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February 24, 2023

VIA EMAIL

Oregon Sunshine Committee
Oregon State Capitol
900 Court Street NE, Salem, OR 97301

Re: Testimony of OPB regarding the current use of the investigatory exemption

Dear Sunshine Committee Task Force:

Thank you for this opportunity to provide testimony toward your oversight of public records law systems.[1] This testimony follows the oral testimony I gave during the January meeting of the Sunshine Committee.[2]

Oregon's public records law ("OPRL") is a critical tool for Oregonians to stay informed about the actions of their government, to provide oversight, and ultimately to make sure that public systems are serving the public good. Journalists and media play a crucial role in investigating and disseminating information of great public concern, and the OPRL is particularly crucial to our ability to perform that role effectively. However, too many public bodies today apply this law meant for open public access in ways that end up withholding records to which the public is entitled. Exemptions that were intended to be qualified and narrow too often swallow the general rule of access. This misuse of public records exemptions is particularly significant with respect to law enforcement agencies' ("LEAs") refusals to provide records under the investigatory exemption. These exemptions need to be clarified to bring these practices back into alignment with the overall purpose of our open records laws, and to allow the public prompt and full access to critical information of public concern.

1) Public records exemptions are routinely misused to withhold records.

While the clear purpose of the OPRL is to facilitate public access to records, all too often government bodies seek loopholes within the rules to frustrate that access. Specifically with respect to LEAs, exemptions related to investigations have been used to routinely bar access to all or nearly all records related to criminal investigations on a categorical basis, without regard to the public concern in the specific matter. This practice has forced media organizations and others

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[1] I would like to acknowledge that this written testimony was a team effort by a number of OPB staff, including the excellent work of Nora Broker, OPB's newest Roger Cooke Legal Fellow.

[2] The full recording of the meeting can be found here. www.youtube.com/watch?v=a2cmRD1UqjA (last visited February 15, 2023).

seeking to inform the public about high-profile issues to pursue long and difficult fights for public records.

The OPRL provides that "[e]very person has the right to inspect any public record of a public body in this state."[3] Oregon institutions have long recognized that this open access to public records is a vital part of our democracy, enhancing public awareness of the conduct of government entities and fostering trust in Oregon's government.[4] To meet these ends, the general rule under the OPRL is one of access and disclosure—public records must be disclosed upon request.[5]

Exemptions to disclosure are limited exceptions to this general rule, and where they apply, they should be construed narrowly.[6] The burden is placed on public bodies seeking to withhold documents on the basis of exemptions to prove that an exemption actually applies to the specific records sought.[7] To support withholding, the public interests of the public body must outweigh the public interest in disclosure.[8]

Under ORS 192.345(3), a public record may be exempt from disclosure if it is "investigatory information compiled for criminal law purposes." This conditional exemption is designed in part to protect the confidentiality needs of active police investigations (if one is occurring and such confidentiality is necessary to affect justice).[9] This exemption applies for the limited time period where the public interest in orderly progress of the investigation outweighs the interest in disclosure. In *Jensen v. Schiffman*, the Oregon Court of Appeals held that application of this conditional statutory exemption requires "identification and balancing of the various purposes for secrecy."[10]

Contrary to the conditional nature of this exemption, public bodies have routinely used the investigatory records exemption to justify wholesale withholding of case files of investigations, shielding virtually all documents related to investigations from disclosure. In defending blanket withholding on appeal, public bodies have relied on dicta from *Jensen* (noting that such files ordinarily remain secret) to do away with the balancing test entirely and have treated these records as categorically exempt. This application twists the holding and result of *Jensen*, a case where records were ultimately ordered disclosed. While the court did note that

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3 ORS 192.310 to 192.401.

4 *See* State of Or. Dep't of Just., *Attorney General's Public Records and Meetings Manual*, 6 (November 2014). Oddly, the revised manual does not mention the importance public records plays in democracy, but does strike a tone of optimism with respect to disclosure based on the 2017 legislative enactments to Oregon Public Records Law. S*ee* State of Or. Dep't of Just., *Attorney General's Public Records and Meetings Manual* (June 2019), https://www.doj.state.or.us/wp-content/uploads/2019/07/public_records_and_meetings_manual.pdf.

