. [ORS 244.260\(4\)\(d\)\(C\)](#).

immediately become known. However, a decision to spend \$2,500 to bring the finalists in for interviews would be a final decision. A decision to *negotiate* with a “first choice” candidate, with salary and other conditions of employment remaining unsettled, is not a final decision. A decision to formally *offer* the position to one candidate is a final decision, even before acceptance.

A governing body cannot evade the “final action” requirement by using coded terms. For example, a formal public vote to extend an offer of appointment to “Ms. A” would be a clear violation of the law’s requirements, unless a statute outside of the Public Meetings Law *prohibits* disclosure of the individual’s name.

A governing body meeting in executive session must return to *public* session before taking final action. This requirement cannot be circumvented by simply announcing, in executive session, that the meeting is now open, and then proceeding without affording interested persons a chance to attend. If a public meeting will be held again after the executive session, the desirable practice would be to announce, before the executive session, a specific time for returning to open session. Otherwise, reasonable means must be used to give actual notice to interested persons that the meeting is again a public meeting. If the executive session has been short, it may be sufficient to open the door and announce to persons in the hall that the meeting is open to the public. But clearly, returning to an unscheduled and unannounced “open session,” for which those attending the previous session have no notice and no opportunity to attend, does not comply with the law.

The formal decision, of course, can be postponed to the next regular or duly announced public meeting. In fact, this procedure is necessary for any executive session that is not held in conjunction with a public session, unless the notice of executive session also informs the public and interested persons of the time and place at which the session will be opened to make the formal decision.

Finally, statutes outside the Public Meetings Law effectively may modify the requirement that no final action be taken in executive session. For example, in labor negotiations covered by the Public Employees Collective Bargaining Act, an offer made by the governing body’s

negotiator, if accepted by the employees' bargaining representative, is binding and effective, and an agreement must be signed even if the governing body has not formally approved the offer in open session.<sup>747</sup> The governing body may then appropriately ratify the agreement at a subsequent public meeting.<sup>748</sup>

### 3. Method of Convening Executive Session

A governing body may hold a meeting consisting of only an executive session. The notice requirements are the same as those for any other meeting.<sup>749</sup> In addition, the notice must cite to the statutory authority for the executive session.<sup>750</sup> An example of this type of notice is found at [Appendix J-5](#).

An executive session may also be called during a regular, special, or emergency meeting for which notice has already been given. The person presiding over the meeting must announce the statutory authority for the executive session before going into executive session.<sup>751</sup> A sample script for use in calling an executive session during a public meeting is found at [Appendix J-8](#).

### 4. Media Representation at Executive Session

Representatives of the news media are expressly allowed to attend executive sessions, with some exceptions.<sup>752</sup> However, the governing body may require that these attendees not disclose specific information discussed at the sessions.<sup>753</sup>

Legislative history reveals that allowing media attendance was intended to foster good relations with news media organizations; provide a mechanism to ensure that governing bodies limited executive sessions to

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<sup>747</sup> [S. Benton Educ. Ass'n v. Monroe Union High Sch. Dist. #1](#), 83 Or App 425, 431–32 (1987).

<sup>748</sup> *Id.*

<sup>749</sup> See ORS 192.640(2).

<sup>750</sup> *Id.*

<sup>751</sup> ORS 192.660(1).

<sup>752</sup> ORS 192.660(4).

<sup>753</sup> *Id.*

permissible purposes; and permit the media to gain valuable background information for future reporting.<sup>754</sup>

**a. Who is a representative of the news media?**

A representative of the news media is a news gatherer<sup>755</sup> who has a formal affiliation with an institutional news medium, that is, with an entity formally organized for the purpose of gathering and disseminating news.<sup>756</sup> The news media includes specialty publications, which cover specific subject areas for a special audience, regardless of whether the publication's specific area relates to the subject matter of a particular executive session.<sup>757</sup>

The news media is not limited to traditional print and broadcast media, but can include internet media.<sup>758</sup> For example, while a blogger keeping an online personal journal with reflections and comments would likely not qualify as a representative of the news media, an individual who regularly posts for a website maintained a by traditional media company (e.g., cnn.com) likely would qualify.<sup>759</sup> Relevant factors typically include whether the entity has staff and a formal business structure and regularly disseminates news to the public.<sup>760</sup> Because no bright-line definition exists, we encourage governing bodies to consult with their legal counsel when receiving a request from a blogger or other non-traditional journalist to attend an executive session.

While governing bodies can adopt comprehensive policies regarding access to executive sessions, those policies are unenforceable to the extent

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<sup>754</sup> Op Atty Gen No 8291, at 12, 2016 WL 2905510 (Apr 18, 2016), available at <https://www.doj.state.or.us/wp-content/uploads/2017/06/op8291.pdf>.

<sup>755</sup> A reporter would typically qualify as a news gatherer, while, for example, a newspaper's advertising manager is not a news gatherer and therefore would not qualify as a representative of the news media. 39 Op Atty Gen 600, 602, 1979 WL 35636 (1979).

<sup>756</sup> [Op Atty Gen No 8291](#), at 13–14. Note that portions of our earlier opinions interpreting this phrase may no longer be valid in light of this recent 2016 opinion.

<sup>757</sup> *Id.* at 14.

<sup>758</sup> *Id.* at 15–16.

<sup>759</sup> *Id.*

<sup>760</sup> *Id.* at 16.

they conflict with the statutory requirements permitting representatives of the news media to attend.<sup>761</sup> For example, a governing body cannot limit attendance to one representative of each type of news medium;<sup>762</sup> exclude a representative with a personal interest in the executive session's subject matter;<sup>763</sup> exclude a representative for failing to provide media credentials within certain deadlines;<sup>764</sup> or require representatives to provide advance notice of their intent to attend an executive session.<sup>765</sup> However, governing bodies are not required to accept a mere assertion that a person qualifies as a news representative.<sup>766</sup>

#### **b. Re-disclosing Information**

A governing body may require that media representatives not disclose specific information.<sup>767</sup> The presiding officer should make the specification, or the governing body could do so (or overrule the presiding officer) by motion. *Absent any such specification, the entire proceeding may be reported and the purpose for having an executive session may be frustrated.* Except in the rarest instances, the governing body at least should allow the general subject of the discussion to be disclosed, and it cannot prevent discussion of the statutory grounds justifying the session. The nondisclosure requirement should be no broader than the public interest requires.

However, the Public Meetings Law provides no sanction to enforce this requirement that a news representative not disclose specified information.<sup>768</sup> The experience of more than three decades has been that the media, by and large, honor the nondisclosure requirement. Ultimately,

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<sup>761</sup> *Id.* at 20.

<sup>762</sup> *Id.* at 17.

<sup>763</sup> *Id.* at 17–18. However, as discussed below, certain representatives connected to current or anticipated litigation involving the governing body can be excluded from an executive session discussing that litigation. ORS 192.660(5).

<sup>764</sup> [Op Atty Gen No 8291](#), at 21.

<sup>765</sup> *Id.*

<sup>766</sup> *Id.* at 20.

<sup>767</sup> ORS 192.660(4). See a sample script at Appendix J-8.

<sup>768</sup> [Op Atty Gen No 8291](#), at 18–19; 42 Op Atty Gen 392, 397–98, 1982 WL 183052 (1982).

“enforcement” of the nondisclosure requirement depends upon cooperation between public officials and the media. This cooperation advances the purposes of both government and the news media.

A media representative has no obligation to refrain from disclosing information gathered at an executive session if the governing body fails to specify that certain information is not for publication. But media representatives may wish, in a spirit of cooperation, to inquire whether a governing body’s failure to specify was an oversight. And a representative is under no obligation to keep confidential any information the reporter independently gathers as the result of leads obtained in an executive session. A representative also has the clear right to disclose any matter covered in an executive session that is not properly within the scope of the announced statutory authorization. Indeed, the presence of media representatives at executive sessions probably encourages compliance with statutory restrictions on holding closed sessions.

Although members of the public typically may tape record or video record public meetings with an unconcealed device,<sup>769</sup> we do not believe this is the case with respect to members of the media who attend executive sessions. We believe the presiding officer may require that members of the media not tape or video record executive sessions, in order to decrease the likelihood that information discussed in the executive session will be inadvertently disclosed.

### **c. Exceptions**

Several exceptions exist to the general rule permitting representatives of the news media to attend executive sessions. The media can be excluded from an executive session held to conduct deliberations with the governing body’s labor negotiator(s),<sup>770</sup> or a hearing held by a district school board to

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<sup>769</sup> See [ORS 165.540\(6\)\(a\)](#) (providing exception to crime of recording communications without notice).

<sup>770</sup> See ORS 192.660(4) (referring to ORS 192.660(2)(d)); [Barker v. City of Portland](#), 67 Or App 23 (1984) (city council did not violate meetings law by selectively excluding editor-in-chief of union’s newspaper from an executive session with city’s labor negotiators).

consider expulsion of a student from a public school or a student's confidential medical records.<sup>771</sup>

When an executive session is held for the purpose of conferring with legal counsel about current litigation or litigation likely to be filed, the governing body must exclude any member of the news media who is a party to the litigation to be discussed, or who is an employee, agent, or contractor of a news media organization that is a party to the litigation.<sup>772</sup>

### 5. Other Persons Permitted to Attend Executive Sessions

An executive session is by definition a meeting “which is closed to certain persons.”<sup>773</sup> It follows that the governing body may permit other persons to attend. Generally, an executive session is closed to all except members of the governing body, persons reporting to it on the subject of the executive session or who are otherwise involved, and news media representatives. However, nothing prohibits the governing body from permitting other specified persons to attend.<sup>774</sup> And statutes outside of the Public Meetings Law specifically allow health professional regulatory boards to permit public officials and members of the press to attend executive sessions in which the board considers information it has obtained in the course of an investigation of a licensee or applicant.<sup>775</sup> The attending individuals should be reminded, however, that they may not disclose such

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<sup>771</sup> See ORS 192.660(4) (referring to [ORS 332.061\(2\)](#)). However, this exception applies only if the student or the student's parent or guardian does not request a public hearing.

<sup>772</sup> ORS 192.660(5). We have concluded that a “member” of the news media is synonymous with a “representative” of the news media. [Op Atty Gen No 8291](#), at 16. For further analysis on who is an employee, agent, or contractor of a news media organization, see *id.* at 16–17.

<sup>773</sup> ORS 192.610(2) (emphasis added).

<sup>774</sup> Cf. [Barker](#), 67 Or App at 24 (noting that a city council allowed certain news media representatives to attend an executive session with the city's labor negotiators even though the media could have been excluded).

<sup>775</sup> [ORS 676.175\(8\)\(a\)](#). In this context, “public official” means a member, member-elect, staff member, or employee of a state agency or board, a district attorney's office, the Department of Justice, a state or local public body that licenses, franchises or provides emergency medical services, or a law enforcement agency, as long as the executive session reasonably relates to the entity's regulatory or enforcement function. See ORS 676.175(8)(b) (referring to ORS 676.177).

information to any other members of the public. The fact that certain persons have been allowed to attend is not grounds for the general public to attend the executive session.

#### **F. Enforcement of the Law**

As noted above, the Attorney General and district attorneys have no enforcement role under the Public Meetings Law. Education and persuasion are by far the best tools available to obtain compliance. Most violations of the Public Meetings Law occur because the governing body is not familiar with the requirements of the law. Quoting the provisions of the law to the governing body often results in future compliance. Most governing bodies that are aware of the law make a good faith effort to comply.

There are, however, cases in which governing bodies continue to violate the law and can be neither persuaded nor educated. Even in such a case, quoting the legal provisions that create potential personal liability of governing body members for attorney fees, ORS 192.680(3) and (4), or that authorize the imposition of civil penalties for violation of the executive session provisions of the law, ORS 192.685, is worth trying before suit is filed. But in some cases only litigation will suffice.

