Legislative Recommendations: Bulk Data Requests

Oregon Sunshine Committee
November 25, 2019

Introduction. Governor Brown requested that the Sunshine Committee "report to the Legislature in December of 2019 its recommendations for potential public records legislation to be introduced in the 2020 Legislative Session related to requests of bulk data containing personally identifiable information collected by public bodies." A subcommittee of the Sunshine Committee held multiple meetings and considered stakeholder input on this issue before delivering a recommendation to the full Sunshine Committee. The Sunshine Committee also heard stakeholder input and made minor changes to the subcommittee's recommendation on the basis of that input. Although the Committee feels that all of these recommendations deserve legislative consideration, the second and third recommendations may be considered independently of one another.

Context. Historically, requests for large numbers of public documents and the information contained within them were processed by hand by the public entity, because they were stored in hard-copy format. The public entity could recover labor and copying costs for its time and effort in responding to the request. This likely had – and in some cases continues to have -- a deterrent effect on requesters who were unable or unwilling to wait for or pay for large volumes of documents.

With the wide availability of electronic records storage, there is a growing public expectation that large amounts of data can and should be accessible quickly, easily, and at minimal cost to either the public entity or the requester. Under current law, however, a request for bulk public data is subject to the same limitations (time, resources, exemptions, varying technological capabilities of the public entity) as any other public records request and typically bulk public data is not stored with transparency in mind.

Separately, there is a specific privacy concern around the bulk release of conditionally exempt PII.

In its efforts to promote transparency and disclosure, the Legislature should consider updating public records laws to better interface with electronic storage capabilities and take concrete actions to address the release of PII in bulk.

Recommendations:

(1) Define "bulk data" in ORS chapter 192. Consider the definition of "data" provided in HB 3361 (2017) as an example.

(2) Though reliance solely on automated disclosure processes could create some risks, the legislature should incorporate into Oregon's Public Contracting Code criteria for "transparency by design," so that solicitations for electronic storage technology promote prompt, efficient retrieval of requested information. For example, establish criteria for records storage technology solicitations that allow for:

- Easy segregation and redaction of conditionally or fully exempt PII.

§ To the extent applicable, building on the concepts already provided in HB 3361.

§ Non-proprietary, publicly available data dictionaries and algorithms applied to data storage and modifications.

§ Easy custom export of bulk data.

§ Public-facing storage whereby requested non-exempt information may be obtained directly from a website or other location by the requester with little or no involvement of public body personnel.

§ The ability for local agencies to utilize software, systems, or contracts already in place or planned for use by state agencies that accomplish these transparency objectives, preferably with input from representative smaller public entities.

§ Develop a state-provided, prequalified list of vendors who agree to comply with these requirements, from which local governments may select.

§ If technological criteria are mandated rather than just recommended, include in the legislation an "out" for small public entities for whom the requirements are cost-prohibitive, or provide need-based financial assistance.

(3) Create statutorily authorized methods for releasing bulk PII that is conditionally exempt from disclosure (including requests under ORS 192.363) by facilitating easier and more consistent balancing between (A) the public interests served by disclosure of personally-identifiable information (which may include facilitating accurate scholarship and journalism) and (B) the interests served by nondisclosure (which may include personal privacy and, in some cases, safety). Examples of such methods could include:

a. Providing a standardized data transfer agreement template, identifying authorized purposes for which bulk PII data may be used and prohibiting unauthorized uses and disclosures. Public bodies should not be penalized for violations of the agreement by requesters nor tasked with enforcing it; any penalties should be imposed on requesters who violate the agreement and enforceable by injured individuals directly. Signing such an agreement should remain optional, both legally and practically. Neither the terms nor the existence of such agreements should impede existing public interest access.

b. Establishing a statewide method of optionally "pre-certifying" persons or entities who have demonstrated a legitimate business or public interest need for PII bulk data, such as for research or journalistic purposes. If a neutral third party determines in advance that the public interest will be furthered by allowing the person or entity to obtain bulk data, this would relieve individual public entities from having to first determine the use to which the data will be put in making a public interest determination. If this option is pursued, identify a single decision-maker, preferably one who is publicly accountable, and provide clear criteria for pre-certification. These steps should ensure predictable decisions that are consistent with the overall public interest in balancing legitimate access to information with personal privacy and safety.