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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 5, 2020

Senator Dallas Heard
900 Court Street NE S316
Salem OR 97301

Re: Questions regarding Senate Bill 1530

Dear Senator Heard:

You asked three questions[1] related to Senate Bill 1530. A restatement of your questions and our answers are provided below.

Does section 32 of the bill prohibit legislators from obtaining the information being exempted from disclosure under the public records law?

Yes, except in very limited circumstances. Section 32 of SB 1530 provides that a certain limited amount of information obtained by the State of Oregon under the Oregon Greenhouse Gas Initiative (OGGI) shall be treated as confidential business information, is exempt from disclosure under the public records law, ORS 192.311 to 192.478, and may not be disclosed to any person or entity except in aggregated form,[2] or if the disclosure is to other agencies of the executive department, as defined in ORS 174.112, or to persons engaged by the State of Oregon to provide administrative or technical services to support implementation of the OGGI.[3] Disclosures to other agencies of the executive department or other persons engaged by the state may be made only if the disclosure is necessary for purposes of the administration and implementation of the OGGI.[4]

Based on a reading of the plain text of that provision, section 32 would prohibit disclosure to members of the Legislative Assembly of the information protected by that section. That does not, however, mean that a member of the legislature is completely without options to obtain the information.

ORS 171.510 authorizes the President of the Senate, the Speaker of the House of Representatives or the chairperson or vice chairperson of a legislative committee upon a majority vote of the committee to "issue any processes necessary to compel the attendance of witnesses and the production of any books, papers, records or documents as may be required."

[1] Your opinion request tabulated the inquiries as two questions, but we have separated them into three to reflect that your first inquiry presented two distinct questions.
[2] SB 1530 section 32 (2) and (3).
[3] SB 1530 section 32 (4).
[4] *Id.*

A subpoena issued under ORS 171.510 may compel testimony or the production of records on any matter relating to legislative business.

ORS 171.522 provides for judicial enforcement of any process issued under ORS 171.510. Finally, under ORS 171.990, a person summoned as a witness under ORS 171.510 to give testimony or produce records and who refuses to comply is guilty of a misdemeanor.

Do government entities outside of the executive branch have access to all the information gathered by the state in regard to this program?

No, except pursuant to the legislative subpoena powers described above, if the government entity is a person engaged by the State of Oregon as described in section 32 (4) of SB 1530, or if the information is required to be produced in litigation. Again, section 32 (4) outlines the universe of persons to whom information may be disclosed in an individually identifiable form if that information is otherwise protected under section 32 (2). Subsection (4) of section 32 provides:

> This section does not prohibit the disclosure of information between the office and other agencies of the executive department, as defined in ORS 174.112, or to persons engaged by the State of Oregon to provide administrative or technical services to support implementation of sections 4 to 32 or 45 to 53 of this 2020 Act, if the disclosure is necessary for purposes of the administration and implementation of sections 4 to 32 or 45 to 53 of this 2020 Act.

If a government entity does not meet the definition of an "agenc[y] of the executive department" under ORS 174.112, the information protected by section 32 is generally not disclosable to the government entity. However, it is at least conceivable that a "person[ ] engaged" by the state to provide administrative or technical services to support implementation of the OGGI could be a government entity. In either case, information protected by section 32 would be disclosable in an individually identifiable form to a government entity only to the extent that such disclosure is necessary for that government entity to carry out its role in administration and implementation of the OGGI.

Finally, it may be that some of the information protected by section 32 could be made available to the judicial branch, but only to the extent that information is produced as discovery documents in litigation pursuant to applicable rules of civil procedure.

If the Office of Greenhouse Gas Regulation were to enter into an agreement or a contract with a third party (like, for example, another state, the Western Climate Initiative or another country) for the purposes of trading compliance instruments and administering the OGGI, would a future Legislative Assembly be prevented from withdrawing from or amending that contract?

