**[DRAFT] Report on Administrative and Public Safety Exemptions**

To: Attorney General’s Public Records Reform Task Force

From: Subcommittee on Exemptions

Date:

**Executive Summary**

The subgroup of the Attorney General’s Public Records Law Reform Task Force examined 107 exemptions preliminarily categorized as serving a public safety purpose or a government administration purpose. Of those exemptions, there were only three that all members of the subgroup felt could not be either eliminated or combined with other exemptions. In contrast, there were 68 exemptions that three or more members felt should either be eliminated or combined with other exemptions.

The subgroup’s work confirms that it is feasible to group similar exemptions, and that there is significant potential for making exemptions more consistent. The subgroup recommends that the Task Force should, at a minimum, propose comprehensively cataloging disclosure exemptions in statute. A separate proposal to combine related exemptions, streamlining the law and reducing inconsistencies, should also be considered. The subgroup also discussed other approaches to dealing with the proliferation of exemptions from public disclosure requirements which merit consideration by the larger group. Finally, the subgroup believes that issues surrounding the “public interest” provisions for disclosure should continue to be examined with the goal of making those provisions more consistent and comprehensible.

**Organization of Report**

This report begins by recapping the subgroup’s mission, describing the subgroup’s approach to its work and making some observations about the views of subgroup members regarding the exemptions reviewed so far. It then discusses the implications of that work, with respect to both the task of creating a policy statement to inform the Public Records Law and the work of improving the state of the law regarding exemptions from disclosure. Appended to this report are two spreadsheets. Appendix A shows how each member of the subgroup assessed each exemption. Appendix B identifies exemptions that could be grouped together. In addition to serving as a potential blueprint for a catalog, the latter spreadsheet should prove helpful in identifying areas where more consistency is possible.

**Subgroup Mission, Methodology and Findings**

From January through March, a subgroup of the Attorney General’s Public Records Reform Task Force reviewed 107 exemptions from public disclosure. Those were the exemptions preliminarily placed into two overarching categories: exemptions designed to facilitate public safety efforts, and exemptions designed to facilitate the efficient administration of government programs. This work was undertaken for a number of reasons, including

* to assess what sorts of improvements to the structure of these exemptions might be desirable and feasible;
* to consider whether exemptions should be eliminated or substantively changed;
* to begin the process of evaluating various public interest standards applicable to some exemptions; and
* to explore the exemptions created for the purpose of improving government administration, in order to inform the task force’s work on a policy statement.

The decision that the subgroup should begin with the “Administration” and “Public Safety” exemptions was made in order to make the subgroup’s work manageable, and also because many members of the larger task force expressed curiosity about the types of exemptions that were classified under the “Administration” category.

The subgroup consists of six members of the task force:

* Jeb Bladine (Oregon Newspaper Publishers Association)
* Michael Kron (Office of Attorney General Ellen Rosenblum)
* Betty Reynolds (Public Member)
* Dave Rosenfeld (Oregon State Public Interest Research Group)
* Robert Taylor (Office of Secretary of State Jean Atkins)
* Scott Winkels (League of Oregon Cities)

The exemptions in the relevant categories were consolidated in a separate document and provided to the members of the task force. Five of the subgroup members independently considered each of the 107 exemptions (there were actually 108 originally, but one has been re-categorized) and indicated whether, in that member’s opinion, the particular exemption should be:

1. retained as a stand-alone exemption;
2. eliminated;
3. combined with exemptions for similar information; or
4. made consistent with other exemptions for similar information.

One member noted that, in doing this work, he was primarily concerned with the first two questions – in other words, whether the exemption makes sense at all, rather than whether it could be improved by combining it with other similar exemptions. In addition, members were encouraged to note if they had questions about a particular exemption. Given the nature of the work, a number of members inevitably did. In addition, some members of the subgroup marked more than one of the above alternatives for some exemptions.

After this work had been done independently, the subgroup met and discussed the results of that review, what should be conveyed to the task force, and how that should be accomplished. This report is the result of the subgroup’s work so far.

