

Senate Bill 481

Sponsored by Senators BEYER, KRUSE, Representatives HELM, HUFFMAN (at the request of Attorney General Ellen F. Rosenblum) (Pre-session filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Establishes state policy regarding public access to public records. Establishes time frames for public body responses to public records requests. Requires Attorney General to maintain catalog of public records law exemptions. Provides protections against liability and privilege waivers resulting from public records disclosures. Clarifies appeal procedures for reviews of public records requests.

A BILL FOR AN ACT

1
2 Relating to public records; creating new provisions; and amending ORS 40.280, 192.440, 192.450 and
3 192.460.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1. Sections 2, 4, 8 and 9 of this 2017 Act are added to and made a part of ORS**
6 **192.410 to 192.505.**

7 **SECTION 2. The Legislative Assembly finds and declares that:**

8 (1) **Protecting public access to information about government and governmental actions**
9 **ensures that the public is informed and able to meaningfully participate in government.**

10 (2) **Access to information enables Oregonians to ensure that their public servants per-**
11 **form honestly, faithfully and competently.**

12 (3) **It is the policy of this state that:**

13 (a) **Public records are accessible to members of the public, with specific exemptions;**

14 (b) **Exemptions from public records disclosure requirements must be construed narrowly**
15 **in favor of the public's right to know;**

16 (c) **Access to public records is timely;**

17 (d) **Fees for access to public records may be waived or reduced to serve the public in-**
18 **terest and may not exceed the actual cost of making the public records available;**

19 (e) **An exemption from mandatory disclosure enacted after the effective date of this 2017**
20 **Act must expressly identify the interests for which the exemption is needed; and**

21 (f) **All exemptions from public records disclosure requirements must be written and in-**
22 **terpreted to ensure that an exemption is no broader than necessary.**

23 **SECTION 3. ORS 192.440 is amended to read:**

24 192.440. (1) **A public body that is** the custodian of any public record that a person has a right
25 to inspect shall give the person, upon **receipt of a written** request:

26 (a) A copy of the public record if the public record is of a nature permitting copying; or

27 (b) A reasonable opportunity to inspect or copy the public record.

28 *[(2) If a person makes a written request to inspect a public record or to receive a copy of a public*
29 *record, the public body receiving the request shall respond as soon as practicable and without unrea-*
30 *sonable delay. The public body may request additional information or clarification from the requester*

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 for the purpose of expediting the public body's response to the request. The response of the public body
2 must acknowledge receipt of the request and must include one of the following:]

3 [(a) A statement that the public body does not possess, or is not the custodian of, the public
4 record.]

5 [(b) Copies of all requested public records for which the public body does not claim an exemption
6 from disclosure under ORS 192.410 to 192.505.]

7 [(c) A statement that the public body is the custodian of at least some of the requested public re-
8 cords, an estimate of the time the public body requires before the public records may be inspected or
9 copies of the records will be provided and an estimate of the fees that the requester must pay under
10 subsection (4) of this section as a condition of receiving the public records.]

11 [(d) A statement that the public body is the custodian of at least some of the requested public re-
12 cords and that an estimate of the time and fees for disclosure of the public records will be provided
13 by the public body within a reasonable time.]

14 [(e) A statement that the public body is uncertain whether the public body possesses the public re-
15 cord and that the public body will search for the record and make an appropriate response as soon
16 as practicable.]

17 [(f) A statement that state or federal law prohibits the public body from acknowledging whether the
18 record exists or that acknowledging whether the record exists would result in the loss of federal bene-
19 fits or other sanction. A statement under this paragraph must include a citation to the state or federal
20 law relied upon by the public body.]

21 **(2) If an individual who is identified in a public body's procedure described in subsection**
22 **(7)(a) of this section receives a written request to inspect or receive a copy of a public re-**
23 **cord, the public body shall within five business days after receiving the request acknowledge**
24 **receipt of the request or complete the public body's response to the request. An acknowl-**
25 **edgment under this subsection must:**

26 **(a) Confirm that the public body is the custodian of the requested record;**

27 **(b) Inform the requester that the public body is not the custodian of the requested re-**
28 **cord; or**

29 **(c) Notify the requester that the public body is uncertain whether the public body is the**
30 **custodian of the requested record.**

31 (3) If the public record is maintained in a machine readable or electronic form, the [custodian]
32 **public body** shall provide a copy of the public record in the form requested, if available. If the
33 public record is not available in the form requested, the [custodian] **public body** shall make the
34 public record available in the form in which the [custodian] **public body** maintains the public record.