##### **1. Injunctive or Declaratory Actions**

Anyone affected by a decision of a governing body may file a lawsuit to require compliance with, or prevent violations of, the Public Meetings Law by members of the governing body, or to determine whether the Public Meetings Law applies to meetings or decisions of the governing body.<sup>776</sup> The Court of Appeals has held that residents of a school district, and a labor organization whose members included district employees and taxpayers, were affected by the district's decisions where they were "vitally interested in all manner of [the district's] decisions."<sup>777</sup> And the court held that organizations that educated the public about animal exploitation would have

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<sup>776</sup> ORS 192.680(2). Such a lawsuit is the exclusive remedy for a violation of Public Meetings Law, ORS 192.680(6), except for the Oregon Government Ethic Commission's imposition of civil penalties for violating the executive session provisions, ORS 192.685.

<sup>777</sup> [\*Harris v. Nordquist\*](#), 96 Or App 19, 22–23 (1989).

their interests impacted by a university committee charged with ensuring the proper treatment of animals used in research.<sup>778</sup>

A suit must be brought in the circuit court of the county in which the governing body ordinarily meets,<sup>779</sup> and must be commenced within 60 days following the date that the decision becomes public record.<sup>780</sup> The plaintiff must engage a private attorney, or appear *pro se* (for oneself). An action may be brought even before any decision affecting the plaintiff has been made,<sup>781</sup> and is not moot solely because a governing body has ceased its improper meeting practices.<sup>782</sup>

If a court determines that a governing body made a decision in violation of Public Meetings Law, the decision may be voided,<sup>783</sup> or the court may order appropriate equitable relief.<sup>784</sup> The court may also order payment of the plaintiff's reasonable attorney fees.<sup>785</sup> The governing body can avoid the voiding of its decision by reinstating the decision while in compliance with the law.<sup>786</sup> We construe this to require the governing body to substantially reconsider the issues, and not to merely conduct a perfunctory rerun.

Similarly, if a subcommittee decides on a recommendation to a public body in violation of the law, the public body can avoid the voiding of its subsequent decision by making the decision in full compliance with the law.

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<sup>778</sup> [\*SETA v. Inst. Animal Care & Use Comm.\*](#), 113 Or App 523, 527 (1992).

<sup>779</sup> ORS 192.680(2).

<sup>780</sup> ORS 192.680(5).

<sup>781</sup> [\*Harris\*](#), 96 Or App at 22–23 (1989) (plaintiff seeking to enjoin future violations).

<sup>782</sup> [\*Barker v. City of Portland\*](#), 94 Or App 762, 765 (1989) (explaining that the governing body's past illegal actions remained in violation of the law).

<sup>783</sup> ORS 192.680(1).

<sup>784</sup> ORS 192.680(3). An example of equitable relief is ordering the governing body to avoid future violations of Public Meetings Law. Future violations of such an order could lead to penalties for contempt of court.

<sup>785</sup> *Id.*

<sup>786</sup> ORS 192.680(1).

However, if a governing body's violation was the result of intentional disregard of the law or willful misconduct by a quorum, then the court will void the decision (despite any attempt to reinstate the decision), unless other equitable relief is available.<sup>787</sup> In addition, any members of the body who engaged in the willful misconduct will be *personally* liable to the governing body for any attorney fees it has to pay to the plaintiff.<sup>788</sup>

We think that voiding a governing body's decision is typically a remedy of last resort. That remedy often may be viewed as contrary to the public interest by undermining the stability of governmental decision-making and harming innocent persons who have acted in reliance on that decision. However, a violation involving an aggravating factor, such as a conflict-of-interest violation, may lead to the decision being voided.

## 2. Civil Penalties

Complaints that public officials have violated the executive session provisions may be made to the Oregon Government Ethics Commission for review and investigation.<sup>789</sup> Violations can result in civil penalties up to \$1,000, unless the governing body was acting under the advice of its legal counsel.<sup>790</sup>

In reviewing and investigating a complaint, the commission may interview witnesses, review minutes and other records, and obtain any other information pertaining to the governing body's executive sessions.<sup>791</sup>

If the commission chooses not to pursue a complaint at any time before conclusion of a contested case hearing, the public official against whom the complaint was brought may be entitled to reimbursement of reasonable costs and attorney fees. The reimbursement would be made by the public body to which the official's governing body has authority to make recommendations or for which the official's governing body has authority

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<sup>787</sup> ORS 192.680(3).

<sup>788</sup> ORS 192.680(4).

<sup>789</sup> ORS 192.685(1). The commission has adopted rules to carry out this function at [chapter 199, division 40](#), of the Oregon Administrative Rules.

<sup>790</sup> [ORS 244.350\(2\)](#).

<sup>791</sup> ORS 192.685(2).

to make decisions.<sup>792</sup> A public official who prevails following a contested case hearing shall, upon petition to Marion County Circuit Court, be awarded reasonable attorney fees to be paid by the commission.<sup>793</sup>

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<sup>792</sup> ORS 192.685(3).

<sup>793</sup> [ORS 244.400](#).



## APPENDIX I – FREQUENTLY ASKED QUESTIONS

**Q. May a three-member governing body meet with staff in carrying out its administrative functions, without complying with all the notice and other requirements of the Public Meetings Law?**

A. If the governing body is meeting in order to obtain information on which it later will deliberate, or to deliberate or decide on substantive matters, it must comply with the notice, public attendance, and recordkeeping requirements of the Public Meetings Law.

**Q. As a member of a three-member governing body, must I notify the press and public and arrange for their attendance every time I drop into a colleague's office or make a telephone call to another member?**

A. Yes, if you discuss the business of the governing body. The law requires that the public have access to any meeting of a quorum of a governing body of a public body when the governing body meets to gather information on which it will later deliberate, or to deliberate or make a decision on any matter of policy or administration.

**Q. Is a "retreat" of a governing body subject to the Public Meetings Law?**

A. The answer depends on the matters discussed at the retreat. If the retreat is confined, for instance, to general principles of decision-making or personal interaction, the Public Meetings Law would not apply. However, if at the retreat the governing body deliberates toward or makes a decision on official business, or gathers information on which it later will deliberate, the meetings law applies. In addition, any retreat or training session that includes deliberations must be held inside the governing body's jurisdiction.

**Q. What about a "retreat" for other employees and administrators of the public body attended by members of the governing body?**

A. Such a "retreat" can be organized to avoid the meeting of a quorum of the governing body for the purpose of gathering information or deliberating toward decisions on matters within their responsibility, in which case the meetings law would not apply. However, it also is very easy for information gathering or policy deliberations by members of the governing body to occur, in violation of the Public Meetings Law.

**Q. May a quorum of members of a governing body participate in a “community retreat” sponsored by a chamber of commerce?**

A. Yes, so long as they avoid getting together as a group for any deliberations.

**Q. What is a quorum?**

A. The Public Meetings Law does not define quorum. It may be defined by city charter, rules of order, or some other source. Absent other controlling authority, a quorum is a majority of a governing body’s members. Even if a group decides to operate by consensus, the meetings law will apply if a quorum of the group’s members are needed for the body to make a decision or recommendation. See also discussion of Quorum in [Appendix K](#).

**Q. Is an on-site inspection subject to the Public Meetings Law?**

A. No. On-site inspections are not “meetings” subject to the meetings law. However, a quorum of the governing body should be careful not to decide on or deliberate towards any decision while attending an inspection.

**Q. Does the Public Meetings Law apply to a chamber of commerce?**

A. No.

**Q. Is a people’s utility district board subject to the Public Meetings Law?**

A. Yes.

**Q. How about an electric cooperative?**

A. No. That is a private body.

**Q. How about a nonprofit corporation that receives all of its funds from the state or local government?**

A. No, unless it is formally acting as an advisory body to a public body or is required by contract to open its meetings. If the corporation is the “functional equivalent” of a public body, it may also be subject to the Public Meetings Law.

**Q. Are homeowners associations and rental associations subject to the Public Meetings Law?**

A. No.

**Q. Are neighborhood associations subject to the Public Meetings Law?**

A. It depends on whether the particular neighborhood association is a “governing body of a public body.” Determining whether a neighborhood association is subject to the Public Meetings Law requires an analysis of several factors, including the specific responsibilities and authority of that particular neighborhood association.

Notwithstanding the analysis under the Public Meetings Law, some cities require, as a condition of their recognition of a neighborhood association, that neighborhood association meetings be open to the public.

**Q. Is an administrative hearing subject to the Public Meetings Law?**

A. The deliberations of state agencies conducting contested cases in accordance with the Administrative Procedures Act, and of several specifically named agencies, are exempt from the meetings law. However, the information-gathering portions of the contested cases are subject to the meetings law if conducted by a governing body. Proceedings in the nature of contested cases conducted by local governing bodies are subject to the meetings law. Contested cases conducted by an individual hearings officer are not subject to the law, because a single hearings officer is not a governing body.

**Q. Does the Public Meetings Law apply to the Oregon legislature?**

A. The application of the Public Meetings Law to the Legislative Assembly has not been directly addressed in an opinion by the courts or the Attorney General. However, the Oregon Constitution and rules of both chambers require that deliberations of floor sessions and committee meetings, but not caucus sessions, be open to the public and members of the media.

**Q. How far in advance must a public body give notice of its regular meetings?**

A. Far enough in advance to reasonably give interested persons actual notice and an opportunity to attend. Because the notice must specify the principal subjects to be covered, it must be given separately for each meeting even though the public and news media know that the body meets, for example, every Wednesday evening.

**Q. Is a notice posted solely on a bulletin board sufficient?**

A. It is not. However, such a notice may be used with news releases and mailing lists to meet the notice requirements.

**Q. Must meeting notices be published as legal notices?**

A. No.

**Q. Does the Public Meetings Law notice requirement require the purchase of advertising?**

A. No, it requires only appropriate notice.

**Q. May a governing body issue a single notice for a “continuous session” that may last for several days?**

A. Probably yes, if the body can identify the approximate times that principal subjects will be discussed.

**Q. Must a notice be provided for a meeting that is exclusively an executive session?**

A. Yes. The notice requirements are the same and must cite the statutory authority for the executive session.

**Q. Is a media request to receive notice of any meetings sufficient to require notice of special and emergency meetings?**

A. Yes.

**Q. If a news organization requests notice of meetings, is it sufficient for that notice to be mailed “general delivery” to that news organization?**

A. Probably yes, if mailed far enough in advance. It is up to the news organization to establish procedures to ensure that the proper person receives the notice. For a special or emergency meeting, a telephone call or a fax to a responsible person is advisable.

**Q. Is a meeting without proper notice an illegal meeting?**

A. A meeting without notice violates the Public Meetings Law.

**Q. Must a governing body notify the public when a meeting has been cancelled, for example, when bad weather requires a last-minute cancellation?**

A. The Public Meetings Law does not require a governing body to notify the public when a meeting has been cancelled. Although not required,

it is certainly appropriate for a governing body to notify the public that a meeting has been cancelled when it is feasible to do so.

**Q. May governing bodies hold public meetings at a location outside of the geographic boundaries of their jurisdiction if there is no appropriate meeting site within their geographic boundaries?**

A. In addition to holding a meeting within the geographic boundaries of its jurisdiction, a governing body can hold a meeting at the public body's administrative headquarters, the nearest practical location, or—for county, city, or state public bodies—within Indian country of a federally recognized Oregon Indian tribe that is within the geographic boundaries of Oregon. In certain circumstances, it is possible that the nearest practical location might be outside the governing body's geographic boundaries. In addition, a meeting may be held in other locations in the event of an actual emergency necessitating immediate action.

