

To: Oregon Sunshine Committee Members  
From: Michael Kron, Oregon Sunshine Committee Chair  
Re: Organizing review of exemptions.  
Date: March 7, 2018

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At its inaugural meeting on January 31, 2018, this committee discussed the project of reviewing more than 550 exemptions from public disclosure. Members generally agreed that we need to manage that review by imposing some sort of order. A number of possible approaches were discussed:

- Chronological, considering exemptions in the order they were adopted;
- Categorical, grouping similar exemptions and considering them together; and
- Hierarchical, prioritizing consideration of some exemptions (either those proposed by members or those that are actually found within Chapter 192 of the Oregon Revised Statutes).

In addition, we discussed a hybrid of the last two approaches. That would involve identifying particular exemptions to start with, and simultaneously considering other exemptions that are closely related based on how the exemptions have been categorized.

We agreed that I would outline these options. This is my attempt. For each different approach, I have explained what I expect the approach would entail, and what I consider to be the advantages and disadvantages of the approach. I have also enclosed some spreadsheets that I hope will help illustrate some of these possible approaches.

## **1. Chronological approach.**

### **a. Methodology**

To review the exemptions in chronological order, Sunshine Committee staff would need to first determine when each particular exemption was initially enacted. The committee would then proceed to review exemptions, starting with the exemptions initially enacted when the Public Records Law was first passed in 1973.

### **b. Advantages**

If we assume that older exemptions are more likely to be obsolete than more recently created ones, this approach may allow us to quickly identify candidates that can be eliminated or combined with other exemptions. (It also could provide an interesting time-lapse view of the way the Public Records Law accreted exemptions over the years. Actually, I suspect there are not many people who would call that interesting. So let's say "interesting to me.")

c. Disadvantages

I am skeptical that older exemptions are significantly more likely to be obsolete than more recent ones. If I am right, the main potential advantage I see for this approach would not materialize. The very first exemptions passed include many of the exemptions that are actually written in Chapter 192 with the rest of the Oregon Public Records Law. Many of those are general and still used today.

In addition, it is unlikely that exemptions enacted close together in time cover similar subjects. As a result, the committee could have widely varying subjects under consideration in a single meeting. This could mean a wider spectrum of stakeholders wanting to make their views known at each meeting and may make preparing for the meetings more difficult.

The committee also could end up revisiting similar issues several times. Given the length of this project, that would increase the likelihood of the committee taking inconsistent approaches. Especially since membership is likely to change somewhat over the years.

Finally, simply identifying when each exemption was enacted could consume a fair amount of staff time. Though the dates of legislative enactments are included in the codified Oregon Revised Statutes, this determination can be complicated if a statute was moved from one section to another, or if an exemption that was not included in the original statute was added at some point by amendment. (For example, the exemptions in ORS 192.345 and 192.355 were added at various points, and the notes stating when those statutes were amended do not explain which section was added or changed at what time.) Some chronology errors would not be the end of the world, but trying to get it right would take some effort.

## 2. Categorical Approach

a. Methodology

Under this approach, the committee would do one of three things:

- a. Assign each exemption a category describing the purpose of the exemption;
- b. Direct committee staff, or a subcommittee, to assign each exemption a category; or
- c. Borrow the categorization work that was already undertaken by the Attorney General's Public Records Law Reform Task Force and build on that.

Exemptions within a particular category could then be reviewed together.

The task force grouped exemptions into four large categories:

- Exemptions for personal privacy and safety;
- Exemptions for public safety and law enforcement;
- Exemptions for nongovernmental financial information; and
- Exemptions to facilitate the administration of government.

The exemptions were then further subdivided within each category. I have enclosed a spreadsheet showing the exemptions in the nongovernment financial information category to illustrate the way exemptions might be grouped together under this approach. (Similar spreadsheets for the other categories are available online. I would be happy to provide a link to anyone who is interested.)

b. Advantages

Grouping exemptions into categories would allow the committee to consider similar exemptions more or less simultaneously. As a result it would be easier to identify inconsistencies and opportunities to consolidate exemptions. Preparing for meetings should entail a narrower range of materials. And some interested stakeholders may be able to provide their input once instead of multiple times. In addition, the risk that the committee might take inconsistent approaches would be minimized.

c. Disadvantages

Categorization of more than 550 exemptions will sometimes be imprecise. People may disagree about the purpose of a particular exemption. For example, I view the exemption for police body camera footage as intended to protect privacy. But it could plausibly be understood as a law enforcement exemption. And while temporary exemptions to protect ongoing audits and other non-criminal investigations seem to be designed to facilitate efficient government administration, permanent exemptions that apply to some licensing board investigations seem designed to protect the financial interests of licensees, avoiding disclosures that could encourage consumers to seek services from different providers. Because categorization will be inherently imprecise, similar-seeming subjects will not always be addressed together.