Some numbers[[1]](#footnote-1) may provide a useful overview of what the subgroup found:

* There were only 2 exemptions that all members of the subgroup unequivocally agreed should be left as stand-alone exemptions. One provides that minutes or recordings of “executive sessions” – portions of a public meeting from which the general public can be excluded pursuant to specific statutory authorization – are exempt from disclosure if disclosure would be inconsistent with the reason why executive session is allowed in the first place. The other provides that faculty scholarship is exempt from disclosure until publicly released, copyrighted or patented. (A third exemption – for records relating to the running of Oregon’s correctional institutions – solicited two questions asking whether it could be combined with other similar exemptions. In Appendix B, that exemption appears grouped with another exemption that appears to serve the same general purpose.)
* By contrast, there were 68 exemptions that at least 3 members – a majority of those who participated in the review – felt should either be eliminated or combined with other exemptions in some way. With respect to administration exemptions, a majority of the subgroup felt that 63 of 85 exemptions could be eliminated or combined. A majority felt that way about 5 of 22 public safety exemptions.
* 22 exemptions received 5 (or more) votes in favor of eliminating or changing the exemption.
* 31 exemptions received 4 votes in favor of eliminating or changing the exemption.
* 16 exemptions received 3 votes in favor of eliminating or changing the exemption.
* 20 exemptions received 2 votes in favor of eliminating or changing the exemption.
* 14 exemptions received 1 vote in favor of eliminating or changing the exemption.

Substantively, the exemptions that received the most votes in favor of some change concerned:

* Agreements by which property owners are permitted to self-regulate, and agree to meet or exceed environmental regulatory requirements;
* Mediation confidentiality;
* Some communications between public bodies relating to small business;
* Reports to public bodies of various kinds of suspected misconduct;
* Non-criminal investigations conducted by public bodies;
* Software and computer data;
* Information about child abuse multidisciplinary teams’ compliance with their own established protocols and procedures; and
* Information about candidates for a position.

**Implications for the Task Force**

***Exemption Organization and Consistency***

Discussing the results of this process, members of the subgroup agreed that categorizing and formally cataloging exemptions would be useful and feasible. To be fully effective, the catalog would need to replace the “catchall” exemption of ORS 192.502(9). The subgroup discussed that a similar suggestion in Senate Bill 41 (2011) caused anxiety due to uncertainty whether the proposed replacement really captured all of the exemptions in Oregon law. The catalog of public records exemptions developed for this task force is more exhaustive, however. And delaying the effective date of repealing ORS 192.502(9) would allow time for legislative correction if any important exemptions have been overlooked.

In addition to categorizing and cataloging, the subgroup also felt that it would be possible to improve the law by making similar exemptions consistent with one another. For example, subgroup members suggested that a single approach to non-criminal investigations could be practical. However, subgroup members felt that it might make sense to propose that sort of consolidation separately from a straightforward catalog. The subgroup recognized that the existing exemptions are presumably the result of lobbying by affected interest groups. Indeed, the subgroup acknowledged that differences between exemptions may reflect considered legislative determinations regarding the relative sensitivity of seemingly similar information. For both of those reasons, a proposal to substantively change exemptions is likely to be harder to pass than a proposal to simply catalog existing exemptions. Although the subgroup believes that consistency is worth pursuing and should be proposed, the consensus of the subgroup is that the catalog on its own would be very useful. Consequently, a catalog probably should not be tied to substantive amendment of exemptions. For similar reasons, subgroup members opined that task force recommendations regarding the cost and timing of public records responses should be pursued through separate legislation.

The subgroup discussed the importance of pairing changes to existing exemption laws with big-picture architectural changes that will encourage future legislatures to retain a disciplined legal structure. The plan to propose a policy statement, in particular, was identified as an important step to prevent the Public Records Law gradually reverting back to something like its current state even if the task force’s proposals are adopted. The legislature might also be encouraged to assess existing exemptions against that architecture.

In light of these considerations the subgroup[[2]](#footnote-2) makes the following recommendations.