A joint meeting of two or more governing bodies or a joint meeting with a federally recognized Oregon Indian tribe must be held within the geographic boundaries of one of the bodies or of a tribe, or at the nearest practical location.

**Q. If during an executive session, the members of the governing body discuss matters outside its proper scope, what is the proper role of media representatives present? May they begin taking notes?**

A. The Public Meetings Law does not prohibit media representatives from taking notes of executive sessions they attend, whether or not the discussion includes matters outside the lawful scope of the executive session. The law merely permits the governing body to require that specified information discussed during executive session not be disclosed. Media representatives may freely disclose matters outside the session's proper scope. Nonetheless, it always is proper for those representatives politely to call the governing body's attention to the fact that it has strayed from the specified subject or subjects to be discussed in executive session.

**Q. May a governing body restrict the number of media representatives attending an executive session?**

A. No.

**Q. May a reporter who has a personal stake in a matter be excluded from an executive session?**

A. No, except that a reporter who is a party to litigation or who is an employee, agent, or contractor of a news media organization that is a party to litigation, should be excluded from an executive session held to discuss that litigation.

**Q. May a governing body reviewing or evaluating a public employee's performance in executive session exclude the employee from attending?**

A. If the public employee requests a public session, the meeting must be held in public, and the employee may not be excluded. If the employee makes no such request, then the employee may be excluded. Sufficient advance notice must be given to the employee to allow the employee to choose whether to request a public meeting.

**Q. Must reporters be permitted access to executive sessions conducted by electronic conference?**

A. Yes.

**Q. May a governing body reach a decision in an executive session?**

A. It may not reach a final decision, but it may informally decide or reach consensus. This is proper so long as the body goes into public session to act formally on the matter.

**Q. What if the decision is to take no action? For example, a complaint with respect to a public official, informally concluded to be without sufficient merit to warrant discipline?**

A. It is appropriate, but probably not required, to announce in public session that the matter was not resolved, that no decision was reached or that in the absence of a motion for action, no action will be taken. If, however, a final "no action" decision is made by vote of a quorum of a governing body, the decision must be made and announced in public session.

**Q. If a city council meets in executive session to discuss litigation, must the council meet in public session to vote to file a lawsuit or appeal?**

A. Yes. Final decisions must be made in public.

**Q. Is smoking prohibited at an executive sessions?**

A. Most likely yes. Whether smoking is prohibited depends on whether the location of the executive session is covered by the Oregon Indoor Clean Air Act.

**Q. May I tape record a public meeting?**

A. Yes. You may also videotape a meeting, subject to reasonable rules of the public body to avoid disruption.

**Q. Must I inform the governing body before I tape record?**

A. No. The criminal prohibition on recording a conversation without notification does not apply to the use of an unconcealed recording device at a public or semipublic meeting.

**Q. May a public body refuse to use a microphone during its public meetings?**

A. The meetings law does not specifically address what steps public bodies must take to ensure that the general public can sufficiently monitor public meetings. However, ORS 192.630(5)(a) and the Americans with Disabilities Act impose certain requirements on public bodies to ensure that their communications at public meetings with persons with disabilities are as effective as communications with others.

**Q. Does the Public Meetings Law grant me the right to testify before a public body?**

A. No, the Public Meetings Law only guarantees the public a right to monitor the meetings of public bodies; it does not grant members of the public the right to interact with public bodies during those meetings.

**Q. May a person who has disrupted prior meetings, assaulted board members, etc., be excluded from a public meeting?**

A. It is doubtful that a person may be excluded for prior conduct. The person who causes the disruption may be arrested for trespass.

**Q. Are written minutes required?**

A. Written minutes or a sound, video, or digital recording is required for any meeting, including an executive session.

**Q. What do I do when a public body's minutes are inconsistent with the notes I took during a meeting?**

A. You should work directly with the public body to correct discrepancies that you believe exist in the minutes. In so doing, it may be useful to speak with other attendees to determine if your recollection is accurate. In addition, other attendees may be able to lend support if you have difficulty convincing the public body that the minutes are inaccurate.

**Q. How can a suit be filed for a meetings violation?**

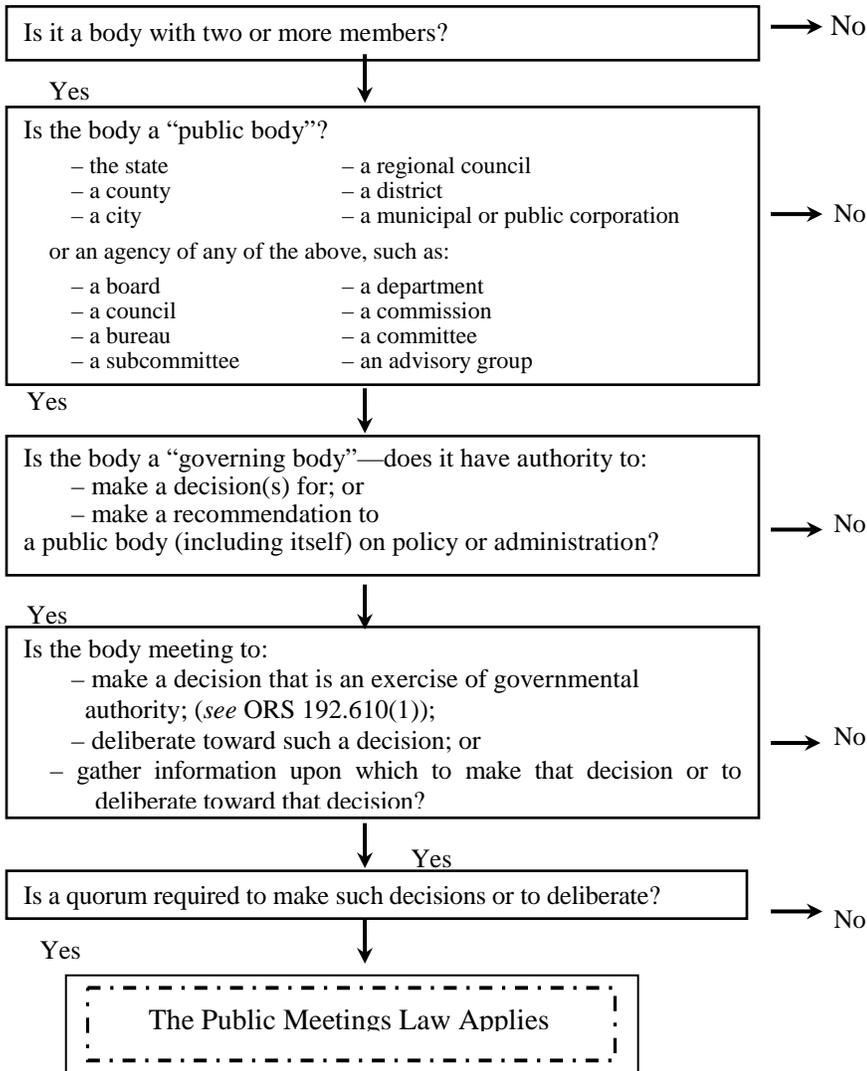
A. A suit should be filed in circuit court. The timing of the suit depends on the relief sought, but no action under the meetings law may be commenced more than 60 days after the decision challenged became public record. A complaint for violation of the executive session provisions of the Public Meetings Law may be filed with the Oregon Government Ethics Commission.

**APPENDIX J – SAMPLES, FORMS**

Guide to Bodies Subject to Public Meetings Law..... J-2  
Public Meetings Checklist..... J-3  
Sample Meeting Notices..... J-5  
Checklist for Executive Session..... J-6  
Sample Script to Announce Start of Executive Session..... J-8  
Sample Public Meetings Minutes..... J-9

**GUIDE TO BODIES SUBJECT TO PUBLIC MEETINGS LAW**

This is a simplified guide to understanding when the meetings of a particular body are subject to the Public Meetings Law. For a discussion of the various elements, refer to the text of this manual.



**PUBLIC MEETINGS CHECKLIST**

The Public Meetings Law applies to all meetings of a quorum of a governing body of a public body for which a quorum is required to make a decision or to deliberate toward a decision on any matter, and to any deliberations between a quorum of the governing body. This checklist is intended to assist governing bodies in complying with the provisions of the law; however, you should consult the appropriate section(s) of this manual for a complete description of the law's requirements.

- OPEN TO THE PUBLIC.** Unless an executive session is authorized by statute, the meeting must be open to the public.
- NOTICE.** The governing body must notify the public of the time and place of the meeting, as well as the principal subject to be discussed. Notice should be sent to:
  - News media;
  - Mailing lists; and
  - Other interested persons.

The notice for a regular meeting must be reasonably calculated to give "actual" notice of the meeting's time and place. Special meetings require at least 24-hours' notice. Emergency meetings may be called on less than 24-hours' notice, but the minutes must describe the emergency justifying less than 24-hours' notice.

- SPACE AND LOCATION**
- Space.** The governing body should consider the probable public attendance and should meet where there is sufficient room for that expected attendance.
- Geographic location.** Meetings must be held within the geographic boundaries over which the public body has jurisdiction, at its administrative headquarters, at the nearest practical location, or— for state, county, or city entities—within Indian county of a federally recognized Oregon Indian tribe that is within the boundaries of the state.
- Nondiscriminatory site.** The governing body may not meet at a place where discrimination on the basis of race, color, creed, sex, sexual orientation, national origin, age, or disability is practiced.
- Smoking is prohibited.**

- ACCESSIBILITY TO PERSONS WITH DISABILITIES
- Accessibility. Meetings must be held in places accessible to individuals with mobility and other impairments.
- Interpreters. The governing body must make a good faith effort to provide an interpreter for hearing-impaired persons.
- Americans with Disabilities Act (ADA). The governing body should familiarize itself with the ADA, which may impose requirements beyond state law.
- VOTING. All official actions by governing bodies must be taken by public vote. Secret ballots are prohibited.
- MINUTES and RECORDKEEPING. Written minutes or a sound, video, or digital recording must be taken at all meetings, including at executive sessions. The minutes or recording must include at least the following:
  - Members present;
  - Motions, proposals, resolutions, orders, ordinances, and measures proposed and their disposition;
  - Results of all votes and, except for bodies with more than 25 members unless requested by a member, the vote of each member by name;
  - The substance of any discussion on any matter; and
  - A reference to any document discussed at the meeting. (Reference to a document exempt from disclosure under the Public Records Law does not affect its exempt status.)

The minutes or recording must be available to the public within a “reasonable time after the meeting.”

**SAMPLE MEETING NOTICES**

Notice of [Regular, Special or Emergency] Meeting

The Oregon Dungeness Crab Commission will hold a (regular/special/emergency) meeting at 9:00 a.m. at the Netarts Community Hall, 10 Ocean Avenue, Netarts, Oregon, on October 4, 1987.

[A copy of the agenda of the meeting is attached.]

— or —

[The meeting will cover extension of commercial takes of Dungeness crabs, and a proposed limitation on sports crabbing in Neahkahnie Bay.]

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours before the meeting to (name and telephone/TTY number) .

Notice of Executive Session

The Oregon Dungeness Crab Commission will hold an executive session at 9:00 a.m. at the Netarts Community Hall, 10 Ocean Avenue, Netarts, Oregon, on October 4, 1987. The session will consider an applicant for the position of Assistant Marine Biologist. The executive session is being held pursuant to ORS 192.660(2)(a).

**NOTE:** Meeting notices are not required to be signed by an officer or employee. A notice mailed or delivered will be sufficient. It must be mailed or delivered to any news medium that has requested notice and, so far as possible, to any other persons who have requested notice or who are known to be interested. Notification of the general public is also necessary, and a notice merely posted on a bulletin board is ordinarily not sufficient. Such posting and notification to appropriate newspapers, radio stations, and wire services is appropriate. It is not necessary to use paid notices. Notice by telephone or fax is advisable for emergency meetings.

