

**Oregon Sunshine Committee Meeting Minutes**  
January 23, 2019

Location: Mozilla Firefox offices, 1120 NW Couch St #320, PDX

<b>Sunshine Committee Members</b>
Oregon State Senator Brian Boquist (excused) Selena Deckelmann, Director of Engineering, Mozilla Firefox Eileen Eakins, Law Office of Eileen Eakins, LLC Charlie Fisher, OSPIRG State Director Mary Beth Herkert, Oregon State Archivist (by phone) Karin Johnson, Independence City Recorder (by phone) Michael Kron, Special Counsel, Oregon Department of Justice (excused) Emily Matasar, Government Accountability Attorney, Governor's Office Oregon State Representative Karin Power (excused) Oregon State Senator Floyd Prozanski (excused) Adrienne Roark, Vice-President and General Manager, KPTV Fox 12 (excused) Morgan Smith, Polk County Counsel (by phone) Brent Walth, Journalism Professor, University of Oregon Oregon State Representative Carl Wilson (excused) Bennett Hall, Newspaper Publishers Association (excused)
<b>Guests</b>
Ginger McCall (by phone) Andy Foltz (by phone) Brett Budnick Todd Albert
<b>Agenda</b>
<b>VIDEO STREAM 00:00:00-1:57:40</b>
Welcome and Introductions
Vice Chair <b>Matasar</b> chaired in for Chair <b>Kron</b> who was unable to attend the meeting.
First agenda item: Approval of 10.3.18 draft minutes
There were some typos and Ms. <b>Johnson</b> was present in person, not by phone. Ms. <b>Matasar</b> will correct. No other comments on the minutes. On motion and second the committee unanimously approved the minutes edited to correct typos and make Karen Johnson present in person.
Second agenda item: Discussion on Personal Privacy Exceptions
Todd Albert, Deputy Public Records Advocate, presented an overview of the investigative report on privacy information related to government bodies' holding personal identifiable information (PII) Ginger McCall's team was asked to prepare in support of the Sunshine Committee's work. He concluded by stating the disclosure of PII proposes significant risks that should be closely considered by the committee as it proceeds. In light of the risks, other jurisdictions have taken a cautious approach to release of PII, particularly personal contact information. Many jurisdictions limit the disclosure of personal addresses, personal email addresses, personal phone numbers and other related PII. While some states draw distinctions between the privacy of government

employees and privacy of members of the public, the federal government does not. One possible path to balancing the privacy interests with the public interest and disclosure was to closely align with Georgia's approach, which states in part, "records and information disseminated pursuant to this paragraph may be used only by its authorized recipient and only for the authorized purpose."

Mr. **Fisher** asked if Ms. **McCall's** team ran into how states' or FOIA handled situations where an agency wasn't applying the public interest test appropriately. Mr. **Albert** stated they had not explored that area for their report. Ms. **McCall** added that there were robust review opportunities under federal FOIA if one is wrongfully denied information with the chance of recovering attorney fees if they prevail. Federal FOIA also has a lot of case law that Oregon doesn't to help direct agencies on how to handle FOIA requests. Mr. **Albert** added that states also varied. Some had no right to appeal where others did like Connecticut.

No further discussion was had on the report.

Third Agenda Item: Discussion on Recommendations on Personal Privacy Exemptions.

Ms. **Matasar** wanted to acknowledge receipt of comments from both committee members and the public that they consider tabling this recommendation for the future. She gave options on what the committee could discuss and opened the floor for discussion.

Ms. **Herkert** made the recommendation to table the discussion and gave her reason why. She did not feel they were to the point where they could make a recommendation moving forward. She would rather look at other exemptions to get a decent process and credibility in place before moving forward.

