

To: Oregon Sunshine Committee Members
From: Michael Kron, Oregon Sunshine Committee Chair
Re: Proposed exemption review criteria
Date: May 8, 2018

This memo annotates the draft criteria for exemption review circulated in April. The goal is to explain why certain questions were proposed, and what sorts of considerations I intended to capture. It will also discuss why a number of questions that other states have adopted are not included in the proposed criteria.

Annotated Discussion of Proposed Questions

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

Clarity not only makes it easier for public bodies to correctly apply the law, but also reduces the chance of conflict over exemption claims. Depending on the context of the exemption, there are various ways an exemption might communicate clearly. If the exemption relates to highly specific laws, the relevant terms may or may not be adequately defined. If the exemption is a general one, the more guidance the language of the exemption provides, the easier it will be to understand what is exempt from disclosure. Some statutes may suggest that information should be exempt from public disclosure, but fail to say so explicitly. And there may be cases where clarity can be improved by amending exemptions to better reflect the ways courts interpret them.

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

Members may have different opinions about whether particular exemptions are a good idea. The committee collectively may decide that some exemptions reflect bad public policy, or that exemptions are obsolete. Even if the exemption seems to make sense as a policy matter, making sure that the reason for the exemption is clear will help ensure that public bodies apply exemptions correctly. When requests are denied, it will help requesters understand the reasoning behind the denial. Fundamentally, the policy questions implicated by public records exemptions are about balancing the value of an open and accountable government against interests like personal privacy and public safety.

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

Sometimes exemptions miss the mark. For example, the Attorney General's Public Records and Meetings Manual explains that the legislature was focused on the issue of using the public records law to obtain email lists when it enacted the exemption for email addresses in

ORS 192.355 focused on. As written, a public body could understand the exemption to justify redacting most email addresses from every single piece of email correspondence. This unintended application would make disclosing emails time-consuming and costly.

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

Even if an exemption is serving the intended interest, it is still worth asking whether it is doing that efficiently. For example, an exemption that appears intended to allow a public body to conduct an investigation without disclosing its evidence as it goes might continue to unnecessarily protect information after the matter has concluded. An exemption intended to mirror federal confidentiality laws might actually protect more information than federal law requires. Or an exemption designed to protect personal privacy might inadvertently protect aggregated statistical information.

Is the exemption redundant?

Oregon law has many exemptions that apply to information that seems very similar. In those cases, are all of the exemptions actually needed, or do they overlap? Redundant exemptions can only confuse matters, potentially making it far more difficult to understand what information is and isn't protected. Because we will generally be considering similar exemptions together, redundancy will hopefully be relatively easy to identify, especially with the context that staff memos will endeavor to provide. However, categorizing exemptions is not an exact science, so members will want to think about prior work as well as the exemptions currently being considered.

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?

All of the exemptions in ORS 192.345 apply “unless the public interest requires disclosure in the particular instance.” Several exemptions in ORS 192.355 have specific public interest standards that may sometimes require disclosure. All of these provisions reflect a legislative judgment that there is a category of public information that must be disclosed sometimes, but not always. This approach ensures that the public has access to information when something significant may be at stake. But assessing the public interest can be controversial and difficult for public bodies. The identity of the requester and the purpose of the request may be relevant to the public interest question, but introducing those considerations can create opportunities for bad decisions. And it might even be fair to wonder why information that must be disclosed sometimes shouldn't just be disclosed routinely. All of these considerations – along with the nature of the information that the exemption relates to – warrant the committee's attention as it weighs whether an exemption appropriately balances the public interest.

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?

Some public records exemptions build in a specific expiration, recognizing that the reasons for withholding information may diminish over time. For example, the exemption for public records prepared in connection with likely litigation expires when the litigation is over or no longer likely to occur. ORS 192.345(1). And many exemptions that apply to various types of investigatory processes – such as audits – expire once the investigation is over. The courts have also interpreted the criminal investigatory exemption, which applies unless the public interest requires disclosure, to generally expire when the criminal matter is resolved. But generally, unless an exemption says something specific about its expiry, it will apply 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?

This is another area where categorizing exemptions, and providing context through staff memos, should be extremely helpful. When similar information is treated differently in different contexts, it is easy to create confusion. Requesters may not understand why information available from one government agency is not available from another. And public employees may have a difficult time keeping track of seemingly arbitrary distinctions. These difficulties may nevertheless be justified in some circumstances. But even if that is the case, requesters and custodians will have an easier time understanding the rules when reasons for different treatment are explained or obvious.

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?

Even if an exemption does not have a public interest test built into it, many public records exemptions are not mandatory. Public bodies can choose to disclose information that is merely exempt from disclosure. When a law requires confidentiality, however, the custodian of the record does not have that flexibility. There are undoubtedly good reasons for some confidentiality requirements. But it is worth asking whether the policies at stakes justify requiring public bodies to refuse requests.

Comparison to Other States' Criteria

A number of questions asked by other states are not included in the criteria I have proposed. I want to briefly explain why I made some of those decisions.

Each of the other states asks questions that refer to specific policy goals. I did not do so, partly because of the difficulties I experienced with the Attorney General's Public Records Law Reform Task force in attempting to articulate policy goals with that degree of specificity. And it is hard to be confident that such a list could be complete. Instead, I proposed more generic questions about policy – basically, whether the policy is discernable, whether it makes sense, and whether it is being effectively served. Members certainly should be assessing the policy justification for exemptions, and the proposed questions encourage that.

The criteria adopted by Maine and Washington ask whether federal law requires the particular information to be exempt from disclosure. I have not proposed that question here, because Oregon has a single exemption that applies to any information “the disclosure of which is prohibited by federal law or regulations.” ORS 192.355(8). In light of this exemption, it is difficult to see how any other exemption would be required by federal law. On the other hand, there may be cases where federal law requires limited confidentiality but Oregon law makes a broader amount of information exempt. That is certainly something that we would want to know, but I believe it is adequately covered by the proposed question about whether the exemption protects too much information.

Maine’s criteria also asks questions about whether public bodies should be collecting the exempt information in the first place. That is undoubtedly a worthwhile question, but reviewing public bodies’ information collection practices is outside of the scope of our already large task.

The criteria adopted by Virginia ask whether language should be changed or clarified in light of court opinion. This is another good question, but I omitted it on the theory that the question about clarity should cover it. If the exemption has been interpreted in a manner that may not be obvious from the text, the staff memo should identify that fact. In that context, the question about whether those interpretations warrant a change to the statutory language seem like questions about clarity. Virginia also offers a question about consistency with other states’ laws. Given the scope of our existing project, I was reluctant to add this inquiry. But I expect that, when this issue is relevant, stakeholders will call our attention to it. In any event, this question is ultimately about policy.

Washington’s criteria include a question about whether an exemption is implicit, noting that Washington law requires explicit exemptions. Oregon law has a similar requirement, and I believe this is a worthwhile question, but fundamentally it is a question about whether the law is sufficiently clear. So is the Washington question asking if there could be doubts about whether the exemption applies to specific information. I did not include separate questions about these subjects. Washington also asks whether an exemption could protect statistical exemption. Again, this is a useful inquiry. But I felt that it was adequately covered by asking whether the exemption protects too much information or the wrong information. Washington’s question about whether the reasons for the exemption still exist seem to overlap with proposed questions about policy justifications for exemptions, as does the question about government accountability.