It depends. Nothing in the text of SB 1530 specifically authorizes or creates a contract,[5] nor prohibits a future Legislative Assembly from passing legislation requiring the state to

[5] *Health Net, Inc. v. Dep't of Revenue*, 362 Or. 700, 716 (2018) *quoting Moro v. State of Oregon*, 357 Or. 167, 195 (2015) ("[W]e 'treat a statute as a contractual promise only if the legislature has clearly and unmistakably expressed its intent to create a contract.'").

withdraw from or to amend the type of hypothetical contract that you describe. However, we must also consider whether a piece of future legislation requiring the state to withdraw from or to amend such a hypothetical contract would present an unconstitutional impairment of contract. It is very difficult for us to provide an analysis of this question in the time provided for drafting of this opinion. However, we can provide some initial general impressions to hopefully help guide your consideration of the policy.

Article I, section 21, of the Oregon Constitution, provides, in part, that no law "impairing the obligation of contracts shall ever be passed." Article I, section 10 of the United States Constitution, provides, in relevant part: "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts."[6] Although analysis under the federal and state contracts clause differs in some respects, each involve similar considerations.[7]

The Oregon Supreme Court uses a two-step process for analyzing claims under the Contract Clause. "First, it must be determined whether a contract exists to which the person asserting an impairment is a party; and, second, it must be determined whether a law of this state has impaired an obligation of that contract."[8]

Here, assuming that a contract exists, threshold questions in determining the extent to which the legislature might be constrained by the contracts clause will depend, in large part, on the terms of the agreement or contract at issue. It is not unusual, and should be expected, that a contract of the type you hypothesize would have provisions for managing the potential withdrawal of a party from the agreement. For example, the 2017 linkage agreement between the State of California and the Provinces of Ontario and Quebec provides that a party may withdraw from the agreement by "giving written notice of intent to withdraw" to the other parties. The agreement further provides that the withdrawing party "shall endeavour [sic]" to give 12 months' notice of intent to withdraw and endeavor to match the withdrawal with the end of a compliance period.[9]

Another threshold issue will be the existence of parties that might be able to raise a cognizable claim.[10]

Assuming a party with a cognizable claim exists, a court will likely apply general principles of contract law to govern the inquiry of whether a contract exists to which a person is asserting an impairment.[11] The Oregon Supreme Court has also identified additional rules that apply when a state is a contracting party, including that the state may not contract away its police power.[12] While the vitality and scope of the proposition that a state may not contract away

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[6] We refer to both provisions collectively as the "Contracts Clause."
[7] *See Hughes v. State*, 314 Or. 1, 35 (1992) (noting that different analyses apply but reaching the same result under both clauses); *Eckles v. State*, 306 Or. 380, 390 (1988) (concluding that framers of Oregon Constitution meant to incorporate federal Contracts Clause into state constitution, "though not necessarily every case decided under the federal provision.").
[8] *Id.* at 13-14.
[9] "Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions," https://www.arb.ca.gov/cc/capandtrade/linkage/2017_linkage_agreement_ca-qc-on.pdf (last visited February 5, 2020).
[10] *Cf. Health Net*, 362 Or. at 753-755 (Nakamoto, J., concurring in part and concurring in the judgment in part) (arguing that while Oregon's adoption of Multistate Tax Compact created a contract, taxpayer was not an intended third-party beneficiary of the compact and had no right to use compact's apportionment formula).
[11] *See Hughes*, at 13-14.
[12] *Id.* at 14.

its police power may be somewhat unclear under existing case law,[13] we predict that the question of whether the type of future legislation you hypothesize would present an impairment of contract may hinge on analysis of this proposition.

If future legislation were to be determined by a court to impair the obligation of a contract in violation of the Contracts Clause, the legislation would be void as it relates to that contract.[14]

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Very truly yours,

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[13] *See Eckles v. State,* 306 Or 380, 399 (1988).
[14] *See Hughes* at 31.