

Oregon Sunshine Committee Meeting Minutes
July 18, 2018

Location: Oregon State Capitol, Room 343

Sunshine Committee Members
<p>Oregon State Senator Brian Boquist (excused) Selena Deckelmann, Director of Engineering, Mozilla Firefox (by phone) Eileen Eakins, Law Office of Eileen Eakins, LLC (by phone) Charlie Fisher, OSPIRG State Director Mary Beth Herkert, Oregon State Archivist Karin Johnson, Independence City Recorder Michael Kron, Special Counsel, Oregon Department of Justice Emily Matasar, Government Accountability Attorney, Governor's Office Oregon State Representative Karin Power (excused; Richa Poudyal attended on behalf) Oregon State Senator Floyd Prozanski (excused) Adrienne Roark, Vice-President and General Manager, KPTV Fox 12 (excused) Morgan Smith, Polk County Counsel Brent Walth, Journalism Professor, University of Oregon Oregon State Representative Carl Wilson (excused) Bennett Hall, Newspaper Publishers Association</p>
Guests
<p>Andy Foltz, by phone Nick Budnick Ginger McCall Graham Derringer Zakir Khan Will Tatum</p>
Agenda
VIDEO STREAM 0:00 –
<p>Welcome and Introductions</p> <p>Chair Kron suggested that guests and members introduce themselves. He introduced Bennett Hall, Special Projects Editor at the Corvallis Gazette Times, who is replacing Christian Wihtol as the representative of newspaper publishers.</p>
<p>First agenda item: May 16, 2018 Draft Minutes</p> <p>Chair Kron proceeded to first agenda item. Ms. Deckelmann pointed out that the header was missing. There were some typos and a misattributed quote. Chair Kron will correct. No other comments on the minutes. On motion and second the committee unanimously approved the minutes edited to correct typos, misattributed quote, and add the header.</p>
<p>Second agenda item: Continuation of Discussion Regarding Criteria for Exemption Review</p> <p>Mr. Walth circulated proposed additions to the criteria and discussed the additions. He wanted to ensure the committee was framing their questions correctly and proposed slightly different</p>

wording.

Chair **Kron** had no objection to reframing the question. He discussed concerns he had about the four questions at the beginning of Mr. **Walth's** email and reiterated his concern that the answer to those questions would always be yes.

Chair **Kron** suggested four new criteria questions. Mr. **Walth** pointed out that the new questions take into consideration government accountability when the previous questions didn't.

Ms. **Matasar**, Ms. **Deckelmann**, and Mr. **Hall** agreed with the importance of government accountability and supported Chair **Kron's** proposed questions. Mr. **Hall** stated that as the committee got more in depth with the exemption and found the framework wasn't working as needed, the criteria could be revisited. Mr. **Smith** agreed.

Chair **Kron** read them to the committee:

1. Why should this information be kept from the public? What public policy interests are served?
2. What interests suffer if this information is not available to the public? To what extent does it hinder government accountability?
3. Is the exemption appropriately written in light of the above? Does it adequately balance the relevant interests?
4. If there are multiple exemptions, do there need to be? Are the various exemptions written in a way that captures the relevant differences?

Ms. **Deckelmann** suggested the committee create a template summarizing the exemption with the criteria in mind. Chair **Kron** agreed. Mr. **Foltz** could incorporate that information into the materials he was preparing.

On motion and second the committee unanimously approved the criteria proposed by Chair **Kron**

Third agenda item: Exemptions Discussed During Public Testimony

Chair **Kron** circulated a proposal to the committee members with Ms. **Eakins** proposed additions. The proposal was intended to create an exemption for personal contact information that provided the same treatment to everyone, but that could be overruled if there was legitimate public interest and particular purpose for the request. Ms. **Eakins** felt public employees should be treated the same as private employees. He encouraged discussion of the proposal.

Ms. **Herkert** suggested that before making a blanket proposal, the committee should take into consideration whether each personal privacy exemptions contained the same information or if they were significantly different and gave her reasoning behind her suggestion. Chair **Kron** opined it would be disaster if the committee wanted to agree on specific language. He envisioned that the members would agree on policy recommendations. Ms. **Herkert** agreed and clarified her suggestion.

Chair **Kron** asked whether the committee favored separate recommendations for phone numbers, addresses and email addresses.