Even if we rely heavily on the work done by the task force, the committee, staff or subcommittee will probably need to devote some time to making sure that exemptions are categorized in a way that meets this committee's expectations. It is also important to be aware that some categories may contain so many exemptions that addressing them all in a single meeting will be impossible. Finally, merely sorting exemptions into categories will not help us decide where to begin, or how to proceed.

### **3. Hierarchical Approach**

a. Methodology

As discussed in our meeting, this approach might allow members to nominate particular exemptions, which would then be considered by the committee. We also discussed using ORS Chapter 192 to establish a hierarchy; that would entail starting with the exemptions that are actually codified within the Oregon Public Records Law before moving on to exemptions scattered throughout the statute books. Another basis for identifying a hierarchy of exemptions might be to use the data in the Attorney General's electronic exemption catalog showing which exemptions have been the subject of appellate opinions and significant Attorney General orders; we could start with the ones that have been interpreted the most frequently and move on from

there. I have enclosed a spreadsheet showing which exemptions have been the most common subjects of appellate opinions and AG orders, based on the data currently in the catalog.

b. Advantages

This committee includes a number of people with extensive experience on both sides of the public records law. Thus, a hierarchy based on member input could help us focus on relatively significant exemptions. Using the data in the Attorney General's catalog would accomplish basically the same thing, without relying on member input. Using both methods would give both advantages. The data in the AG catalog suggests that Chapter 192 exemptions are often disputed, so starting with those would capture some of the benefit of allowing members to choose exemptions.

Another advantage of a hierarchical approach is that the committee, staff or subcommittee would not need to expend any effort categorizing exemptions or assembling them chronologically. But not doing that sort of preparatory work will result in some disadvantages too.

c. Disadvantages

By itself, this approach is unlikely to result in the comprehensive review the committee is required to perform, since not every exemption is going to fall within any hierarchy we might devise. We might be with an odd assortment of exemptions to consider at the end. This approach could also suffer some disadvantages of the chronological approach, because the exemptions identified for review may have little to do with one another. Again, that could mean less focused meetings, potentially larger groups of stakeholders looking to provide input, and potentially more complicated preparation for meetings because the committee might be discussing multiple subjects with little or no relation to one another.

#### **4. Hybrid Approaches**

a. Methodology

As the name suggests, the idea here would be to combine two of the other approaches discussed above. So, to combine the hierarchical approach with the categorical approach, we would first decide on one or more hierarchies – for example, starting with the exemptions that are actually found in ORS Chapter 192. The committee (perhaps by delegation to staff or a subcommittee) would then identify related exemptions that would be considered at the same time. I have enclosed, as an example, a spreadsheet showing security-related exemptions, from within ORS Chapter 192 and from outside of it, that could be considered together under this approach. The chronological approach could also be paired with the categorical approach. That would keep a chronological approach as the basic organizing principle, but depart from chronology to insure that related exemptions are considered together to the extent possible.

Combining the hierarchical and chronological approaches is theoretically possible, but I do not think it would make sense.

b. Advantages

These approaches would combine many of the advantages of the categorical approach with the advantages of whichever other approach we also choose. For example, we might have members identify the exemptions we want to start with, and then simultaneously consider exemptions in the same category. Thus we would be addressing exemptions that members think are important without missing exemptions on related subjects.

c. Disadvantages

Categorization is still going to be imprecise, so all of the issues related to that will apply here as well. In fact they may be exacerbated somewhat, since we might do an early review of some exemptions within a broad category while others in that category might wait quite a while for their turn to come up. And, at least in some versions of this approach, it is possible that we would have a few “straggler” exemptions – exemptions that are neither selected for review nor closely related to exemptions that are selected for review. That is not a major problem, however. Stragglers should not be as common as under a purely hierarchical approach, and they could easily be swept up at the end of the process.