5 See State of Or. Dep't of Just., Attorney General's Public Records and Meetings Manual, 6 (June 2019), https://www.doj.state.or.us/wp-content/uploads/2019/07/public_records_and_meetings_manual.pdf

6 *Id.* at 29.

7 Id.

8 Jensen v. Schiffman, 24 Or. App. 11, 16 (1976).

9 *See* Jensen v. Schiffman, 24 Or. App. 11, 16 (1976).

10 *Id.* at 18.

interest in secrecy is often greater before an investigation concludes, that did not turn a balancing test into a categorical bright line rule. This continued misconstrual of the *Jensen* case has resulted in a wholesale inversion of the purpose of the public records law.

The impact of this routine overbroad application of investigatory exemptions has been stark. In the 46 years from the ruling in *Jensen* to September 2022, not one Multnomah County District Attorney order seeking open investigation documents found sufficient public interest to warrant disclosure.[11] In practice, this contingent exemption and nominal balancing test fully swallowed the rule as to these documents.

This poor track record of lack of transparency has only increased the public distrust in police conduct, a fact emphasized by the Oregon Supreme Court in *ACLU v. City of Eugene*.[12] In that case, the court reaffirmed that the appropriate test is "whether the public interest in disclosure outweighs the competing interest in confidentiality, with the presumption in favor of disclosure."[13] The court noted the importance of the public interest in police oversight and the impact of nondisclosure. "[I]t is important that the basis for differing results be known and understood. Some members of the public are suspicious. Tragic wrongs have not been addressed."[14] In ordering the disclosure of records, the court noted that "when information is withheld, the public may suspect that the City has something to hide."[15]

Yet despite this clear statement by the Oregon Supreme Court, public bodies continue to treat the investigatory exemption as a complete bar to timely disclosure of any document. Change is needed to bring the use of the investigatory exemption back into alignment with the broader statutory purpose and the public interests described by the Oregon Supreme Court.

1) **September 7, 2022 was the first time the Multnomah County District Attorney (the "MCDA") granted <u>partial</u> release in response to a petition filed during an open investigation by the Portland Police Bureau.**

An illustrative recent case involves the matter of the Portland Police Bureau (the "PPB") investigation into the killing of Sean Kealiher, a local Portland activist.[16] Kealiher was a prominent political activist in Portland's anti-fascist community. Kealiher's activism included significant criticism of the PPB. On October 12, 2019, Kealiher was purposefully struck by an

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[11] The MCDA is a leading public body with respect to public records and the application of the investigatory exemption. It is possible, although highly unlikely, that a district attorney from another jurisdiction has ordered release of records in an active investigation. Similarly, it is possible, although also unlikely, that the Oregon Attorney General has ordered disclosure in an open investigation.

[12] <u>ACLU of Or., Inc. v. City of Eugene</u>, 360 Or. 269, 291 (2016). This case is not an investigatory exemption case, but a case relating to the disclosure of police disciplinary records. Although the exemptions are different, the ruling here makes it clear that the public interest analysis is the same. The question of the timing of the disclosure was not before the court.

[13] *Id.* at 291.

[14] *Id.* at 298.

[15] *Id.* at 293

[16] Petition of Bial, MCDA PRO 22-20. Although the appeal was to the MCDA, the Clackamas County District Attorney handled the appeal at the MCDA's request due to a conflict of interest. CCDA issued the PRO September 7, 2022.

SUV following an argument at a local bar. The vehicle then crashed into the Democratic Party headquarters across the street. The driver and passengers fled on foot.

During the initial stages of the investigation the PPB recovered the car, took statements by friends of the victim, and obtained video footage of the scene showing the vehicle swerving onto the sidewalk and striking Kealiher.

Despite the high-profile nature of Kealiher's killing, which PPB acknowledged explicitly at the time, and the significant evidence present, no arrests were made in the months following the killing. After a few vague incident reports and bulletins, the PPB released little information and largely declined comment, citing an active investigation.