35 (4)(a) The public body may establish fees reasonably calculated to reimburse the public body for
36 the public body's actual cost of making public records available, including costs for summarizing,
37 compiling or tailoring the public records, either in organization or media, to meet the [person's] re-
38 quest.

39 (b) The public body may include in a fee established under paragraph (a) of this subsection the
40 cost of time spent by an attorney for the public body in reviewing the public records, redacting
41 material from the public records or segregating the public records into exempt and nonexempt re-
42 cords. The public body may not include in a fee established under paragraph (a) of this subsection
43 the cost of time spent by an attorney for the public body in determining the application of the pro-
44 visions of ORS 192.410 to 192.505.

45 (c) The public body may not establish a fee greater than \$25 under this section unless the public

1 body first provides the [*requestor*] **requester** with a written notification of the estimated amount of
 2 the fee and the [*requestor*] **requester** confirms that the [*requestor*] **requester** wants the public body
 3 to proceed with making the public record available.

4 (d) Notwithstanding paragraphs (a) to (c) of this subsection, when the public records are those
 5 filed with the Secretary of State under ORS chapter 79 or ORS 80.100 to 80.130, the fees for fur-
 6 nishing copies, summaries or compilations of the public records are [*those*] **the fees** established by
 7 the Secretary of State by rule[,] under ORS chapter 79 or ORS 80.100 to 80.130.

8 (5) The custodian of [*any*] a public record may furnish copies without charge or at a substan-
 9 tially reduced fee if the custodian determines that the waiver or reduction of fees is in the public
 10 interest because making the record available primarily benefits the general public.

11 (6) A [*person*] **requester** who believes that there has been an unreasonable denial of a fee
 12 waiver or fee reduction may petition the Attorney General or the district attorney in the same
 13 manner as a [*person*] **requester who** petitions when inspection of a public record is denied under
 14 ORS 192.410 to 192.505. The Attorney General, the district attorney and the court have the same
 15 authority in instances when a fee waiver or reduction is denied as [*it has*] when inspection of a
 16 public record is denied.

17 (7) A public body shall make available to the public a written procedure for making public [*re-*
 18 *cord*] **records** requests that includes:

19 (a) The name of one or more [*persons*] **individuals within the public body** to whom public [*re-*
 20 *cord*] **records** requests may be sent, with addresses; and

21 (b) The amounts of and the manner of calculating fees that the public body charges for re-
 22 sponding to requests for public records.

23 (8) This section does not apply to signatures of individuals submitted under ORS chapter 247 for
 24 purposes of registering to vote as provided in ORS 247.973.

25 **SECTION 4. (1) A public body shall complete its response to a written public records re-**
 26 **quest that is received by an individual identified in the public body's procedure described in**
 27 **ORS 192.440 (7)(a) as soon as practicable and without unreasonable delay.**

28 **(2) A public body's response to a public records request is complete when the public body:**

29 **(a) Provides access to or copies of all requested records within the possession or custody**
 30 **of the public body that the public body does not assert are exempt from public disclosure,**
 31 **or explains where the records are already publicly available;**

32 **(b) Asserts any exemptions from disclosure under ORS 192.501 or 192.502 that the public**
 33 **body believes apply to any requested records and, if the public body cites ORS 192.502 (8) or**
 34 **(9), identifies the state or federal law that the public body relied on in asserting the ex-**
 35 **emptions;**

36 **(c) As required by ORS 192.505, provides redacted copies of any records containing both**
 37 **exempt and nonexempt information;**

38 **(d) To the extent that the public body is not the custodian of records that have been re-**
 39 **quested, provides a written statement to that effect;**

40 **(e) To the extent that state or federal law prohibits the public body from acknowledging**
 41 **whether any requested record exists or that acknowledging whether a requested record ex-**
 42 **ists would result in the loss of federal benefits or imposition of another sanction, provides**
 43 **a written statement to that effect, citing the state or federal law that the public body relies**
 44 **on, unless the written statement itself would violate state or federal law; and**

45 **(f) If the public body denies a request for records under ORS 192.501 or 192.502, includes**

1 a statement that the requester may seek review of the denial of the public records request
 2 under ORS 192.410 to 192.505.

3 (3) If a public body has informed a requester of a fee permitted under ORS 192.440 (4),
 4 the obligation of the public body to complete its response to the request is suspended until
 5 the requester has paid the fee, the fee has been waived by the public body pursuant to ORS
 6 192.440 (5) or the fee otherwise has been ordered waived.

