November 4, 2019
Location: Oregon State Capitol, Hearing Room C, 900 Court St. NE, Salem, OR 97301
Sunshine Committee Members

Michael Kron, Special Counsel, Oregon Department of Justice / Chair
Emily Matasar, Government Accountability Attorney, Governor's Office / Vice Chair
Mary Beth Herkert, Oregon Secretary of State
Karin Johnson, Independence City Recorder (by phone)
Morgan Smith, Polk County Counsel
Bennett Hall, Newspaper Publishers Association
Charlie Fisher, OSPIRG State Director
Eileen Eakins, Law Office of Eileen Eakins, LLC
Kim Thatcher, PRAC non-voting member / member of Sunshine Committee? – *Chair Kron asked Mr. Foltz to update website for this*

Guests

Nick Budnick, SBJ
Andy Foltz, Public Records Counsel, Department of Justice
Cameron Miles, Office of Legislative Counsel
Adrienne Roark, Vice-President, and General Manager KPTV Fox 12
(by phone)
Alexia (last name unknown) Chief of Staff for Representative Karrin Power (by phone)
Steve Suo, The Oregonian
Courtney Graham, SEIU Local 503
Scott Winkles, League of Oregon Cities

Agenda

AUDIO STREAM 0:00 to 02:41:00

Chair Kron introduces Committee and agenda items.

Agenda Item #1 - Records Advocate Independence Proposal/ approved by PRAC

Chair Kron: Council approved proposed Legislative language in hopes to create more independence for the PR Advocate. PRAC is responsible to appoint or terminate (for cause) the advocate. The Advocate is no longer required to be chair, but it's not forbidden, Council can choose its own chair. There is now a provision that specifies Council can support or oppose Legislation relating to Public Records Law and can request one or more Legislators to introduce Legislation. The language was posted on website, which was approved by the PRAC, with one dissenting vote.

Suggestions were made to Ginger McCall about a Statutory Amendment, which was circulated to the group and pros/cons were discussed. **Mr. Fisher** asked about the beginning to end process. **Chair Kron** responded in that, its intention is being played out. *Some audience discussion took place in which was hard to hear.* **Mr. Suo** mentioned finding a funding source that is more stable and less political.

Mr. Smith shared the Advisor would still be on the board, of the body that oversees their work, which is awkward. **Chair Kron** shared Rob suggested changing the provision that makes the advocate the chair.

Mr. Fisher questions whether the Sunshine Committee should endorse this since the work aligns with the Committee. **Chair Kron** already voted for it. **Ms. Herkert** is in favor of the independence of PR Advocate, believes its awkward the Advocate oversees the board. **Mr. Hall** endorses independent PR Advocate.

Mr. Budnick mentions other Legislative ideas out there. Senator Hass has Legislation out there on this which is slightly different than what was presented by PRAC.

Meeting Attendee Introductions Made (forgot to open with this).

Agenda Item #2 - Recommendation on Bulk Data Request – Ms. Eakins' Subcommittee

Ms. Eakins: Bulk records requests are a new phenomenon. Need a definition of "Bulk Data" there was one provided in HB 3361 (2017). However, one in ORS 192 would be appropriate. There are specific privacy concerns with data requests for PII (the type that generates the most interest). Recommendations have been made specific to PII, but these would include bulk data, which may or may not include PII.

A lot of bulk data disclosure can be addressed by different storage methods. One recommendation is that Legislature consider modifications to OR's Public Contracting Code to establish transparency by design. So that when public entities go to purchase data storage technology, it's with the understanding the goal will be to make it easier to redact and reply to requests.

Need Legislative guidance on publicly accessible bulk data. It's possible to run into problems with trade secrets because data dictionaries and algorithms that go into setting up the system can be considered propriety, which can be problematic to the government, in terms of disclosure.

Suggested to create a pre-certifying option (compared to a "TSA Precheck") for public entities, those authorized, have been approved by Government in a manner they know they can disclose without any issues. Those not named on the list would have to go through the formal request process, which would include redactions as any other request would.