Mr. **Smith** asked for clarification of whether the committee was talking about personal contact information or information of a personal nature. Chair **Kron** stated that the goal was for the committee to look at the exemptions only in terms of personal contact information so a policy recommendation could be made. Mr. **Smith** thought the committee could agree on one personal contact information exemption and explained why. Chair **Kron** agreed, but expressed concern of policy implications.

Mr. **Smith** felt discretion should be left with the individual agency or public entity in possession of the records, assuming they were not completely abandoning the concept of the balancing test already in the public records law. This would allow for flexibility.

Ms. **Herkert** talked about the default expiry period of exemptions that her agency comes across and the problems they run into. An individual's address from 75 years ago shouldn't matter because they are most likely not at that address any longer. Ms. **Herkert** opined that very little information in historical records should be exempt from disclosure.

Ms. **Matasar** agreed and asked Ms. **Herkert** her recommendation on how to discuss expiry periods from a historical perspective. Ms. **Herkert** said the committee should look to see if it has a valid time frame and decide if the intent for the time frame is still a valid concern.

Chair **Kron** wondered if the public records advisory might be a better place to discuss the expiry of exemptions. Ms. **McCall** said there was already a general 25 year limit on use of exemptions with the exception of four specific kinds of records and suggested preserving that law as it was. Ms. **Herkert** agreed. The committee briefly discussed expiry periods for exemptions.

Noting that communications methods change over time, Ms. **Deckelmann** thought it might be helpful to recommend enumerating the different kinds of personal contact information in statute. Instead of creating a separate rule with each, new types of contact information should just be added to the list.

Chair **Kron** stated that if the committee recommended enumerating different types of contact information it would give them the opportunity to think about whether they all should be treated the same. Discussion occurred on different types of contact information and how some information was already available online, such as property records. Ms. **McCall** argued that exemptions nevertheless create practical security, as a single records request is simpler than searching property records in many counties.

Ms. **Eakins** expressed concern about requests made with the intent to harass; if information is freely available the problem would only worsen. She agreed with delineating types of contact information, but would err on the side of exempting anything that is not directly related to the public employee's employment unless there is a compelling public policy reason to disclose it.

Chair **Kron** opened the discussion to the journalist and public interest members to get their opinion in terms of the tension between legitimate need for the information versus the desire to protect it as a default rule when there is not a legitimate need.

Mr. **Hall** agreed that public records law could be abused by individuals for purposes of harassment or to send out spam or to try to scam innocent citizens, but countered that it is important for journalist to occasionally reach out to public employees. He gave examples from his own experience of how he was denied information despite there being a public interest for the information. In his opinion, having access to public employee contact information can in many instances serve a legitimate public interest.

Chair **Kron** stated that it sounded like there is a simultaneous recognition of the reasonableness to protect personal contact information from illegitimate use, but a concern that legitimate uses are getting swept up with the illegitimate. Mr. **Hall** agreed.

Mr. **Smith** pointed out as a general rule, public bodies do not look at the reason behind the request to justify release. Members discussed the public interest test that applies to some exemptions as an example of circumstances in which that can be considered. Chair **Kron** returned to the difficulty of a recommendation that accounts for legitimate use but prevents illegitimate uses. Members agreed that was desirable.

Because there are different classes of contact information and specific classes of individuals, Mr. **Fisher's** inclination would be to go through the individual exemptions, use the four criteria questions, and determine whether each one meets those criteria as opposed to trying to give the legislature a broad recommendation. Chair **Kron** expressed doubt about treating different classes of individual differently, suggesting that the privacy concerns identified in this area were common ones.

Mr. **Fisher** responded that the privacy exemption is already a blanket way of addressing personal information. The committee's recommendation should be that as a default, the information should be public, while assessing whether particular exemptions the legislature deems important actually rise to the level of importance that they should and are in the public interest.

Mr. **Miles** approached the table and questioned who was going to make the list for the legislature to eliminate the numerous existing exemptions. Chair **Kron** directed Mr. **Miles** to the list he brought on the table. Mr. **Miles** didn't think the committee could say blanket eliminate all of them without talking about each one. Chair **Kron** described that part of the committee's charge was to ensure consistency and efficient administration of the law. From his perspective both of those interests are served by having one rule instead of several. Mr. **Hall** asked if it would be possible to identify a set of reasons for withholding personal contact information on a case by case basis, articulate those, and say otherwise contact information should be disclosed. Chair **Kron** commented that in theory that would work. It would just be a more specific version of the public interest test.

