

June 4, 1998

Dave Henderson
Legislative Administrator
Legislative Administration Committee
140-A State Capitol
Salem, Oregon 97310

Re: Opinion Request OP-1998-3

Dear Mr. Henderson:

You have asked for advice regarding the handling of requests for copies of telephone billing records for members of the Oregon Legislative Assembly. We set forth your questions and our brief answers below, followed by an analysis.

1. Are legislator's telephone billing records subject to disclosure under Oregon's Public Records Law?

Yes.

2. Does the "Policy Governing Requests to Inspect Public Records" require formal adoption by the Legislative Administration Committee (LAC)?

Yes. The LAC must give reasonable notice of its intent to adopt a policy and conduct a hearing open to the public before adopting such policy by a majority vote of committee members.

Discussion

1. Legislative Telephone Records

The LAC receives, processes and pays the telephone bills for the Legislative Assembly. ORS 171.113 provides:

It is the policy of the Legislative Assembly that all use of state provided phones by members or by legislative staff at the members' direction, including phones assigned either at the member's residence or at the Capitol, shall be considered to be used on state business for purposes of the Legislative Assembly.

The billing records received by the LAC display the date, time, telephone number called, city, state, and length of each call made from legislators' offices, sorted by telephone of origination.⁽¹⁾ You ask whether such telephone billing records are subject to disclosure under Oregon's Public Records Law.

Under the Public Records Law, ORS 192.410 to 192.505, every person has a right to inspect "any public record of a public body" in Oregon, subject to certain exemptions and limitations. ORS 192.420. For purposes of this law, ORS 192.410(3) defines the term "public body" as including:

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.

The term "state agency" is defined by ORS 192.410(5) to mean:

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.

Because the LAC is created by statute as a joint committee of the Legislative Assembly, ORS 173.710, it is a public body subject to the Public Records Law except insofar as the LAC is exempt under Article IV, section 9, of the Oregon Constitution. Under that constitutional provision, "Senators and Representatives * * * shall not be subject to any civil process during the session of the Legislative Assembly, nor during the fifteen days next before the commencement thereof." Or Const Art IV, § 9. In the context of the Public Records Law, we interpret the immunity from service of civil process to mean that, during the relevant time period, a legislator cannot be subject to a petition to the Attorney General requiring response as to whether he or she claims the right to withhold disclosure of public records or to service of a summons and complaint in a proceeding for injunctive or declaratory relief in circuit court to obtain disclosure of public records. *See* ORS 192.480. This limitation does not mean that a person may not make a public records request of the LAC during this period. Nor does it mean that the LAC may not respond to such a request during this period, either through staff without involvement of any individual legislator or with the voluntary participation of a legislator.

ORS 192.410(4) defines a "public record" as including:

any writing containing 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.

The telephone billing records received, processed and paid by the LAC are writings relating to the conduct of the public business, and they are used and retained by the LAC. Thus we conclude that these billing records are within the definition of "public record."

There is no exemption from the disclosure mandate of the Public Records Law specifically for telephone billing records of members of the Legislative Assembly. The only exemption that might cover such records generally is ORS 192.502(2),⁽²⁾ which exempts from disclosure:

Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instances.

This exemption requires a two-step analysis: first, is the information "personal" and, second, would its disclosure constitute an unreasonably invasion of privacy? Information is "personal" if it relates to "a particular person," such as a person's home address, age, weight or residential telephone number. *See Jordan v. MVD*, 308 Or 433, 441, 781 P2d 1203 (1989). The billing record information showing telephone numbers called, the city, state, date, time and length of the call is not "personal" to a legislator

in the usual sense. Such information about a particular legislator's telephone calls is specific to that one individual, however, and it may reveal something about the legislator's habits or acquaintances, which is personal. Thus, it is possible, though we believe unlikely, that a court would conclude the billing records are personal information as to the individual legislators who made the telephone calls. To the extent a legislator has called someone's residential telephone number, that number would be personal information of the individual called.

Accordingly, the billing records could be subject to the exemption if their public disclosure would constitute an "unreasonable invasion of privacy." This is an objective test, requiring the determination on a case-by-case basis whether "an ordinary reasonable person would deem [it] highly offensive." *Id.* at 442-43. The mere fact that "the information would not be shared with strangers is not enough to avoid disclosure." *Id.* at 441. *See also id.* at 444-45 (Gillette, J., concurring) ("A general desire 'to be let alone' * * * will not be sufficient.").

In construing the exemption in ORS 192.502(2), the courts have noted that it is "an exception to the general rule favoring disclosure" and should be narrowly construed. *Guard Publishing Co. v. Lane County School Dist.*, 310 Or 32, 37, 792 P2d 854 (1990) (citing *Jordan* 308 Or at 439).

We do not believe that disclosure of legislators' telephone billing records would constitute an unreasonable invasion of privacy. The billing records list only the date, time, telephone number, city, state, and length of the call. Although the records might disclose something about the personal habits or acquaintances of legislators, the state-provided telephones are used "on state business for purposes of the Legislative Assembly." ORS 171.113.

