FREEDOM FOUNDATION

To: Oregon Sunshine Committee

From: Ben Straka, Policy Analyst

Date: May 16, 2018

Re: ORS 192.355(3) and ORS 192.365

Dear Committee Members,

To help this committee determine whether ORS 192.355(3) and ORS 192.365 are appropriate exemptions (or whether they deserve to be reformed), allow me to briefly explain the history and circumstances surrounding the creation of these exemptions.

First, ORS 192.365 was created by House Bill 3037[1] in 2015, and exempts certain contact information of state-paid home care workers, child care providers and adult foster care providers from public disclosure, subject to a public interest balancing test laid out in ORS 192.363.

ORS 192.365

Generally speaking, the care workers described in ORS 192.365 provide in-home care to clients who receive Medicaid funds and/or other state subsidies. The care workers are deemed public employees "for purposes of collective bargaining."[2] In 2014, the U.S. Supreme Court ruled in *Harris v. Quinn* that these in-home care workers cannot be required to pay union dues or fees as a condition of employment.

On December 17th, 2014, a Freedom Foundation employee submitted a valid public records request[3] to the Department of Human Services ("DHS") for the "names and addresses of all home health care providers in Oregon."

The Foundation requested the information for the sole purpose of informing home care workers of their constitutional rights under *Harris*.

At the time of the Foundation's public records request, HB 3037 did not exist and there was no exemption for the list of home care worker information. Emails from DHS officials confirmed that the information was subject to disclosure.

Several weeks after the Foundation's request, on February 27th, 2015, an email from the DHS official handling the request stated, in relevant part:

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[1] https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB3037
[2] ORS 410.612 (home care), 329A.430 (child care), 443.733 (adult foster care).
[3] http://media.oregonlive.com/opinion_impact/other/2015/12/02/request.pdf

> "Your request is in process, and it is currently with the Department of Justice for a quick review prior to our response. I expect that review to be completed **next week, and I will get back to you at that time.**"[4] (emphasis in original)

After receiving no response, the Foundation again followed up with DHS. On April 10th, 2015, an email from the same DHS official stated, in relevant part, as follows:

> "**HB 3037 has now been signed by the Governor and is effective upon her signature.**.... Specifically, the new law prohibits the disclosure of certain personal information of home care workers, operators of child care facilities, exempt family child care providers, and operators of adult foster homes...
>
> Because of the enactment of HB 3037 and the fact that the information you have requested is exempt from disclosure under HB 3037, we have no responsive records to provide you."[5] (emphasis in original)

The Foundation's request was denied nearly four months after it was originally submitted, on the same day HB 3037 was signed into law. HB 3037 specifically exempted the information pertaining to home care workers that the Foundation had requested. The bill also exempted the contact information of all care workers – specifically, child care providers and adult foster care providers – whose rights had also been affected by *Harris*.

Although DHS cited "legislation moving quickly" as the cause of the delay, the Foundation's request had been submitted more than two months before HB 3037 was even introduced.

In short, the current public records exemption in ORS 192.365 was accomplished with the passage of HB 3037 in 2015.

There is no evidence that anything other than the Foundation's public records request prompted the exemption of care worker information. This concern was echoed by *The Oregonian* editorial board, which wrote two articles criticizing the creation of the exemption.[6]

Public records exemptions should not be created to serve specific interest groups at the expense of the public and government transparency, especially when there is no evidence of any threat to public safety or privacy. And it's worth noting that certain information listed in ORS 192.365 (Social Security Numbers, for example) should indeed be protected from disclosure.

