



**Comments of Kimberly McCullough, Policy Director
Public Records Sunshine Committee**

5/16/18 – Exemption Review Process & Personal Contact Information Exemptions

Members of the Sunshine Committee:

I regret that a scheduling conflict prevents me, or another representative from the American Civil Liberties Union of Oregon¹, from attending the meeting of the Sunshine Committee on May 16th. In lieu of our attendance, we are submitting these written comments regarding the issues you will be discussing at the meeting.

Please note that this is not an exhaustive or complete analysis. We also do not purport to have an authoritative analysis of what should happen with each exemption and look forward to hearing the committee's insights. We hope, however, that the issues we raise will be helpful to you all.

Proposed Exemption Review Criteria

The proposed exemption criteria is well thought out and appears to be a generally good framework for asking the right types of questions to prompt a meaningful review and discussion. We do have a few questions regarding the criteria and process:

Will be any exploration of the legislative history of each exemption? Just as a review of relevant court opinions and public records orders can provide helpful context to understanding whether an exemption was drafted with sufficient clarity, legislative history can be helpful for understanding the justifications and reasoning behind enactment of a particular exemption. This may not be necessary for each exemption's review, but it seems that it could be helpful in at least some instances.

Will there be any exploration of how similar exemptions are handled in other jurisdictions?

This may also be unnecessary for each exemption, but it could prove useful in some circumstances. I am curious if the committee has considered if/when this type of research will be undertaken.

¹ The American Civil Liberties Union of Oregon (ACLU of Oregon) is a nonpartisan, nonprofit organization with more than 42,000 members in the State of Oregon.

Regarding process, will you explore each of the criteria questions for each exemption and document your discussion in the meeting notes? Will this exploration lead to further research and revisiting of the exemptions at future meetings? We realize that the determination of exactly how this process will go is likely a work-in-progress. We are asking these process questions in large part to try to understand the points of entry for us to provide additional support to the committee as you move forward.

Review of Exemptions Related to Personal Contact Information

ORS 165.673 – Trap & trace and pen register search results

The information protected by this exemption (records of a person's telephone calls) is particularly sensitive information, which is why it is subject to a warrant requirement. This exemption appropriately allows very limited disclosure. Our recommendation is that it not be changed.

ORS 192.345(25) – Donors to public universities

This exemption seems to be duplicative of the generic "personal privacy" exemption. One relevant question to consider, however, is whether or how much a court or the AG's analysis would differ when evaluating an exemption request related to the names of donors to public universities under the generic exemption, on the one hand, and this specific exemption, on the other. Pertinent to this question is the fact that the generic exemption requires that public disclosure would constitute an "unreasonable invasion of privacy," yet such a requirement is not explicitly stated in this specific exemption.

One possibility is that the generic exemption's requirement that the privacy intrusion be unreasonable adds a layer of analysis not applicable to this specific exemption. It is also possible that a court or the AG would engage in an exploration whether the privacy intrusion of disclosing donor addresses and phone numbers would be unreasonable when balancing against the public interest under this specific exemption. If the latter is the case, the analysis would be entirely redundant under both exemptions. If this is the case, the exemption should be eliminated.

On the other hand, it is possible that a court or the AG would not analyze whether the privacy intrusion is unreasonable under this specific exemption. Or the court or the AG might consider the legislature's creation of this specific exemption is an indication that the legislature considered disclosure of this information to be an unreasonable invasion of privacy *per se*. In

either case, eliminating this specific exemption would make disclosure of donor addresses and phone numbers somewhat more likely.

This then begs the question of whether donor addresses and telephone numbers are truly private information that is fundamentally different (or worthy of more privacy protections) from addresses and phone numbers of other individuals. It is frankly hard to understand how this might be true. As such, it seems that this exemption is unnecessary—barring some compelling argument that we have not considered—regardless of whether analysis of the generic exemption and this specific exemption substantively differ.

All that said, this may be an instance where some legislative history research would be helpful, to determine whether there is a policy justification that is not immediately apparent.

ORS 192.345(29) – College student email addresses

Similar to the exemption above, this exemption seems to be redundant of the generic personal privacy exemption.

That said, a possible justification for attempting to create extra protection for this information (if this exemption would indeed be analyzed to provide extra protection) is a desire to protect students from solicitations from credit card companies and other entities that may want to obtain lists of students from universities for advertising purposes.

