

To: Oregon Sunshine Committee Members  
From: Michael Kron, Oregon Sunshine Committee Chair  
Re: Proposed criteria for exemption review.  
Date: April 20, 2018

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When the exemption is read in context, is it apparent what information it is seeking to protect?

Is the reason for the exemption apparent? Do you think Oregonians would generally agree that this information should not be disclosed to the public?

Is the exemption actually serving the interest it means to serve?

Does the exemption protect too much information? Too little information? The wrong information?

Is the exemption redundant?

Some exemptions do not apply if disclosure would serve the public interest under the specific circumstances of the request. Does this exemption include such a public interest balancing test? If not, should it? If so, does the balancing test seem appropriate?

By default, exemptions expire after 25 years. Does this exemption include a specific expiration period? If not, are there good reasons for the information to remain exempt for at least 25 years?

Does this exemption treat information in a manner that is consistent with how state law treats similar information in other contexts? If not, are there good reasons for the different treatment?

Most exemptions allow public bodies to withhold records, but allow disclosure, while some exemptions require confidentiality. If this exemption does not allow disclosure, is there a good reason for that?

# Maine Revised Statutes

## Title 1: GENERAL PROVISIONS

### Chapter 13: PUBLIC RECORDS AND PROCEEDINGS

#### Subchapter 1-A: PUBLIC RECORDS EXCEPTIONS AND ACCESSIBILITY

#### **§434. Review of proposed exceptions to public records; accessibility of public records**

**1. Procedures before legislative committees.** Whenever a legislative measure containing a new public records exception is proposed or a change that affects the accessibility of a public record is proposed, the joint standing committee of the Legislature having jurisdiction over the proposal shall hold a public hearing and determine the level of support for the proposal among the members of the committee. If there is support for the proposal among a majority of the members of the committee, the committee shall request the review committee to review and evaluate the proposal pursuant to subsection 2 and to report back to the committee of jurisdiction. A proposed exception or proposed change that affects the accessibility of a public record may not be enacted into law unless review and evaluation pursuant to subsections 2 and 2-B have been completed.

[ 2011, c. 320, Pt. D, §3 (AMD) .]

**2. Review and evaluation.** Upon referral of a proposed public records exception from the joint standing committee of the Legislature having jurisdiction over the proposal, the review committee shall conduct a review and evaluation of the proposal and shall report in a timely manner to the committee to which the proposal was referred. The review committee shall use the following criteria to determine whether the proposed exception should be enacted:

- A. Whether a record protected by the proposed exception needs to be collected and maintained; [2003, c. 709, §3 (NEW) .]
- B. The value to the agency or official or to the public in maintaining a record protected by the proposed exception; [2003, c. 709, §3 (NEW) .]
- C. Whether federal law requires a record covered by the proposed exception to be confidential; [2003, c. 709, §3 (NEW) .]
- D. Whether the proposed exception protects an individual's privacy interest and, if so, whether that interest substantially outweighs the public interest in the disclosure of records; [2003, c. 709, §3 (NEW) .]
- E. Whether public disclosure puts a business at a competitive disadvantage and, if so, whether that business's interest substantially outweighs the public interest in the disclosure of records; [2003, c. 709, §3 (NEW) .]

F. Whether public disclosure compromises the position of a public body in negotiations and, if so, whether that public body's interest substantially outweighs the public interest in the disclosure of records; [2003, c. 709, §3 (NEW).]

G. Whether public disclosure jeopardizes the safety of a member of the public or the public in general and, if so, whether that safety interest substantially outweighs the public interest in the disclosure of records; [2003, c. 709, §3 (NEW).]

H. Whether the proposed exception is as narrowly tailored as possible; and [2003, c. 709, §3 (NEW).]

I. Any other criteria that assist the review committee in determining the value of the proposed exception as compared to the public's interest in the record protected by the proposed exception. [2003, c. 709, §3 (NEW).]

[ 2003, c. 709, §3 (NEW) .]

**2-A. Accountability review of agency or official.** In evaluating each proposed public records exception, the review committee shall, in addition to applying the criteria of subsection 2, determine whether there is a publicly accountable entity that has authority to review the agency or official that collects, maintains or uses the record subject to the exception in order to ensure that information collection, maintenance and use are consistent with the purpose of the exception and that public access to public records is not hindered.

[ 2005, c. 631, §6 (NEW) .]

**2-B. Accessibility of public records.** In reviewing and evaluating whether a proposal may affect the accessibility of a public record, the review committee may consider any factors that affect the accessibility of public records, including but not limited to fees, request procedures and timeliness of responses.

[ 2011, c. 320, Pt. D, §3 (NEW) .]

**3. Report.** The review committee shall report its findings and recommendations on whether the proposed exception or proposed limitation on accessibility should be enacted to the joint standing committee of the Legislature having jurisdiction over the proposal.

[ 2011, c. 320, Pt. D, §3 (AMD) .]

#### SECTION HISTORY

2003, c. 709, §3 (NEW). 2005, c. 631, §6 (AMD). 2011, c. 320, Pt. D, §3 (AMD).

The Revisor's Office cannot provide legal advice or interpretation of Maine law to the public.

If you need legal advice, please consult a qualified attorney.

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Page composed on 11/03/2017 01:22:09.

