

D R A F T

SUMMARY

Establishes state policy regarding public access to public records. Establishes time frames for public body responses to public records requests. Requires Attorney General to maintain catalog of public records law exemptions. Provides protections against liability and privilege waivers resulting from public records disclosures. Clarifies appeal procedures for reviews of public records requests.

A BILL FOR AN ACT

Relating to public records; creating new provisions; and amending ORS 40.280, 192.440, 192.450 and 192.460.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2, 4, 8 and 9 of this 2017 Act are added to and made a part of ORS 192.410 to 192.505.

SECTION 2. The Legislative Assembly finds and declares that:

(1) Protecting public access to information about government and governmental actions ensures that the public is informed and able to meaningfully participate in government.

(2) Access to information enables Oregonians to ensure that their public servants perform honestly, faithfully and competently.

(3) It is the policy of this state that:

(a) Public records are accessible to members of the public, with specific exemptions;

(b) Exemptions from public records disclosure requirements must be construed narrowly in favor of the public's right to know;

(c) Access to public records is timely;

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 (d) Fees for access to public records may be waived or reduced to
2 serve the public interest and may not exceed the actual cost of making
3 the public records available;

4 (e) An exemption from mandatory disclosure enacted after the ef-
5 fective date of this 2017 Act must expressly identify the interests for
6 which the exemption is needed; and

7 (f) All exemptions from public records disclosure requirements
8 must be written and interpreted to ensure that an exemption is no
9 broader than necessary.

10 **SECTION 3.** ORS 192.440 is amended to read:

11 192.440. (1) **A public body that is** the custodian of any public record that
12 a person has a right to inspect shall give the person, upon **receipt of a**
13 **written** request:

14 (a) A copy of the public record if the public record is of a nature per-
15 mitting copying; or

16 (b) A reasonable opportunity to inspect or copy the public record.

17 *[(2) If a person makes a written request to inspect a public record or to*
18 *receive a copy of a public record, the public body receiving the request shall*
19 *respond as soon as practicable and without unreasonable delay. The public*
20 *body may request additional information or clarification from the requester for*
21 *the purpose of expediting the public body's response to the request. The re-*
22 *sponse of the public body must acknowledge receipt of the request and must*
23 *include one of the following:]*

24 *[(a) A statement that the public body does not possess, or is not the custo-*
25 *dian of, the public record.]*

26 *[(b) Copies of all requested public records for which the public body does*
27 *not claim an exemption from disclosure under ORS 192.410 to 192.505.]*

28 *[(c) A statement that the public body is the custodian of at least some of*
29 *the requested public records, an estimate of the time the public body requires*
30 *before the public records may be inspected or copies of the records will be*
31 *provided and an estimate of the fees that the requester must pay under sub-*

1 *section (4) of this section as a condition of receiving the public records.]*

2 *[(d) A statement that the public body is the custodian of at least some of*
3 *the requested public records and that an estimate of the time and fees for*
4 *disclosure of the public records will be provided by the public body within a*
5 *reasonable time.]*

6 *[(e) A statement that the public body is uncertain whether the public body*
7 *possesses the public record and that the public body will search for the record*
8 *and make an appropriate response as soon as practicable.]*

9 *[(f) A statement that state or federal law prohibits the public body from*
10 *acknowledging whether the record exists or that acknowledging whether the*
11 *record exists would result in the loss of federal benefits or other sanction. A*
12 *statement under this paragraph must include a citation to the state or federal*
13 *law relied upon by the public body.]*

14 **(2) If an individual who is identified in a public body's procedure**
15 **described in subsection (7)(a) of this section receives a written request**
16 **to inspect or receive a copy of a public record, the public body shall**
17 **within five business days after receiving the request acknowledge re-**
18 **ceipt of the request or complete the public body's response to the re-**
19 **quest. An acknowledgment under this subsection must:**

20 **(a) Confirm that the public body is the custodian of the requested**
21 **record;**

22 **(b) Inform the requester that the public body is not the custodian**
23 **of the requested record; or**

24 **(c) Notify the requester that the public body is uncertain whether**
25 **the public body is the custodian of the requested record.**

26 **(3) If the public record is maintained in a machine readable or electronic**
27 **form, the [custodian] public body shall provide a copy of the public record**
28 **in the form requested, if available. If the public record is not available in**
29 **the form requested, the [custodian] public body shall make the public record**
30 **available in the form in which the [custodian] public body maintains the**
31 **public record.**

1 (4)(a) The public body may establish fees reasonably calculated to reim-
2 burse the public body for the public body's actual cost of making public re-
3 cords available, including costs for summarizing, compiling or tailoring the
4 public records, either in organization or media, to meet the [*person's*] re-
5 quest.