One year later, following the 2020 Black Lives Matter protests, PPB's apparent continued inaction on the Kealiher case rose to public attention again. On the one-year anniversary of the murder, community advocates planned social media campaigns and other events to mark the event, and PPB flagged these activities as a likely focal point for direct action by such advocates. In the face of PPB's apparent inaction and lack of communication about the murder investigation, many activists and community members wondered whether the failure to act was influenced by politics, and specifically Kealiher's past criticism of PPB.[17] Community members seeking answers from PPB included local political figures and candidates, as well as Kealiher's mother, and the case drew significant press attention.

On January 28, 2021 journalist W. Paul Smith of the First Look Institute, Inc., d.b.a. The Intercept, filed a public records request for case records seeking to shed light on the PPB handling of the case. PPB released a few records, which the Intercept deemed "inconsequential," and withheld the bulk of responsive records relying on exemptions including the investigatory exemption. Oregon Public Broadcasting filed a first request for public records in June 2021, duplicative of the Smith request, and received similarly meager records. OPB filed two subsequent requests, the latter of which went fully ignored before an appeal was filed to the Multnomah County District Attorney's office.

The handling of the investigation itself was a matter of serious public concern in Portland. Yet media requests for documents were rejected and ignored, and PPB staffing changes to the former cold case process indicated that the investigation would likely not proceed further. Nevertheless, the claims of investigatory exemption remained.

On August 2, 2022, days before a decision in OPB's petition was expected, PPB arrested Christopher Knipe for Sean Kealiher's murder. OPB revised its reply brief to address the arrest, and in an order of September 7, 2022, the Clackamas County District Attorney's office (handling the appeal due to MCDA's conflict of interest) issued an order granting partial access to PPB

[17] Zane Sparling, *Portland mom: Police refuse to solve death of Sean Kealiher*, Pamplin Media (Oct. 13, 2020), https://www.portlandtribune.com/...rtland-mom-police-refuse-to-solve-death-of-sean-kealiher/article_1236e173-0bd4-5999-afe8-f36e253a8434.html (last visited Jan. 17, 2023).

records.[18] This partial access was the first time that a petition had succeeded with respect to a PPB open case.

The release of the records and other OPB sources indicated that PPB had slow-walked the investigation, and in fact most relevant evidence leading to the arrest of the suspect had been collected at the scene or soon after, nearly two years before the arrest was made.[19]

This high-profile case epitomized the value and necessity of public oversight to police investigations. As the investigation remained nominally open with no updates or visible progress, public distrust grew and the conduct of PPB itself became a newsworthy topic of concern. Despite an apparently abandoned investigation, the PPB relied on exemption claims to shield most of its records from inquiries from media and the public, and its ultimate action was conspicuously timed around appeals of those claims, suggesting that the public pressure may have played a role.[20] Simply put, the public and media that serve them should not have to fight this hard to receive documents that are vital to the understanding of whether a law enforcement body conducts its obligations without regard to officers' personal feelings regarding the victim.

While the MCDA PRO requiring partial disclosure was appreciated, most of the investigative file remains secret. In a case like this one, with such an overwhelming public interest, disclosure of the entire file was warranted.

2) Sunshine delayed is not as bright; the OPRL requires balancing at the time of request.

Law enforcement agencies often assert blanket exemption policies for all records of open, active cases, with no regard for any public urgency to inspect records. While some cases may not necessitate disclosure immediately rather than after the case resolves, at other times there may be extreme interest in immediate oversight. It is this oversight by *outside* parties and the public generally that is the beating heart of the public records law, and under that law, denial of these urgent requests must be based on a prompt, *case by case* evaluation.

ORS 192.345 expressly states that exemption claims do not apply where "the public interest requires disclosure *in the particular instance*."[21] By its plain terms the ORS does not permit the assertion of exemption as to any specific records claim where the public interest in those specific records is sufficiently weighty. Further, because the general purpose and rule of

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[18] Petition of Bial, MCDA PRO 22-20.

[19] Jonathan Levinson and Ryan Haas, *Records imply Portland police slow-walked high profile homicide case,* OPB (September 15, 2022), https://www.opb.org/article/2022/09/15/portland-police-records-sean-kealiherhomicide-Investigation/ (last visited Jan. 17, 2023).