**FOIA RECORD Exemptions:  
Criteria for measuring "appropriateness" of any  
exemption.**

Exemption under consideration:

- Relating to:  
\_\_\_\_\_
- Code Section(s) and subdivision  
reference: \_\_\_\_\_  
\_\_\_\_\_
- Date reviewed; action recommended by  
subcommittee: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- Action by FOIA Council;  
date: \_\_\_\_\_

1. Policy basis for exemption: ((i) public good--protection of (a) the public purse or (b) the public bargaining, negotiating, litigating position; (ii) attorney/client or other privilege recognized by law; (iii) protection of privacy interest--personal identifying information, financial information, health information; or (iv) protection of trade secrets, intellectual property or other proprietary interest--
  - Does original rationale for the language still stand or has it weakened or disappeared since the language was enacted?

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2. Application of the narrow construction rule found in FOIA at § 2.2-3700--

- Is the language easy to understand and apply or does it create gray areas of interpretation that invite disagreements?
- Is language consistent with other provisions of FOIA or does the imprecise use of words/phrases generate ambiguities?
- Is language necessary in light of other provisions of the Code of VA?

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3. Need to update and/or clarify nomenclature/technology terms--

- Is the language redundant or repeat concepts already expressed in FOIA?

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4. Impact of VA Supreme Court decisions and/or opinions of the Attorney General and/or the FOIA Council that interpret this exemption--

- Should current language be changed to reflect these decisions/opinion?

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5. Legislative history and intent, to the extent available.

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6. Need to review comparable provisions in other states' FOIA laws; if so, do other states' statutes improve or provide needed clarity?

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7. Staff recommendations, if any.

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8. Notes.

July 8, 2014 Meeting:

Abbreviations:

c. or cc.	chapter(s) of Acts of Assembly
'EE	Employee
'ER	Employer
K	Contract
NIR	No Issue Raised
N/C	No Comments
Pbod	Public Body
Prec	Public Record
Rec	Recommendation
TBC	To Be Continued
VACO	VA Association of Counties
VCOG	VA Coalition for Open Government
VML	VA Municipal League
VPA	VA Press Association

Subcommittee member and staff name abbreviations:

RT	Robert (Bob) Tavenner
CA	Chris Ashby
SH	Stephanie Hamlett
EJ	Ed Jones
TO	Tim Oksman
ME	Maria Everett, staff
AG	Alan Gernhardt, staff

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## CRITERIA FOR REVIEWING SELECTED EXEMPTIONS

*Approved at November 6, 2007 Committee meeting*

- 1) Is the exemption narrowly crafted?
  - a) The Public Records Act mandates disclosure unless the records fall within specific exemptions which “exempts or prohibits disclosure of specific information or records.” RCW 42.56.070.
  - b) Exemptions are construed narrowly. RCW 42.56.030.
- 2) Is the exemption of information or records implied?
  - a) Agencies and parties may only rely on exemptions that are expressly authorized by statutory or constitutional provisions. RCW 42.56.070.
- 3) Is the exemption codified under RCW 42.56?
  - a) If not, is there a conflict between the mandate of disclosure under RCW 42.56, and the required non-disclosure of specific information or records under the other statute?
  - b) Should the exemption be re-codified or amended to specifically reference RCW 42.56?
- 4) Is the exemption mandatory?
  - a) Agencies are required to exercise discretion and redact specific information. RCW 42.56.070; RCW 42.56.210. “[T]he exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought.” RCW 42.56.210.
  - b) Should the exemption identify a specific vital government interest? The Legislature’s “choice of the word ‘vital’ must be given due respect.” AGLO 1976 No. 47.
  - c) Should the exemption be amended to allow the agency discretion to redact certain information?
- 5) Could the exemption include statistical information?
  - a) No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons. RCW 42.56.210.
- 6) Is the application of the exemption time-limited? If not, can it be time limited?
- 7) Can the exemption be clarified?



- 8) Does the exemption continue to be necessary given the passage of time and changes in government or policy interests?
- 9) Does withholding or release of the record put an individual's safety at risk?
- 10) Does the withholding or release of the record put an individual's or organization's privacy at risk?
  - a) "Invasion of privacy" is defined in the Public Records Act as where disclosure of information about a person would be (1) highly offensive to a reasonable person; and (2) is not of legitimate concern to the public. RCW 42.56.050.
  - b) It is not enough that disclosure of such personal information "may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3).
  - c) "[T]he use of a test that balances the individual's privacy interest against the interest of the public in disclosure is not permitted." *Dawson v. Daly*, 120 Wn.2d 782, 795 (1993) (citing *Brouillet v. Cowles Publ'g Co.*, 114 Wn2d 788, 798 (1990)).
  - d) There is no general exemption just for "privacy" under RCW 42.56. The Public Records Act does "not create any right of privacy beyond those rights that are specified in this chapter as express exemptions". RCW 42.56.050.
  - e) There are five sections in RCW 42.56 that specifically reference "privacy". RCW 42.56.050; .070; .210; .230; .240.
- 11) Does the withholding or release of the record put an individual's or organization's financial interest at risk?
- 12) Does the withholding or release of the record put safety of the general public at risk?
- 13) Does the withholding or release of the record promote a vital government interest/function?
- 14) Is there doubt about an exemption's applicability to specific information?
  - a) Where there is reasonable doubt regarding the applicability of an exemption to specific records or information, disclosure should be required.
  - b) No public agencies or officials "shall be liable, nor shall a cause of action exist, for any loss or damage" for disclosure of public records based upon a "good faith" effort to comply with the Public Records Act. RCW 42.56.060.
- 15) How does the exemption affect government accountability?
- 16) Is the withholding or release of the record directed by federal law or state constitution?