Ms. **Deckelmann** agreed and suggested a subcommittee to investigate the data and exemptions and parallelize the effort with more frequency. Mr. **Walth** agreed with Ms. **Herkert** and with Ms. **Deckelmann** on the creation of a subcommittee and explained his reasoning. Mr. **Fisher** also agreed to a subcommittee. Ms. **Eakins** didn't have a strong opinion one way or the other. She didn't necessarily think tabling the discussion would make it any easier the next time it is brought up and it may be that a subcommittee could strike a compromise, assuming the whole committee would accept it.

Ms. **Matasar** said sounded like the members were more open to the idea of a subcommittee than before when it was suggested. Ms. **Eakins** stated that if it helped advance their agenda, she would be in favor of it.

Ms. **Deckelmann** asked Ms. **Herkert** what exemptions she would recommend as being an alternate to the personal privacy exemptions. Ms. **Herkert** suggested looking at exemptions that are no longer needed or that are in direct conflict with the federal FOIA. Her biggest concern with personal privacy PII is that it is the most difficult of all other exemptions and the committee didn't have a good handle on how they wanted to deal with it. Mr. **Smith** thought a subcommittee that met more frequently would allow for more robust discussion, while the Sunshine Committee could move onto lower hanging fruit to get some momentum.

Ms. **Matasar** asked if they should consider a motion or vote on creating a subcommittee. Ms.

**Deckelmann** thought they should spend some time talking about the charter for the subcommittee. Mr. **Fisher** thought they should think about what the sidebars and mandate for the subcommittee would be and then entertain a motion on creating the subcommittee and its members.

Ms. **Matasar** opened the floor to the committee to discuss the subcommittee tasks. She stated they have the criteria, but it sounded like they needed more. Ms. **Eakins** agreed and opined that the ultimate role of the subcommittee would be to come up with a recommendation for the whole committee to vote on. As for the subcommittee's task, her thought was for them to first define PII and then discuss the benefits of disclosure for each item. The recommendation would be based on that discussion. She believed an approach could be taken that helps enable the press to do their jobs without necessarily giving away more information than necessary.

Ms. **Matasar** commented her understanding is the subcommittee would tackle the PII question while the main committee moved onto easier, less contentious group of exemptions. Ms. **Deckelmann** viewed it as parallelizing the efforts. She thought it would be interesting to also research the impact of the decision points the subcommittee may come up with and weigh out the different issues that occur with both electronic and paper records. She also wanted to talk with Mozilla's chief data officer to see if there was a better way to label and classify data and how that would play a part in the decision points.

Mr. **Fisher** had similar ideas. He didn't completely understand the implications of tightening up personal information in terms of how that would impact a journalist for example. Based on public testimony, even if they came up with a perfect interest balancing test, they would still have agencies who weren't applying it correctly. He felt they would need to include in the scope of the subcommittee a way to ensure compliance in a consistent manner. Mr. **Smith** disagreed that should be part of the scope and stated ensuring compliance would be more of an enforcement issue and effectuation of the law, rather than if the exemptions are appropriately needed, rebost, etc. He felt the subcommittee would need a clearer recommendation on what the laws would look like and from there take the next step of how to enforce compliance if the balancing test is not being interpreted correctly at a local level. Mr. **Fisher** didn't think they could have a conversation regarding of theory of a perfect balancing test unless they were also thinking of how to put it in practice.

Ms. **Eakins** asked if Mr. **Fisher** saw a difference in discussion of how PII would be handled from an enforcement perspective than just having a general discussion about enforcement of exemptions with PII being included in the discussion. Mr. **Fisher** stated he felt it was more relevant since the balancing test is especially important in this particular instance. However, maybe it needed to be thought about in a broader context.

Although Ms. **Eakins** saw Mr. **Fisher's** point why it might necessitate some separate enforcement conversation, she was inclined to agree with Mr. **Smith's** approach to have a general discussion about enforcement once they figure out what should be exempt and what shouldn't in all areas. She explained why. She would like to see enforcement as part of a larger conversation that looks at all possibilities. Mr. **Fisher** stated his concern was that his recommendation in terms of how they would want the public records laws to look like would be

different if the thought was agencies were going to try to circumvent the law as opposed to an assumption that they wouldn't.

