

To: Oregon Sunshine Committee Members
From: Michael Kron, Oregon Sunshine Committee Chair
Re: Draft of report to Legislative Assembly due July 2018.
Date: April 20, 2018

Introduction

The Oregon Sunshine Committee is pleased to submit this inaugural report to the Legislative Assembly as required by ORS 192.511(3)(e). The laws creating the Sunshine Committee charge it with a review of the hundreds of exemptions from public disclosure requirements that are found throughout the Oregon Revised Statutes. The law also broadly charges the Sunshine Committee to “[s]tudy and identify any inefficiencies and inconsistencies in the application of public records laws that impede transparency in public process and government” and to “[m]ake recommendations on changes in existing law, policy and practice to enhance transparency and facilitate rapid fulfillment of public records requests made to public bodies.” ORS 192.511(3)(c) and (d).

The Sunshine Committee has held three meetings, and has just begun the substantive work required of it. This report will focus on the composition of the committee and the groundwork that has been done to facilitate the immense project of reviewing hundreds of exemptions from public disclosure requirements.

Composition of the Oregon Sunshine Committee

ORS 192.511(1) specifies the composition of the Oregon Sunshine Committee. Four legislators serve as ex-officio members. By law, they are the members of the subcommittee of the Legislative Counsel Committee that is described in ORS 192.499. Those legislators are:

- Senator Brian Boquist of Dallas;
- Senator Floyd Prozanski of Eugene;
- Representative Karin Power of Milwaukee;
- Representative Carl Wilson of Grants Pass.

In addition to these distinguished members, the Attorney General, Governor and Secretary of State are represented:

- Mary Beth Herkert, State Archivist, Office of Secretary of State Dennis Richardson;
- Michael Kron, Special Counsel, Office of Attorney General Ellen Rosenblum;
- Emily Matasar, Government Accountability Attorney, Office of Governor Kate Brown.

The remaining eight members were appointed by Attorney General Rosenblum to represent specific interests identified in statute:

- A person with information technology expertise: Selena Deckelmann, Director of Engineering, Mozilla Firefox;
- Three representatives of local government to represent the interests of counties, cities, school districts and special districts:
 - Eileen Eakins, Law Office of Eileen Eakins, LLC;
 - Karin Johnson, Independence City Recorder;
 - Morgan Smith, Polk County Counsel;
- A representative of broadcasters: Adrienne Roark, Vice-President and General Manager, KPTV Fox 12;
- A representative of professional journalists: Brent Walth, Journalism Professor, University of Oregon;
- A representative of newspaper publishers: Christian Wihtol, Senior Editor, Register Guard;
- A representative from a nonprofit open government or public interest group: Charlie Fisher, OSPIRG State Director.

Mr. Kron was elected to serve as Chair of the Sunshine Committee, and Ms. Matasar was elected Vice Chair. Staff support includes Cameron Miles of the Office of Legislative Counsel, and Oregon Department of Justice Public Records Counsel Andy Foltz.

Meetings to Date

The Sunshine Committee has held three meetings so far, in January, March and May of this year.

At the January meeting, Attorney General Rosenblum welcomed the members and made introductory remarks. Members introduced themselves and discussed the statutory role of the Sunshine Committee, focusing on the need to establish a coherent methodology for reviewing more than 500 statutory exemptions. The Sunshine Committee also took care of some basic

administration, selecting Mr. Kron to chair the group and adopting parliamentary rules to govern its proceedings.

At its March meeting, the Sunshine Committee considered a report from Chair Kron outlining various possible approaches for structuring the review of exemptions. After discussion, the Sunshine Committee decided on a categorical approach to this task. That approach, and the reasoning behind the Sunshine Committee's decision, is discussed in detail later in this report. In summary, discussing exemptions by category should make it easier to identify inconsistent or redundant exemptions. It should also make it easier for easier and more convenient for members to prepare for meetings and for outside stakeholder to present their views to the Sunshine Committee. At its March meeting, the Sunshine Committee also decided that it would prioritize review based on available information about which exemptions have generated the most appellate court decisions and Attorney General Public Records Orders. In addition, the Sunshine Committee discussed the need for general criteria to evaluate exemptions, and agreed that it would take testimony – orally, to the extent possible – from stakeholders interested in the exemptions being considered.