*Recommendation 1 - Something to Do*

The task force should, as it has been discussing, propose a catalog of exemptions based on classifications tied to a policy statement that will guide future legislatures (as well as courts and government official tasked with implementing the public records law). In order to insure that the catalog is legally effective, a (delayed) repeal of ORS 192.502(9) should also be part of this proposal. Appendix B represents approximately one-fifth of this project. The subgroup is willing to do similar work on other large categories of exemptions. However, it may be necessary to establish at least one additional subgroup to get through all of the myriad exemptions in a timely manner.

*Recommendation 2 – Something to Consider*

The task force should consider separately proposing consolidation of exemptions. With respect to exemptions preliminarily categorized as serving “public safety” and “administration” interests, Appendix B sets forth categories within which more consistent approaches to information could be established. This approach could be taken either with regard to all of the nearly 560 exemptions or, as a test case, with respect to only some of the exemptions. Given that the purpose of the public records law is generally to help citizens understand the decisions of government and the basis for those decisions, members of the subgroup felt that the “Administration” exemptions might make a particularly useful set to test the willingness of the legislature to make the potentially controversial decisions needed to make better sense of forty-plus years of adopting public records exemptions on what seems to be an essentially ad-hoc basis.

In making this recommendation the subgroup is mindful of several considerations that will be relevant to the direction the task force ultimately takes. One is that each exemption likely has – or at least had at some point – an interested constituency that worked to secure the existing law. Even changes designed to make those exemptions consistent with other similar exemptions could be concerning to those groups. To the extent that the task force proposes substantive changes to exemptions it will need to decide whether to afford potentially interested groups the opportunity to be heard before the task force, or whether to simply allow them to make their case to the legislature. To put this choice in perspective, consolidating only the 85 “Administration” exemptions as contemplated by Appendix B could attract the interest of dozens of interested stakeholder groups – from licensed professionals to would-be contractors to state and local government entities.

The task force also discussed a more comprehensive version of the streamlining approach. Namely, rather than trying to consolidate existing exemptions, the task force could simply replace the existing specific exemptions with exemptions designed to apply generally to the categories the task force feels appropriate. This alternative approach could have the advantages of flexibility, simplicity and comprehensibility. Of course, this would be an even more significant legislative undertaking than streamlining exemptions. Nevertheless the idea of a simple set of generally-applicable exemptions offers sufficient advantages that members of the subgroup felt it would merit the discussion and consideration of the full task force.

*Recommendation 3 – Something to Study Further*

The subgroup also discussed difficulties presented by the plethora of “public interest” tests that require some otherwise-exempt records to be disclosed depending on the requirements of the public interest. Two distinct difficulties were discussed. The subgroup believes this area warrants further thought, both by the subgroup and by the larger task force.

First, the concept of the “public interest” is abstract and not defined in statute. One member observed that it is easy for public bodies to simply say that disclosing information is not in the public interest. Another observed that, because requesters making public interest arguments are often suspicious of something that has occurred within a public body, they are likely to be suspicious of that public body’s determination that disclosure is not in the public interest. The idea that the considerations relevant to assessing the public interest could be defined in statute was discussed. Subgroup members were generally favorable to the idea though some skepticism was voiced regarding whether that could meaningfully be done in the abstract.

Second, the fact that multiple public interest tests exist was briefly discussed. For example, 4 slightly different public interest standards exist within the 85 administration exemptions. It was posited that, if there are to be different thresholds for deciding whether the public interest has been sufficiently established, those thresholds should at least make sense with respect to one another and employ terms that clearly signify the difference that is meant between one standard and the next.

The subgroup does not have specific recommendations regarding public interest tests at this time, but with the approval of the task force intends to continue looking at this issue as it continues to consider exemptions. The task force as a whole may likewise wish to discuss these issues.