Ms. **Johnson** stated that as a public employee, it should be the other way. Her private contact information should be hers and a balancing test given to her onto why it should be public. Chair

Kron thought it was logically the same to do either **Mr. Hall's** suggestion or **Ms. Johnson's** suggestion. **Mr. Smith** opined that the requestor has the burden to make a showing of necessity of public interest.

Chair **Kron** expressed agreement with **Mr. Hall's** suggestion. **Mr. Hall** clarified that he made his suggestion because there is value in consolidating many of the exemptions as possible. **Ms. Herkert** agreed.

The committee recessed for a break.

Chair **Kron** called back to order after break and summarized the discussion prior to break. He asked for **Mr. Hall's** opinion. **Mr. Hall** suggested that contact information should be publically available unless there is a compelling reason not to, with a set of general circumstances under which the information could be withheld, and explained his reasoning.

Chair **Kron** pointed out there are a lot of other personal information that are going to have similar public policy issues and it could be a mistake that the committee wasn't discussing them altogether. **Mr. Hall** stated it would be nice to consolidate the information and simplify them to the extent it is possible.

Chair **Kron** stated that there is always going to be default of availability and the existing default of availability applies to most people who are not government employees but who use government services. The committee can keep that default or propose the default be applied more broadly. It is his belief that at the time the current rules were enacted, the dangers we face today with various data theft weren't an issue then. **Ms. Herkert** agreed. It all has to do with ease of access. The laws have not kept up with technology. The broader question is if the information is easily accessible, does it still need to be exempt?

Ms. Deckelmann commented on the risks. At Mozilla, their focus is preventing mass disclosure. It is very difficult to protect an individual person because if an adversary really wants the individual's information, they're probably going to be able to get it, but in the case of everyone's information, there are things Mozilla can do to try to prevent everyone from being subject to a data breach. Chair **Kron** asked whether that was primarily driven by the pragmatic difficulty of protecting individuals or based on a policy determination. **Ms. Deckelman** answered that it was a very pragmatic issue for them. It is a more practical problem to think of it in terms of what in general can they do to protect personal information. Chair **Kron** asked if that would have implications for the default rule the committee might propose. **Ms. Deckelmann** stated in general if there is a compelling reason, it is worth protecting most individuals.

Ms. Eakins agreed with **Ms. Deckelmann's** comments. The law should create a reasonable degree of protection for personal contact information with the understanding that there may be times when the information does need to be disclosed. She wondered what the public policy argument was for a public entity that presumably values its employees for it to make all information easily accessible to anybody who wants it.

Chair **Kron** asked the committee whether members felt the law should protect public employees

but not people who are government's customers.

Ms. **McCall** approached the table and urged the committee to consider that just because information is submitted to the government by an individual does not make that information the government's information. It is still the personal information of the individual. The government should not be the tool by which someone who wants to gain an individual's private information for nefarious purposes manages to gain the information and undermine a person's control of their personal information. She doesn't think that's the business the government should be in. She thought the balancing test included in the law and included in the proposal does a good job of addressing a lot of the concerns she heard people voice and gave her reasoning. She suggested it might be helpful to look at that public interest balancing test and consider what kind of factors should be included in that and to spell that out in the law. Chair **Kron** stated that could be counterproductive because an individual applying for government services has less protection than a public employee who has an exemption for their personal address. Ms. **McCall** stated the consideration should be the same regardless of an individual's status as a public employee or a member of the public applying for government services.

Mr **Walth** didn't think the committee should treat public employees the same as private sector employees. He agreed with Mr. **Hall** that the presumption should be full disclosure unless there are compelling reasons not to do so. He asked the attorneys in the room how the general privacy exemption and its public interest test apply to contact information. Chair **Kron** answered that if the only basis for protecting your address would be the privacy exemption, then it is likely to be disclosed unless the person who is looking for it is a stalker. The committee is currently reviewing a handful of exemptions that protect personal contact information but only for select classes of people, such as medical licensees and public employees. Both of those statutorily require clear and convincing evidence that the disclosure be in the public interest.

Mr. **Fisher** expressed indecisiveness. He suggested the committee should only address the current exemptions and determine whether they are justified, rather than try to make a general rule for contact information. Ms. **Eakins** asked if the committee had to decide the public policy questions among themselves or do they tell the legislature what they think it should do it. Mr. **Fisher** opined that if the committee wanted to come up with something productive to send to the legislature, they should try to confine their conversation within this broad framework to the task of this committee.