6 (b) The public body may include in a fee established under paragraph (a)
7 of this subsection the cost of time spent by an attorney for the public body
8 in reviewing the public records, redacting material from the public records
9 or segregating the public records into exempt and nonexempt records. The
10 public body may not include in a fee established under paragraph (a) of this
11 subsection the cost of time spent by an attorney for the public body in de-
12 termining the application of the provisions of ORS 192.410 to 192.505.

13 (c) The public body may not establish a fee greater than \$25 under this
14 section unless the public body first provides the [*requestor*] **requester** with
15 a written notification of the estimated amount of the fee and the
16 [*requestor*] **requester** confirms that the [*requestor*] **requester** wants the
17 public body to proceed with making the public record available.

18 (d) Notwithstanding paragraphs (a) to (c) of this subsection, when the
19 public records are those filed with the Secretary of State under ORS chapter
20 79 or ORS 80.100 to 80.130, the fees for furnishing copies, summaries or
21 compilations of the public records are [*those*] **the fees** established by the
22 Secretary of State by rule[,] under ORS chapter 79 or ORS 80.100 to 80.130.

23 (5) The custodian of [*any*] **a** public record may furnish copies without
24 charge or at a substantially reduced fee if the custodian determines that the
25 waiver or reduction of fees is in the public interest because making the re-
26 cord available primarily benefits the general public.

27 (6) A [*person*] **requester** who believes that there has been an unreason-
28 able denial of a fee waiver or fee reduction may petition the Attorney Gen-
29 eral or the district attorney in the same manner as a [*person*] **requester who**
30 petitions when inspection of a public record is denied under ORS 192.410 to
31 192.505. The Attorney General, the district attorney and the court have the

1 same authority in instances when a fee waiver or reduction is denied as *[it*
2 *has]* when inspection of a public record is denied.

3 (7) A public body shall make available to the public a written procedure
4 for making public *[record]* **records** requests that includes:

5 (a) The name of one or more *[persons]* **individuals within the public**
6 **body** to whom public *[record]* **records** requests may be sent, with addresses;
7 and

8 (b) The amounts of and the manner of calculating fees that the public
9 body charges for responding to requests for public records.

10 (8) This section does not apply to signatures of individuals submitted
11 under ORS chapter 247 for purposes of registering to vote as provided in ORS
12 247.973.

13 **SECTION 4. (1) A public body shall complete its response to a**
14 **written public records request that is received by an individual iden-**
15 **tified in the public body's procedure described in ORS 192.440 (7)(a) as**
16 **soon as practicable and without unreasonable delay.**

17 **(2) A public body's response to a public records request is complete**
18 **when the public body:**

19 **(a) Provides access to or copies of all requested records within the**
20 **possession or custody of the public body that the public body does not**
21 **assert are exempt from public disclosure, or explains where the re-**
22 **ords are already publicly available;**

23 **(b) Asserts any exemptions from disclosure under ORS 192.501 or**
24 **192.502 that the public body believes apply to any requested records**
25 **and, if the public body cites ORS 192.502 (8) or (9), identifies the state**
26 **or federal law that the public body relied on in asserting the ex-**
27 **emptions;**

28 **(c) As required by ORS 192.505, provides redacted copies of any re-**
29 **cords containing both exempt and nonexempt information;**

30 **(d) To the extent that the public body is not the custodian of re-**
31 **cords that have been requested, provides a written statement to that**

1 **effect;**

2 **(e) To the extent that state or federal law prohibits the public body**
3 **from acknowledging whether any requested record exists or that ac-**
4 **knowledging whether a requested record exists would result in the loss**
5 **of federal benefits or imposition of another sanction, provides a writ-**
6 **ten statement to that effect, citing the state or federal law that the**
7 **public body relies on, unless the written statement itself would violate**
8 **state or federal law; and**

9 **(f) If the public body denies a request for records under ORS 192.501**
10 **or 192.502, includes a statement that the requester may seek review**
11 **of the denial of the public records request under ORS 192.410 to 192.505.**

12 **(3) If a public body has informed a requester of a fee permitted**
13 **under ORS 192.440 (4), the obligation of the public body to complete its**
14 **response to the request is suspended until the requester has paid the**
15 **fee, the fee has been waived by the public body pursuant to ORS 192.440**
16 **(5) or the fee otherwise has been ordered waived.**

17 **(4) A public body may request additional information or clarifica-**
18 **tion from a requester of public records for the purpose of expediting**
19 **the public body's response to the request. If the public body has re-**
20 **quested additional information or clarification in good faith, the public**
21 **body's obligation to further complete its response to the request is**
22 **suspended until the requester provides the requested information or**
23 **clarification or affirmatively declines to provide that information or**
24 **clarification.**

25 **(5) As soon as reasonably possible but not later than 10 business**
26 **days after the date by which a public body is required to acknowledge**
27 **receipt of the request under ORS 192.440, a public body shall:**

28 **(a) Complete its response to the public records request; or**

29 **(b) Provide a written statement that the public body is still pro-**
30 **cessing the request and a reasonable estimated date by which the**
31 **public body expects to complete its response based on the information**

1 currently available.