7 (4) A public body may request additional information or clarification from a requester
 8 of public records for the purpose of expediting the public body's response to the request. If
 9 the public body has requested additional information or clarification in good faith, the public
 10 body's obligation to further complete its response to the request is suspended until the re-
 11 quester provides the requested information or clarification or affirmatively declines to pro-
 12 vide that information or clarification.

13 (5) As soon as reasonably possible but not later than 10 business days after the date by
 14 which a public body is required to acknowledge receipt of the request under ORS 192.440, a
 15 public body shall:

16 (a) Complete its response to the public records request; or

17 (b) Provide a written statement that the public body is still processing the request and
 18 a reasonable estimated date by which the public body expects to complete its response based
 19 on the information currently available.

20 (6) Compliance with the specific time periods established in ORS 192.440 (2) and sub-
 21 section (5) of this section is not required in circumstances where compliance is not reason-
 22 ably possible. Compliance is not reasonably possible if providing a timely response to the
 23 request:

24 (a) Would result in demonstrable impairment of the public body's ability to perform other
 25 necessary functions; or

26 (b) Is impracticable, given:

27 (A) The availability of staff employed by the public body that is necessary to complete
 28 the response to the request; or

29 (B) The volume of public records requests currently being processed by the public body.

30 (7) For purposes of this section, staff members who are on leave or are not scheduled to
 31 work are considered to be unavailable.

32 **SECTION 5.** ORS 192.450 is amended to read:

33 192.450. (1) Subject to ORS 192.480 and subsection [(4)] (5) of this section, *[any person denied the*
 34 *right to inspect or to receive a copy of any public record of a state agency]* **a person who has made**
 35 **a written request to a state agency for public records** may petition the Attorney General *[to*
 36 *review the public record to determine if it]* **for review of any of the following:**

37 (a) **If the state agency denied the request to inspect or receive a copy of a public record,**
 38 **the public record to determine if the public record may be withheld from public inspection.**

39 (b) **The failure of the state agency to timely respond to the request as required by section**
 40 **4 of this 2017 Act. A failure of the state agency to timely respond to the request shall be**
 41 **treated as a denial of the request unless the state agency demonstrates that compliance was**
 42 **not reasonably possible as described in section 4 of this 2017 Act.**

43 (c) **The date by which the state agency estimates completion of the response to the re-**
 44 **quest, as described in section 4 of this 2017 Act, if the requester believes that the estimated**
 45 **completion date is unreasonable and will result in an undue delay in disclosure of the re-**

1 **quested record.**

2 **(d) Any other failure of the state agency to comply with section 4 of this 2017 Act.**

3 **(2)** Except as provided in subsection [(5)] **(6)** of this section[,]:

4 **(a)** The burden is on the **state** agency to sustain its action[. *Except as provided in subsection*
5 *(5) of this section,*]; **and**

6 **(b)** The Attorney General shall issue an order denying or granting the petition, or denying it
7 in part and granting it in part, within seven days from the day the Attorney General receives the
8 petition.

9 [(2)] **(3)(a) Except as provided in paragraph (b) of this subsection,** if the Attorney General
10 grants the petition and orders the state agency to disclose the record, or [*if the Attorney General*]
11 grants the petition in part and orders the state agency to disclose a portion of the record, the state
12 agency shall comply with the order in full within seven days after issuance of the order[.].

13 **(b) The state agency may,** [*unless*] within the seven-day period [*it issues*], **issue** a notice of
14 [*its*] **the state agency's** intention to institute proceedings for injunctive or declaratory relief in the
15 Circuit Court for Marion County or, as provided in subsection [(6)] **(7)** of this section, in the circuit
16 court of the county where the record is held. [*Copies*] **The state agency shall send a copy** of the
17 notice [*shall be sent*] to the Attorney General and by certified mail to the petitioner at the address
18 shown on the petition. The state agency shall institute the proceedings within seven days after [*it*]
19 **the state agency** issues its notice of intention to do so.

20 **(c)** If the Attorney General denies the petition in whole or in part, or if the state agency con-
21 tinues to withhold the record or a part of [*it*] **the record** notwithstanding an order to disclose by
22 the Attorney General, the person seeking disclosure may institute [*such*] proceedings **to enforce the**
23 **order.**

24 [(3)] **(4)(a)** The Attorney General shall serve as counsel for the state agency in a suit filed under
25 subsection [(2)] **(3)** of this section **only** if the suit arises out of a determination by the Attorney
26 General that the public record, **in whole or in part,** should not be disclosed[, *or that a part of the*
27 *public record should not be disclosed if*] **and** the state agency has fully complied with the order of
28 the Attorney General requiring disclosure of [*another*] **any other** part or parts of the public
29 record[, *and in no other case*].