Ms. **Eakins** stated that Mr. **Fisher** raised a good point. In the broader discussion, they tended to assume the conversation is in relation to the State of Oregon when it, in fact, included all governmental entities in Oregon and that needed to be part of the larger conversation. The recommendation should be what was best and workable for other forms of local government in addition to the State. The public interest balancing test was subjective and it was hard to draw a bright line in terms of how to define it.

Ms. **Deckelmann** believed defining what disclosure meant in this context and differentiating between the rules that apply to bulk data access and individual records would be helpful. Mr. **Fisher** asked if she could state what she meant by defining what public disclosure meant. Ms. **Deckelmann** stated that the public records advocate talked about different kinds of disclosures that came about through different means and there was an important difference between the two. She didn't think the law differentiated between someone in the media obtaining information to confirm data for a story versus someone obtaining information to share publically.

Mr. **Walth** believed that in order for the committee to make a recommendation it would need to make the case that the current law does not work. He believed there were feelings and opinions about changing it, but it was unclear what all those were. He thought the subcommittee needed to identify ways in which the law should be changed. What was currently not working? What could work better? What should be protected? He suggested the whole committee provide 5 or 6 questions the subcommittee needed to address to help focus them.

Mr. **Fisher** agreed and suggested defining different levels of PII disclosure based on certain characteristics. Ms. **Eakins** mentioned a house bill that sought to carve out an exemption in public records law for members of the media and the question was who is going to define media. She questioned those representing the media in the group if there was a credible way to define media. Would it be a fair compromise to say that if a request is coming from the media, it should be treated differently or would it be too problematic? Mr. **Smith** echoed Ms. **Eakins** comments in relation to the struggle to define media and felt they needed some kind of opinion from the journalism community to define exactly what a media member is if they are going to set up ways to articulate different levels of disclosure. Otherwise there is added ambiguity on public entities trying to discern who the requestor is.

Mr. **Fisher** mentioned that there was something in the public records advocate's report about a contract related to the use of the information in terms of what cannot be disclosed publically. It seemed to him that the uses would be a better way to define the different ways of disclosure as opposed to the entity doing the requesting. Ms. **Eakins** mentioned one jurisdiction that appealed to her where one would have to attest to the fact they were going to use the information for a particular purpose and are penalized if they do not. She explained that her clients needed bright lines and clarifying in what circumstances disclosure is allowed or not allowed would help them tremendously.

Ms. **Deckelmann** believed a large body of work had been done to classify the uses of data and

the subcommittee could further research that work, see what is out there in terms of licensing data, and what can be applied in this situation.

Ms. **Eakins** and Mr. **Smith** volunteered to be on the subcommittee.

Mr. **Walth** suggested the following questions for the subcommittee to answer that could be used to come up with specific proposals:

1. What are the particular and specific issues people have with the way the Oregon public records law works now with regard to public PII.
2. In what ways can we actually increase transparency by addressing these problems?
3. In what way can we address concerns about misuse of PII? In other words, to address all the other issues that have been brought up by everyone there.

Mr. **Walth** struggled with trying to understand the question they were trying to answer and thought input from members of the community would be beneficial. Ms. **Deckelmann** thought one question they were trying to answer was how the government could effectively manage the exemptions. Ms. **Herket** felt the first three questions Mr. **Walth** suggested got to the heart of what they were trying to do.

Ms. **Matasar** suggested two questions: what should never be exempt and what should always be exempt and explained her reasoning. Mr. **Fisher** thought it would be great to articulate public interest reasons for each piece of PII. Ms. **Herket** liked where Ms. **Matasar** was going but if one piece of information that was not exempt was combined with an exempt item, then together, it would make both exempt. She was concerned this would only put them back to a push pull situation again.