2 (6) Compliance with the specific time periods established in ORS
3 192.440 (2) and subsection (5) of this section is not required in circum-
4 stances where compliance is not reasonably possible. Compliance is
5 not reasonably possible if providing a timely response to the request:

6 (a) Would result in demonstrable impairment of the public body's
7 ability to perform other necessary functions; or

8 (b) Is impracticable, given:

9 (A) The availability of staff employed by the public body that is
10 necessary to complete the response to the request; or

11 (B) The volume of public records requests currently being processed
12 by the public body.

13 (7) For purposes of this section, staff members who are on leave or
14 are not scheduled to work are considered to be unavailable.

15 **SECTION 5.** ORS 192.450 is amended to read:

16 192.450. (1) Subject to ORS 192.480 and subsection [(4)] (5) of this section,
17 *[any person denied the right to inspect or to receive a copy of any public record*
18 *of a state agency]* a person who has made a written request to a state
19 agency for public records may petition the Attorney General *[to review the*
20 *public record to determine if it]* for review of any of the following:

21 (a) If the state agency denied the request to inspect or receive a
22 copy of a public record, the public record to determine if the public
23 record may be withheld from public inspection.

24 (b) The failure of the state agency to timely respond to the request
25 as required by section 4 of this 2017 Act. A failure of the state agency
26 to timely respond to the request shall be treated as a denial of the
27 request unless the state agency demonstrates that compliance was not
28 reasonably possible as described in section 4 of this 2017 Act.

29 (c) The date by which the state agency estimates completion of the
30 response to the request, as described in section 4 of this 2017 Act, if
31 the requester believes that the estimated completion date is unrea-

1 **sonable and will result in an undue delay in disclosure of the requested**
2 **record.**

3 **(d) Any other failure of the state agency to comply with section 4**
4 **of this 2017 Act.**

5 **(2)** Except as provided in subsection [(5)] **(6)** of this section[,]:

6 **(a)** The burden is on the **state** agency to sustain its action[. *Except as*
7 *provided in subsection (5) of this section,*]; **and**

8 **(b)** The Attorney General shall issue an order denying or granting the
9 petition, or denying it in part and granting it in part, within seven days from
10 the day the Attorney General receives the petition.

11 [(2)] **(3)(a) Except as provided in paragraph (b) of this subsection,** if
12 the Attorney General grants the petition and orders the state agency to
13 disclose the record, or [*if the Attorney General*] grants the petition in part
14 and orders the state agency to disclose a portion of the record, the state
15 agency shall comply with the order in full within seven days after issuance
16 of the order[,].

17 **(b) The state agency may,** [*unless*] within the seven-day period [*it*
18 *issues*], **issue** a notice of [*its*] **the state agency's** intention to institute
19 proceedings for injunctive or declaratory relief in the Circuit Court for
20 Marion County or, as provided in subsection [(6)] **(7)** of this section, in the
21 circuit court of the county where the record is held. [*Copies*] **The state**
22 **agency shall send a copy** of the notice [*shall be sent*] to the Attorney
23 General and by certified mail to the petitioner at the address shown on the
24 petition. The state agency shall institute the proceedings within seven days
25 after [*it*] **the state agency** issues its notice of intention to do so.

26 **(c)** If the Attorney General denies the petition in whole or in part, or if
27 the state agency continues to withhold the record or a part of [*it*] **the record**
28 notwithstanding an order to disclose by the Attorney General, the person
29 seeking disclosure may institute [*such*] proceedings **to enforce the order.**

30 [(3)] **(4)(a)** The Attorney General shall serve as counsel for the state
31 agency in a suit filed under subsection [(2)] **(3)** of this section **only** if the

1 suit arises out of a determination by the Attorney General that the public
2 record, **in whole or in part**, should not be disclosed[, *or that a part of the*
3 *public record should not be disclosed if*] **and** the state agency has fully com-
4 plied with the order of the Attorney General requiring disclosure of
5 [*another*] **any other** part or parts of the public record[, *and in no other*
6 *case*].