[Describe May meeting.]

Exemption Review: Methodology and Schedule

As mentioned above, the Sunshine Committee has adopted a categorical approach to exemption review. Under this method, exemptions are grouped into categories – and subcategories – which will then be reviewed together as a group. To assist in the categorizing effort, the Sunshine Committee has adopted work done by the Attorney General's Public Records Law Reform Task Force to group similar exemptions. The Sunshine Committee members remain free to re-categorize exemptions. But for now, the categorization of exemptions is as follows:

- Administration of Government Exemptions
 - Computer Programs
 - Civil Prosecuting Attorney Material
 - Competitive Procurement

Confidential Submissions
Reports to Public Bodies
Test Materials
Civil and Regulatory Investigations
Legislative Process
Dispute Regulation and Litigation
Accident Reports
Business Transactions
Voter Pamphlet Material
Natural Resource/Species Protection
Archeological Information
Patient Safety Data Obtained by Government
Information Sharing
Correctional Institutions
Requirements of Other Laws
Human Resources

Public Safety and Law Enforcement Exemptions

Security
Undercover Law Enforcement
Intercepted Communications
Criminal Investigatory Information

Personal Privacy and Safety Exemptions

Background Check Records
Contact Information
Offender Information
Decedent/Survivor Information
Disability Information
Education Records
Family Law
Financial Information
Health
Interpreter Information
Juvenile
Mental Health
Miscellaneous

Economic Affairs Exemptions

Agriculture Industry
Tax Records
Contractors with Public Bodies
Energy Industry
Export Industry
Finance Industry
General Business

Health Industry
Insurance Industry
Licensed Professions
Resource Extraction
Subsidies
Telecommunications
Waste Management
Miscellaneous

To make its way through this material, the Sunshine Committee will be guided by a combination of (1) available data concerning the extent to which various exemptions have generated disputes between requesters and public bodies and (2) the expertise of Sunshine Committee members. Specifically, the Sunshine Committee delegated to Chair Kron the task of determining which categories and subcategories include the greatest number exemptions that have been the subject of appellate review and Attorney General orders. This information is culled from the electronic catalog of public records exemptions created by the Attorney General pursuant to ORS 192.340. At its May meeting, the Sunshine Committee began its substantive review of exemptions with consideration of 12 exemptions concerning addresses, phone numbers, and other contact information.

As currently planned, the Sunshine Committee will take the categories in this order:

- Personal Privacy and Safety Exemptions
- Administration of Government Exemptions
- Economic Affairs Exemptions
- Public Safety and Law Enforcement Exemptions

Sunshine Committee members may propose specific exemptions to take out of order. If suggestions are accepted, then other related exemptions will also be moved out of order, helping to insure that similar exemptions in a particular category will still be considered together.

Criteria for Review

In considering the numerous exemptions, Sunshine Committee members agree that uniform criteria will be helpful to insure consistent review and provide a framework for discussion. This is consistent with what similar groups have done in other states. In keeping with

the statutory charge of the group, the Sunshine Committee adopted the following guideposts for its review of exemptions:

- 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?

If necessary, these will be adjusted as the work of the Oregon Sunshine Committee proceeds.

Other Work

In addition to its exemption review work, the Sunshine Committee has discussed its charge to make recommendations for improving government transparency. Given the scope of the exemption review project, and the fact that the 2017 legislature separately created the Public Records Advisory Council with duties similar to the Sunshine Committee's broader responsibilities, it seems likely that the Sunshine Committee will need to focus on its large project – at least until members are comfortable that the exemption review is adequately under

way. Nevertheless, members are very interested in broader Public Records Law issues. Consequently, the Sunshine Committee intends to stay apprised of the work of the Public Records Advisory, and will coordinate with that body as appropriate. In addition, Sunshine Committee members can ask the chair to add items other than exemption review to meeting agendas. But, for the time being, the Legislative Assembly should expect this Committee's work and reports to focus primarily on exemption review.

Conclusion

The Oregon Sunshine Committee has embarked on a large project to improve a very important tool for assuring public access to information about the activities of state and local government. Members look forward to making recommendations to the Legislative Assembly for improving government transparency in Oregon, while also making the Oregon Public Records Law easier to administer. The Sunshine Committee believes that its efforts in its first three meetings have created a solid foundation for the significant work to come.