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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 29, 2013

Representative Phil Barnhart
900 Court Street NE H383
Salem OR 97301

Re: Differences in public record exemptions under ORS 192.501 and 192.502

Dear Representative Barnhart:

You asked for an explanation of the difference between exemptions from disclosure of public records that are listed under ORS 192.501 and ORS 192.502. You asked for this explanation in the context of HB 3294-A, which amends ORS 192.502 to create a new exemption for electronic mail addresses in the possession or custody of the executive department, local government, local service district or special government body.

Public records generally

The Public Records Law, ORS 192.410 to 192.505, confers on every person the right to inspect the public records of a public body in Oregon, unless an exemption permits or requires a record to be withheld from disclosure. The term "public record" is very broadly defined to include any record in any medium that contains information relating to the conduct of the public's business. Thus, the Public Records Law is primarily one of disclosure. Applicable exemptions are narrowly interpreted.[1] Significantly, a public body is ordinarily free to disclose a public record even when an exemption applies to that record.[2] A far more limited group of laws require certain records to be held confidentially.

Conditional exemptions under ORS 192.501

ORS 192.501 lists 37 different exemptions from disclosure for different categories of public records. All 37 exemptions are conditional exemptions, which means that a public record described in one of these 37 exemptions must nevertheless be disclosed if "the public interest requires disclosure in the particular instance."[3] When a public record is subject to a conditional exemption under ORS 192.501, the public body in possession of the record must balance the public interest in favor of disclosure against the competing interest in favor of confidentiality.[4] Such a balancing warrants disclosure when disclosure would result in the public learning how public bodies conduct their business or administer particular programs, but would warrant maintaining confidentiality if disclosure would prejudice or prevent the carrying out of a public

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[1] *Coos County v. Oregon Dept. of Fish and Wildlife*, 86 Or. App. 168, 173 (1987).
[2] *Portland Adventist Medical Center v. Sheffield*, 303 Or. 197, 199 (1987).
[3] ORS 192.501.
[4] *Turner v. Reed*, 22 Or. App. 177, 187 (1975).

body's functions.[5] When a public body engages in balancing the public interest in disclosure against the interest in maintaining confidentiality and concludes that the public interest in disclosure outweighs interest in maintaining confidentiality, the public body must disclose the record in question.

Exemptions under ORS 192.502

ORS 192.502 lists 38 different exemptions from disclosure for other categories of public records. Most of these exemptions are "unconditional" exemptions, which means a public body need not engage in a balancing test in order to withhold public records described in the exemption from disclosure. Again, however, a public body may choose to disclose records described in most of the exemptions listed in ORS 192.502 if the public body elects to do so.

HB 3294-A

HB 3294-A amends ORS 192.502 to exempt from disclosure electronic email addresses in the possession or custody of the executive department, a local government, a local service district or a special government body. Because the exemption proposed by HB 3294-A is placed in ORS 192.502, it is an unconditional exemption, meaning that an entity listed above need not engage in a balancing of the competing interests of disclosure and confidentiality, in order to determine that electronic mail addresses need not be disclosed. Nothing in HB 3294-A, however, would prohibit an entity from disclosing those addresses if it elected to disclose.

Finally, note that the exemption in HB 3294-A does not apply to electronic mail addresses assigned by a public body for use by public employees in the ordinary course of their employment.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

Dexter A. Johnson
Legislative Counsel

[5] *Attorney General's Public Records and Meetings Manual* (2011), at 27.