

IN FAVOR OF A BALANCING TEST TO REQUIRE RELEASE OF INFORMATION EXEMPTED FROM DISCLOSURE UNDER OREGON HEALTH INFORMATION LAWS

In reviewing the list of Oregon health information laws that contain some level of exemption from disclosure under public records law, I see the need to roll back or modify the exemption in some cases. In many cases, I see a need, at minimum, to apply a public interest balancing test. I believe that it is not always possible to foresee a set of circumstances in which the public interest in disclosure of particular categories of public records might outweigh an otherwise legitimate right to privacy. Based on that belief, it seems to me reasonable to make a provision to apply a balancing test to many if not all laws that conditionally or categorically exempt public records from disclosure.

Some particular examples which I hope will illustrate my point:

ORS 431A.125 Oregon Health Authority Powers (p. 23)

Makes all data collected by OHA under the statewide injury and violence prevention program confidential and privileged. Only exception to this exemption is “for the purpose of conducting research and studies.”

At a minimum, this exemption should have an exception to require disclosure of deidentified data. It should also be subject to a public interest balancing test.

ORS 433.008 Confidentiality of Disclosure (p. 27)

Makes information obtained by public health officials in the course of investigating a reportable disease or disease outbreak confidential, with extremely limited exceptions.

Those exceptions do not include any sort of broad provision to allow (or, better yet, require) release of deidentified data, even though that sort of information could be of compelling public interest, as illustrated by the reporting of Bryce Dole. Dole requested deidentified data from OHA “that shows a race/ethnicity breakdown of COVID-19 data reported in Umatilla County and Morrow County” to determine the number of COVID-19 cases, deaths and hospitalizations broken down by race and ethnicity.

OHA flatly refused this request, citing ORS 433.008 and saying it could not disclose the requested data.

Dole was eventually able to obtain the data he sought from the Umatilla and Morrow County health departments, even though those agencies would appear to be covered by the same law.

The result was a story that clearly showed that Hispanic populations in both counties were disproportionately impacted by the COVID-19 pandemic. ([‘We failed them’: New data shows](#)

[Hispanic residents disproportionately impacted by COVID-19 in 2020, East Oregonian, March 16, 2021\)](#)

At the least, the law should be modified to require disclosure of deidentified data and a balancing test should be provided.

ORS 634.550 Center Governing Board (p. 40)

Makes medical information received by Pesticide Analytical and Response Center confidential.

At minimum, should require disclosure of deidentified information and include a balancing test.

It is difficult for a non-attorney to provide a detailed evaluation of many of the public records law exemptions contained in the Oregon health information laws. While there is clearly a strong privacy interest in maintaining the confidentiality of individually identifiable health information, and many of these exemptions will fall under the vast and (seemingly) unassailable umbrella of HIPAA or other federal laws, I continue to believe that there may be some circumstances that may seem unimaginable in which the public interest would be served by some level of disclosure of the information made secret by these laws. In the absence of a balancing test, I don't know how we preserve the ability, when it would serve the public interest, to obtain access to what are, after all, public records.

Bennett Hall

Oregon Sunshine Committee Member

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