



THE NONPROFIT
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Testimony of James White, Executive Director, Nonprofit Association of Oregon
HB4067
February 22, 2016
Senate Committee on Judiciary

The Nonprofit Association of Oregon (NAO) continues to oppose HB4067 as currently drafted.

NAO strongly supports good governance practices among the more than 17,000 charitable nonprofit organizations in Oregon. As the Oregon's state association serving nonprofits, we believe that whistleblowers deserve broad legal protections and we join with millions of nonprofits across the country that recognize strong whistleblower protections are critical to well-functioning nonprofits. NAO works as the Oregon dissemination partner for Independent Sector's *Principles for Good Governance and Ethical Practice*. NAO actively promotes this publication and toolkit, which outlines 33 best practices for charities and foundations around ethics and accountability. Principle Four of these principles provides guidance for nonprofits specifically on whistleblower policies.

NAO believes that repeated amendments of HB4067 do not address fundamental flaws in this legislation. Combining legislation that was written to address public sector whistleblower protections with the very different legal class of 501(c) (3) nonprofit organizations has created a complex and conflicted piece of legislation that will not even serve the stated purposes of the proponents, but will create confusion and cause small, rural, culturally specific, and religious nonprofits and churches to inadvertently run afoul of the law.

The concerns that we have with this legislation are both broadly philosophical and specifically technical.

In previous testimony, I outlined NAO's concerns that:

HB4067 would supplant existing mechanisms designed to protect and balance the interests of all parties as well as existing whistleblower practices already understood by nonprofits. These regulations cover the proposed purposes of the legislation including regulations under Sarbanes-Oxley Act 1107, IRS regulations and even existing Oregon Statutes. NAO has no objection to the existing law, codified as ORS 659A.200 et seq. The framework of the law is to protect whistleblowers who are public employees or who work for private contractors who contract with public agencies. The proponents of HB4067 apparently believe the protections need to be enhanced based on the bad practices of one organization which records show actually had no one come forward or identify as a whistleblower. To that end the proponents have included in HB4067 penalties for violators, mandated that impacted organizations adopt and distribute whistleblower policies, and provided an affirmative defense for employees of the covered organizations. To the extent that these enhancements apply to the organizations described in the existing legislation (including nonprofits who contract with government entities), NAO can support these additions to the law. But the sponsors attempt to apply these

protections to a new class of organizations (nonprofits) and this is where the proposed legislation becomes deeply flawed. There is no attempt to explain why the existing architecture, including Sarbanne Oxley, the voluntary sector efforts, and the encouragement from the IRS form 990 is inadequate.

Philosophically, we believe that it is bad policy making to combine the very different needs and requirements for oversight of the public sector with the nonprofit sector. HB4067 first appeared in the 2015 session as legislation designed to ensure public sector employee whistleblower protections in the wake of the resignation of Governor Kitzhaber and allegations of whistleblower intimidation. After not passing the 2015 session, HB4067 was introduced into this session with the addition of including nonprofits, but without recognizing the important differences between the public and nonprofit sectors.

There is no attempt to focus the law's addition on the protection of public assets; it applies to all violations of law. Therefore, there is no attempt to explain why nonprofits should be segregated from for profits. There is no recognition of the costs that will be imposed on small nonprofits that now must craft whistleblower policies to comply with the law. Almost half of the registered charities in Oregon are so small that they do not have to file even a 990EZ. So why do we need to encourage an employee of a small nonprofit to come forward and turn in the executive director for what may be a local rule or infraction while doing nothing to encourage an employee of a *for profit* glass manufacturer to come forward and notify authorities that the company is polluting the environment and community atmosphere, potentially sickening generations of Oregonians for their lifetimes.

Technically, the legislation creates serious concerns that include, but extend beyond, our concerns regarding the inclusion of nonprofits. Specifically:

HB4067 encourages the disclosure of information in violation of numerous state and federal laws, which places high risk of loss on nonprofit organizations that, unlike public entities, rely heavily on contract rights to protect their continued existence.