30 **(b)** In [*any*] a case in which the Attorney General is prohibited from serving as counsel for the
31 state agency, the **state** agency may retain special counsel.

32 [(4)] **(5)(a)** A person **who is** denied the right to inspect or to receive a copy of [*any*] a public
33 record of a health professional regulatory board, as defined in ORS 676.160, that contains informa-
34 tion concerning a licensee or applicant, and [*petitioning*] **who petitions** the Attorney General to
35 review the public record shall, on or before the date of filing the petition with the Attorney General,
36 send a copy of the petition by first class mail to the health professional regulatory board.

37 **(b)** Not more than 48 hours after the **health professional regulatory** board receives a copy of
38 the petition, the **health professional regulatory** board shall send a copy of the petition by first
39 class mail to the licensee or applicant who is the subject of [*any*] a record for which disclosure is
40 sought. [*When sending a copy of the petition to the licensee or applicant, the*] **The health professional**
41 **regulatory** board shall include **with the petition** a notice informing the licensee or applicant that
42 **the licensee or applicant may file** a written response [*by the licensee or applicant may be filed*]
43 with the Attorney General not later than seven days after the date [*that the notice was sent by the*
44 *board*] **on which the health professional regulatory board sends the notice.** Immediately upon
45 receipt of [*any*] a written response from the licensee or applicant, the Attorney General shall send

1 a copy of the **written** response to the petitioner by first class mail.

2 [(5)] **(6)(a)** The person seeking disclosure of a public record of a health professional regulatory
3 board[, *as defined in ORS 676.160,*] that is confidential or exempt from disclosure under ORS 676.165
4 or 676.175[, *shall have*] **has** the burden of demonstrating to the Attorney General by clear and con-
5 vincing evidence that the public interest in disclosure outweighs other interests in nondisclosure,
6 including but not limited to the public interest in nondisclosure.

7 **(b)** The Attorney General shall issue an order denying or granting the petition, or denying or
8 granting [*it*] **the petition** in part, [*not later than the 15th day following the day that*] **within 15 days**
9 **of the date on which** the Attorney General receives the petition. [*A copy of the Attorney*
10 *General's*] **The Attorney General shall serve by first class mail a copy of the Attorney**
11 **General's** order granting a petition or part of a petition [*shall be served by first class mail*] on the
12 health professional regulatory board, the petitioner and the licensee or applicant who is the subject
13 of [*any*] **the** record ordered to be disclosed.

14 **(c)** The health professional regulatory board [*shall*] **may** not disclose [*any*] **the** record prior to
15 the seventh day following the service of the Attorney General's order on a licensee or applicant
16 entitled to receive notice under this subsection.

17 [(6)] **(7)** If the Attorney General grants or denies the petition for a record of a health profes-
18 sional regulatory board[, *as defined in ORS 676.160,*] that contains information concerning a licensee
19 or applicant, the **health professional regulatory** board, a person denied the right to inspect or
20 receive a copy of the record or the licensee or applicant who is the subject of the record may in-
21 stitute proceedings for injunctive or declaratory relief in the circuit court for the county where the
22 public record is held. The party seeking disclosure of the record [*shall have*] **has** the burden of
23 demonstrating by clear and convincing evidence that the public interest in disclosure outweighs
24 other interests in nondisclosure, including but not limited to the public interest in nondisclosure.

25 [(7)] **(8)** The Attorney General may comply with a request of a health professional regulatory
26 board to be represented by independent counsel in [*any*] **a** proceeding under subsection [(6)] **(7)** of
27 this section.

28 **SECTION 6.** ORS 192.460 is amended to read:

29 192.460. (1) **The provisions of** ORS 192.450 [*applies*] **apply** to [*the case of*] a person **who makes**
30 **a request for public records to** [*denied the right to inspect or to receive a copy of any public record*
31 *of*] a public body other than a state agency, except that:

32 (a) The district attorney of the county in which the public body is located, or if [*it*] **the public**
33 **body** is located in more than one county the district attorney of the county in which the adminis-
34 trative offices of the public body are located, shall carry out the functions of the Attorney General;

35 (b) [*Any*] **A** suit filed must be filed in the circuit court for the county described in paragraph (a)
36 of this subsection; and

37 (c) The district attorney may not serve as counsel for the public body[,] in the cases permitted
38 under ORS 192.450 [(3),] **(4)** unless the district attorney ordinarily serves as counsel for the public
39 body.

