Legislative Recommendations

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Although there are exceptions, if a local public entity withholds -- or hesitates to disclose -- requested records it is usually for one or more of the following three reasons:

1. They do not understand their obligations under the public records laws.

2. They fear reprisals – public or legal -- for disclosing what should not be disclosed, or what the person who is the subject matter of the request believes should not be disclosed. Typically risk-averse by nature of the job, they err on the side of non-disclosure.

3. The administrative burden of handling the request is problematic due to the scope, volume, or frequency of requests compared to what the entity perceives to be its core operations.

Each of these is addressed further below, with recommendations.

1. They do not understand their obligations under the public records laws.

A. Most public entities have at least one person on staff or on the governing board who knows to consult ORS chapter 192 as well as the AG's *Public Records and Meetings Manual* for guidance on public records questions. And, those who have an attorney to advise them will usually consult with him or her when in doubt about how to respond.

Clarifying and streamlining ORS chapter 192 so that it is easier for a layperson to read, and revising the AG's Manual accordingly, would help to encourage timely compliance by creating as much of a "bright line" as possible for public entities to know what the law does and does not require.

With respect to PII specifically, it may be helpful to:

1) Refer all statutes allowing or requiring withholding of PII to ORS chapter 192 so that there is one guiding statute for this type of information.

2) Develop a standard definition of what is included in "Personally Identifiable Information."

3) Apply it to all public bodies and agencies in Oregon.

4) Define the circumstances when PII shall be disclosed; shall not be disclosed (absent a court order); and may be withheld (i.e., absent a clear and convincing showing of the public interest in disclosure).

5) Provide criteria for the public entity to consider in deciding whether disclosing a record is "in the public interest."

6) Provide a template request for records that substantially conforms to ORS 192.363:

> **192.363 Contents of certain requests for disclosure.** (1) A request for the disclosure of records described in ORS 192.355 (3) or 192.365 must include the following information:
> (a) The names of the individuals for whom personal information is sought;
> (b) A statement describing the personal information being sought; and
> (c) A statement that satisfies subsection (2) of this section.
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> (2) The party seeking disclosure shall show by clear and convincing evidence that the public interest requires disclosure in a particular instance.
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> (3) Upon receiving a request described in subsection (1) of this section, a public body shall forward a copy of the request and any materials submitted with the request to the individuals whose personal information is being sought or to any representatives of each class of persons whose personal information is the subject of the request.
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> (4) For purposes of subsection (3) of this section, the public body has sole discretion to determine the classes of persons whose personal information is the subject of the request and to identify the representatives for each class.
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> (5) The public body may not disclose information pursuant to the request for at least seven days after forwarding copies of the request under subsection (3) of this section.
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> (6) The public body shall consider all information submitted under this section and shall disclose requested information only if the public body determines that the party seeking disclosure has demonstrated by clear and convincing evidence that the public interest requires disclosure in a particular instance.

B. Continued emphasis should be placed on education and training of public officials, both staff (who are typically the ones responding to records request) and elected officials (who turn over about every four years and often have no experience working in the public sector). Opportunities for the AG's office and the Office of the Public Records Advocate to work with other organizations that provide this kind of training – such as the Association of Oregon Counties, League of Oregon Cities, and Special Districts Association of Oregon -- should continue to be explored.

2. **They fear reprisals – public or legal -- for disclosing what should not be disclosed, or what the person who is the subject matter of the request believes should not be disclosed. Typically risk-averse by nature of the job, they err on the side of non-disclosure.**

The fear of public reprisals can be mitigated somewhat by providing clarifying direction as discussed in section 1 above. With respect to legal protections, ORS chapter 192 already includes three statutes that protect public entities from liability for inadvertently, or otherwise acting in good faith, disclosing protected information:

> **192.335 Immunity from liability for disclosure of public record; effect of disclosure on privilege.** (1) A public body that, acting in good faith, discloses a public record in response to a request for public records is not liable for any loss or damages based on the disclosure unless the disclosure is affirmatively prohibited by state or federal law or by a court order applicable to the public body. Nothing in this subsection shall be interpreted to create liability on the part of a public body, or create a cause of action against a public body, based on the disclosure of a public record.
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> (2) A public body that discloses any information or record in response to a written request for public records under ORS 192.311 to 192.478 that is privileged under ORS 40.225 to 40.295 does not waive its right to assert the applicable privilege to prevent the introduction of the information or record as evidence pursuant to ORS 40.225 to 40.295.
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> **192.368 Nondisclosure on request of home address, home telephone number and electronic mail address; rules of procedure; duration of effect of request; liability; when not applicable.** (1) An individual may submit a written request to a public body not to disclose a specified public record indicating the home address, personal telephone number or electronic mail address of the individual. A public body may not disclose the specified public record if the individual demonstrates to the satisfaction of the public body that the personal safety of the individual or the personal safety of a family member residing with the individual is in danger if the home address, personal telephone number or electronic mail address remains available for public inspection.
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> *** (5) A public body may not be held liable for granting or denying an exemption from disclosure under this section or any other unauthorized release of a home address, personal telephone number or electronic mail address granted an exemption from disclosure under this section.
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> **192.380 Immunity from liability for disclosure of certain personal information; recovery of costs.** (1) A public body or any official of the public body that determines that a party requesting information under ORS 192.355 (3), 192.363 or 192.365 has demonstrated by clear and convincing evidence that the public interest requires disclosure in a particular instance is immune from civil or criminal liability associated with the disclosure.
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> (2) A public body that receives a request for disclosure of records under ORS 192.355 (3) or 192.365 is entitled to recover the cost of complying with ORS 192.363 without regard to whether the public body determines that the party requesting disclosure has demonstrated by clear and convincing evidence that the public interest requires disclosure in a particular instance.

It would be clearer and more powerful to combine these into one overarching statute, and possibly move it toward the beginning of the chapter to emphasize this protection.

3. The administrative burden of handling the request is problematic, due to the scope, volume, or frequency of requests compared to what the entity perceives to be its core operations.

The time limitations for responding to public records requests that took effect January 1, 2018 (see ORS 192.324 and 192.329), were helpful in drawing a "bright line" as discussed in section 1 above. They also had—and continue to have-- the effect of increasing pressure on public entities that already struggle to provide timely responses to public records requests due to having little or no staff to serve this function, and/or the frequency or volume of requests being submitted. This is compounded by the fact that the frequency and scope of public records requests can't usually be predicted. A small public entity might go for decades without receiving any at all, and then be asked to respond to a large number in a short period of time. This makes staffing for this responsibility an administrative challenge.

ORS 192.329 takes the size of the entity into consideration, which is helpful, i.e.:

> (6) The time periods established by ORS 192.324 and subsection (5) of this section do not apply to a public body if compliance would be impracticable because:
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> (a) The staff or volunteers necessary to complete a response to the public records request are unavailable;
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> (b) Compliance would demonstrably impede the public body's ability to perform other necessary services; or
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> (c) Of the volume of public records requests being simultaneously processed by the public body.
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> (7) For purposes of this section, staff members or volunteers who are on leave or are not scheduled to work are considered to be unavailable.
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> (8) A public body that cannot comply with the time periods established by ORS 192.324 and subsection (5) of this section for a reason listed in subsection (6) of this section shall, as soon as practicable and without unreasonable delay, acknowledge a public records request and complete the response to the request.

Because this part of the law is relatively new it remains to be seen how helpful it is to smaller public entities who have legitimate difficulties accommodating public records requests in a timely fashion while still providing necessary services. But it is certainly helpful that the law recognizes the position of smaller local governments that operate with very small budgets and little or no paid staff.

With that said, this caveat in the statute only provides flexibility for local governments in complying with the law. It does nothing to protect or help them when one or more members of the general public have decided to use the public records law as a bludgeon to demand action on the part of the public entity, to exact retribution of some kind, or to get to the bottom of a perceived conspiracy on the part of the public body. These kinds of abuses rarely happen from legitimate members of the media, but experience with at least one angry and relentless requester can leave a small government entity gun-shy about public records requests of any kind, making them reluctant to respond.

Minor changes in the public records laws could help to address some of this risk. For example:

1. Clearly allow for recovery of fees to include a minimum "administrative fee" in addition to recovery of direct costs for the entity. Currently, if a records request requires time and labor of volunteers, the public entity has no clear path to charge a fee even for the time it takes the volunteers to open the office, turn on the lights, locate and copy the records, or supervise a requester who makes repeated requests to inspect the records in person. So, charging a fee as a possible check on frivolous requests is debatable.

2. ORS chapter 192 makes the county District Attorney the option of first resort for requesters who allege violations of the law by local governments. Since 2018, a requester also may seek mediation from the Public Records Advocate. Under current law, the requester may also seek relief in a court of law, and in some cases seek attorney fees when doing so. It is likely both sides of this process – both the public entity and the requester – would benefit by having the statute settle on a single method for deciding public records disputes in a dispositive way, so that a determined requester does not have multiple decision-makers considering the same dispute.