However, given the history of this exemption, I would encourage the committee to consider whether it truly serves a purpose besides preventing organizations like the Freedom Foundation from informing care workers about a U.S. Supreme Court decision with which some parties may

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[4] http://media.oregonlive.com/opinion_impact/other/2015/12/02/sorryfordealay.pdf
[5] http://media.oregonlive.com/opinion_impact/other/2015/12/02/rejectedbydhs.pdf
[6] http://www.oregonlive.com/opinion/index.ssf/2015/12/kate_browns_government-transpa.html and http://www.oregonlive.com/opinion/index.ssf/2015/12/government_transparency_oregon.html

disagree. If not, then ORS 192.365 is a perfect example of an improper and unnecessary exemption that should be scaled back.

ORS 192.355(3)

The same legislation, HB 3037, also produced the current version of ORS 192.355(3), which exempts certain contact information of public employees and volunteers (subject to the same public interest balancing test laid out in ORS 192.363).

Although some of the public employee/volunteer contact information was already exempt from disclosure prior to the passage of HB 3037, the legislation added significantly to the list of exempted information.

Given the fact that this 2015 amendment was paired with the creation of ORS 192.365 in HB 3037, we have no reason to believe the additional exemptions for public employees serve any purpose other than to inhibit the ability of groups like the Freedom Foundation to communicate with public employees.

Consequently, I'd like to encourage this committee to strongly consider whether ORS 192.355(3), as currently written, deserves to be reexamined.

Again, genuinely sensitive personal information should be protected from disclosure (Social Security Numbers, for example). But even if the information disclosable under ORS 192.355(3) is broadened, public employees with legitimate concerns for their privacy are still protected by ORS 192.355(2)[7], the overarching "personal privacy" exemption. Categorically exempting the list of public employee information from disclosure, however, inhibits legitimate uses of this information.

Public Interest Balancing Test – ORS 192.355(3) and ORS 192.365

Both exemptions discussed here – ORS 192.355(3) and ORS 192.365 – are subject to a public interest balancing test in ORS 192.363. In other words, the information listed in those statutes can be disclosed if the requestor shows "by clear and convincing evidence that the public interest requires disclosure in a particular instance."[8]

However, the subjectivity of the public interest test is highly problematic.

As Mr. Kron summarized in a recent memo[9] to this committee:

> *"[A]ssessing the public interest can be controversial and difficult for public bodies. The identity of the requester and the purpose of the request may be relevant to the public interest question, but introducing those considerations can create*

[7] ORS 192.355(2)
[8] ORS 192.363
[9] https://www.doj.state.or.us/wp-content/uploads/2018/05/OSC_2018-05-16_Proposed_Exemption_Review_Criteria.pdf

opportunities for bad decisions. And it might even be fair to wonder why information that must be disclosed sometimes shouldn't just be disclosed routinely."

The Foundation's experiences have shown this to be true. Specifically, public bodies have used the public interest test to deny subsequent Foundation records requests with little to no explanation of exactly why disclosure was *not* in the public interest.

If a public interest balancing test is to apply to ORS 192.355(3) at all, it should follow the same standard as ORS 192.355(2), the "personal privacy" exemption.

Unlike ORS 192.355(3), which expressly prohibits disclosure of public employee information *unless* the requestor can show (and the public body agrees) that the public interest requires disclosure, ORS 192.355(2) requires disclosure *unless* the public body determines it would be an unreasonable invasion of privacy (and if it would be, then the information cannot be disclosed unless the requestor shows that the public interest still requires disclosure).

In other words, ORS 192.355(2) provides disclosure is the rule, not the exception. The opposite is true in ORS 192.355(3), which places the burden of proof solely on the requestor. Given that both statutes deal with personal information, and that disclosure should generally be favored under Oregon's Public Records Laws, it would make sense to apply a more public-friendly interest test to ORS 192.355(3).

Conclusion

The circumstances surrounding the passage of HB 3037 in 2015 and the creation of the care worker exemption – ORS 192.365 – leave little doubt that it was created for improper and unnecessary reasons.

The circumstances surrounding ORS 192.355(3) are somewhat less clear, but they still leave room for questions, and in any case, the Foundation believes this particular exemption is too broad and is not served by an appropriate public interest balancing test.

Sincerely,

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