

Report of the Oregon Sunshine Committee

July 1, 2020

DRAFT

Introduction

The Oregon Sunshine Committee is pleased to submit its second biannual report to the Public Records Subcommittee of the Legislative Counsel Committee. The Sunshine Committee is proud of its accomplishments over the past two years. Though it faces some challenges in its work, the Sunshine Committee is optimistic about the role it can play advocating for improved government transparency over the next several years. Should the Public Records Subcommittee have questions about this report the Sunshine Committee would be happy to address those at an upcoming meeting or through a supplemental report.

-Statutory basis

ORS 192.511 establishes the Sunshine Committee and sets out its purposes. The Sunshine Committee's single largest charge is to review essentially all existing public records disclosure exemptions by 2026. But the Sunshine Committee is also empowered to "[s]tudy and identify any inefficiencies and inconsistencies in the application of public records laws that impede transparency in public process and government." And it is charged with making "recommendations on changes in existing law, policy and practice to enhance transparency and facilitate rapid fulfillment of public records requests made to public bodies." Finally, it is required to make a report to the Public Records Subcommittee every other year.

-Committee membership

Statutorily, the Sunshine Committee consists of fifteen members. The four members of the Public Records Subcommittee participate *ex-officio*. Nine members are selected by the Attorney General to represent various stakeholder groups. And both the Governor and Secretary

of State designate a member. These are the non-legislative members currently serving on the Sunshine Committee:

- Selena Deckelmann, Mozilla Firefox
- Eileen Eakins, Law Office of Eileen Eakins
- Charlie Fisher, Oregon State Public Interest Research Group
- Bennett Hall, Corvallis Gazette-Times
- Mary Beth Herkert, Office of the Secretary of State
- Karin Johnson, City of Independence
- Michael Kron, Office of the Attorney General
- Emily Matasar, Office of the Governor
- Adrienne Roark, KPTV/KPDX
- Morgan Smith, Polk County
- Brent Walth, University of Oregon School of Journalism and Communication

Collectively, these members represent the interests of a wide array of stakeholders.

-Structure of report

Following this introductory section, this report will describe the Sunshine Committee's work and recommendations over the past two years, as well as its plans. Exemption review work is discussed first, starting with an explanation of exemptions reviewed to date and recommendations of the Sunshine Committee based on that review. An update on the Sunshine Committee's plans to finish its review follows. After discussing exemptions, this report continues with a description of the Sunshine Committee's broader work. That includes both general recommendations adopted to date, along with a description of areas that Sunshine

Committee members are interested in – and challenges that the Sunshine Committee foresees. The final section of the report examines various ways in which the Sunshine Committee can continue to serve Oregonians, and the Public Records Subcommittee, going forward. The specific recommendations approved by the Oregon Sunshine Committee are attached after the conclusion of the report.

Exemption Review

The Attorney General’s catalog of public disclosure exemptions, which contains the statutes the Sunshine Committee must review, contains 651 entries. As explained in the Sunshine Committee’s 2018 report, those have been divided into categories based on subject matter, and the Sunshine Committee has established the order in which they will be reviewed. The Sunshine Committee has also adopted criteria by which it will assess exemptions:

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

These have not been adopted as questions that the Sunshine Committee will formally answer with respect to every exemption. Instead, they are the principles that inform the Sunshine Committee’s consideration of exemptions and underlie its recommendations.

-Exemptions reviewed so far

To date the Sunshine Committee has reviewed more than sixty exemptions relating to various categories of personal information. These include exemptions for contact information, exemptions that govern personal financial information, exemptions that protect various family-related legal matters, and exemptions that pertain to health information. These areas concern the difficult overlap between transparency and government accountability, on the one hand, and public policies in favor of personal privacy, on the other. In considering its recommendations on these subjects, the Committee has heard from members of the public, from media, from various interest groups, and from government representatives.

-Recommendations to date

--General

The Sunshine Committee's recommendations reflect that these exemptions for personal information touch on legitimate personal privacy matters. For the most part, recommendations in these areas focus on the need to reduce the overall number of exemptions, treat similar information similarly, and make it easier for both governments that administer the law and members of the public who request records to understand what information is exempt from public disclosure. The Sunshine Committee generally feels that these goals could be furthered by combining related exemptions and insuring that the Oregon Public Records Law itself contains at least an explicit reference to the relevant statutes.

In many cases, removing confidentiality statutes from their existing locations and instead placing them in the Oregon Public Records Law would not be advisable. That is because many confidentiality provisions are part of a larger statutory framework. They also need to be

understood by people working within that framework. Plus, simply providing that something is exempt from disclosure under the Oregon Public Records law may not accomplish the primary goal of the statute. For example, the Oregon Public Records law currently incorporates the evidentiary privileges that apply in courtrooms, which are codified in ORS Chapter 40. *See* ORS 192.455(9)(a). But the reverse is not true: courts do not apply public records exemptions when they decide whether evidence is admissible or must be turned over to a different party. As a result, removing evidentiary privileges from ORS Chapter 40 and placing them in the Oregon Public Records Law would not be advisable. But the Oregon Public Records Law nevertheless could be more specific in identifying nondisclosure laws that are codified elsewhere. This would, of course, significantly increase the size of the Oregon Public Records Law. But it would enable users of the law – including both governments and public records requesters – to more readily understand what information is exempted from disclosure requirements, especially if those references were sensibly organized.