Also, could set up a website so information that is not subject to disclosure, can be easily obtained, and not have to go through a public records request. If there is going to be a mandate for electronic data storage changing, just having the understanding that some local governments won't have the funds to make those changes well. There should be some sort of "out" or need-based assistance available for support.

Perhaps, a bulk data transfer agreement – where the party requesting the data agrees not to use it for improper purposes. It should include a private right of action, so that if someone is harmed, the issues are between the requester and not the government.

Chair Kron reads email from Selena Decklemen, "I feel I got my substantive comments in, but I'm primarily concerned about ensuring that algorithmic transparency is part of the recommendation. In addition to the data dictionary, where it concerns the creation of data that impacts citizens' access to government services". **Chair Kron** provides an example: an applicant applying for a DHS program through a third-party system. This system collects analysis of data that the state has about the person that results in a computed value, that then lives in a field of database. **Ms. Decklemen's** point means the public should have access to the data dictionary and the data inputted into the system to determine eligibility. **Ms. Herkert** recommends making just a summary available, instead of the algorithm because it is such a complex issue. **Ms. Eakins** confirms this item is on the subcommittee's recommendations. **Mr. Smith** states these comments stemmed from the trade secret conversation that took place in the subcommittee. To the extent you have a data contractor who develops a database for you, if that database or software includes creating new figures based on inputted data. Ms. Decklemen would like to have that algorithm disclosed publicly. As opposed to most public contractors who are going to consider that propriety and usually don't consent to giving up their intellectual property rights.

Agenda Item #3 – Public Comments

Mr. Steve Suo:

Shares story about OHA declining/removing people for Medicaid eligibility for psychiatric services based on judgements made by its contractor. The contractor had a 20-30 question list that determined eligibility, that questionnaire was considered propriety. It was questioned if the basis in which this work was being conducted was appropriate and if it created any harm for OHA participants.

Feedback from subcommittee's meeting: he likes the transparency by design and believes it's strong to have the Sunshine Committees support behind this and believes it will help cost of disclosure and security of PII.

Encourages committee to urge easy custom export of bulk data without specialized programming by public. One core item of transparency by design that City of Portland and other agencies have been encouraged to adopt. City of Portland did recently for Police.

Discusses and reads ORS 192.363(2) "the party seeking disclosure shall show by clear and convincing evidence that the public interest requires disclosure in a particular instance". He doesn't feel this makes sense in bulk data request and it would be difficult for the requestor to meet these needs. He recommends changing to, "the party seeking disclosure shall show by clear and convincing evidence that disclosure serves the public interest". He believes this is a lower bar.

Mentions SEIU requested changes regarding ORS 192.363 – personally identified information can be requested and disclosed by a public body. Requester must list names of individuals whose PII has been requested. Forces requester to make two requests: 1) a list of all employees

of State of Oregon 2) submit a list of names who they want information for. Does not believe this supports privacy.
The used to proprietary software by the public bodies should not be used to impinge the public's right to inspect public records, which would include data dictionaries.

Mr. Fisher understands the bulk data transfer agreement to not change status quo, since currently they need to satisfy the public interest. He questions whether this is a current issue or if he foresees this being an issue down the road. **Mr. Suo** responded in that he has not had a denial on these grounds but believes that this statute will become a bigger part of the process since there is a focus on bulk data and if Legislature adopts data transfer agreements, this statue will become the main channel.

Mr. Suo recommends for 3(a) regarding data transfer template – it just refers to "data" right now and should explicitly say "PII" or "bulk data PII". Additionally, adding a proposal of easy custom export of data.

Chair Kron states that ORS 192.363 pertains employees, but there are similar provisions for contracted employees providing healthcare and childcare. **Mr. Suo** confirms this is the area of his concern.