And records were released just days from a decision on a Summary Judgment motion in The Intercept's case. Alice, Sperry, *The killing of a Portland antifascist activist went unsolved. Then journalists sued the city,* The Intercept (August 16, 2022), https://theintercept.com/2022/08/16/portland-police-sean-kealiher-death-investigation/. (Last accessed January 17, 2023).

[20] Jonathan Levinson and Ryan Haas, *Records imply Portland police slow-walked high profile homicide case,* OPB (September 15, 2022), https://www.opb.org/article/2022/09/15/portland-police-records-sean-kealiherhomicide-Investigation/ (last visited Jan. 17, 2023).

[21] ORS 192.345 (emphasis added).

the public records law is disclosure, the ultimate "burden is on the public body to sustain its action."[22] Any attempt to apply a categorical rule of exemption, without regard to the specific circumstances for any discrete records request, inappropriately ignores and erases these express terms in the statute.

A claim of exemption applies to a specific request, and every specific request must be evaluated in a timely manner with either production or withholding of records. That is, every records request is a particular instance requiring evaluation at the time it is made. In form and function, a denial of production under the investigatory exemption is a full and final denial as to the specific request at issue at the time it was made – and each such decision must be justified by the agency.

It is true that the *Jensen* court noted that, generally speaking, records compiled with respect to an open investigation may often be withheld.[23] There are surely many sound reasons for this in the usual case, generally speaking. Nothing in that statement, however, allows organizations to create a total, categorical rule that erases the obligation to consider each particular instance of the public interest supporting a request at the time it is made. There have been cases, such as the Kealiher matter, where the conduct of law enforcement itself may be at serious issue; where immediate sunlight is needed into law enforcement's activities or lack thereof. In these cases the public cannot simply take law enforcement agencies' word at face value.

Critically, the public records law requires the public bodies to *affirmatively justify each withholding*. It does not permit law enforcement agencies to deny records in these instances without a particular justification.

Time is of the essence. As the saying goes, there are times when justice delayed is justice denied – and the public records law leaves no room for a blanket presumption otherwise. A general policy that delay is always acceptable and the public can always wait an indeterminate amount of time turns the agency's burden on its head, and goes against the fundamental purpose of the public's right of access to records.

The Sunshine Committee should not lose sight of the fact that the OPRL is primarily concerned with the public's interest in oversight and disclosure. Public entities are all established to serve different, important public interests, and law enforcement agencies are specifically charged with directly serving the interest in public safety. Agencies' preferences regarding document production will naturally reflect their mission. But the OPRL is expressly a tool of oversight, a counterweight meant to provide outside scrutiny, and it necessarily centers different public interests – the public interest in full and open access to the workings of public agencies. While balancing exemption claims within the OPRL will appropriately recognize and accommodate law enforcement (public) interests, such interests do not allow deference to agencies' preferences entirely, or allow those entities to drive the analysis unilaterally *at any point in the investigation*. As this committee reviews the current form and function of our public

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[22] *ACLU*, 360 Or. at 282 (quoting then-ORS 192.490(1)).

[23] *See Jensen*, 24 Or. App. at 16.

records policies and practices, it is critical to remember the primary purpose of the OPRL, and to center those interests of disclosure it is meant to directly serve.

Much like justice, disclosure delayed is disclosure denied. Nothing remains static. The news cycle, even for long form journalism, is short. It seems that most public bodies know that the news cycle is short, and assert exemptions and request extensions as a means to draw out the process, making it difficult to obtain public documents, and then finally providing them when the impact on the public body is negligible.

Sunshine is brightest during the day. Based on recent statements of the chair of the Sunshine Committee,[24] it appears to us that the Oregon Department of Justice prefers to disclose at sunset, when the impact is least. This is specifically addressed in the next section.

3) Responses to concerns raised by members of the Sunshine Committee and speakers.

At the January 2023 meeting of the Sunshine Committee, it became clear that stakeholders have very different viewpoints as to why transparency is necessary during the investigatory process, and why there may be serious public interest in prompt disclosure that cannot wait until a year or two later when the investigation is done. The necessity of timely disclosure to maintain the public trust may not have been fully considered.