**CHECKLIST FOR EXECUTIVE SESSION**

This checklist is intended to assist governing bodies in complying with the executive session provisions of the Public Meetings Law; however, you should consult the appropriate section(s) of this manual for a complete description of the requirements.

- Provide notice of an executive session in the same manner you give notice of a public meeting. The notice must cite to the specific statutory provision(s) authorizing the executive session.
- Announce that you are going into executive session pursuant to ORS 192.660 and cite the specific reason(s) and statute(s) that authorize the executive session for *each* subject to be discussed. See sample script at K-9. (You may hold a public session even if an executive session is authorized.)
- If you intend to come out of executive session to take final action, announce when the open session will begin again.
- Specify if any individuals other than the news media may remain.
- Tell the media what may *not* be disclosed from the executive session. If you fail to do this, the media may report everything. If you discuss matters other than what you announce you are going to discuss in the executive session, the media may report those additional matters.
- A member of the news media must be excluded from executive sessions held to discuss litigation with legal counsel if he or she is a party to the litigation or is an employee, agent, or contractor of a news media organization that is a party.
- Come back into open session to take final action. If you did not specify at the time you went into executive session when you would return to open session, and the executive session has been very short, you may open the door and announce that you are back in open session. If you unexpectedly come back into open session after previously announcing you would not be doing so, you must use reasonable measures to give actual notice to interested persons that you are back in open session. This may require postponing final action until another meeting.

- Keep minutes or a sound, video, or digital recording of executive sessions.

**NOTE:** If a governing body violates any provision applicable to the executive session provisions in the Public Meetings Law, a complaint against individual members of the governing body can be filed with the Oregon Government Ethics Commission (OGEC). The OGEC may impose a \$1,000 civil penalty, unless the governing body went into executive session on the advice of its attorney.

**SAMPLE SCRIPT TO ANNOUNCE START OF EXECUTIVE SESSION**

The [governing body] will now meet in executive session pursuant to ORS 192.660(\_\_\_\_) [choose appropriate section(s) for *this* session], which allows the Commission to meet in executive session to [list activity(ies)].

Representatives of the news media and designated staff shall be allowed to attend the executive session. All other members of the audience are asked to leave the room. Representatives of the news media are specifically directed not to report on or otherwise disclose any of the deliberations or anything said about these subjects during the executive session, except to state the general subject of the session as previously announced. No decision may be made in executive session. At the end of the executive session, we will return to open session and welcome the audience back into the room.

**Note:** The governing body may choose to allow other specified persons to attend the executive session. See [\*Barker v. City of Portland\*](#), 67 Or App 23 (1984).

**SAMPLE PUBLIC MEETINGS MINUTES**

Oregon State Dungeness Crab Commission

Minutes

Regular (Special or Emergency) Meeting    October 4, 1987

Netarts, Oregon

Pursuant to notice made by press release to newspapers of general and local circulation throughout the state and mailed to persons on the mailing list of the Commission and the members of the Commission, a (regular /special/emergency) meeting of the Dungeness Crab Commission was held at the community hall in Netarts, Oregon.

Present were Chairman Abel Adams, and Commissioners Bertha Bales, Charles Carter and Donald David, the entire membership of the Commission. The executive secretary of the Commission, Elmer Eaton, presented the Commission's agenda as follows:

- (1) Request to amend commercial limits of daily take of Dungeness crab from the estuaries and ocean waters of the State of Oregon.
- (2) Report of marine biologist Franklin on the effect of recent micro-organic growths in Siletz Bay on crab population.
- (3) Request to consider portions of Neahkahnie Bay off limits for sports crabbing.

Testimony on the commercial limits was received from George Grant representing commercial crabbing industry for an increase and Howard Hawes representing sportsmen.

After discussion, Commissioner David moved that the Commission give notice that it intended to amend the commercial daily limits by a 10 percent increase and that a public hearing be held to receive information, data, and views of interested persons. Voting for the motion: Commissioners Bales, David and Chairman Adams; against: Commissioner Carter. The motion having carried, the executive secretary was directed to prepare a notice of intention to amend a rule and have it published in the Secretary of State's Administrative Bulletin and to notify the press and the Commission's mailing list.

Marine Biologist Franklin reported that micro-organic growths have caused a 20 percent decrease in the crab population of Siletz Bay. Research at the Oregon State University Marine Biology Center indicates that it may

be possible to develop an ecologically sound strain of micro-organism to combat the harmful growth. Commissioner Bales questioned Franklin as to the effects on the balance of life in the Siletz estuary. Franklin indicated that no sure prediction could be given at this time. Commissioner Bales moved that Franklin consult with the Department of Environmental Quality and report back at the next regular meeting of the Commission. The motion was carried unanimously.

A request to declare portions of Neahkahnie Bay off limits for sports crabbing was presented to the Commission. Supporting the request was George Grant representing the commercial crabbing industry. Mr. Grant testified that the extended take of sportsmen was decreasing the potential take of the commercial take. He indicated that the area was an excellent breeding ground and sportsmen were disturbing the young crabs, thereby endangering the population.

Opposing the request were Irving Instant, a marina operator on Neahkahnie Bay, and a representative of the Tillamook Chamber of Commerce, John Jackson, who disputed Mr. Grant's testimony. The Commission considered a written report prepared by the Department of Environmental Quality titled "The Effect of Sports Crabbing on Crab Populations," and dated June 15, 1987. Commissioner David moved that Mr. Franklin investigate the claim and report back to the Commission at its next regular session. The motion was carried unanimously.

The agenda matters having been dealt with, the Chairman stated that an application for the available position of Assistant Marine Biologist to the Commission had been received. The Chairman then directed that the Commission go into executive session to consider the employment application. The Chairman identified ORS 192.660(2)(a) as authority for the executive session. Kenneth King, reporter for the Associated Press, requested to be present at the executive session.

At the conclusion of the executive session, there being no further business, the meeting was adjourned.

s/ Elmer Eaton  
Executive Secretary  
Oregon Dungeness Crab Commission

October 4, 1987

## **APPENDIX K – PARLIAMENTARY PROCEDURE, QUORUMS, AND VOTING**

### **A. PARLIAMENTARY PROCEDURE GENERALLY**

Rules of parliamentary procedure provide the means for orderly and expeditious disposition of matters before a board, commission, or council. They govern the way members of a multi-member body interact with each other. As a general proposition, those procedural guides only affect substantive policy development or third-party interests indirectly and do not have the force of law. They may be waived, modified, or disregarded without affecting the validity of the agency’s decisions.

Public bodies, therefore, have great flexibility to determine their own rules of parliamentary procedure without fear that irregularities or errors will lead to judicial invalidation of their actions. When making or applying rules of parliamentary procedure, a board, commission, or council is limited only by (i) any constitutional or statutory requirements, (ii) rights of third parties which may be affected, and (iii) judicial interpretations of constitutional and statutory rights.

Parliamentary procedure for a multi-member body guides all agency decision-making processes, including deliberations following a contested case or rulemaking hearing and deliberations leading to an advisory recommendation on a matter of public policy to another public body.

To facilitate decision-making, a simplified and flexible approach to parliamentary procedure is helpful. The author of one text on parliamentary procedures believes that “stressing a more straightforward and open procedure for meetings eliminates the parliamentary impasses that appear to follow when too much attention is given to parliamentary intrigue and manipulation.”<sup>794</sup> He has, for example, eliminated the “seconding” of motions because it is “largely a waste of time.”<sup>795</sup> This warning against blind adherence to parliamentary rules is echoed by the author of another text who admonishes that “[t]echnical rules should be used only to the

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<sup>794</sup> R. Keesey, *Modern Parliamentary Procedure* XV–XVI (1994).

<sup>795</sup> *Id.* at 21.

extent necessary to observe the law, to expedite business, to avoid confusion, and to protect the rights of members.”<sup>796</sup>

The most commonly known and used parliamentary authority is perhaps Henry Robert’s *Rules of Order Newly Revised*. However, a more readable authority is Alice Sturgis’s *Standard Code of Parliamentary Procedure* (2d ed 1966). The Oregon House and Senate rely on Paul Mason’s *Manual of Legislative Procedure* (1989). Any of these texts could be adopted by reference to guide board, commission, or council deliberations. A simple motion such as the following is sufficient for this purpose:

Except as otherwise provided by law and except where the (insert title of board or commission) directs or acts to the contrary, (insert title and edition of a parliamentary reference book) shall govern parliamentary processes of this public body.

Alternatively, a board, commission, or council might adapt some of the rules to suit its particular needs and convenience, and adopt a standard text as a “back-up” resource.

## **B. QUORUMS AND VOTES**

Statutes, not parliamentary procedure, specify quorums and voting requirements. The quorums and voting requirements of Oregon state boards, commissions, or councils are governed by general law, [ORS 174.130](#), or by special statutes. General authority to adopt rules to govern their proceedings is not sufficient authority for boards, commissions, or councils to write a rule contrary to [ORS 174.130](#) or special statutes of similar import. However, a state agency with authority to create a board, commission, or council, establish its duties, its structure, and, in short, determine its very existence, may provide by administrative rule what constitutes a quorum and thus release its board, commission, or council from the rigors of [ORS 174.130](#).<sup>797</sup>

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<sup>796</sup> A. Sturgis, *Standard Code of Parliamentary Procedure* 8 (2d ed 1966).

<sup>797</sup> Letter of Advice to Jeffrey Milligan, at 4–5, 1985 WL 199935 (OP-5763) (Jan 16, 1985).

## 1. General Law

[ORS 174.130](#) provides that “Any authority conferred by law upon three or more persons may be exercised by a majority of them unless expressly otherwise provided by law.”

Attorneys General have consistently advised that this statute requires a majority of all members of a board, commission, or council to concur in order to make a decision.<sup>798</sup> When [ORS 174.130](#) applies, a majority of those present and voting in favor of a particular action is not sufficient to authorize that action unless that majority is more than one-half of the total members of the board, commission, or council. For example, in the case of a 13-member board, if only 11 persons were present, six votes for a proposition would be insufficient to authorize any action because six votes would not constitute a majority of the members of that board even though it would constitute a majority of those present.

## 2. When Other Statute Designates Quorum

Many boards and commissions have specific statutes designating the number of members that form a quorum. Most of these statutes, but not all, fix the quorum at a majority of the members of the body.<sup>799</sup>

Some of the statutes regarding particular bodies also fix the number of votes required for different types of decisions by the body. For example, the statute concerning the nine-member Oregon Government Ethics Commission provides that “[a] quorum consists of five members but a final decision may not be made without an affirmative vote of a majority of the members appointed to the commission.”<sup>800</sup>

When the statute does not specify the number of votes necessary for a decision, a decision may be made by a majority of the quorum. This was the common law rule, and is also the rule derived from the application of [ORS 174.130](#) to the quorum that is given authority by the special statute. Different jurisdictions interpret the meaning of “majority of the quorum”

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<sup>798</sup> See, e.g., 36 Op Atty Gen 960, 985, 1974 WL 187642 (1974); 38 Op Atty Gen 1935, 1978 WL 29489 (1978).

<sup>799</sup> See, e.g., [ORS 670.300\(2\)](#) (concerning professional licensing and advisory boards).

<sup>800</sup> [ORS 244.250\(5\)](#).

differently. The interpretation most consistent with Oregon case law and with [ORS 174.130](#) is that a “majority of the quorum” means at least a majority of the minimum number required for a quorum.

When a quorum is present, and all members present cast votes, the “majority of the quorum” is the same as a majority of those voting. A tie, of course, does not constitute a decision.