If that is the case, however, it is interesting that the exemption does not clarify that it is protecting student information against wholesale requests for student email addresses. It seems this could lead to redaction of email addresses from other types of documents obtained in a public record request, which would not necessarily have the same justification for privacy.

As such, it would be helpful to first understand the legislative history of this exemption and then possibly amend the exemption to clarify that it applies to wholesale requests, rather than redaction in every request for a document that includes a student email address.

In addition, considering that ORS 192.355 seems to have been aimed at preventing requests for lists of email addresses, one option could be to roll this exemption into that one. Public universities are not listed among the entities subject to ORS 192.355, but that could easily be changed.

If the exemption was amended as suggested above or rolled into ORS 192.355, it is curious that neither exemption contains a public interest balancing test. It is possible that there may be scenarios where it would be in the public interest to allow a request for a list of all students at a

university. For example, students at that university may want to contact all other students via email in order to organize around an issue on campus or to ask fellow students to petition the school for a change in policy. As such, it would be worthwhile to consider adding a balancing test to this exemption and/or ORS 192.355.

ORS 192.355(3) – Public employee and volunteer information

Again, this exemption seems duplicative of the generic personal privacy exemption. And in this case it is not entirely clear why this personal information is somehow more worthy of protection than personal information related to other individuals. This is particularly true considering that there is a separate exemption protecting personal information if a person would be endangered by the disclosure.

One thing to note regarding this exemption is the fact that it includes more information than just the information covered by the generic personal privacy exemption (SSN, employee ID card numbers, etc.). It would be helpful to know if there are other exemptions that already apply to these additional pieces of information, to ensure that the entire exemption is duplicative.

It could also be helpful to understand the legislative history here.

ORS 192.355(12) – PERS information

At the outset, the number of public records orders applicable to this exemption seems to indicate that an amendment to provide greater clarity would be helpful here. More specifically, the term “nonfinancial membership information” is vague and should either be eliminated or clarified.

Beyond that, it would be helpful to know whether financial records are protected by any other exemption, and if so, whether the exemptions are duplicative. If they are duplicative, the exemption should be eliminated.

ORS 192.355(29) – Employee addresses submitted regarding alternative transportation

While it is not immediately apparent why disclosure of this information might be in the public interest, it is interesting that this exemption does not have a public interest balancing test. It would be helpful to understand what that is the case. Perhaps legislative history would help.

ORS 192.355(40) – Email addresses possessed by public bodies

As the public records order referenced indicates, this exemption has been interpreted to apply to wholesale requests for email addresses. This is not immediately apparent from reading the

exemption, so an amendment to clarify this fact could be helpful to the public in understanding the exemption.

In addition, as noted in the discussion of the student email address exemption above (ORS 192.345(29)), this exemption does not contain a balancing test. Yet it is possible to think of circumstances where it may be in the public interest to allow such requests. For example, a public body might have a list of email addresses for individuals who had lodged a particular type of complaint against a government entity. An advocate on that issue or a news agency might want to contact those individuals for the purpose of advocating on their behalf or to obtain more information from the individuals that would help shine a brighter light on the circumstances that led to the individuals complaining. As such, it could be useful to consider the addition of a balancing test to this exemption.

ORS 192.365 – Providers of home care, child care and adult foster homes

This exemption appears to be duplicative of the generic personal privacy exemption. Similar to many of the exemptions already discussed, it is not readily apparent why this information is worthy of more protection than that of other individuals.

It is also worth noting that there are types of information protected by this exemption that are not contained in the generic exemption (SSN and employee ID card numbers, emergency contact info). It would be helpful to know whether this information is covered by any other exemption to determine if it is also redundant.

ORS 403.135(2) and ORS 403.135(5) – 9-1-1 caller ID & subscriber information

We have no comment regarding these exemptions at this time.

ORS 646.574(3)-(4) – Do not call registry information

We have no comment regarding this exemption at this time.

ORS 646.405(2) – Health professional regulatory board

We have no comment regarding this exemption at this time. It would be helpful to understand the legislative history and intent behind this exemption.

Thank you for your consideration of our comments. Please feel free to contact me if you have any questions, comments, or concerns.