7 (b) In [*any*] **a** case in which the Attorney General is prohibited from
8 serving as counsel for the state agency, the **state** agency may retain special
9 counsel.

10 [(4)] (5)(a) A person **who is** denied the right to inspect or to receive a
11 copy of [*any*] **a** public record of a health professional regulatory board, as
12 defined in ORS 676.160, that contains information concerning a licensee or
13 applicant, and [*petitioning*] **who petitions** the Attorney General to review
14 the public record shall, on or before the date of filing the petition with the
15 Attorney General, send a copy of the petition by first class mail to the health
16 professional regulatory board.

17 (b) Not more than 48 hours after the **health professional regulatory**
18 board receives a copy of the petition, the **health professional regulatory**
19 board shall send a copy of the petition by first class mail to the licensee or
20 applicant who is the subject of [*any*] **a** record for which disclosure is sought.
21 [*When sending a copy of the petition to the licensee or applicant, the*] **The**
22 **health professional regulatory** board shall include **with the petition** a
23 notice informing the licensee or applicant that **the licensee or applicant**
24 **may file** a written response [*by the licensee or applicant may be filed*] with
25 the Attorney General not later than seven days after the date [*that the notice*
26 *was sent by the board*] **on which the health professional regulatory board**
27 **sends the notice**. Immediately upon receipt of [*any*] **a** written response from
28 the licensee or applicant, the Attorney General shall send a copy of the
29 **written** response to the petitioner by first class mail.

30 [(5)] (6)(a) The person seeking disclosure of a public record of a health
31 professional regulatory board[, *as defined in ORS 676.160,*] that is confiden-

1 tial or exempt from disclosure under ORS 676.165 or 676.175[*shall have*] **has**
2 the burden of demonstrating to the Attorney General by clear and convincing
3 evidence that the public interest in disclosure outweighs other interests in
4 nondisclosure, including but not limited to the public interest in
5 nondisclosure.

6 (b) The Attorney General shall issue an order denying or granting the
7 petition, or denying or granting [*it*] **the petition** in part, [*not later than the*
8 *15th day following the day that*] **within 15 days of the date on which** the
9 Attorney General receives the petition. [*A copy of the Attorney General's*]
10 **The Attorney General shall serve by first class mail a copy of the At-**
11 **torney General's** order granting a petition or part of a petition [*shall be*
12 *served by first class mail*] on the health professional regulatory board, the
13 petitioner and the licensee or applicant who is the subject of [*any*] **the** re-
14 cord ordered to be disclosed.

15 (c) The health professional regulatory board [*shall*] **may** not disclose
16 [*any*] **the** record prior to the seventh day following the service of the At-
17 torney General's order on a licensee or applicant entitled to receive notice
18 under this subsection.

19 [(6)] (7) If the Attorney General grants or denies the petition for a record
20 of a health professional regulatory board[*as defined in ORS 676.160,*] that
21 contains information concerning a licensee or applicant, the **health profes-**
22 **sional regulatory** board, a person denied the right to inspect or receive a
23 copy of the record or the licensee or applicant who is the subject of the re-
24 cord may institute proceedings for injunctive or declaratory relief in the
25 circuit court for the county where the public record is held. The party
26 seeking disclosure of the record [*shall have*] **has** the burden of demonstrating
27 by clear and convincing evidence that the public interest in disclosure out-
28 weighs other interests in nondisclosure, including but not limited to the
29 public interest in nondisclosure.

30 [(7)] (8) The Attorney General may comply with a request of a health
31 professional regulatory board to be represented by independent counsel in

1 *[any]* a proceeding under subsection *[(6)] (7)* of this section.

2 **SECTION 6.** ORS 192.460 is amended to read:

3 192.460. (1) **The provisions of** ORS 192.450 *[applies]* **apply** to *[the case*
4 *of]* a person **who makes a request for public records to** *[denied the right*
5 *to inspect or to receive a copy of any public record of]* a public body other than
6 a state agency, except that:

7 (a) The district attorney of the county in which the public body is located,
8 or if *[it]* **the public body** is located in more than one county the district
9 attorney of the county in which the administrative offices of the public body
10 are located, shall carry out the functions of the Attorney General;

11 (b) *[Any]* **A** suit filed must be filed in the circuit court for the county
12 described in paragraph (a) of this subsection; and

13 (c) The district attorney may not serve as counsel for the public body[,]
14 in the cases permitted under ORS 192.450 *[(3),]* (4) unless the district attor-
15 ney ordinarily serves as counsel for the public body.