### C. VACANCIES

The fact that one or more vacancies exist on a board, commission, or council has no bearing on the quorum requirements. Since the law establishes the number of members required for a quorum, the fact that a position is unfilled does not alter this requirement.<sup>801</sup>

### D. ABSTENTIONS

When one or more members present do not vote, the abstention does not count as a vote in favor of the majority position, at least when action requires the concurrence of a majority of the board.<sup>802</sup> No case has yet been decided directly concerning the effect of an abstention when a majority of a quorum may take action. However, based on analogous Oregon precedents and cases from other states, we believe that an abstention does not count as either an affirmative or a negative vote. A member who is present but abstains may, however, be counted toward making up a quorum. An abstention therefore cannot be used to make up the minimum number of votes required to pass or reject a motion.

An example may make this clearer: Board “X” is a seven-member board. A statute provides that four members constitute a quorum. The statute does not specify the number of votes required for action. Therefore, at least three concurring votes are needed (majority of the four required for a quorum) to take action. At a meeting, six of the seven members are present. On a motion, three vote in favor, two vote against, and one abstains. The chairman would correctly declare that the motion passed: the motion only needed three votes in favor, and the abstention counted neither as a vote in favor or as a vote against.

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<sup>801</sup> Letter of Advice to John F. Hoppe, at 3–4, 1989 WL 439831 (OP-6322) (June 8, 1989).

<sup>802</sup> [State ex rel Roberts v. Gruber](#), 231 Or 494 (1962).

Members of boards, commissions, or councils are obviously appointed to make decisions. Absent compelling circumstances, for example, pecuniary conflict of interest problems, board members should not abstain from voting.<sup>803</sup>

#### **E. PROXY VOTE, ABSENTEE VOTE, VOTES BY MAIL, AND SECRET BALLOTS PROHIBITED**

A vote by proxy is a vote cast by a substitute on behalf of a member who is not present at the meeting. Absent a specific statutory provision authorizing a proxy, proxy voting is not authorized and is improper since no member of a board, commission, or council is empowered to delegate his or her vote to others.<sup>804</sup>

An absentee vote is a vote purportedly cast by a member who is not present at the meeting. This procedure is not authorized by Oregon law and is also improper since the absent member may not be counted toward the quorum requirement and may not vote. This is not to suggest, however, that personal presence at the meeting is required. A member may, for example, be present, participate, and vote by telephone.

A vote by mail is a vote purportedly cast by a member without the necessity of a meeting of the board, commission, or council. Absent specific statutory authorization, this procedure could not be used. It would also be improper because a decision by the board, commission, or council may only be made at a meeting at which a quorum is present.

A secret ballot is a vote of the members in private after which only the result is announced to the public. Absent specific statutory authorization, such a procedure would violate the Oregon Public Meetings Law.<sup>805</sup>

If improper procedures in voting such as the use of a proxy, an absentee ballot, a vote by mail, or a secret ballot are used, it will cast grave doubts on the validity of any decision arrived at as a result of using these procedures.

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<sup>803</sup> See [\*Eastgate Theatre, Inc. v. Bd. of County Comm'rs\*](#), 37 Or App 745 (1978) (two commissioners incorrectly abstained from vote).

<sup>804</sup> 16 Op Atty Gen 77, 1932 WL 32868 (1932); Letter of Advice to Fred Segrest (OP-3206) (Feb 21, 1975).

<sup>805</sup> 37 Op Atty Gen 183, 1974 WL 187704 (1974); 39 Op Atty Gen 525, 1979 WL 35618 (1979).

If such procedures are used, an agency should consult its assigned attorney about the possibility of ratifying its prior invalid action.

#### **F. VOTE TABLES**

Two tables follow which show the minimum number of concurring votes necessary to pass or reject a motion. Table I illustrates the application of [ORS 174.130](#), i.e., when no quorum is otherwise specified for a board or commission. By intersecting the number of members on a board with the number of members voting on an issue, the table shows how many concurring votes are needed to pass or reject a motion.

Table II applies to boards and commissions with special statutes that designate a quorum but do not specify the number of votes required for action. It assumes that the quorum is set at majority of the members. It may, however, be used for boards with a different number required for a quorum: simply ignore the far left-hand column and find the number that the applicable statute designates for a quorum in the column named "Minimum Number Present to Form Quorum."

**TABLE I**

**Boards and Commissions Covered by ORS 174.130**

Number of Members on Board	NUMBER OF MEMBERS VOTING																			
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
3	X	2	2																	
4	X	X	3	3																
5	X	X	3	3	3															
6	X	X	X	4	4	4														
7	X	X	X	4	4	4	4													
8	X	X	X	X	5	5	5	5												
9	X	X	X	X	5	5	5	5	5											
10	X	X	X	X	X	6	6	6	6	6										
11	X	X	X	X	X	6	6	6	6	6	6									
12	X	X	X	X	X	X	7	7	7	7	7	7								
13	X	X	X	X	X	X	7	7	7	7	7	7	7							
14	X	X	X	X	X	X	X	8	8	8	8	8	8	8						
15	X	X	X	X	X	X	X	8	8	8	8	8	8	8	8					
16	X	X	X	X	X	X	X	X	9	9	9	9	9	9	9	9				
17	X	X	X	X	X	X	X	X	9	9	9	9	9	9	9	9	9			
18	X	X	X	X	X	X	X	X	X	10	10	10	10	10	10	10	10	10		
19	X	X	X	X	X	X	X	X	X	10	10	10	10	10	10	10	10	10	10	
20	X	X	X	X	X	X	X	X	X	X	11	11	11	11	11	11	11	11	11	11

**Key to Table I**

1. The column on the left shows the number of members on the board or commission.
2. The numbers across the top indicate the number of members voting at a meeting. These include affirmative and negatives votes but do not include abstentions.
3. The number found by intersecting 1 and 2 is the *minimum* number of concurring votes (affirmative *or* negative) that must be cast in order to pass or reject a motion.

4. An abstention is *not* counted as an affirmative or negative vote to make up the minimum number of concurring votes required to pass or reject a motion. If a member abstains, but is present, he or she is still counted for quorum purposes.

5. An “X” indicates that no action should be taken because the number voting is below the minimum number of concurring votes required to pass or reject a motion.

**TABLE II**

**Boards and Commissions Covered by Statutes Specifying Quorum Requirements**

Number of Members on Board	Minimum Number Present to Form Quorum	NUMBER OF MEMBERS VOTING																			
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
3	2	X	2	2																	
4	3	X	2	2	3																
5	3	X	2	2	3	3															
6	4	X	X	3	3	3	4														
7	4	X	X	3	3	3	4	4													
8	5	X	X	3	3	3	4	4	5												
9	5	X	X	3	3	3	4	4	5	5											
10	6	X	X	X	4	4	4	4	5	5	6										
11	6	X	X	X	4	4	4	4	5	5	6	6									
12	7	X	X	X	4	4	4	4	5	5	6	6	7								
13	7	X	X	X	4	4	4	4	5	5	6	6	7	7							
14	8	X	X	X	X	5	5	5	5	5	6	6	7	7	8						
15	8	X	X	X	X	5	5	5	5	5	6	6	7	7	8	8					
16	9	X	X	X	X	5	5	5	5	5	6	6	7	7	8	8	9				
17	9	X	X	X	X	5	5	5	5	5	6	6	7	7	8	8	9	9			
18	10	X	X	X	X	X	6	6	6	6	6	6	7	7	8	8	9	9	10		
19	10	X	X	X	X	X	6	6	6	6	6	6	7	7	8	8	9	9	10	10	
20	11	X	X	X	X	X	6	6	6	6	6	6	7	7	8	8	9	9	10	10	11

**Key to Table II**

1. The far left column shows the number of members on the board or commission.
2. The second column from the left shows the minimum number of members required to be present to form a quorum, assuming a statute fixes a quorum as a majority of the members of the board.
3. The numbers across the top represent the number of members voting at a meeting. These include affirmative and negative votes but do not include abstentions.

4. The number found by intersecting 1 and 2 with 3 is the minimum number of concurring votes (affirmative or negative) that must be cast in order to pass or reject a motion.

5. An abstention is not counted as an affirmative or negative vote to make up the minimum number of concurring votes required to pass or reject a motion. If a member abstains, but is present, he or she is still counted for quorum purposes.

6. An "X" indicates that no action may be taken because the number voting represents less than the minimum number of concurring votes required to effect action.

7. Assuming a quorum is present, the minimum number of concurring votes required to pass or reject a motion varies according to the number of members voting.

**APPENDIX L – SUMMARIES OF OREGON APPELLATE  
COURT DECISIONS**

**1974–1990**

**Crowfoot Elementary School District v. PERB**, 19 Or App 638, 529 P2d 405 (1974).

The court held that a prohibition on public employees from communicating with public officials during labor negotiations did not prevent teachers from appearing at school board budget meetings.

**Egge v. Lane County**, 21 Or App 520, 535 P2d 773 (1975).

Plaintiff alleged that a board of commissioners had violated the Public Meetings Law when it met and denied plaintiff's request for a zoning variance. The court refused to reverse the board's action because ORS 192.680 then provided that "[n]o decision shall be voided" solely for noncompliance with Public Meetings Law.

**Southwestern Oregon Publishing Co. v. Southwestern Oregon Community College**, 28 Or App 383, 559 P2d 1289 (1977).

The court held that a retained labor negotiator was neither a public body nor a governing body; because the collective bargaining sessions were therefore not subject to meetings law, the media could be excluded.

**Smith v. School Dist. No. 45**, 63 Or App 685, 666 P2d 1345 (1983).

The court held that the trial court had not abused its discretion in denying plaintiff's claim for attorney fees where the meeting at issue did not involve a decision that was adverse to plaintiff.

**Barker v. City of Portland**, 67 Or App 23, 676 P2d 1391 (1984).

The court held that the Portland City Council did not violate meetings law by selectively excluding some members of the news media from an executive session held to discuss labor negotiations: news media did not have the statutory right to attend such executive sessions, and the council's decision was "purely a matter of discretion."

**Gilmore v. Board of Psychologist Examiners**, 81 Or App 321, 725 P2d 400 (1986).

The court held that the absence in the meeting minutes of a record of a vote did not alone constitute reversible error. The court explained that absent a showing of prejudice, the petitioner had not "rebutted the presumption that public officers perform their duties lawfully."

**South Benton Educational Ass'n v. Monroe Union High School District #1**, 83 Or App 425, 732 P2d 58 (1987).

The court held that meetings law did not prevent enforcement of a collective bargaining agreement reached in executive session, despite the agreement seemingly constituting a final action. The court explained that it was an unfair labor practice to refuse to sign an agreement reached through collective bargaining, and that the school district could comply with meetings law by ratifying the agreement at a public meeting.

**Barker v. City of Portland**, 94 Or App 762, 767 P2d 460 (1989).

The court held that even though the public body ceased its violations of meetings law, the suit was not moot because determining the extent of past violations and the appropriate remedy was still at issue. The court also held that the plaintiffs, as representatives of the press and as legal entities, alleged sufficient facts to have been affected by a decision of the governing body, and therefore had standing to sue. Finally, the court held that the circuit court, not district court, was the appropriate forum to hear a suit under meetings law.

**Oregon Ass'n of Classified Employees v. Salem-Keizer School District 24J**, 95 Or App 28, 767 P2d 1365 (1989).

The court held that the school district could not justify its emergency meetings because no actual emergency existed as to the matter that was the subject of the decision, even though an emergency existed with respect to a different matter. In addition, an actual emergency could not be justified only based on convenience for the governing body's members.

**Oregonian Publishing Co. v. Board of Parole**, 95 Or App 501, 769 P2d 795 (1989).

The court held that the Parole Board's exemption from Public Meetings Law for the board's deliberations did not apply to the information-gathering phase of parole hearings.

