



STATE OF OREGON
Legislative Counsel Committee

February 27, 2017

To: Members of the Senate Committee on General Government and Accountability

From: Dexter A. Johnson, Legislative Counsel

Subject: Constitutionality of integrated information technology security functions for Secretary of State and State Treasurer

You asked whether Senate Bill 120 (2017) violates Article VI, section 5, of the Oregon Constitution. The answer is no. You also asked more generally if concepts of independence that the Oregon Constitution imbues the offices of the Secretary of State and State Treasurer with—by virtue of establishing those offices as independently elected offices within the executive branch and by assigning specific duties to be performed by those offices—requires that those offices maintain independent information technology security functions. The answer to this question is also no.

Article VI, section 5, of the Oregon Constitution, provides:

The Governor, Secretary of State, and Treasurer of State shall severally keep the public records, books and papers at the seat of government in any manner relating to their respective offices.

Article VI, section 5, has been a part of the Oregon Constitution since statehood in 1859, although the provision was amended by voters at the 1986 general election so as to eliminate the requirement that the Secretary of State reside in Salem.¹ Article VI, section 5, has never been interpreted by any Oregon court. Therefore, determining the meaning of Article VI, section 5, involves applying the same methodology of constitutional interpretation that the Oregon Supreme Court uses to construe constitutional provisions. That methodology differs slightly depending on whether the provision in question was ratified as an original part of the Oregon Constitution or adopted later as an amendment. Because the only amendment to Article VI, section 5, was to eliminate a residency requirement for the Secretary of State—a requirement not related to your question—we conclude that the appropriate methodology to use is that employed when considering an original provision to the Oregon Constitution.

When interpreting original provisions of the Oregon Constitution, the main task is to determine the intent of the people who ratified the constitution. *Monaghan v. School Dist.*, 211 Or. 360, 367 (1957). Intent is determined by considering three factors: (1) the text and context of the provision; (2) the historical circumstances leading up to the enactment of the provision; and (3) prior case law interpreting the provision. *Priest v. Pierce*, 314 Or. 411, 416-417 (1992). As noted above, there is no case law addressing Article VI, section 5. Similarly, there is a paucity of evidence concerning discussion of Article VI, section 5, at the constitutional convention of 1857,

¹ See Senate Joint Resolution 13 (1985), which was referred to and adopted by voters as Ballot Measure 1 (1986).

where the Oregon Constitution was drafted. Article VI contains the sections applicable to the administrative department. Sections 2 to 5 were considered by the convention on August 31, 1857, and were passed by the convention on September 3, 1857, without record of any debate and without amendment.² Accordingly, analyzing the text and context of Article VI, section 5, is determinative.

The text of Article VI, section 5, broken down into components, provides that the Governor, Secretary of State and Treasurer of State “shall severally” keep records. The term “shall severally” means a mandatory direction to each of the officers mentioned, in a separate capacity,³ to keep records. The next component directs that the records be kept “at the seat of government,” which is self-explanatory. The final phrase is “in any manner relating to their respective offices.” The term “in any manner” is a broad grant of discretion with respect to the manner in which the records are kept and, when followed by “relating to their respective offices,” means that each of the three elected officers has complete discretion to determine the manner in which records related to their offices are kept. In summary, a textual analysis of Article VI, section 5, is that the provision directs each of the three elected officers to separately keep those records relating to their offices “in any manner” that they separately determine.

The next step in our inquiry is to examine what SB 120 does and whether SB 120 has any bearing on the directions given in Article VI, section 5. Senate Bill 120 changes the entities to which an existing statute—ORS 182.122—applies to include the Secretary of State and State Treasurer. Therefore, to understand what SB 120 does, one needs to examine ORS 182.122. ORS 182.122 directs the State Chief Information Officer, an Oregon Department of Administrative Services employee, to:

- Review and verify the security of state agency information systems.
- Monitor state networks to identify and react to security threats.
- Conduct vulnerability assessments of state agency information systems.
- Develop and implement policies for responding to security threats.
- Implement forensic techniques and controls for the security of state agency information systems.
- Ensure that remedial actions be taken when vulnerability assessments warrant that actions be reasonably necessary.

Senate Bill 120 removes references to the Secretary of State and State Treasurer from another statute: ORS 182.124. Under ORS 182.124, state officers subject to ORS 182.124 must each establish information systems security plans that:

- Are compatible with security plans established by the State Chief Information Officer under ORS 182.122.
- Review, monitor and verify the security of the information systems of the respective state officer.
- Conduct vulnerability assessments of information systems used by the respective state officer.
- Contain policies that respond to information system security threats.
- Prescribe actions reasonably necessary to assemble and deploy expertise, tools and methodologies to prevent or mitigate damage caused by information system security threats.

² Claudia Burton, “A Legislative History of the Oregon Constitution of 1857—Part II (Frame of Government: Articles III-VII),” 39 Willamette L. Rev. 245, 374-384 (2003).

³ “Severally” is an adverbial form of “several” meaning separate and distinct from one another.

In summary, there is considerable overlap between the duties imposed on the State Chief Information Officer under ORS 182.122 and the duties imposed on independently elected state officers under ORS 182.124.⁴ None of the duties, however, relate directly to which records may be kept. Article VI, section 5, provides that the Governor, Secretary of State and State Treasurer shall keep records relating to their respective offices “in any manner” or in their discretion. Accordingly, because ORS 182.122 and 182.124 address duties to assess and respond to information system security threats and not to how specific records are kept, the changes proposed in SB 120 to the operation of those statutes do not impermissibly contradict the provisions of Article VI, section 5.

The other factor to consider in construing original provisions of the Oregon Constitution, the context of the provision, also bears on our response to your second question; namely, whether SB 120 is unconstitutional on more general grounds that it conflicts with the inherent independence of the Secretary of State and State Treasurer. “Context” means other related constitutional provisions. *State v. Hirsch*, 338 Or. 622, 634 (2005), *overruled on other grounds*, *State v. Christian*, 354 Or. 22 (2013). The heading of Article VI is “Administrative Department,” and other provisions of Article VI establish the offices of Secretary of State and Treasurer of State as statewide elected offices, set forth the duties of the Secretary of State and Treasurer of State and establish a state seal, which is to be kept by the Secretary of State. See Article VI, sections 1 to 4. Article III, section 1, of the Oregon Constitution, establishes three separate branches of state government: the Legislative, the Judicial and, significantly, “the Executive [branch], including the administrative.” Article V, section 1, of the Oregon Constitution, vests chief executive power in the Governor and establishes the Governor as the head of the Executive branch. Article IV, section 1, of the Oregon Constitution, vests the legislative power in the Legislative Assembly. Read collectively, these provisions make clear that the independence of the Secretary of State and of the State Treasurer is limited in that both are part of the Executive branch and that separation of powers principles do not shield them from direction by other Executive branch officials if those officials are so directed by the Legislative Assembly in the exercise of the legislative power. Senate Bill 120 is merely an example of the legitimate exercise of the legislative power.

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⁴ The amendments to ORS 182.124 proposed by SB 120 would leave just the Attorney General subject to ORS 182.124.