

**To:** Attorney General's Public Records Law Reform Task Force  
**From:** Subgroup on Exemptions  
**Date:** 7/14/16  
**Subject:** Recommendations from the 7/12/16 subgroup meeting

The Exemptions Subgroup of the Attorney General's Public Records Law Reform Task Force met on July 12, 2016, to discuss 1) how to proceed with the streamlining of exemptions; 2) how to proceed with the cataloguing of exemptions; and 3) how to legislatively address the number of exemptions.

### **Summary:**

The subgroup recommends the following:

- The task force should propose legislation streamlining exemptions related to public body's business transactions, but only if it can be done in a bill that is separate from the task force's other work.
- With respect to organizing exemptions, the task force should recommend legislation requiring either the Attorney General or the Public Records Ombudsperson's office to maintain an updated, publicly accessible catalog of all the exemptions located outside of ORS 192.501 and 192.502.
- The task force should issue a report addressing the task force's concerns with the large number of exemptions and discussing the possible ways for the legislature to streamline these exemptions. Legislative leadership should be consulted about the appropriate recipient of such a report.

### **Streamlining of Exemptions**

The subgroup first discussed feedback from public bodies that would be affected by the subgroup's first streamlined exemption; that proposed exemption combines five current exemptions that protect from disclosure the sensitive business records of SAIF, OHSU, Oregon Corrections Enterprise (OCE), public providers of electricity, and the Klamath Cogeneration Project. SAIF, OHSU, and OCE submitted written feedback expressing several concerns:

- SAIF, OHSU, and OCE are concerned that requiring a public body to show that disclosure would cause a competitive disadvantage introduces too much uncertainty in applying the exemption. In particular, SAIF explained that the proposed exemption might not prevent competitive disadvantages that don't occur until one, two, or ten years after disclosure. The subgroup discussed eliminating this requirement, as the public bodies would already be required to show that records are not customarily provided to business competitors, and the public-interest test would ensure that records of significant public interest are produced. However, the subgroup was concerned that eliminating this requirement would broaden the exemptions for electricity providers, as those providers' current exemptions require a showing of competitive disadvantage.

- OHSU and OCE expressed the view that including a public-interest test adds too much uncertainty in applying the exemption. OHSU's and OCE's current exemptions are unconditional; that is, they do not weigh whether the public interest require disclosure. OHSU and OCE explained that this ambiguity would deter private-sector companies from partnering or contracting with them. SAIF's exemption already includes a public-interest test. SAIF naturally did not express this concern and members of the subgroup were not persuaded that what is workable for SAIF would be unworkable for the other entities.
- OHSU suggested that the proposed exemption doesn't make clear which public bodies are covered. The subgroup discussed whether removing or modifying the requirement that the public body be regularly engaged in selling goods or services *as a primary function* would clarify the exemption without unduly expanding it. Members struggled with whether there might be better ways to specify which public bodies may assert the exemption.
- OHSU suggested that there should not be an exception requiring disclosure of executive contracts to which the public body is a party. The proposed exemption would allow such contracts to be withheld only to the extent they are exempt under a separate statute.

The subgroup then discussed whether the streamlining process should be abandoned due to the approaching deadline for proposed 2017 legislation and the possibility of opposition from affected public bodies. The subgroup decided to recommend that the task force should proceed with drafting legislation that streamlines exemptions, but only if the streamlining legislation can be separate from the task force's work on timing obligations and on cataloguing. Although the current draft proposal would in some respects broaden the application of the exemption, on the whole the subgroup felt that the proposal could illustrate for the legislature some of the ways in which exemptions are inconsistent, and how those inconsistencies might be addressed. So long as this avenue can be pursued independently of the task force's other legislative recommendations, the subgroup felt that the proposal is worthwhile for that reason.

### **Cataloguing of Exemptions**

The subgroup discussed the best way to make publicly accessible a continuously updated catalog of exemptions outside of ORS 192.501 and 192.502. There were several concerns with replacing the catch-all exemption found in ORS 192.502(9)(a) with a statutory list of all the outside exemptions: the size of such a list (given the 500+ outside exemptions) would make it of limited use to the public and unappealing to the legislature; future legislatures may or may not add new exemptions to this list, meaning it could soon be outdated; and legislation may not capture every exemption, introducing ambiguity as to whether a particular statute acts as an exemption.

The subgroup considered possible alternatives before deciding to recommend to the task force that the draft legislation mandate either the Attorney General or the Public Records Ombudsperson to maintain a publicly available, updated catalog of exemptions. Such a

document should, at a minimum, include an exemption's location in ORS, the relevant text, a brief description of the records affected, and the applicable public body or bodies. The catalog should be user friendly and electronically sortable, allowing individuals to use keywords or agencies to find potentially relevant exemptions.

The subgroup also discussed how to ensure that such a list remain updated, deciding to recommend that District Attorneys, who issue public records orders for local public bodies, should either send all orders to the Attorney General or Ombudsperson, or should send only those orders that recognize an exemption missing from the maintained catalog. (If the Ombudsperson is ultimately required to maintain this list, then the Attorney General, who issues public records orders for state public bodies, should be similarly required to submit orders.)

### **Legislatively Addressing the Streamlining of Exemptions**

The subgroup discussed how to encourage the legislature to address streamlining in future sessions. The idea of recommending the formation of a sunshine committee was discussed, though anecdotal evidence suggesting that such committees achieve little after their initial work was discussed. Subgroup members were also concerned about the task force recommending the formation of what would essentially be another task force—albeit one with some decision making authority. The subgroup decided to recommend that the task force issue a report highlighting the task force's concerns with the large number of exemptions, and discussing possible ways for the legislature to address that problem. Such a report would not be needed by the July deadline for draft legislation, allowing the task force the needed time to complete the report. It was discussed that such a report would also be a good vehicle for documenting the task force's support of, and suggestions for, the Ombudsperson proposal, and could potentially address other issues as well.