Information, like money, has a time value to it. *When* transparency occurs is often more important than *if* transparency occurs. Timely disclosure and the perceived transparency it brings is critical to restoring the public's trust in law enforcement.

a) Timely disclosure and the perceived transparency it brings has value to the public, public interest can be time-sensitive, and LEAs may delay disclosure until the impact of such is negligible.

Transparency is an active practice, something that either exists or does not exist at any moment of time. When LEAs deny a specific request for records, they are practically shielding their work from public view, and that present denial is not changed by a vague promise that access may happen someday. The fact of the matter is that when the public demands answers for pressing issues and is denied, they then proceed without access to information they wanted and perhaps needed to see. When public interest is greatest, when matters of high news value and high public concern are roiling the community, and particularly when a well-informed public may clamor for change or reform, those debates and conversations will proceed without the benefit of transparency unless and until records are finally produced. Ongoing debates may be impoverished for that lack of access. Candidates for office may run and win or lose without necessary information in the hands of the electorate. Debates may not even happen at all for want of information.

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[24] Statement of Michael Kron, Oregon Department of Justice, Oregon Sunshine Committee. January 18, 2023 ("We're not talking about disclosure versus nondisclosure, we're talking about disclosure now when I want it as opposed to versus disclosure in a year or two when the process is done, like I don't know, to me the stakes of that discussion are much lower than the stakes of disclosure nondisclosure.") www.youtube.com/watch?v=a2cmRD1UqjA (testimony at 1:57:06)(last accessed February 1, 2023).

Put plainly, when the public has a significant, urgent need to know, that interest is thwarted by delay. Often, the interests served by later disclosure are different interests, removed, historical and academic. Those later public interests are simply not the same.

Now, there may be significant public interest reasons for obfuscation in particular cases. On balance, there are times when the public may be fine waiting, when opacity is justified, and when the tradeoff serves the overall good. This may even be the usual case for law enforcement investigation records. But the fact remains that transparency delayed is speculative and conditional, and when an engaged and active public meets denial when they have urgent need for information, it will not seem like transparency at all.

The assumption that public access is fungible, and that the public can simply wait indefinitely without prejudice, does not reflect the realities of public attention and public discourse. Time passes, and the public isn't keen to wait. Although there does not appear to be a uniformly accepted study of the public's attention span, none of the literature suggests that public interest remains active and static over a span of one or two years, so that disclosure after that kind of time span has similar effect and meets urgent public needs.

We cannot lose sight of the fact that public records laws are a tool *for the public* to use as a check on agency discretion. It is a counterbalance against any agency inclinations to avoid the hassles or embarrassment of public scrutiny. Agencies know that public debate cycles are dynamic, that news cycles move quickly and that constituent attention is constantly shifting to new concerns.

Deference to agencies can blunt the impact of disclosure by using various mechanisms in the ORPL to delay the release of the inevitable.[25] Too often in practice, we see agencies do precisely this, using mechanisms such as providing cost-prohibitive estimates to obtain records, delaying disclosure through the blanket application of the investigative exemptions, and/or forcing petitions and lawsuits that media and the public rarely have the resources or time to pursue. While these techniques may effectively delay or deny scrutiny, doing so also has harmful consequences for agency functions.

b) The public's perception of whether a law enforcement agency is transparent impacts whether the public has confidence in such agency.

It is well documented that the public's perception of the transparency of law enforcement is a large factor in whether the public has confidence in such agencies.[26] It is similarly well documented that when citizens have confidence in their police force, citizens are willing to

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[25] We note that the Oregon Attorney General, the Multnomah County District Attorney, and the Portland Police Bureau, all have a communications specialist on staff.

[26] *Shining Light on Police & Community Relationships and How Technology Can Help*, Veritone (2021), https://go.veritone.com/law-enforcement-transparency-and-trust-report-2021/p/1. (Last accessed February 1, 2023). The full report is available with registration.

report and testify in criminal cases.[27] Stated differently, when the public has trust in its local policing, the law enforcement agencies are better able to perform their role of enforcing laws.[28] When the public trusts and reports, crime decreases.