Chair **Kron** stated that would entail going through all 11 exemptions, either recommending they stay the same, recommending specific changes, or recommending they be eliminated. He felt that would be more work because they will need to agree on a principle and also agree on the application of the principle as opposed to just agreeing on the principle. Mr. **Fisher** suggested the principles may be different for each scenario. The committee should think about the different reasons information was given to the government. Ms. **Deckelmann** agreed that was possible.

Ms. **Herkert** stated that part of the issue was that they started with the most difficult exemption. The committee needs to look at each exemption, determine similarities and differences, and have a better understanding on how they were crafted. Chair **Kron** stated that the memo Mr. **Foltz** prepared strived to provide that framework. He accepted that the committee may be inconsistent

in the recommendations with respect to various exemptions. Therefore the recommendation would either need to be principled or not principle. Mr. **Fisher** asked if the principle was the four questions the committee had at the beginning. Chair **Kron** stated yes.

Ms. **Matasar** agreed with Chair **Kron's** approach. She didn't necessarily want to go through each exemption. She gave an example from 192.345(25) and stated that Chair **Kron** drafted a statement that addressed specifically the 11 exemptions. She agreed more with suggesting a policy rather than specific language changes for each exemption. The committee has the opportunity to potentially change the law and make it something that it should be.

Ms. **Eakins** felt the committee should start with the current laws and work on how to improve them or provide recommendation on what to keep or how to change them. Chair **Kron** felt there are different ways of fulfilling that role. The proposal drafted was written so it would apply to these specific exemptions and it would result in a specific direction of change without making 11 different recommendations.

Chair **Kron** asked Mr. **Fisher** what the work product would look like if the committee did what he was suggesting. Mr. **Fisher** stated the work product would be to determine if an exemption fits the four criteria that the committee set out. If not, why? If so, why? Should the exemption be combined with another or should they get rid of it? Ms. **Herkert** suggested they could recommend to the legislature that the exemptions for contact information should be combined and the legislature should specify who they apply to. Mr. **Fisher** suggested that there would be different considerations for each exemption.

Chair **Kron** reiterated that he didn't see a good reason to treat some people's contact information differently than others, but it sounded like there were some members who felt otherwise. If that was the case, the recommendation like the one he proposed wasn't going to work.

Mr. **Budnick** moved to the table and encouraged the committee in the interest of advancing through their tasks in a timely manner to join the current discussion with other personal privacy issues and allow more time for research to be done into the issues.

Mr. **Khan** moved to the table and recommended embracing the different opinions of the committee and to use the minority report model so the legislature can have both opinions and decide the best model to implement. He also encouraged the committee to provide the media proper access to materials at a low cost. There are some governments who are abusing the public records law by preventing the media from obtaining records at a reasonable cost. He urged the committee to also think about the impact these laws will have on marginalized communities. He gave examples of how marginalized communities of color can be harassed based on the current laws. Finally, he agreed with Ms. **Matasar's** point of working toward the future and there are models they can use. He recommended that the Committee consider Florida's model.

Ms. **Matasar** expressed confusion on the committee's role. Her understanding was the committee would be prepared to talk about the exemptions based on the information Mr. **Foltz** prepared and then make a recommendation. It now seemed like the committee wanted to go through each exemption next time.

Chair **Kron** suggested members refresh their recollection of what the exemptions are in order to facilitate a discussion. He noted the committee seemed to be split regarding how many rules there should be for different types of personal contact information.

Mr. **Smith** stated that he thought the committee could all agree that there wasn't a need for all 11 exemptions for this type of information. He suggested figuring out what buckets to put the information in. The committee needed to look at the 11 existing rules, understand how the information comes to the government, how it should be disseminated, figure out their own interest test, and come prepared to discuss it at the next meeting. Mr. **Fisher** expressed concern that the committee would only be adding to the list of exemptions. Mr. **Walth** agreed with both Mr. **Fisher** and with Mr. **Smith** about approaching it with different buckets and felt they needed to be clear when sending the exemptions to the legislature that need to be removed, otherwise he didn't think they would be giving the legislature enough guidance.

Chair **Kron** thought fundamentally, the committee would need to decide at some point what the recommendation will be. If it was going to involve 11 specific recommendations, then it was very different than what he wrote and meant a more granular exemption by exemption conversation.