--Specific

Where the Sunshine Committee has made more specific recommendations, it is generally out of concern that exemptions ostensibly designed to protect personal privacy may be written too broadly. For example, an exemption designed to protect privacy should not prevent the disclosure of dis-identified statistical information, or anonymous information that shows how a government program is working. Where there is concern that a public body may be obtaining information that implicates personal privacy, it may be possible to use narrow exemptions that enable private information to be redacted without also exempting other information that could be disclosed without unreasonably invading privacy. The Sunshine Committee is offering a couple of recommendations along these lines.

-Scheduled for upcoming review

The Sunshine Committee's review of health-related exemptions is ongoing. Mental health record exemptions are next on the schedule, and the Sunshine Committee will then work its way through the remaining categories of exemptions for personal information:

- Background Check Records (records documenting criminal background check processes and findings, typically in connection with employment)
- Disability Information (records pertaining to individuals' disabilities)
- Juvenile Records (records relating to juvenile dependency and/or delinquency matters)
- Offender Information (records that relate to those convicted of crimes)
- Education Records (records pertaining to students and schools)
- Decedent/Survivor Information (records pertaining to people who have died, and those who survive them)
- Interpreter Information (records stemming from a relationship with an interpreter, often in the context of a legal proceeding)

The remaining larger categories of exemptions cover (1) economic affairs (generally of private businesses), (2) the administration of government programs, and (3) public safety and law enforcement.

Other issues

Although the review of 651 exemptions is a daunting task that requires sustained concentration, the Sunshine Committee does have a broader purpose as well. Again, the statutes creating the Sunshine Committee authorize it to develop "recommendations on changes in existing law, policy and practice to enhance transparency and facilitate rapid fulfillment of public

records requests made to public bodies.” Unsurprisingly, Sunshine Committee members uniformly feel that it is important for the Sunshine Committee to keep sight of this wider purpose – not only to lend some spice to the difficult work of exemption review, but also because members recognize that there are many interesting, important, and timely issues around the subject of government transparency.

-Recommendations so far

One example concerns the question of using public records requests to obtain personal contact information in bulk from government agencies. Governor Brown asked the Sunshine Committee to look into this issue and make a recommendation, which the Sunshine Committee, after several meetings of the Sunshine Committee and a subcommittee, was very pleased to do. And various collateral issues have come up in the context of the Sunshine Committee’s work reviewing exemptions; the Sunshine Committee is maintaining a list of such recommendations as an evolving list. Both the recommendation to Governor Brown regarding bulk requests for personal information, and a current version of the Sunshine Committee’s general recommendations are attached to this report.

-Areas of committee interest

Areas of concern

Although the Sunshine Committee is generally optimistic about its work, it faces some undeniable challenges. An obvious one is the sheer number of statutes to be reviewed, particularly considering the often specific, and sometimes highly specialized, nature of exemptions. If the ten-year project of exemption review specifically contemplated by ORS 192.511(3)(a) is intimidating, then the prospect that it may not be completed within that time

despite the work members are putting in is simply horrifying. Alongside that existential question sit more pedestrian difficulties.

--Stakeholder participation

When House Bill 2021 (2017), which ultimately created the Sunshine Committee, was first proposed, it contemplated that the legislature would conduct the review that the Sunshine Committee was ultimately tasked with. See <https://olis.oregonlegislature.gov/liz/2017R1/Downloads/MeasureDocument/HB2101/Introduced>. Because the Sunshine Committee cannot actually amend laws, an obvious concern when this change was made was whether stakeholders would appear before the Sunshine Committee to explain their interests, or whether they might simply wait to see whether the Legislative Assembly took up their particular exemption before participating in the process. The Sunshine Committee's experience to date suggests – although not conclusively – that stakeholders are not particularly motivated to provide it with information. The Sunshine Committee's review of exemptions for personal contact information did elicit a decent amount of input from interest groups and affiliated individuals. But direct outreach to stakeholder groups in other contexts (such as family law exemptions and health exemptions) yielded no public testimony. Consequently, members of the Sunshine Committee have had to largely rely on the Department of Justice and other agencies to supplement whatever preexisting knowledge members may have, in a wide variety of legal arenas. (The Public Records Advocate's office has been particularly helpful in this regard, though that office has recently been short staffed.) This makes it more difficult for the Sunshine Committee to be confident in its recommendations. And it raises the prospect that stakeholders may appear during the legislative process to derail Sunshine Committee recommendations.

--Continued enactment of exemptions

Also, the sense of dread engendered by the lurking mass of still-unreviewed exemptions is heightened by the knowledge that more exemptions can be enacted during each session (or special session) of the legislature. Though the implosion of the 2020 session prevented additional exemptions being passed, the 2019 session resulted in several new exemptions the Sunshine Committee must review. Although the Sunshine Committee understands and respects the clear authority of the Legislative Assembly to continue to legislate in this area, the Sunshine Committee would respectfully request that any new exemptions should be adopted only after the Legislative Assembly carefully considers whether they are truly necessary.

--Overlap with mission of Public Records Advisory Council

As noted above, the Public Records Advocate has provided significant assistance to the Sunshine Committee, and the Sunshine Committee is very grateful for that work. Moreover, the Public Records Advisory Council, which works with the Public Records Advocate, has produced work that the Sunshine Committee has been pleased to endorse. See <https://olis.oregonlegislature.gov/liz/2020R1/Downloads/CommitteeMeetingDocument/215288>. There is, however, some question whether it makes sense to have two public bodies with substantially overlapping portfolios.

Going forward

-Willing to vet legislative proposals

-Attempt to intersperse exemption review with other projects

-Openness to hearing from Legislative Counsel Committee subcommittee re our best use

Attachments (approved recommendations)