Studies confirm that transparency is a significant factor in building trust between law enforcement and the community it polices.[29] That trust is the key to effective community policing. Without trust, eyewitnesses will refuse to cooperate with investigators, victims will refuse to testify, and reports of crime will decrease as well. This is not surprising. Individuals who have less favorable opinions of the police are less likely to report a crime.[30] Law enforcement agencies rely on community support to effectively perform their duties, but decreased confidence has harmed this relationship.[31]

This need for public trust in transparency is a pressing issue, as trust in law enforcement agencies is currently exceptionally low, both nationally and abroad. Public calls for reform and transparency have increased in recent years. Perhaps indicative of how powerful the policing issue has become, in the year following the murder of George Floyd, 49 states proposed over 700 pieces of legislation regarding LEA regulation.[32] Oregon was one such state. The Oregon legislature adopted OR HB 2936, which prescribes that law enforcement officers must "demonstrate principles of equity, transparency, honesty and trust."[33] Calls to increase the transparency of LEAs will continue, so long as the public perceives that the activities of law enforcement are shrouded in darkness.[34]

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[27] Emily Ekins, *Policing in America: Understanding Public Attitudes toward the Police. Results from a National Survey*, CATO Insitute (Dec. 7, 2016), https://www.cato.org/survey-reports/policing-america-understanding-public-attitudes-toward-police-results-national.

[28] Importance of Police-Community Relationships and Resources for Further Reading, DOJ, https://www.justice.gov/file/1437336/download (last visited Feb. 10, 2023).

[29] *Shining Light on Public Safety & Community Relationships and How Technology Can Help*, Veritone (2022), https://go.veritone.com/law-enforcement-transparency-and-trust-report-2022/p/1#6285139922c16; *see also* Emily Ekins, *policing in America: Understanding Public Attitudes toward the Police. Results from a National Survey*, CATO Insitute (Dec. 7, 2016), https://www.cato.org/survey-reports/policing-america-understanding-public-attitudes-toward-police-results-national.

[30] Emily Ekins, *policing in America: Understanding Public Attitudes toward the Police. Results from a National Survey*, CATO Insitute (Dec. 7, 2016), https://www.cato.org/survey-reports/policing-america-understanding-public-attitudes-toward-police-results-national.

[31] *Importance of Police-Community Relationships and Resources for Further Reading*, DOJ, https://www.justice.gov/file/1437336/download (last visited Jan. 30, 2023).

[32] Kate Heston et al, *Increasing police transparency is 'messy,' but efforts come from many directions*, Cronkite News (Oct. 18, 2022), https://cronkitenews.azpbs.org/2022/10/18/increasing-police-transparency-comes-from-many-directions/ .

[33] 2021 Ore. HB 2936.

[34] *See* Noreen Nasir et al., *Tyre Nichols' death renews push for police reforms*, PBS (Jan. 29, 2023), https://www.pbs.org/newshour/nation/tyre-nichols-death-renews-push-for-police-reforms.

The Sunshine Committee can help rebuild the relationship between Oregon's communities and its law enforcement agencies by requiring increased transparency and accountability, beginning with revising the investigative exemption.

4) Time Limits on Exemptions.

Under current practice, LEAs also regularly assert investigatory exemptions long past the point where the secrecy may serve a purpose. This is particularly so where information that is being withheld from the public and media has already been provided to interested parties such as criminal suspects or defendants, so that the most interested outside parties already have access. For this reason, the investigative exemption should cease to be available when an arrest is made, an indictment filed, a probable cause hearing conducted, or other proceeding occurs in which information is provided to criminal defendants. There is simply no good reason to use the investigatory exemption to keep information secret when that information is required to be shared with a defendant and/or their counsel. If witnesses need protection or there are confidential aspects to the file, the better course of action is to seek a protective order from the court, instead of relying on an incorrect interpretation of the investigation exemption.[35]

5) Burdensome Fees.

