DISCUSSION DRAFT for 3 March 2023 Sunshine Committee Subcommittee Meeting

Recommendations regarding exemptions for health information.

As the full committee learned, a number of health related exemptions from disclosure are written broadly in a way that suggests they either (a) wholly prohibit disclosure of information (regardless of whether it is individually identifiable), or (b) leave disclosures of aggregated, dis-identified information entirely to the discretion of the public body.

- The legislature should eliminate unnecessary prohibitions against disclosure, and should specifically allow disclosure of aggregate and actually disidentified health information when disclosure is in the public interest.
- Agencies should retain some discretion to decide what data they will produce, particularly while time-sensitive investigations are ongoing. But that discretion should be guided and constrained.
    - One way to accomplish this would be through an oversight body consisting of community stakeholders, responsible for establishing the types of health data that health agencies are required to make publicly available. (For example, we heard that there was a period during the COVID 19 public health emergency when OHA initially exercised its discretion to withhold data showing a disparate impact of the disease on Oregonians of color. The subcommittee does not believe agency discretion should extend so far. A stakeholder-informed oversight body would not likely have allowed such data to be withheld.)
    - Requests for health-related datasets not currently available from an agency could also be directed to such an oversight body, which could expeditiously and fairly determine whether (and on what timeframe) the agency should make the requested dataset available.

Report and Recommendations Regarding Criminal Investigatory Records

The Oregon Public Records Law exempts from disclosure "[i]nvestigatory information compiled for criminal law purposes," unless the public interest requires disclosure in the particular instance. See Oregon Revised Statutes 192.345(3). The Oregon Court of Appeals has indicated that, under this exemption, records pertaining to matters that are ongoing will ordinarily be exempt from disclosure, while records pertaining to concluded matters will ordinarily be exempt.

However, the statute specifically states that "The record of an arrest or the report of a crime shall be disclosed unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim." It goes on to list some of the information that the record of an arrest or report of a crime include.

The subcommittee heard that "[t]he record of an arrest or the report of a crime" is not made available uniformly, even in the absence of a clear reason to withhold it in a particular case. Police agencies have declined on the grounds that they do not have a "record of arrest" or a "report of a crime," or on the grounds that they do not have a record containing all relevant information. That information is:

> (a) The arrested person's name, age, residence, employment, marital status and similar biographical information;
> (b) The offense with which the arrested person is charged;
> (c) The conditions of release pursuant to ORS 135.230 to 135.290;
> (d) The identity of and biographical information concerning both complaining party and victim;
> (e) The identity of the investigating and arresting agency and the length of the investigation;
> (f) The circumstances of arrest, including time, place, resistance, pursuit and weapons used; and
> (g) Such information as may be necessary to enlist public assistance in apprehending fugitives from justice.

The subcommittee also discussed whether additional items should be added to this list of presumptively disclosable information.

> **Recommendation**: Also require police agencies to provide (unless there is a clear need to delay disclosure in the course of a specific investigation) a general explanation of what led to the agency's involvement.

> **Recommendation:** Clarify that, absent clear need to delay disclosure in a particular case, the information specified in paragraphs (a) through (f), plus the explanation just described, *must* be disclosed if that information (1) exists in the particular case; (2) is known to the police agency. This requirement applies to the information, independent of any particular record or records where the information does or does not occur. If this information exists and is known to the

police agency, but has not been disclosed despite no clear need for delay, provide that the police agency may not rely on the exemption for criminal investigatory information until it has disclosed this information.

The subcommittee also discussed what to do about the fact that investigating agencies and prosecuting agencies may have joint custody of criminal investigatory records.

Recommendation: Once a police agency has presented a matter to a prosecutor, unless the prosecutor has declined the matter, the police agency should be able to re-direct public records requests relating to that matter, and any directly related matter, to the prosecutor's office.

Finally, the subcommittee was asked to identify philosophical differences of opinion that may impede progress toward consensus, and attempted to do so. In general those seem to center on X things.

One is the extent to which the generally delay of disclosure until after a criminal matter has concluded is likely to impede the public's ability to effectively oversee the criminal justice system. Those who believe that disclosure delayed is disclosure denied seem more likely to be unsatisfied with the Court of Appeals approach to the public interest balancing. Conversely, those who believe that oversight can be effective based on disclosure at the end of the day (coupled with extensive criminal discovery requirements, open criminal courts, and political control of the elected officials responsible for the process) seem more likely to feel that the existing approach works.

A second, related, difference appears to exist with respect to how members weigh the balance between exposing the criminal justice process to risks (such as jeopardizing fair trials or requiring investigators and prosecutors to spend time processing records request) and the benefits of heightened transparency while a matter remains pending. This is related to the first question in that those who feel disclosure delayed is disclosure denied are probably more likely to conclude that such risks may be warranted.

There may also be different views whether people other than investigators and prosecutors can reasonably be expected to process public records requests for pending matters. Those who believe that other staff can reasonably assess what materials in a file are appropriate for disclosure are probably more likely to believe that requiring law enforcement to thoroughly process requests related to active matters is workable. Conversely those who believe that such decisions would need to be made in consultation with the officials responsible for the proceedings are more likely to see a mechanism by which the criminal justice process could be impeded or even halted by public records requests (even from a suspect or defendant).

Fundamentally the philosophical differences appear to relate to whether delaying disclosure hurts or stymies public oversight of the criminal justice system and, if it does, whether those delays produce public benefits to the criminal justice system that outweigh those harms.