16 (2) Disclosure of a record to the district attorney in compliance with
17 subsection (1) of this section does not waive any privilege or claim of privi-
18 lege regarding the record or its contents.

19 (3) Disclosure of a record or part of a record as ordered by the district
20 attorney is a compelled disclosure for purposes of ORS 40.285.

21 **SECTION 7. Sections 2 and 4 of this 2017 Act and the amendments**
22 **to ORS 192.440, 192.450 and 192.460 by sections 3, 5 and 6 of this 2017**
23 **Act apply to public records requests made on or after the effective date**
24 **of this 2017 Act.**

25 **SECTION 8. (1) The Attorney General shall maintain and regularly**
26 **update a catalog of exemptions created by Oregon statute from the**
27 **disclosure requirements of ORS 192.410 to 192.505. The catalog must**
28 **be as comprehensive as reasonably possible and must be freely avail-**
29 **able to the public in an electronic format that facilitates sorting and**
30 **searching of the catalog.**

31 (2) **The catalog required by subsection (1) of this section must in-**

1 **clude the following information for each exemption:**

2 **(a) A citation to the Oregon statute or statutes creating the ex-**
3 **emption from the disclosure requirements of ORS 192.410 to 192.505;**

4 **(b) The relevant text of each statute creating the exemption;**

5 **(c) If the exemption has been construed by a decision of the Oregon**
6 **Supreme Court or Court of Appeals, a citation to that decision;**

7 **(d) To the extent that the exemption is specific to a particular**
8 **public body or particular types of public bodies, a description of the**
9 **public body or bodies to which the exemption relates; and**

10 **(e) Additional information as the Attorney General deems appro-**
11 **priate.**

12 **(3) To help ensure that the catalog required by subsection (1) of this**
13 **section is as comprehensive as possible:**

14 **(a) The Legislative Counsel shall provide the Attorney General with**
15 **an electronic copy of any Act passed by the Legislative Assembly that,**
16 **in the judgment of the Legislative Counsel, creates an exemption from**
17 **the disclosure requirements of ORS 192.410 to 192.505; and**

18 **(b) When a district attorney issues an order pursuant to ORS**
19 **192.460, the district attorney shall send the Attorney General an elec-**
20 **tronic copy of that order.**

21 **(4) The purpose of the catalog required by subsection (1) of this**
22 **section is to assist public officials and members of the public in as-**
23 **certaining what information is exempt from the public disclosure re-**
24 **quirements of ORS 192.410 to 192.505. The catalog is not intended to**
25 **provide legal advice to public bodies or to members of the public.**

26 **SECTION 9. (1) A public body, including a public official, public**
27 **employee, custodian of public records or other public body that dis-**
28 **clozes public records, is not liable for any loss or damage based on the**
29 **disclosure if the public body, public official, public employee, custodian**
30 **or other public body acts in good faith to comply or attempt to comply**
31 **with the disclosure requirements of ORS 192.410 to 192.505.**

1 **(2) A public body that discloses any information or record in re-**
2 **sponse to a written request for public records under ORS 192.410 to**
3 **192.505 that is privileged under ORS 40.225 to 40.295 does not waive its**
4 **right to assert the applicable privilege to prevent the introduction of**
5 **the information or record as evidence pursuant to ORS 40.225 to 40.295.**

6 **SECTION 10.** ORS 40.280 is amended to read:

7 40.280. A person upon whom ORS 40.225 to 40.295 confer a privilege
8 against disclosure of the confidential matter or communication waives the
9 privilege if the person or the person's predecessor while holder of the privi-
10 lege voluntarily discloses or consents to disclosure of any significant part
11 of the matter or communication. This section does not apply if the disclosure
12 is itself a privileged communication. Voluntary disclosure does not occur
13 with the mere commencement of litigation or, in the case of a deposition
14 taken for the purpose of perpetuating testimony, until the offering of the
15 deposition as evidence. Voluntary disclosure does not occur when represen-
16 tatives of the news media are allowed to attend executive sessions of the
17 governing body of a public body as provided in ORS 192.660 (4), or when
18 representatives of the news media disclose information after the governing
19 body has prohibited disclosure of the information under ORS 192.660 (4).
20 **Voluntary disclosure does not occur when a public body, as defined in**
21 **ORS 192.410, discloses information or records in response to a written**
22 **request for public records made under ORS 192.410 to 192.505.** Voluntary
23 disclosure does occur, as to psychotherapists in the case of a mental or
24 emotional condition and physicians in the case of a physical condition upon
25 the holder's offering of any person as a witness who testifies as to the con-
26 dition.

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