Mr. Nick Budnick
Applauds subcommittee's work to plow through this topic. Nothing in bulk data transfer agreement should impede public interest access to bulk data PII. Calls on Sunshine Committee to provide guidance to legislature, following the testimony that was given from Rob Davis, Oregonian, Tony Shick, OPB, Rachel Alexander and other folks who discussed how society benefits from public interest access last October.

Recommends adding a line in 3a "since its inception the OR Sunshine Committee has heard compelling testimony that public interest access is vital to our society, nothing in the data transfer agreement template should impede public interest access, to the information such as is currently provided for under existing law". He believes something like this would align with SPJ's intention to avoid

He is concerned that a data transfer agreement could contain language that detours public interest access. When this concept was first broached, the concept was to balance privacy and transparency. "This language could go to Legislature without a very explicit statement that we should not restrict public interest bulk data. There's a loophole where things could go array". Clarify bulk data transfer agreement is not intended/cannot impede public interest access to data that exists under current law.

Mr. Smith: bulk data transfer agreement outlines what you will be using the data for, which could be much less of an invasion of privacy for the individual employee, which would tip the scale for public interest test directly in your favor. That works to only assist you in the public interest balancing test for the public's interest right to have information compared to the individual's information that they have a right to privacy within that information. Without an agreement, you'd still have the access under the law, but it would be less of an invasion of

privacy for the individual. **Mr. Budnick** responded to this example by stating there are assumptions in how a situation would be played out, and without having terms in writing, there are loopholes.

Chair Kron shares about a letter from SEIU (posted on website) submitted 10/20/19, by Jared Franz, staff attorney that asks committee to consider some amendments to ORS 192.363 statute. He invited Courtney Graham to speak on behalf of SEIU regarding comments made.

Ms. Courtney Graham: Overall directive from Governor's office for Sunshine committee is to find balance between privacy and transparency.

- Proposed to committee a handful of suggestions for public interest test (ORS 192.363).to clarify that representatives of individuals must be notified within a proposed 48-hr time frame, since response time for state or local government is seven days. Specific concerns in Notice Requirements (3) *she reads from statute*.
- Proper notice is not being given consistently across state agencies. Notice has only been provided recently to individuals whose information is being requested. This isn't in compliance with the statute, it is to adhere to a contractual change the union made in bargaining with the State of Oregon.
- SEIU supports **Mr. Fisher's** recommendation that the information that is disclosed can only be used for the purpose for which it was requested.
- SEIU has concerns with transparency by design – and not relying on the database that protects information / ensuring there is some human intervention at some point. To maintain privacy.
- If there is interest in expanding criteria to be considered when PII is applied, SEIU encourages preservation of individual privacy and safety.
- SEIU generally supports having some right of action. But there is some general concern about what would constitute a misuse of data, what level of specificity would need to be included in a complaint for a private right of action, criteria for pre-certification needs to be much clearer.
- Asks to consider amendments to ORS 192.363 statute
- Comments on recommendations from subcommittee

Chair Kron replies in response to SEIU recommendation about PII including privacy and safety.
He describes the AG's office applies exemptions and analyzes two sides: 1) what interests are in that exemption and what is it trying to protect? 2) what are the public interests and disclosure of this information? He asks if the recommendation if spelling out in statue what the interests are that public bodies should be considering as reasons, they might preclude the information may not be disclosed to go alongside the public interest and disclosure arguments? The interests that favor non-disclosure can be public or private interests.

Ms. Graham responds in speculation (since she didn't write this letter) outlines a value statement in statute whether you put it in statute or forward it along to legislatures with recommendations. Making it explicit that the other side of the scale is privacy or safety.

Ms. Eakins shares a discussion in the standing subcommittee, the last recommendations made were specific to PII and asking legislature to clarify considerations for public interest balancing test. So that the recommendations become a checklist for public interest. If you have a bulk transfer Agreement, then the public doesn't have to consider any of the above. But they should be weighed together.