***Policy Statement – Types of “Administration” Exemptions***

Appendix B groups exemptions together based on perceived similarities between them. The subcategory designations are intended to suggest the general nature of the grouped exemptions. Rather than simply recreating the comprehensive list of statutory exemptions or providing a simple list of general descriptors, this report briefly discusses each identified subcategory of administrative exemptions, and provides examples. The most recent proposed policy statement considered by the task force states that exemptions are appropriate “To enable the efficient administration of governmental programs, only if administration would be significantly impaired without the exemption.” Task force members’ questions about this category of exemptions, and about the language used to describe it, were among the motivations for the formation of the subgroup. These characterizations in this section of the report are intended to be informative and should not be taken as expressing view with respect to the policies behind any particular category of exemption.

*1. Computer programs and data*

These four exemptions generally allow public bodies to withhold software programs from disclosure. For example, though a public body would generally be required to disclose a document created in Microsoft Word, this kind of exemption means that the public body is not required to disclose a copy of the code for Microsoft Word itself. To the extent it applies to purchased software, the exemptions may be redundant with intellectual property law. But the exemptions also apply to computer programs that public bodies own the intellectual rights to, either because the public body created the software, had the software created for the public body, or otherwise acquired the rights. (Some of these exemptions also address specific kinds of electronic data. The reasons for exempting specific types of data are presumably different than the reason for exempting computer programs. Specific types of data could be addressed in exemption categories enacted for similar purposes.)

*2. Civil prosecuting attorney notices*

In two civil contexts having to do with business behavior (unlawful trade practices and security seal violations), attorneys bringing civil claims – often from the Attorney General’s office – are required to give the business notice of the alleged violation. The business then has ten days to propose an “assurance of voluntary compliance” to resolve the allegation. These exemptions provide that the notice is not a public record during that ten-day period. It is somewhat unclear whether the intent is to protect the integrity of the attorney’s case prior or to protect the interests of the business, but for now this has been categorized as an administrative exemption.

*3. Competitive procurement documents*

Public bodies often acquire goods and services through a competitive bidding process. These five exemptions assure an even competitive field by making proposals exempt from disclosure until the close of the bidding period.

*4. Information submitted in confidence*

 These two exemptions apply to information provided to public bodies on the understanding that the information will not be disclosed, providing some ability for public bodies to potentially honor that understanding. One applies generally; anyone can take advantage of it provided the requirements are met. The other applies to regulators and law enforcement providing information related to banking and insurance regulation.

*5. Reports of misconduct made to government bodies*

 Eight exemptions provide varying levels of confidentiality for reports to various government bodies or the individuals making those reports. Examples include reports of elder abuse, complaints about health care facilities, and reports of impairment concerning driving ability. Some of these provisions make the report itself confidential (reports by licensees about other licensee misconduct) while others only apply to the identity of the reporter (complaints about health care facilities). There is some overlap with the regulatory investigation exemptions (number 7 on this list) in that many of the exemptions in that category apply both to reports and to the investigatory process that follows.

*6. Test materials*

 Two exemptions from disclosure apply to testing documents. One is generic, the other applies to civil service exams. The generic one applies to the extent that testing would be affected and includes a public interest test; the other does not.

*7. Civil and regulatory investigations*

 Thirteen exemptions in the administrative category provide temporary or otherwise limited confidentiality for civil and regulatory investigations. It is worth noting that about forty similar exemptions, which provide significantly more confidentiality, have been classified as designed to protect private economic affairs. The reasoning behind that preliminary distinction is that, where a limited exemption appears designed to allow a public body space within which to conduct an investigation (a government administrative function), stricter confidentiality regimes appear designed to protect various practitioners from the potential adverse business consequences of publicly disclosing complaints even after the investigation has been complete (a private economic interest). Examples of administrative exemptions in this category apply to the auditors’ investigations of complaints to the waste, fraud and abuse hotline, and investigations of alleged government ethics violations. Even within the subset of these exemptions categorized as administrative there is some inconsistency. For example, while most of these exemptions are temporary, some of them have other limitations. Five of them have public interest tests. One of them is limited to the extent that federal law makes similar federal records confidential.

*8. Legislative process*

 Five provisions make various types of information within the legislative process confidential. These include communications between legislators and legislative counsel, draft measures in the legislative fiscal office and legislative revenue office, and matters designated as confidential that are handled by the legislative natural resources officer.