**Harris v. Nordquist**, 96 Or App 19, 771 P2d 637 (1989).

The court held that residents, employees, and taxpayers of a school district who were vitally interested in the district's decisions and the information leading to those decisions, had standing to challenge the district's alleged Public Meetings Law violations.

The court also held that the board members' gatherings at restaurants before and after board meetings did not violate ORS 192.630(2) because the evidence showed only that some members had occasionally discussed what was going on at the schools. The court explained that this was not enough to show that the members met with the purpose of deciding on or deliberating towards a decision, or that the discussions in fact involved such deliberations. Evidence that a quorum had a private gathering was not a prima facie case of a violation such that the burden shifted to the board.

The court also held that there had been no "meeting," and that therefore the board did not violate the duty to keep minutes under ORS 192.650. Even if the gathering were prohibited by ORS 192.630(2), there would have been no violation of ORS 192.650 because minutes of prohibited meetings were not required.

Finally, the court held that ORS 192.650 required minutes to be preserved for a reasonable time after a meeting, and that in this instance, one year was a reasonable time.

#### **1991–CURRENT**

**[Students for the Ethical Treatment of Animals v. Institutional Animal Care & Use Committee](#)**, 113 Or App 523, 833 P2d 337 (1992).

The court held that groups with the goal of educating the public about animal exploitation had standing under ORS 192.680(2) to seek a declaration that a university committee charged with ensuring that animal research met certain standards violated Public Meetings Law. The court explained that the committee's decisions, and information on which those decisions were made, had a potential impact on the groups' ability to perform an educational role.

**[Independent Contractors Research Institute v. DAS](#)**, 207 Or App 78, 139 P3d 995 (2006).

The court held that an advisory council created by DAS to advise the Chief Procurement Officer on a certain program was exempt from Public Meetings Law because it was providing recommendations to a single official. The court explained that a single official, even one who is an officer of a named group, is not a "public body."

[Krisor v. Henry](#), 256 Or App 56, 300 P3d 199 (2013).

The court held that a challenge to a county fair board's hiring decision was moot because the hired employee was no longer employed, and there was no reason to believe that any future improper hiring decisions would evade a court's review.

[Rivas v. Board of Parole](#), 277 Or App 76, 369 P3d 1239 (2016).

The court held that the Parole Board did not violate Public Meetings Law by using a file-pass procedure to decide whether to order an additional psychological evaluation for an offender. This procedure involved passing the file from board member to board member, with each one commenting on the form in private. The court explained that this procedure did not violate ORS 192.630(1) because it was not a contemporaneous gathering of the board and was therefore not a "meeting." The procedure did not violate ORS 192.630(2) because the board's deliberations are expressly exempt from the meetings law under ORS 192.690(1).

[Handy v. Lane County](#), 360 Or 605, 385 P3d 1016 (2016), *rev'g in part* [274 Or App 644](#), 362 P3d 867 (2015).

The Supreme Court held that plaintiff had not produced sufficient evidence, in responding to an anti-SLAPP motion to dismiss, that a quorum of the county commission had met in private to decide on or deliberate toward a decision on how to respond to a public records request. The court explained that a commissioner's passive receipt of an e-mail discussing the records request was not sufficient to establish that the commissioner had decided or deliberated on how to respond to the request.

In reaching the opposite conclusion, the Court of Appeals had held that a quorum could meet in violation of ORS 192.630(2) through a series of e-mails and person-to-person conversations, even though no single exchange involved a quorum of commissioners. The dissent concluded that a violation could occur only if there were a contemporaneous gathering of the quorum (whether in-person or electronically). The Supreme Court did not reach this issue in its opinion.

In the portion of its opinion not reviewed by the Supreme Court, the Court of Appeals held that the decision to hold an emergency meeting to discuss the public records request did not violate Public Meetings Law because the county charter did not require a vote of a quorum to hold such a meeting.

[TriMet v. Amalgamated Transit Union Local 757](#), 362 Or 484, 412 P3d 162 (2018), *aff'g* [276 Or App 513](#), 368 P3d 50.

The court held that TriMet failed to establish that its collective bargaining team's private sessions with the union's team could not violate Public Meetings Law. The court rejected TriMet's argument that, assuming the bargaining team was a governing body, there would be no violation due to the team's lack of a quorum requirement to transact its business. The court first explained that a governing body can "meet" for purposes of ORS 192.630(2) without convening a formal "meeting" under ORS 192.630(1). The court then explained that the bargaining team, and every governing body, has a quorum because there is always "some minimum number of members that must participate in order for the body to be competent to transact business."

The court also held that ORS 192.660(3) did not require labor negotiations to be held in a "meeting." It required only that "*when* a public body conducts labor negotiations in sessions that qualify as 'meetings,' they must be 'open' unless the parties agree otherwise."

[State v. Seidel](#), 294 Or App 389 (2018).

The court upheld the conviction of a disruptive member of the public who disobeyed a police officer's order to leave a city council meeting. Although Public Meetings Law requires that "all persons be permitted to attend any meeting," this was intended to open governmental decision-making to the public, not to prevent public bodies from maintaining order at meetings.



**APPENDIX M – SUMMARIES OF OREGON ATTORNEY  
GENERAL OPINIONS**

**1974–1980**

**37 Op Atty Gen 183** (1974), 1974 WL 187704.

The Public Meetings Law prohibited the use of secret ballots by a governing body.

**38 Op Atty Gen 50** (1976), 1976 WL 451475.

A governing body could not ban the tape recording of its official public proceedings by individual citizens, and could restrict such taping *only* to the extent necessary to protect the orderly conduct of the proceedings.

**38 Op Atty Gen 1471** (1977), 1977 WL 31327.

When a governing body gathers to obtain information on a subject within its jurisdiction, it is deliberating towards a decision and must comply with the meeting requirements.

**38 Op Atty Gen 1584** (1977), 1977 WL 31340.

The management board and the advisory committee of the Tri Agency Dog Control Authority (two cities and a county) were both governing bodies subject to the Public Meetings Law.

**38 Op Atty Gen 2122** (1978), 1978 WL 29514.

It was constitutional for the Public Meetings Law to provide that information obtained by newsmen during an executive session should not be disclosed. Meetings law did not restrict the rights of the news media, but instead granted a limited right of access, which otherwise would not exist. “[I]n each case where an executive session is authorized by the Public Meetings Law, the operation and interests of an Oregon governing body could be jeopardized if the meeting were made public.” Meetings law does not provide for any sanction of the media for violating a directive not to disclose specified information. “The legislature apparently chose to rely upon the good faith of reporters in complying with the requirement.”

**39 Op Atty Gen 480** (1979), 1979 WL 35604.

The board of education of a community college district could meet in executive session to consider a written personnel evaluation of a college president because the evaluation was exempt under Public Records Law.

**39 Op Atty Gen 525** (1979), 1979 WL 35618.

A city council could not vote in private, despite city charter provisions to the contrary.

**39 Op Atty Gen 703** (1979), 1979 WL 35661.

It was not an unconstitutional violation of equal protection for the Public Meetings Law to allow access by news media representatives to executive sessions, while denying access to the public.

**40 Op Atty Gen 388** (1980), 1980 WL 112751.

Deliberations of a county court (board of commissioners) after a public hearing to consider an appeal on the granting of a subdivision permit had to be held in public. The exemption for equivalent deliberations of a state agency governing body after a contested case hearing did not apply to local government bodies, and the exemption for judicial proceedings did not apply to quasi-judicial proceedings.

**40 Op Atty Gen 458** (1980), 1980 WL 112763.

A workshop session of the board of a special district was subject to the Public Meetings Law. Any meeting of a quorum of the board to hear arguments of nonboard members, in any setting, had to be held in public, unless executive session was authorized.

**41 Op Atty Gen 28** (1980), 1980 WL 113323.

Home-rule cities and counties were subject to the Public Meetings Law. Regular or special meetings between members of administrative staff and a county governing body were subject to meetings law. Noting regular and special meeting dates on a master calendar in the board's office was *not* sufficient notice of meetings. *Any* meeting of two or more members of a three-member governing body was a "public meeting" if the purpose was to decide or deliberate toward a decision on matters within the jurisdiction of the board, regardless of who else was present.

**41 Op Atty Gen 218** (1980), 1980 WL 113360.

The proceedings of the Land Use Board of Appeals qualified as contested case hearings under Public Meetings Law, and therefore the board's deliberations after formal hearings were exempt from the law.

**1981–1990****42 Op Atty Gen 187** (1981), 1981 WL 152293.

A three-member body with investigatory and reporting functions, of which one member was appointed by the Governor of Oregon and two by the Governor of Washington, was not subject to the Public Meetings Law because (1) it was not delegated authority to decide policy, to administer, or to make recommendations; (2) the Governor (to whom it reported) as an individual officer was not a “public body” under meetings law; and (3) the body was not an Oregon body.

**42 Op Atty Gen 362** (1982), 1982 WL 183044.

A public body could not discuss its chief executive officer’s salary in executive session as part of the process of setting it. It could not discuss salary negotiations for nonunion employees in executive session.

**42 Op Atty Gen 392** (1982), 1982 WL 183052.

There was no means to ensure that news media attending executive sessions would keep the discussions confidential.

The Oregon Investment Council could employ executive session to consider records exempt under the Public Records Law; if it knew or had good reason to believe that other governmental bodies were in competition for the kind of investment opportunity it was considering; and to deliberate with any person designated by it to negotiate a real property transaction.

**Letter of Advice to Sen. Margie Hendricksen** (OP-5468) (July 13, 1983).

A governing body could enforce meetings rules that related to order and decorum, limit the time allowed for persons to make presentations, require that no one could have the floor without securing permission from a presiding officer, and prohibit disturbing or disrupting a meeting.

**44 Op Atty Gen 69** (1984), 1984 WL 192199.

Student government committees that prepared and made recommendations to the student government on incidental fee assessments and allocations were subject to meetings law.

**Letter of Advice to Ron Eachus** (OP-6292) (Sept 12, 1988), 1988 WL 416300.

The Public Utility Commission had to comply with the Public Meetings Law when a quorum of the commission met with staff to receive

informational briefings on general topics of public utility regulation and agency administration. Even if information conveyed at a briefing did not relate to a matter requiring immediate action, the information could have some bearing on future decisions, the responsibility for which was placed upon a quorum of the commission.

**Letter of Advice to W.T. Lemman** (OP-6248) (Oct 13, 1988), 1988 WL 416293.

The meetings of a college-president search committee were subject to the meetings law: even though the committee made its recommendations to the chancellor, a single official, the chancellor had a limited role in screening the recommendations before submitting them to the Board of Higher Education, a public body.

**46 Op Atty Gen 155** (1989), 1989 WL 439806.

The board of directors of the Oregon Medical Insurance Pool was not a governing body of a public body, and therefore was not subject to the Public Meetings Law.

**Letter of Advice to Rep. Carl Hosticka** (OP-6376) (May 18, 1990), 1990 WL 519211.

A governing body could meet in executive session to “conduct deliberations with persons designated by the governing body to negotiate real property transactions.” The apparent policy underlying this provision was to permit public bodies to protect their negotiating position in real property transactions by keeping certain information confidential. This provision did not permit a governing body to discuss long-term space needs or general lease site selection policies in executive session.

#### **1991–CURRENT**

[Letter of Advice to L. Patrick Hearn](#) (OP-1997-4) (Aug 13, 1997), 1997 WL 469004.

Meetings of the State Professional Responsibility Board, which is part of the attorney disciplinary process of the Oregon State Bar, were exempt from Public Meetings Law as judicial proceedings. The meetings were adjudicatory in nature and were part of a process that ultimately could result in a judicial decision.