Chair Kron believes the recommendations coming from the subcommittee is responsive to the Governor's letter. He questions if the Committee needs to focus on the larger issue of "potential public records legislation related to requests bulk data containing personally identifiable information" not specific to one statute. Wonders if we should table discussions surrounding 192.363 to address the Governor's general question.

Mr. Hall questions what would constitute authorized/unauthorized uses of data? Why did Subcommittee feel it was necessary to specify the law should include a private right of action? **Mr. Smith:** if we are holding onto private information that gets potentially misused by a third party, it shouldn't be a risk of the public entity, the consequences should be on the requestor of the data. **Ms. Herkert** questions what happens with that data when they are done? If someone is hacked, how does that work? Is there a requirement that you return the information? Goes back to Mr. Budnick's question of does it lessen transparency v. increase it. Some of the previous laws in place around this were created before the more recent technology developments.

Ms. Eakins suggests it will be the responsibility of the requester and to enforce that if anything goes array, no liability for agency. Statutory protections are there, and if the committee is going to make an agreement, there should be language in there surrounding indemnifications and liability. That way there is no gray area of whether the statue or agreement is to uphold in conflicts. **Mr. Fisher** states the information that is being requested is not entirely confidential.

Chair Kron says there are laws that require if you're acquiring data, you must use reasonable measures to protect it. Committee should consider that into the agreement. He wonders about penalties in the agreement. You can choose not to sign the agreement, if you take the short cut, you agree to the purposes of use. **Mr. Hall** says there may be people that interpret the message as, if you don't sign the agreement, you're not going to get the data. Emphasis that signing an agreement would always be optional and is not intended to impede on access to public records. **Mr. Fisher** recommends keeping the recommendation as is, relying on other state/federal statutes for that protection. **Ms. Herkert:** SB 481 (2017) then reads bill and finishes by stating this is an example of law that needs to be updated.

Mr. Hall has concerns of private right of action and does not feel he is ready to make an informed vote today. **Ms. Herkert** agrees with the recommendation but believes there are still some gray areas. **Mr. Smith** agrees with recommendation. **Ms. Eakins** agrees but to add clarifying language. **Mr. Fisher** feels like they are close, incorporate changes, but more time.

Chair Kron shared that Selena, Morgan, Eileen, and Bennett's are members whose terms are up at end of year.

Chair Kron summarizes recommendations made. Mr. Suo's were to add requirement that easy custom export of data should be feature of transparency by design**. Chair Kron** agrees to add this as a separate bullet under section two of this recommendation. In section three, regarding releasing bulk PII, repeat qualifier PII when discussing bulk data.

Mr. Budnick's proposed adding to paragraph regarding bulk data transfer agreements – those terms cannot impede public record access. **Chair Kron** believes that would be easy to add, and important to disclose that existing avenue would not be closed off to access data. This is an alternative. Any penalties can be enforceable against requestor and not public entity.

SEIU suggested four recommendations: failing to review information before it's disclosed puts individuals at risk. Chair Kron believes it could make sense to acknowledge that technological solutions alone are not a good practice, but technology practices could be improved. To the extent, we are talking about public interest served by disclosure, also talk about counter-vailing interest that these exemptions are designed to protect. Misuse of data, be spelled out. Recommend to legislature to identify permissible uses, and any penalties would apply to impressible uses. Clear and rigid requirements to TSA precheck method. Create a single decision maker to ensure consistently.

Mr. Miles: Deadline for members to request bills for short session to be pre-filed is November 22nd. Doesn't recall final deadline. They are in the middle of compilation and haven't completed 2019 ORS. No drafting of legislative and none will start until about December/January.

Reports from other Subcommittee Chairs

Mr. Fisher's subcommittee has not met.
Chair Kron, Ms. Herkert and **Mr. Hall's** Subcommittee:
Ms. Herkert: split exemptions three ways. Each of them had about 200 to review. What could be eliminated or combined with something else? She will compile exemptions that she believes we can do away with. Revised lists were going to be sent to Mr. Foltz afterward.

Adjournment