The affirmative defense contained in HB 4067 Section 2(1) applies specifically to information that would otherwise be exempt from disclosure as provided in ORS 192.501-192.505. ORS 192.502(8) protects from disclosure any and all information "the disclosure of which is prohibited by federal law or regulations," while ORS 192.502(9) prevents disclosure of information "the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." The bill, therefore, purports to grant complete absolution to persons violating state and federal privacy laws. The Supremacy Clause of the United States Constitution prevents state governments from creating legislative exceptions to federal law. The laws that we have identified that HB4067 grants absolution on, include but not limited to the following:

- Oregon Consumer Identity Theft Protection Act of 2007
- Health Insurance Portability and Accountability Act of 1996 ("HIPAA")
- Family Educational Rights and Privacy Act ("FERPA")
- The Privacy Act of 1974
- Federal Information Security Act of 2002

Because these laws protect the privacy rights of third parties, HB 4067 appears to completely foreclose third parties' ability to enforce their privacy rights under the law, so long as an

employee has a "good faith and objectively reasonable belief" of an employer's violation of law, rule, or regulation. Furthermore, HB 4067 exacerbates existing privacy concerns by creating an illusion of safety that encourages the disclosure of information in violation of numerous laws.

HB4067(2)(2) does not adequately protect nonprofit organizations from penalties related to violation of federal privacy laws nor does it adequately protect nonprofit organizations from loss of funding based on disclosure to a state agency.

HB 4067 unnecessarily eliminates judicial intervention to balance competing interests of privacy and whistleblower protection. The Attorney General of the State of Oregon, with respect to public bodies, and its Charitable Activities Division, with respect to nonprofit organizations, has the authority to investigate alleged malfeasance. Supplementing that authority is the ability to request production of incriminating information by subpoena. To the extent such information is protected by state or federal law, a court of competent jurisdiction may thereafter determine whether, or to what extent, such information must be produced. Therefore, avenues currently exist for the production of protected information from nonprofit organizations with due regard for both existing privacy rights and whistleblower protections; the imposition of HB 4067 upon nonprofit organizations supplants the existing mechanisms designed to protect and balance the competing interests of all parties and undermines the ability of the judiciary to maintain balance between privacy rights and whistleblower protections.

HB4067 proposes to apply its provisions not only to the new class of nonprofit employees, regardless of whether they contract with government, but also to board members associated with those organizations. Board members of nonprofits are not employees and cannot be treated as such. There was only one submission of written testimony before the House committee by a bill sponsor and it really made no attempt to explain the need for or justification for this proposed expansion of the law. Are the governors of the organization afraid to report to themselves and take corrective action? One can only imagine the downstream chaos that will be caused by this inclusion in HB4067. It seems that the main reason to protect whistleblowers is that they will not be fired and lose their livelihood. This has no bearing on volunteer directors.

There is no attempt to explain why the bill applies to religious organizations or churches that hold 501 (c)(3) status). We believe it is ill advised for the Oregon legislature to make a policy on whistleblower protections that are not thoughtfully cross-referenced with laws pertaining to religious freedoms and separations of church and state.

It should also be noted that if there is really a significant problem with nonprofit whistleblowers not coming forward today and this bill removes whatever roadblocks the proponents believe are in the way, the Oregon Department of Justice will theoretically receive a mountain of new complaints, yet the fiscal impact statement prepared for your review says that there will be no significant fiscal impact. We are unable to reconcile these inconsistencies.

NAO supports reasonable and non-burdensome regulations and policies that already make the nonprofit community the most transparent sector of the U.S. economy. Passing HB4067 would create a confusing system that could cause nonprofits, especially small, rural and culturally specific nonprofits and churches, to run afoul of the law inadvertently. An appropriate balance must be struck which recognizes and respects the independent activities of nonprofits as public-spirited yet still private organizations.

For these reasons, NAO is opposed to the passage of HB4067 as currently written.