40 (2) Disclosure of a record to the district attorney in compliance with subsection (1) of this sec-
41 tion does not waive any privilege or claim of privilege regarding the record or its contents.

42 (3) Disclosure of a record or part of a record as ordered by the district attorney is a compelled
43 disclosure for purposes of ORS 40.285.

44 **SECTION 7. Sections 2 and 4 of this 2017 Act and the amendments to ORS 192.440, 192.450**
45 **and 192.460 by sections 3, 5 and 6 of this 2017 Act apply to public records requests made on**

1 or after the effective date of this 2017 Act.

2 **SECTION 8.** (1) The Attorney General shall maintain and regularly update a catalog of
3 exemptions created by Oregon statute from the disclosure requirements of ORS 192.410 to
4 192.505. The catalog must be as comprehensive as reasonably possible and must be freely
5 available to the public in an electronic format that facilitates sorting and searching of the
6 catalog.

7 (2) The catalog required by subsection (1) of this section must include the following in-
8 formation for each exemption:

9 (a) A citation to the Oregon statute or statutes creating the exemption from the disclo-
10 sure requirements of ORS 192.410 to 192.505;

11 (b) The relevant text of each statute creating the exemption;

12 (c) If the exemption has been construed by a decision of the Oregon Supreme Court or
13 Court of Appeals, a citation to that decision;

14 (d) To the extent that the exemption is specific to a particular public body or particular
15 types of public bodies, a description of the public body or bodies to which the exemption re-
16 lates; and

17 (e) Additional information as the Attorney General deems appropriate.

18 (3) To help ensure that the catalog required by subsection (1) of this section is as com-
19 prehensive as possible:

20 (a) The Legislative Counsel shall provide the Attorney General with an electronic copy
21 of any Act passed by the Legislative Assembly that, in the judgment of the Legislative
22 Counsel, creates an exemption from the disclosure requirements of ORS 192.410 to 192.505;
23 and

24 (b) When a district attorney issues an order pursuant to ORS 192.460, the district attor-
25 ney shall send the Attorney General an electronic copy of that order.

26 (4) The purpose of the catalog required by subsection (1) of this section is to assist public
27 officials and members of the public in ascertaining what information is exempt from the
28 public disclosure requirements of ORS 192.410 to 192.505. The catalog is not intended to pro-
29 vide legal advice to public bodies or to members of the public.

30 **SECTION 9.** (1) A public body, including a public official, public employee, custodian of
31 public records or other public body that discloses public records, is not liable for any loss
32 or damage based on the disclosure if the public body, public official, public employee, custo-
33 dian or other public body acts in good faith to comply or attempt to comply with the disclo-
34 sure requirements of ORS 192.410 to 192.505.

35 (2) A public body that discloses any information or record in response to a written re-
36 quest for public records under ORS 192.410 to 192.505 that is privileged under ORS 40.225 to
37 40.295 does not waive its right to assert the applicable privilege to prevent the introduction
38 of the information or record as evidence pursuant to ORS 40.225 to 40.295.

39 **SECTION 10.** ORS 40.280 is amended to read:

40 40.280. A person upon whom ORS 40.225 to 40.295 confer a privilege against disclosure of the
41 confidential matter or communication waives the privilege if the person or the person's predecessor
42 while holder of the privilege voluntarily discloses or consents to disclosure of any significant part
43 of the matter or communication. This section does not apply if the disclosure is itself a privileged
44 communication. Voluntary disclosure does not occur with the mere commencement of litigation or,
45 in the case of a deposition taken for the purpose of perpetuating testimony, until the offering of the

1 deposition as evidence. Voluntary disclosure does not occur when representatives of the news media
2 are allowed to attend executive sessions of the governing body of a public body as provided in ORS
3 192.660 (4), or when representatives of the news media disclose information after the governing body
4 has prohibited disclosure of the information under ORS 192.660 (4). **Voluntary disclosure does not**
5 **occur when a public body, as defined in ORS 192.410, discloses information or records in re-**
6 **sponse to a written request for public records made under ORS 192.410 to 192.505.** Voluntary
7 disclosure does occur, as to psychotherapists in the case of a mental or emotional condition and
8 physicians in the case of a physical condition upon the holder's offering of any person as a witness
9 who testifies as to the condition.

10