Presently, pursuing public records requests can bring onerous burdens for requestors not only in terms of time but also the financial cost of the process, including appeals and other challenges needed to secure records that are often improperly withheld. For this reason, LEAs should be required to pay legal fees incurred by requesters who successfully appeal exemption claims to the district attorney or Oregon Attorney General. Appeals are particularly burdensome for requesters, and a fee shifting structure would better allow requesters to contest overbroad withholding of records. For similar reasons, the fees in all public records requests made by media organizations should be waived. Media requesters are particularly situated to seek records for public information and disclosure, and as repeat players in the public records system, incur significant costs adjudicating these matters.

The existence of a healthy media ecosystem is critical to democracy. Local news organizations and local reporters provide a vital educational function to the communities that are served by Oregon's public bodies. Unfortunately, the existence of local reporters is shrinking across the state. Local newspapers are ceasing operations.[36] Even those local organizations that

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[35] In contrast, if information is shared with defendant and/or their counsel under a protective order, media organizations and the public have an opportunity to intervene and receive timely resolution, as compared to the current options, which is a petition and lawsuit. We note that this is a safer option for public bodies as well, because a motion to intervene does not contain a fee shifting provision.

[36] Erik Neuman, *Medford Mail Tribune announces it will close Friday*, OPB (January 11, 2022), https://www.opb.org/article/2023/01/11/medford-mail-tribune-oregon-newspaper-news-journalism/ (last visited Jan. 18, 2023).

survive are being bought out by national media organizations that cut local reporter positions and replace local content with national news.[37]

When local news is lost, that vacuum is filled by national news. National studies have concluded that the loss of local news in communities across the nation results in increased political polarization.[38]

With this context, it is important to take steps to preserve the local media organizations we have and make it easier for them to bring local news to Oregonians. A good first step would be to make public records not only free to access, but easy to access as well.

6) Firm Timelines.

Public bodies often devote insufficient resources to processing record requests, and the result is unacceptably long delays in response time and processing time for public records overall. Currently, there are not enough incentives for public bodies to take reasonable actions to prevent these undue delays, and amending the applicable laws and regulations to give more teeth to production timelines would greatly improve public access to records to which they are entitled by law. Potential rules for public bodies that do not comply with required deadlines might include:

(1) required disclosure of all responsive records that are overdue, unless otherwise prohibited by law (i.e., prohibit the public body from asserting discretionary exemptions like the investigative exemption);

(2) a requirement to dedicate a minimum budget amount based on percentage of the public body's total budget toward adequate systems and staffing to process PRRs in a timely manner; and

(3) payment of a nondiscretionary penalty for missed records deadlines to the requester of an amount that is significant ($1,000-$5,000), and any amount should be adjusted for inflation for years after 2023.

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[37] Allison Frost, *UO study highlights local news gaps, how to boost Oregon's 'civic information infrastructure'*, OPB (November 1, 2022). , https://www.opb.org/article/2022/11/01/uo-study-highlights-local-news-gaps-how-to-boost-oregons-civic-information-infrastructure/ (last visited Jan. 18, 2023).

(From the study's lead author Reginal Lawrence, "It's important to remember when we talk about the health of local news systems, we're not just talking about the literal loss of news outlets when they closed, but we're also talking about things like consolidation, getting bought up and becoming part of larger conglomerate chains, and we're talking about the shrinkage of budgets and people in newsrooms. That's all happening, but it's happening more dramatically in especially rural and less populated areas of Oregon where you have really vast geographic regions that are fairly sparsely populated. And there's just a real challenge there for access to local news."

[38] Allison Frost, *UO study highlights local news gaps, how to boost Oregon's 'civic information infrastructure'*, OPB (November 1, 2022), https://www.opb.org/article/2022/11/01/uo-study-highlights-local-news-gaps-how-to-boost-oregons-civic-information-infrastructure/ (lasted visited Jan. 18, 2023).

7) Proposed Amendments.

Given the current fundamental problems with the investigatory exemption to public records requests, a statutory amendment is warranted to ensure that records are processed in a way that is faithful to the open-access purpose of our public records laws. Too many public bodies interpret the exemption in categorical ways, withholding too many documents for too long, frustrating public access and oversight on issues of critical public importance. The following proposed amendments would help to clarify and refocus the use of exemption in line with the statutory purpose and legislative intent.