[\*\*49 Op Atty Gen 32\*\*](#) (1998), 1998 WL 223374.

Health professional regulatory boards had to hold contested case hearings on a notice of intent to impose discipline of a licensee in executive session because of a general prohibition on disclosing this information. Representatives of the news media could attend these hearings. These boards' deliberations following the hearing were exempt from meetings law; therefore the boards were not required to provide notice, take minutes, or permit attendance by the news media. The boards could not take a final action or make final decisions on such disciplinary cases in executive session, but had to ensure that any discussion in public session did not disclose any confidential information.

[\*\*Letter of Advice to David F. White\*\*](#) (OP-2014-2) (Dec 10, 2014), 2014 WL 7150430.

Meetings of the Board of Bar Examiners that discussed the character and fitness review of bar applicants were not exempt from Public Meetings Law as contested case proceedings because they were not conducted in accordance with the provisions of ORS chapter 183. However, meetings that involved hearing or reviewing evidence, arguments, or deliberations as part of the review process were exempt as judicial proceedings. Meetings concerning the bar examination were subject to meetings law, but discussions of test materials that were exempt from public disclosure under ORS 192.345(4) could take place in executive session.

[\*\*Op Atty Gen No 8291\*\*](#) (Apr 18, 2016), 2016 WL 2905510.

Representatives of the news media permitted to attend executive session were defined as "individuals who gather news and who have a formal affiliation \* \* \* with an institutional news media entity." Both general interest media and media that covered specific subject areas for special audiences could qualify. Online news media, such as blogs, could also qualify depending on the circumstances.

There was no limit on how many representatives could attend executive session, even if a representative had a direct personal interest in the matter being discussed, had previously disclosed confidential information obtained at executive session, or did not ordinarily report on the governing body holding the session.



## APPENDIX N – OREGON REVISED STATUTES

### PUBLIC MEETINGS

**192.610 Definitions for ORS 192.610 to 192.690.** As used in ORS 192.610 to 192.690:

(1) “Decision” means any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present.

(2) “Executive session” means any meeting or part of a meeting of a governing body which is closed to certain persons for deliberation on certain matters.

(3) “Governing body” means the members of any public body which consists of two or more members, with the authority to make decisions for or recommendations to a public body on policy or administration.

(4) “Public body” means the state, any regional council, county, city or district, or any municipal or public corporation, or any board, department, commission, council, bureau, committee or subcommittee or advisory group or any other agency thereof.

(5) “Meeting” means the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. “Meeting” does not include any on-site inspection of any project or program. “Meeting” also does not include the attendance of members of a governing body at any national, regional or state association to which the public body or the members belong. [1973 c.172 §2; 1979 c.644 §1]

**192.620 Policy.** The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of ORS 192.610 to 192.690 that decisions of governing bodies be arrived at openly. [1973 c.172 §1]

**192.630 Meetings of governing body to be open to public; location of meetings; accommodation for person with disability; interpreters.** (1) All meetings of the governing body of a public body shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by ORS 192.610 to 192.690.

(2) A quorum of a governing body may not meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as otherwise provided by ORS 192.610 to 192.690.

(3) A governing body may not hold a meeting at any place where discrimination on the basis of race, color, creed, sex, sexual orientation, national origin, age or disability is practiced. However, the fact that organizations with restricted membership hold meetings at the place does not restrict its use by a public body if use of the place by a restricted membership organization is not the primary purpose of the place or its predominant use.

(4)(a) Meetings of the governing body of a public body shall be held:

(A) Within the geographic boundaries over which the public body has jurisdiction;

(B) At the administrative headquarters of the public body;

(C) At the nearest practical location; or

(D) If the public body is a state, county or city entity, within Indian country of a federally recognized Oregon Indian tribe that is within the geographic boundaries of this state. For purposes of this subparagraph, "Indian country" has the meaning given that term in 18 U.S.C. 1151.

(b) Training sessions may be held outside the jurisdiction as long as no deliberations toward a decision are involved.

(c) A joint meeting of two or more governing bodies or of one or more governing bodies and the elected officials of one or more federally recognized Oregon Indian tribes shall be held within the geographic boundaries over which one of the participating public bodies or one of the Oregon Indian tribes has jurisdiction or at the nearest practical location.

(d) Meetings may be held in locations other than those described in this subsection in the event of an actual emergency necessitating immediate action.

(5)(a) It is discrimination on the basis of disability for a governing body of a public body to meet in a place inaccessible to persons with disabilities, or, upon request of a person who is deaf or hard of hearing, to fail to make a good faith effort to have an interpreter for persons who are deaf or hard of hearing provided at a regularly scheduled meeting. The sole remedy for

discrimination on the basis of disability shall be as provided in ORS 192.680.

(b) The person requesting the interpreter shall give the governing body at least 48 hours' notice of the request for an interpreter, shall provide the name of the requester, sign language preference and any other relevant information the governing body may request.

(c) If a meeting is held upon less than 48 hours' notice, reasonable effort shall be made to have an interpreter present, but the requirement for an interpreter does not apply to emergency meetings.

(d) If certification of interpreters occurs under state or federal law, the Oregon Health Authority or other state or local agency shall try to refer only certified interpreters to governing bodies for purposes of this subsection.

(e) As used in this subsection, "good faith effort" includes, but is not limited to, contacting the department or other state or local agency that maintains a list of qualified interpreters and arranging for the referral of one or more qualified interpreters to provide interpreter services. [1973 c.172 §3; 1979 c.644 §2; 1989 c.1019 §1; 1995 c.626 §1; 2003 c.14 §95; 2005 c.663 §12; 2007 c.70 §52; 2007 c.100 §21; 2009 c.595 §173; 2017 c.482 §1]

**192.640 Public notice required; special notice for executive sessions or special or emergency meetings.** (1) The governing body of a public body shall provide for and give public notice, reasonably calculated to give actual notice to interested persons including news media which have requested notice, of the time and place for holding regular meetings. The notice shall also include a list of the principal subjects anticipated to be considered at the meeting, but this requirement shall not limit the ability of a governing body to consider additional subjects.

(2) If an executive session only will be held, the notice shall be given to the members of the governing body, to the general public and to news media which have requested notice, stating the specific provision of law authorizing the executive session.

(3) No special meeting shall be held without at least 24 hours' notice to the members of the governing body, the news media which have requested notice and the general public. In case of an actual emergency, a meeting may be held upon such notice as is appropriate to the circumstances, but the

minutes for such a meeting shall describe the emergency justifying less than 24 hours' notice. [1973 c.172 §4; 1979 c.644 §3; 1981 c.182 §1]

**192.650 Recording or written minutes required; content; fees. (1)**

The governing body of a public body shall provide for the sound, video or digital recording or the taking of written minutes of all its meetings. Neither a full transcript nor a full recording of the meeting is required, except as otherwise provided by law, but the written minutes or recording must give a true reflection of the matters discussed at the meeting and the views of the participants. All minutes or recordings shall be available to the public within a reasonable time after the meeting, and shall include at least the following information:

(a) All members of the governing body present;

(b) All motions, proposals, resolutions, orders, ordinances and measures proposed and their disposition;

(c) The results of all votes and, except for public bodies consisting of more than 25 members unless requested by a member of that body, the vote of each member by name;

(d) The substance of any discussion on any matter; and

(e) Subject to ORS 192.311 to 192.478 relating to public records, a reference to any document discussed at the meeting.

(2) Minutes of executive sessions shall be kept in accordance with subsection (1) of this section. However, the minutes of a hearing held under ORS 332.061 shall contain only the material not excluded under ORS 332.061 (2). Instead of written minutes, a record of any executive session may be kept in the form of a sound or video tape or digital recording, which need not be transcribed unless otherwise provided by law. If the disclosure of certain material is inconsistent with the purpose for which a meeting under ORS 192.660 is authorized to be held, that material may be excluded from disclosure. However, excluded materials are authorized to be examined privately by a court in any legal action and the court shall determine their admissibility.

(3) A reference in minutes or a recording to a document discussed at a meeting of a governing body of a public body does not affect the status of the document under ORS 192.311 to 192.478.

(4) A public body may charge a person a fee under ORS 192.324 for the preparation of a transcript from a recording. [1973 c.172 §5; 1975 c.664 §1; 1979 c.644 §4; 1999 c.59 §44; 2003 c.803 §14]

**192.660 Executive sessions permitted on certain matters; procedures; news media representatives' attendance; limits.** (1) ORS 192.610 to 192.690 do not prevent the governing body of a public body from holding executive session during a regular, special or emergency meeting, after the presiding officer has identified the authorization under ORS 192.610 to 192.690 for holding the executive session.

(2) The governing body of a public body may hold an executive session:

(a) To consider the employment of a public officer, employee, staff member or individual agent.

(b) To consider the dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent who does not request an open hearing.

(c) To consider matters pertaining to the function of the medical staff of a public hospital licensed pursuant to ORS 441.015 to 441.063 and 441.196 including, but not limited to, all clinical committees, executive, credentials, utilization review, peer review committees and all other matters relating to medical competency in the hospital.

(d) To conduct deliberations with persons designated by the governing body to carry on labor negotiations.

(e) To conduct deliberations with persons designated by the governing body to negotiate real property transactions.

(f) To consider information or records that are exempt by law from public inspection.

(g) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations.

(h) To consult with counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed.

(i) To review and evaluate the employment-related performance of the chief executive officer of any public body, a public officer, employee or staff member who does not request an open hearing.

(j) To carry on negotiations under ORS chapter 293 with private persons or businesses regarding proposed acquisition, exchange or liquidation of public investments.

(k) To consider matters relating to school safety or a plan that responds to safety threats made toward a school.

(L) If the governing body is a health professional regulatory board, to consider information obtained as part of an investigation of licensee or applicant conduct.

(m) If the governing body is the State Landscape Architect Board, or an advisory committee to the board, to consider information obtained as part of an investigation of registrant or applicant conduct.

(n) To discuss information about review or approval of programs relating to the security of any of the following:

(A) A nuclear-powered thermal power plant or nuclear installation.

(B) Transportation of radioactive material derived from or destined for a nuclear-fueled thermal power plant or nuclear installation.

(C) Generation, storage or conveyance of:

(i) Electricity;

(ii) Gas in liquefied or gaseous form;

(iii) Hazardous substances as defined in ORS 453.005 (7)(a), (b) and (d);

(iv) Petroleum products;

(v) Sewage; or

(vi) Water.

(D) Telecommunication systems, including cellular, wireless or radio systems.

(E) Data transmissions by whatever means provided.

(3) Labor negotiations shall be conducted in open meetings unless negotiators for both sides request that negotiations be conducted in executive session. Labor negotiations conducted in executive session are not subject to the notification requirements of ORS 192.640.

(4) Representatives of the news media shall be allowed to attend executive sessions other than those held under subsection (2)(d) of this

section relating to labor negotiations or executive session held pursuant to ORS 332.061 (2) but the governing body may require that specified information be undisclosed.

(5) When a governing body convenes an executive session under subsection (2)(h) of this section relating to conferring with counsel on current litigation or litigation likely to be filed, the governing body shall bar any member of the news media from attending the executive session if the member of the news media is a party to the litigation or is an employee, agent or contractor of a news media organization that is a party to the litigation.

(6) No executive session may be held for the purpose of taking any final action or making any final decision.

(7) The exception granted by subsection (2)(a) of this section does not apply to:

(a) The filling of a vacancy in an elective office.

(b) The filling of a vacancy on any public committee, commission or other advisory group.

(c) The consideration of general employment policies.

