From: Orchard, Jack
To: Foltz Andrew
Cc: Bennett Hall
Subject: Sunshine Committee
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Andrew : Bennett Hall spoke with me a few days ago about my experiences and current thoughts about the disclosure of "investigative information" in response to public records requests under ORS Ch. 192. Unfortunately, I cannot attend the Committee's March 15 virtual meeting. Bennett asked if I could provide some written comments in lieu of participation at the meeting.

A bit of background about me : I have represented the state newspapers publishers association for a number of years, as well as almost all of the state's newspapers concerning a variety of public records matters. This has allowed me to be involved in all aspects of the public records process, including Circuit Court, Court of Appeals and Supreme Court litigation. Public records questions regularly come to me from every Oregon county. Reporters and editors frequently contact me about real life issues concerning public records access..

In recent years, few public records issues have been as contentious as criminal records' disclosures, especially those at, or for, pre-trial phases of the criminal law process. Too many District Attorneys and City and County Attorneys have shown increasingly greater reluctance to provide timely pre-trial information, citing the rubric of "on-going investigation" as the reason why this information must be withheld.

My problem with this almost-mantra like response is that it has been selective in administration (sometimes we will, sometimes we won't) and too-often uttered, instead of being analyzed. I see too many "just because" responses to such records requests. They compromise both the criminal justice and public disclosure systems.

The treatment of criminal record information is quite unique under Oregon law. There are at least three specific guideposts which form the policy and direction in this area : the Oregon Constitution's requirements of an open criminal
justice system, the overriding Public Records law policy of openness and the specific Public Records Law requirements for criminal
information disclosure. Taken together, I view the intensified reluctance by DAs, City and County Attorneys to respond timely and cooperatively to records requests, as inconsistent with the applicable legal framework.

If one carefully reads ORS 192.345 (3), the record of an arrest or crime report shall be

disclosed according to the particulars of the statute. Delay in providing the record information is only permitted if there is a "clear need" for temporarily withholding the information or to protect the complaining party or the victim. There need to be reasons for these exceptions.

The disclosure requirement and the limited instances allowing withholding can be reconciled by redacting the sensitive information , as directed by ORS 192.338. Too often, I see the governments' redaction obligation being disregarded.

But these narrow instances are the exceptions to disclosure. ORS 192.345 (2) doesn't permit a wholesale withholding or "just because" in answer to a records request. While I believe most public officials controlling these records try to implement the law appropriately, there are a cadre who do not, as I have repeatedly encountered in certain locales. They apparently see some great tug-of-war that warrants their resort to secrecy. Disappointingly, the secrecy is too-often later shown to be tinged with protections of shoddy (or worse) law enforcement work, by local political influences or by a desire to act as a local public records czar. In several instances, the gatekeeper has clearly hoped to destroy the timelines and currency of public disclosure in hopes that the testy issues "will just go away."

Where such conduct deserves little sympathy from me is when an arrest has been made. Despite ORS 192.345 (3)'s clear language, there are an increasingly number of cases where an arrest report is neither compiled or created or where NONE of the arrest information is provided or confirmed in response to a public records request. This is inexcusable. We don't have secret arrests in our system. We don't have arrests without the supporting documentation, on-file and available. To make everything secret is absolutely contrary to the guiding principles of the criminal records system.

It may be that ORS 192.345 (3) can use some editorial work. It's been with us for many years. I'd first like to see a renewal in its proper administration , as written and intended. Perhaps problems at the margins can then be identified and rectified. Reporters and editors have told me they have grown cynical with the attitude that if the information isn't made available, then the requestor can simply "Sue Me."

This isn't a "Guys and Dolls" song and dance.

I say this because the people who control whether the public views and obtains a public record are public officials. Their obligations under Oregon law are not to law enforcement or for political considerations. Their obligations are to the public and the legal structure which governs criminal record disclosure. In many instances, these gatekeepers transcend being "just" public officials; they are elected public officials. When they deprive the public of access to documentation of their department's operations or their own judgments, they also deprive the public of a knowledge base concerning their tenure in office and the right of the public to

make an electoral assessment of their performance.

Thanks for the opportunity to comment. Lest the Committee believe that my advice is always absolute disclosure, absolutely, there have been a several disgruntled reporters and editors who were displeased that I couldn't support their position that criminal information was an "open sesame" concept in certain high profile cases. There are justified reasons for law enforcement to withhold some information, sometimes. It's the instances of withholding all the information and disregarding the law that I find discouraging. It's the attitude that requestors must continually pull thread after thread out of the clock of secrecy in order to make the law work.

It IS the public's Records Law, not law enforcement's.

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