The Investigatory Exemption – ORS 192.355(3) currently reads as follows.

> The following public records are exempt from disclosure under ORS 192.311 (Definitions for ORS 192.311 to 192.478) to 192.478 (Exemption for Judicial Department) unless the public interest requires disclosure in the particular instance:
>
> (3) Investigatory information compiled for criminal law purposes. 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. Nothing in this subsection shall limit any right constitutionally guaranteed, or granted by statute, to disclosure or discovery in criminal cases. For purposes of this subsection, the record of an arrest or the report of a crime includes, but is not limited to:

OPB proposes the following amended language.

> (3) Investigatory information compiled for criminal law purposes.
>
> (a) Notwithstanding anything in this Section (3), records will not be considered investigatory information compiled for criminal law purposes unless the public body served with the request is a law enforcement agency as that term is defined in ORS 181A.010(7)(a):
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> (b) Every record deemed exempt under this Section (3) shall be disclosed unless and only for so long as there is a clear and specific need to delay disclosure in the course of a specific investigation, including a need to protect the complaining party or the victim from physical harm that cannot reasonably be protected by redaction under ORS 192.338.
>
> (c) Upon receipt of a public records request, such public body must review each responsive record individually to determine if such record may be protected under subsection (b) above. For each page of any record determined by the Attorney General or district attorney to have been wrongfully withheld, or over redacted, for any period of time under this section, public body must pay requester a fee of $100 plus statutory interest calculated from the time of request until the record was disclosed.
>
> (d) Nothing in this Section (3) modifies a public body's requirement to disclose all documents that can be made nonexempt through compliance with ORS 192.338.
>
> (e) An investigation is deemed concluded upon the latter of the arrest of the suspect, the indictment of the suspect, or the arraignment of the suspect. For requests seeking information in a case where a suspect has not been arrested, an investigation is deemed concluded at a date one year from the date of the crime.
>
> (f) Nothing in this subsection shall limit any right constitutionally guaranteed, or granted by statute, to disclosure or discovery in criminal cases. For purposes of this subsection, the record of an arrest or the report of a crime includes, but is not limited to: [continue as original]

This proposed amendment is written to address multiple significant issues with the current investigatory exemption system. Broadly, they seek to formalize the fundamental approach adopted in *Jensen*, and provide meaningful incentives and tools to ensure that those rules are followed faithfully.

(1) Section 3(a) is designed to address the situation encountered in OPB v Oregon Department of Corrections ("ODOC"). In that case, ODOC refused a records request for documents pertaining to Jeremy Christian's incarceration before he fatally stabbed two people and injured a third on the MAX Light Rail train in Portland, Oregon. These records had been public records for 7-15 years until they were "compiled" with other investigatory materials in connection with the MAX train killings.

(2) Sections (3)(b), 3(c), and 3(d) amendments would refocus agency review on the appropriate itemized evaluation, rather than inappropriate and automatic whole-file claims of exemption, which are widely made by public bodies. By adding enforcement tools, the 3(c) amendment would also provide meaningful incentives for public bodies to follow these new guidelines by disincentivizing over-withholding.

(3) Section 3(e) addresses the situation where a LEA is slow walking an investigation as was the case in the murder of Sean Kealiher, discussed above.

8) While statutory amendments would help, the problem of public bodies not following clear statutory intent requires further action to resolve.

We are unsure how the legislature can be any clearer regarding the presumption of disclosure and the placement of the burden on the public bodies. Many public bodies and certain court decisions have not followed the statutory language. We would welcome a conversation about potential solutions. Perhaps the legislature could adopt a preamble and in the legislative history discuss the problems with how the case law and petition process has not followed the original intent of the legislature.

9) Action is needed.

The current practice around requests for investigatory public records is not working as intended by the legislature. For too long, law enforcement and other public bodies have used claims of exemptions to deny access to public records broadly and automatically, contrary to the clear intent and purpose of the OPRL. Building trust and ensuring effective oversight requires reforms to reign in these misapplications of the law, and we encourage you to take up these measures.

Sincerely,

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