(d) The employment of the chief executive officer, other public officers, employees and staff members of a public body unless:

(A) The public body has advertised the vacancy;

(B) The public body has adopted regular hiring procedures;

(C) In the case of an officer, the public has had the opportunity to comment on the employment of the officer; and

(D) In the case of a chief executive officer, the governing body has adopted hiring standards, criteria and policy directives in meetings open to the public in which the public has had the opportunity to comment on the standards, criteria and policy directives.

(8) A governing body may not use an executive session for purposes of evaluating a chief executive officer or other officer, employee or staff member to conduct a general evaluation of an agency goal, objective or operation or any directive to personnel concerning agency goals, objectives, operations or programs.

(9) Notwithstanding subsections (2) and (6) of this section and ORS 192.650:

(a) ORS 676.175 governs the public disclosure of minutes, transcripts or recordings relating to the substance and disposition of licensee or applicant conduct investigated by a health professional regulatory board.

(b) ORS 671.338 governs the public disclosure of minutes, transcripts or recordings relating to the substance and disposition of registrant or applicant conduct investigated by the State Landscape Architect Board or an advisory committee to the board.

(10) Notwithstanding ORS 244.290, the Oregon Government Ethics Commission may not adopt rules that establish what entities are considered representatives of the news media that are entitled to attend executive sessions under subsection (4) of this section. [1973 c.172 §6; 1975 c.664 §2; 1979 c.644 §5; 1981 c.302 §1; 1983 c.453 §1; 1985 c.657 §2; 1995 c.779 §1; 1997 c.173 §1; 1997 c.594 §1; 1997 c.791 §9; 2001 c.950 §10; 2003 c.524 §4; 2005 c.22 §134; 2007 c.602 §11; 2009 c.792 §32; 2015 c.421 §2; 2015 c.666 §3]

**Note:** Section 4, chapter 666, Oregon Laws 2015, provides:

**Sec. 4.** The amendments to ORS 192.660 and 244.290 by sections 1 to 3 of this 2015 Act apply to alleged violations of ORS 192.660 that occur on or after the effective date of this 2015 Act [January 1, 2016]. [2015 c.666 §4]

**192.670 Meetings by means of telephone or electronic communication.** (1) Any meeting, including an executive session, of a governing body of a public body which is held through the use of telephone or other electronic communication shall be conducted in accordance with ORS 192.610 to 192.690.

(2) When telephone or other electronic means of communication is used and the meeting is not an executive session, the governing body of the public body shall make available to the public at least one place where, or at least one electronic means by which, the public can listen to the communication at the time it occurs. A place provided may be a place where no member of the governing body of the public body is present. [1973 c.172 §7; 1979 c.361 §1; 2011 c.272 §2]

**192.672 State board or commission meetings through telephone or electronic means; compensation and reimbursement.** (1) A state board or commission may meet through telephone or other electronic means in accordance with ORS 192.610 to 192.690.

(2)(a) Notwithstanding ORS 171.072 or 292.495, a member of a state board or commission who attends a meeting through telephone or other electronic means is not entitled to compensation or reimbursement for expenses for attending the meeting.

(b) A state board or commission may compensate or reimburse a member, other than a member who is a member of the Legislative Assembly, who attends a meeting through telephone or other electronic means as provided in ORS 292.495 at the discretion of the board or commission. [2011 c.272 §1]

**Note:** 192.672 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 192 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

**192.680 Enforcement of ORS 192.610 to 192.690; effect of violation on validity of decision of governing body; liability of members.** (1) A decision made by a governing body of a public body in violation of ORS 192.610 to 192.690 shall be voidable. The decision shall not be voided if the governing body of the public body reinstates the decision while in compliance with ORS 192.610 to 192.690. A decision that is reinstated is effective from the date of its initial adoption.

(2) Any person affected by a decision of a governing body of a public body may commence a suit in the circuit court for the county in which the governing body ordinarily meets, for the purpose of requiring compliance with, or the prevention of violations of ORS 192.610 to 192.690, by members of the governing body, or to determine the applicability of ORS 192.610 to 192.690 to matters or decisions of the governing body.

(3) Notwithstanding subsection (1) of this section, if the court finds that the public body made a decision while in violation of ORS 192.610 to 192.690, the court shall void the decision of the governing body if the court finds that the violation was the result of intentional disregard of the law or willful misconduct by a quorum of the members of the governing body, unless other equitable relief is available. The court may order such equitable relief as it deems appropriate in the circumstances. The court may order

payment to a successful plaintiff in a suit brought under this section of reasonable attorney fees at trial and on appeal, by the governing body, or public body of which it is a part or to which it reports.

(4) If the court makes a finding that a violation of ORS 192.610 to 192.690 has occurred under subsection (2) of this section and that the violation is the result of willful misconduct by any member or members of the governing body, that member or members shall be jointly and severally liable to the governing body or the public body of which it is a part for the amount paid by the body under subsection (3) of this section.

(5) Any suit brought under subsection (2) of this section must be commenced within 60 days following the date that the decision becomes public record.

(6) The provisions of this section shall be the exclusive remedy for an alleged violation of ORS 192.610 to 192.690. [1973 c.172 §8; 1975 c.664 §3; 1979 c.644 §6; 1981 c.897 §42; 1983 c.453 §2; 1989 c.544 §1]

**192.685 Additional enforcement of alleged violations of ORS 192.660.** (1) Notwithstanding ORS 192.680, complaints of violations of ORS 192.660 alleged to have been committed by public officials may be made to the Oregon Government Ethics Commission for review and investigation as provided by ORS 244.260 and for possible imposition of civil penalties as provided by ORS 244.350.

(2) The commission may interview witnesses, review minutes and other records and may obtain and consider any other information pertaining to executive sessions of the governing body of a public body for purposes of determining whether a violation of ORS 192.660 occurred. Information related to an executive session conducted for a purpose authorized by ORS 192.660 shall be made available to the Oregon Government Ethics Commission for its investigation but shall be excluded from public disclosure.

(3) If the commission chooses not to pursue a complaint of a violation brought under subsection (1) of this section at any time before conclusion of a contested case hearing, the public official against whom the complaint was brought may be entitled to reimbursement of reasonable costs and attorney fees by the public body to which the official's governing body has authority to make recommendations or for which the official's governing body has authority to make decisions. [1993 c.743 §28]

**192.690 Exceptions to ORS 192.610 to 192.690.** (1) ORS 192.610 to 192.690 do not apply to the deliberations of the Psychiatric Security Review Board, the State Board of Parole and Post-Prison Supervision, state agencies conducting hearings on contested cases in accordance with the provisions of ORS chapter 183, the review by the Workers' Compensation Board or the Employment Appeals Board of similar hearings on contested cases, meetings of the state lawyers assistance committee operating under the provisions of ORS 9.568, meetings of the personal and practice management assistance committees operating under the provisions of ORS 9.568, the county multidisciplinary child abuse teams required to review child abuse cases in accordance with the provisions of ORS 418.747, the child fatality review teams required to review child fatalities in accordance with the provisions of ORS 418.785, the peer review committees in accordance with the provisions of ORS 441.055, mediation conducted under ORS 36.252 to 36.268, any judicial proceeding, meetings of the Oregon Health and Science University Board of Directors or its designated committee regarding candidates for the position of president of the university or regarding sensitive business, financial or commercial matters of the university not customarily provided to competitors related to financings, mergers, acquisitions or joint ventures or related to the sale or other disposition of, or substantial change in use of, significant real or personal property, or related to health system strategies, or to Oregon Health and Science University faculty or staff committee meetings.

(2) Because of the grave risk to public health and safety that would be posed by misappropriation or misapplication of information considered during such review and approval, ORS 192.610 to 192.690 shall not apply to review and approval of security programs by the Energy Facility Siting Council pursuant to ORS 469.530. [1973 c.172 §9; 1975 c.606 §41b; 1977 c.380 §19; 1981 c.354 §3; 1983 c.617 §4; 1987 c.850 §3; 1989 c.6 §18; 1989 c.967 §§12,14; 1991 c.451 §3; 1993 c.18 §33; 1993 c.318 §§3,4; 1995 c.36 §§1,2; 1995 c.162 §§62b,62c; 1999 c.59 §§45a,46a; 1999 c.155 §4; 1999 c.171 §§4,5; 1999 c.291 §§25,26; 2005 c.347 §5; 2005 c.562 §23; 2007 c.796 §8; 2009 c.697 §11; 2011 c.708 §26; 2017 c.442 §25]

**Note:** The amendments to 192.690 by section 25, chapter 442, Oregon Laws 2017, become operative July 1, 2018. See section 36, chapter 442, Oregon Laws 2017. The text that is operative until July 1, 2018, is set forth for the user's convenience.

**192.690.** (1) ORS 192.610 to 192.690 do not apply to the deliberations of the Oregon Health Authority conducted under ORS 161.315 to 161.351, the Psychiatric Security Review Board, the State Board of Parole and Post-Prison Supervision, state agencies conducting hearings on contested cases in accordance with the provisions of ORS chapter 183, the review by the Workers' Compensation Board or the Employment Appeals Board of similar hearings on contested cases, meetings of the state lawyers assistance committee operating under the provisions of ORS 9.568, meetings of the personal and practice management assistance committees operating under the provisions of ORS 9.568, the county multidisciplinary child abuse teams required to review child abuse cases in accordance with the provisions of ORS 418.747, the child fatality review teams required to review child fatalities in accordance with the provisions of ORS 418.785, the peer review committees in accordance with the provisions of ORS 441.055, mediation conducted under ORS 36.252 to 36.268, any judicial proceeding, meetings of the Oregon Health and Science University Board of Directors or its designated committee regarding candidates for the position of president of the university or regarding sensitive business, financial or commercial matters of the university not customarily provided to competitors related to financings, mergers, acquisitions or joint ventures or related to the sale or other disposition of, or substantial change in use of, significant real or personal property, or related to health system strategies, or to Oregon Health and Science University faculty or staff committee meetings.

(2) Because of the grave risk to public health and safety that would be posed by misappropriation or misapplication of information considered during such review and approval, ORS 192.610 to 192.690 shall not apply to review and approval of security programs by the Energy Facility Siting Council pursuant to ORS 469.530.

**192.695 Prima facie evidence of violation required of plaintiff.** In any suit commenced under ORS 192.680 (2), the plaintiff shall be required to present prima facie evidence of a violation of ORS 192.610 to 192.690 before the governing body shall be required to prove that its acts in deliberating toward a decision complied with the law. When a plaintiff presents prima facie evidence of a violation of the open meetings law, the burden to prove that the provisions of ORS 192.610 to 192.690 were complied with shall be on the governing body. [1981 c.892 §97d; 1989 c.544 §3]

**Note:** 192.695 was added to and made a part of ORS chapter 192 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

**192.710** [1973 c.168 §1; 1979 c.262 §1; repealed by 2015 c.158 §30]

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**STATEMENT OF NONDISCRIMINATION AND  
COMPLIANCE WITH THE AMERICANS WITH  
DISABILITIES ACT (ADA)**

The Americans with Disabilities Act of 1990 (ADA) requires all programs, services and activities of state and local governmental agencies to be accessible to persons with disabilities.

The Oregon Department of Justice does not discriminate in providing access to its programs, services and activities on the basis of race, color, religion, ancestry, national origin, political affiliation, sex, age, marital status, sexual orientation, physical or mental disability, or any other inappropriate reason prohibited by law or policy of the state or federal government.

For additional information regarding (1) the department's ADA compliance, (2) its policy of nondiscrimination, (3) availability of the information on this pamphlet in a different format or (4) procedures for resolving a complaint that the department has discriminated in providing access to the department's programs, services and activities—please contact the department's ADA coordinator:

ADA Coordinator  
1162 Court Street N.E. (Northwest Corner at 12th Street)  
Salem, Oregon 97301-4096  
Telephone: 503-947-4342 — Voice  
800-735-2900 — TTY  
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