Ms. **Herkert** commented that she liked the approach of determining what is the information being used for and why. She felt the statement broadened the exemption. If she had to go through a test with every single public records request, it will become expensive and the cost will get passed off.

Ms. **Matasar** stated that more clarity in the law, even if it exempts more information, would allow public records requests to be fulfilled quicker without necessarily hindering transparency in most cases.

Chair **Kron** said he did not understand how the committee could recommend in good faith that the legislature keep any of the exemptions without expanding the exemptions to also cover others. He felt that if there was a legitimate reason to protect the information, that reason would not be specific to the public employees, licensees, and other people favored under the current law. Mr. **Walth**, Ms. **Herkert**, and Ms. **Deckelmann** agreed. Mr. **Walth** clarified that he was concerned that the exemption was going to get broader.

On motion and second the committee unanimously tabled the discussion on the 11 exemptions personal contact information until next meeting.

Fourth Agenda Item: Future Business

Chair **Kron** asked if the committee should take Mr. **Budnick's** suggestion to broaden the discussion. Should there be more public comment for things like dates of birth? If so, did the committee want him, as the chair, to prepare a proposal on his own and decide whether to broaden their agenda.

Mr. **Hall** would like to hear more about why people would want to protect dates of birth. Chair **Kron** stated that the question is not whether we have it, it's do we include that in the conversation because it's basically the same thing. Mr. **Hall** stated he thought it would fall under the general heading of types of personal information that perhaps should or should not be disclosed. Chair **Kron** suggested expanding it to everything that is included in any one of the 11 exemptions.

Ms. **McCall** commented on Ms. **Herkert's** comment about the usefulness to have some research and data points to look at instead of going based on emotion. As part of her office as the public records advocate, she offered, with the assistance from others in the committee, to do this research and drafting and submit a report to the committee that can potentially be discussed at the November meeting. All agreed.

Chair **Kron** suggested using the September meeting to solicit public comments on the additional topics they will now be addressing, which would theoretically give Ms. **McCall** until October to submit her report. Ms. **McCall** said it would be helpful to hear from the committee what they thought the useful research avenues or questions would be. She discussed potentially looking at what other states or the federal government is doing for similar information and gave an example of how the federal FOIA differed from Oregon law.

Chair **Kron** clarified for the committee that they were free to directly contact Ms. **McCall** since she was not a part of the Sunshine Committee. Ms. **McCall** also encouraged members of the public to contact her and assured that all decisions would be based on data points and research regardless of her personal opinion.

Ms. **Matasar** added a suggestion of taking up the question of individualized requests for data vs. data base requests specifically. She discussed a recent AG decision denying the use of dates of birth in order to seek personal home address information. The governor's office had already asked Ms. **McCall** to prepare a presentation and report on specific data sets of information and suggested it be lumped in with the rest of the exemptions if the committee would agree to take that on. Ms. **McCall** stated that if anyone wanted to volunteer to assist with that research, she would be happy for the assistance.

Mr. **Fisher** stated there seemed to be confusion about the purpose of the committee and he suggested at least having a conversation to make sure everyone was on the same page about what they actually wanted to achieve. He thought the question of whether the committee was going to make blanket recommendations, which may then expand what was exempted, or if they were going to just look at the exemptions is an important question to answer and may also raise other implications. Chair **Kron** didn't conceive of them as different things. He believed the committee's job was to come up with a recommendation and in different circumstances, different people may feel that different recommendations are appropriate. He gave an example. There may not be a universal answer to what the committee will do and they won't know until they've looked at all the exemptions.

Mr. **Hall** stated that generally he liked the way Chair **Kron** framed the draft recommendation to the legislature, but shared Mr. **Fisher** and Mr. **Walth's** concern regarding broader exemptions.

However, he believed the committee should get the larger question of personal privacy versus the public's right to know out of the way. He asked if the committee could look at other model public records law, which could cut through a majority of the discussion, and have those added to Ms. **McCall**'s report. Although Ms. **McCall** was very interested in researching other models, she thought it would have to be a separate inquiry in a future task.

For the next meeting, Chair **Kron** will figure out what the other privacy related information is covered in the current exemptions and what other exemptions they implicate. The September meeting will be entirely public testimony and in November, the committee will reconvene to discuss what was heard from the public, what they learned from Ms. **McCall** in the meantime and whatever other information they get.

Adjournment

After motion and second, the Committee unanimously voted to adjourn.