

Dexter A. Johnson
LEGISLATIVE COUNSEL



From the Desk of
Senator Brian Boquist

900 COURT ST NE S101
SALEM, OREGON 97301-4065
(503) 986-1243
FAX: (503) 373-1043
www.oregonlegislature.gov/lc

STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

January 14, 2015

Senator Brian Boquist
900 Court Street NE S305
Salem OR 97301

Re: Secretary of State's Election Complaint Disclosure Obligations and Criminal Penalty Enforcement

Dear Senator Boquist:

The following is in response to your opinion request regarding two questions pertaining to election violation complaints that are subject to criminal penalties. First, you asked whether the Secretary of State is permitted to keep records confidential in response to public records requests for information related to election violations that are subject to criminal penalties. Second, you asked what, if any, criminal or law enforcement authority the secretary possesses.

Short Answer

First, the Secretary of State must follow the public records law when addressing public records requests regarding election violation complaints that are subject to criminal penalty. As a result, the secretary may not withhold any information requested under the public records law, unless an exemption applies that allows or requires the secretary to withhold the information. There are many exemptions from required disclosure under the public records law.

Second, the Secretary of State does not possess any law enforcement authority to impose criminal penalties for violations of elections laws. The secretary is granted rulemaking authority to administer the state's election laws,¹ and the secretary has authority to impose penalties for complaint violations, which vary according to the nature of the complaint violation. Although the secretary is permitted to impose civil penalties for violation of elections laws, this power does not extend to criminal penalties.

Public Records

ORS chapter 192 governs the public records policies of the state. This chapter identifies, among other things, records that are subject to public inspection and records that are exempt from disclosure.² Election complaints fall within the meaning of "public record" under ORS 192.410 because an election complaint falls within the very broad definition of "public record"; namely, a writing that reflects the conduct of the public's business. Furthermore, election complaints are generally not exempt from disclosure and thus are subject to public inspection.³

¹ ORS 246.150.

² See ORS 192.501 to 192.505.

³ ORS 192.420 (1).

Depending on the specific circumstances, however, there may be certain exemptions that apply to the records in question. Specifically, records pertaining to litigation or criminal investigatory material are conditionally exempt from disclosure under ORS 192.501 (1) and (3).

When a public record is conditionally exempt, this means that the public body that is the custodian of the record must balance the interests that favor confidentiality against the public's interest in disclosure, with the presumption always being in favor of disclosure.⁴ There are hundreds of public records exemptions; without more knowledge concerning the records in question, we will be unable to rule out other exemptions as being a basis for withholding these records.

Election Complaints Subject to Criminal Penalty

Oregon law grants the Secretary of State extensive rulemaking authority to administer the state's election laws.⁵ ORS 260.345 is the primary statute that sets forth the procedures for filing complaints that allege a violation of an election law or rule. Under this provision, the secretary is responsible for the complaint investigation and determination of whether an actual election violation occurred.⁶

ORS chapter 260 also describes the penalties for election law violations. ORS 260.993 sets forth the provisions that, if violated, are subject to criminal penalties. ORS 260.995 allows the Secretary of State, following an investigation under ORS 260.345, to impose a civil penalty for each violation "of any provision of Oregon Revised Statutes relating to the conduct of any election, any rule adopted by the secretary under ORS chapters 246 to 260 or any other matter preliminary to or relating to an election, for which a civil penalty is not otherwise provided."⁷

ORS 260.995 does not grant the Secretary of State any law enforcement authority. Moreover, the statute draws a clear line between the enforcement authority for civil and criminal penalties. Following an investigation and determination that an election violation has occurred, ORS 260.995 specifically authorizes the secretary or the Attorney General to impose civil penalties.⁸ Conversely, upon a finding of a violation subject to criminal penalties, the secretary is required to immediately report the findings to the Attorney General and request prosecution.⁹ Therefore, we conclude that it is within the Attorney General's, not the secretary's, authority to enforce criminal penalties.

Please let us know if you have any other questions or concerns.

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,

⁴ *Turner v. Reed*, 22 Or. App. 177, 187 (1975).

⁵ ORS 246.150.

⁶ ORS 260.345 (3).

⁷ ORS 260.995.

⁸ See also ORS 260.345 (4)(b).

⁹ ORS 260.345 (4)(a).

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

A handwritten signature in black ink, appearing to be 'js' or similar initials, written in a cursive style.

By
Jessica A. Santiago
Staff Attorney