*9. Dispute resolution and litigation*

 Seven exemptions provide various, but significant, degrees of confidentiality to a number of mediation and mediation-related processes, including communications between parties who are mediating. Two exemptions provide for confidentiality in specific dispute resolution settings: inmate complaints and housing discrimination allegations. The exemption for documents pertaining to litigation, in contrast, is limited to the period while the litigation is ongoing (or anticipated) and is limited by a public interest test.

*10. Accident reports*

 Three exemptions make accident reports required from vehicle owners exempt from disclosure. It is probably worth noting that, to the extent an accident results in a police or other public safety response, the same or very similar information will be available from police reports or other public sources.

*11. Public bodies’ business transactions and records*

 A handful of public bodies that ostensibly compete with private businesses enjoy specific exemptions that appear designed to protect their ability to do so. Examples are workers compensation insurance, a hospital, and the sale of goods and services created by inmate labor. Other examples include public utilities, public investments, and “innovative” partnerships between government and private businesses. All together there are ten exemptions in this category. Some of these are temporary, and some require disclosure if that would serve the public interest, but others are not limited.

*12. Voter pamphlet*

 Two exemptions temporarily protect submissions for inclusion in voter pamphlets prior to the publication of the pamphlets.

*13. Resource protection*

 Four exemptions make information about efforts to protect species, natural resources or archeological artifacts exempt from disclosure. One requires a showing that disclosure would likely result in a taking; the other three include a public interest limitation.

*14. Patient safety data*

 Two exemptions apply to data about patient safety. This is another type of exemption that could arguably be placed in the economic affairs category, depending whether the purpose is described as encouraging the provision of such data or protecting the people who provide it from the potentially adverse business consequences if the data were disclosed. These exemptions also mention types of patient information that could presumably be individually identifiable, though to the extent they do the information would almost certainly be exempt under privacy-related provisions.

*15. Information sharing within or between public bodies*

Five exemptions apply to various communications within or between public bodies. Three are general. The lawyer-client privilege is one, the long-stated purpose of the privilege being to encourage candor with lawyers so that they can advise on compliance with legal requirements. Another protects frank advice within or between agencies, but only if the public interest in favor of such advice clearly outweighs the interests in disclosure. The third general exemption provides that if information is exempt in the hands of one public body, it is exempt when transferred to another public body, so long as the purpose for confidentiality remains. Two specific exemptions protect, respectively, some intergovernmental communication about small businesses and information developed by county multidisciplinary child abuse teams about their compliance with their own standards and protocols.

*16. Correctional institution records*

 A general exemption provides that information is exempt if its disclosure would interfere with the rehabilitation of a person in custody or substantially prejudice or prevent corrections functions. A specific provision allows rules governing the release of information about inmate transfers under the public records law; at this time there is no rule restricting the public disclosure of this information.

*17. Other confidentiality laws*

 A single exemption provides that information is exempt from public disclosure if federal laws or regulations prohibit disclosure. Another provision exempts information that is made confidential or privileged by state law. And a third, discussed earlier, provides confidentiality for executive session minutes and recordings.

 *18. Human resources*

 A generally-applicable exemption provides that information about employee discipline, and the materials supporting such discipline, is exempt from disclosure unless the public interest requires otherwise in the particular circumstances. The other exemption in this category is far more specific and concerns applications, rather than discipline.

1. This report sometimes talks about “votes” and sometimes talks about how many members held a particular opinion. Whenever the report refers to votes, it is possible that there may be some double counting, because some members made multiple designations for some exemptions. But when the report describes the views of members, each member is counted only once – including any statement about unanimity. For example, imagine 3 members felt an exemption should be eliminated, one member felt that it should either be eliminated or combined with similar exemptions, and the fifth member felt the exemption should be retained. This report might state that there were four votes to eliminate the exemption, or that there were five votes to eliminate or change the exemption. But it would not state that five *members* voted to eliminate or change it, or that the subgroup was unanimously of that opinion. [↑](#footnote-ref-1)
2. Mr. Winkels was absent from the meeting in which these recommendations were discussed. [↑](#footnote-ref-2)