Moreover, individual legislators would not reasonably have an expectation of "privacy" in the billing records, which are received by the LAC and, we assume, reviewed by its staff before being paid. *Cf. Smith v. Maryland*, 442 US 736, 742-43, 99 S Ct 2577, 61 L Ed2d 220 (1979) (in context of Fourth Amendment guarantee against unreasonable "search," stating that there can be no rational expectation of privacy in the telephone numbers dialed). Accordingly, we cannot say that disclosure of telephone billing records generally would be an unreasonable invasion of the legislators' privacy.

Nor do we believe that disclosure of telephone numbers would generally be an unreasonable invasion of privacy of individuals whose residential telephone numbers were called by a legislator from a state-provided telephone. Although the records do not contain the name of the party called, someone certainly might be able to find out that information. Nevertheless, most persons do not find it highly offensive to disclose their telephone numbers, as demonstrated by the extensive listings of residential telephone numbers in the telephone directory.

In any event, the determination of whether disclosure of personal information would constitute an unreasonable invasion must be made on a case-by-case basis. A blanket policy of nondisclosure violates the Public Records Law. *Guard Publishing*, 310 Or at 39-40. Thus, we have previously concluded that lottery prize winners' "addresses and telephone numbers, as a class, cannot be exempt from disclosure under [ORS 192.502(2)] because they do not meet the criteria for that exemption." Letter of Advice dated September 23, 1985, to Robert W. Smith, Director, Oregon State Lottery (OP-5860). *See also* Public Records Order, September 9, 1996, Coreson/Burns (requiring Oregon Department of Fish and Wildlife to make available telephone numbers of hunting license holders).

In sum, we conclude that legislators' telephone billing records are subject to disclosure under Oregon's

Public Records Law unless a determination is made that in a particular instance disclosure would constitute an unreasonable invasion of privacy.⁽³⁾ Even in that situation, disclosure would be required if "the public interest by clear and convincing evidence requires disclosure in the particular instance." ORS 192.502(2).

2. Policy Adoption by the Legislative Administration Committee

You also ask whether the LAC's "Policy Governing Requests to Inspect Public Records" requires formal adoption. This policy was adopted by the LAC Management Team on May 14, 1996, but the LAC itself has not taken formal action on the policy.

ORS 173.770 provides:

(1) The Legislative Administration Committee *may adopt rules to carry out its duties under statute* or legislative rules or directives, including setting and collecting fees for facilities and services and obtaining copyrights and patents on copyrightable or patentable materials developed, published or produced by committee staff.

(2) Rules adopted under authority of this section are not rules within the meaning of ORS 183.310 to 183.550 and are not subject to review under ORS 183.710 to 183.725. However, the Legislative Administration Committee *shall give reasonable notice of its intent to adopt rules and conduct a hearing open to the public before adopting any rule.*

(3) As used in this section, "*rule*" means *any directive, standard or statement of general application that implements or interprets the duties of the Legislative Administration Committee* and includes amendment or repeal of a prior rule but does not include internal management directives or statements relating to committee business between committee members or between committee members and committee staff or between committee staff.

(Emphasis added.) ORS 173.770 authorizes the LAC to adopt rules to carry out its duties under statute. Any standard or statement of general application that implements or interprets the duties of the LAC, other than internal management directives or statements between LAC members or staff relating to committee business, are considered rules. Such rules must be adopted by the LAC after notice and a public hearing.

The "Policy Governing Requests to Inspect Public Records" specifies, among other things, the form and content of requests for public records of the LAC and the fees that may be charged by the LAC for making public records available. This policy is a statement of general application implementing the duties of the LAC under the Public Records Law. It is not merely an internal management directive, but directly affects the persons making public records requests. Such a policy is a "rule" of the LAC as defined by ORS 173.770(3). Accordingly, ORS 173.770(2) requires the policy to be adopted by the LAC after reasonable notice of its intent to do so and a hearing open to the public⁽⁴⁾ Adoption by the LAC requires "the affirmative vote of the majority of members from each house who serve as members of the committee."⁽⁵⁾ ORS 173.730(5).

Sincerely,

Donald C. Arnold
Chief Counsel

1. We understand that the majority of calls made on the state-provided phones are state business related, but that legislators and their aides may also make personal calls for which they reimburse the Legislative Assembly.

[Return to previous location](#)

2. We understand your question to relate to telephone billing records generally and not to situations that might be unique to individual legislators. For example, it is conceivable that disclosure of an individual legislator's telephone billing records could disclose the existence of an attorney-client privileged communication, which would be exempt from disclosure under ORS 192.502(9). Consideration of such individual situations is beyond the scope of this opinion.

[Return to previous location](#)

3. If the LAC determined that in a particular instance disclosure of information in a telephone billing record would constitute an unreasonable invasion of privacy, the LAC would have a duty to separate exempt and nonexempt information within the billing record and to disclose the nonexempt information. ORS 192.505. See **Turner v. Reed**, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

[Return to previous location](#)

4. The LAC is not required to comply with the rulemaking requirements of ORS 183.325 to 183.355. ORS 173.770(3).

[Return to previous location](#)

5. The LAC consists of the Speaker of the House of Representatives, the President of the Senate, four members of the House appointed by the Speaker, and three members of the Senate appointed by the President. ORS 173.730(1).

[Return to previous location](#)

Go to:

[Top of page.](#)



Created 6/10/98
Webmaster see: [Print Services.](#)