Ms. **Johnson** asked if there was a way for the recipient to question the identity, motive, and need of the requestor since the law currently finds these irrelevant. Mr. **Smith** didn't think there was a good answer to Ms. **Johnson's** question. He thought it would open another minefield for the public entities from unequal treatment and discrimination in that they would then have to dictate which type of classes of individuals have access to information and which don't.

Ms. **Deckelmann** stated it was a question of what one will do with the information and a very reasonable baseline was thinking in terms of potential selling bulk data transfer, for example. Mr. **Fisher** talked about a potential license stating what information could be used for versus what it won't. [Note: audio cut out while Ms. **Deckelmann** and Mr. **Smith** were talking].

Ms. **Eakins** liked Ms. **Deckelmann's** approach with the subcommittee. She thought a part of the conversation would again have to be enforcement options when one violates a potential agreement.

Ms. **Matasar** asked for any further comments. Mr. **Smith** commented that given the sheer volume of different exemptions that reference PII, a main charge for the subcommittee might be to find a way to consolidate them into something more readable. The committee agreed. Mr. **Fisher** suggested discussing the questions the subcommittee would tackle. Ms. **Deckelmann's**

suggested taking a break so the proposed questions could be typed out, followed by a discussion of them and vote on the subcommittee. The committee recessed for a break.

Ms. **Matasar** brought the committee back to order and read the proposed questions that Mr. **Fisher** typed up and that were emailed to the committee members during the break. Mr. **Walth** suggested ordering the questions in a way that first defined the issue and ranking them to give the subcommittee a path and explained how that could be accomplished. Ms. **Matasar** wondered if they needed to order the questions at that moment or if the subcommittee could reorganize them. Mr. **Walth** felt the subcommittee could, however, Mr. **Fisher** wanted the committee to organize the questions. Mr. **Walth** suggested simply saying that their mission was to first identify the questions to answer, the problems to address, and identify potential steps, remedies, and resolutions. He was fine with not ordering the questions but it needed to be clear that the mission was to identify the issues. Ms. **Herkert** agreed. Ms. **Deckelmann** recapped the order of the questions with input from Fisher.

Ms. **Eakins** motioned to create a subcommittee with the charge of reviewing the PII information specifically considering the questions that the committee has directed them to consider and coming to the Sunshine Committee with a recommendation. Seconded by Mr. **Fisher**.

Mr. **Walth** added a friendly amendment so it was clear that the subcommittee's charge was to identify PII and issues and specific concerns with the current law, to make a recommendation to the whole committee. Ms. **Herkert** made a motion to amend the original motion with Mr. **Walth's** amendment. Seconded by Ms. **Deckelmann**.

After motion and second, the Committee unanimously voted appoint a subcommittee.

Ms. **Matasar** stated she would name the members of the subcommittee who had earlier announced they would volunteer. Those members were: Ms. **Eakins**, Ms. **Deckelmann**, Mr. **Smith**, Mr. **Walth** and Mr. **Fisher**. Ms. **Johnson** volunteered as an alternate member. After motion and second, the Committee unanimously voted to appoint the named members to the subcommittee. After motion and second, the Committee unanimously voted to appoint Ms. **Deckelmann** as chair of the subcommittee.

Fourth Agenda Item: Future Business

Ms. **Matasar** asked if the committee wanted to move onto the next exemptions on the schedule, still within the personal exemption category, or move forward with easier exemptions. Ms. **Herkert** motioned to go off schedule and move away from personal exemptions. Ms. **Matasar** wanted to know what exemptions should be considered next. Ms. **Deckelmann** suggested looking at outdated exemptions. Ms. **Herkert** agreed.

Ms. **Matasar** suggested Chair **Kron** and Mr. **Foltz** propose some outdated exemptions that might make sense to group together and review next. Mr. **Foltz** stated he would discuss this with Chair **Kron** and Ms. **Matasar** stated the list should be circulated well in advance of the next meeting.

The next meeting will occur at the State Archives.

Adjournment

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

DRAFT