

**Report of the Oregon Sunshine Committee**  
**July 1, 2018**

## **Introduction**

The Oregon Sunshine Committee is pleased to submit this inaugural report to the public records subcommittee of the Legislative Counsel Committee, as required by ORS 192.511(3)(e). The law creating the Sunshine Committee charges it with a review of the hundreds of exemptions from public disclosure requirements that are found throughout the Oregon Revised Statutes. The law also broadly directs the Sunshine Committee to “[s]tudy and identify any inefficiencies and inconsistencies in the application of public records laws that impede transparency in public process and government” and to “[m]ake recommendations on changes in existing law, policy and practice to enhance transparency and facilitate rapid fulfillment of public records requests made to public bodies.” ORS 192.511(3)(c) and (d).

The Sunshine Committee has held three meetings, and has just begun the substantive work required of it. This report will focus on the composition of the committee and the groundwork done to facilitate the immense project of reviewing hundreds of exemptions from public disclosure requirements.

Materials documenting the Sunshine Committee’s past work, and upcoming meetings, are available to all at <https://www.doj.state.or.us/oregon-department-of-justice/public-records/public-records-reform/>.

## **Composition of the Oregon Sunshine Committee**

ORS 192.511(1) specifies the composition of the Oregon Sunshine Committee. Four legislators serve as ex-officio members. By law, they are the members of the subcommittee of the Legislative Counsel Committee, described in ORS 192.499, to which this report is addressed. Those legislators are:

- Senator Brian Boquist of Dallas;
- Senator Floyd Prozanski of Eugene;
- Representative Karin Power of Milwaukie;

- Representative Carl Wilson of Grants Pass.

In addition, the Attorney General, Governor and Secretary of State are represented:

- Mary Beth Herkert, State Archivist, Office of Secretary of State Dennis Richardson;
- Michael Kron, Special Counsel, Office of Attorney General Ellen Rosenblum;
- Emily Matasar, Government Accountability Attorney, Office of Governor Kate Brown.

The remaining eight members were appointed by Attorney General Rosenblum to represent specific interests identified in statute:

- A person with information technology expertise: Selena Deckelmann, Director of Engineering, Mozilla Firefox;
- Three representatives of local government to represent the interests of counties, cities, school districts and special districts:
  - o Eileen Eakins, Law Office of Eileen Eakins, LLC;
  - o Karin Johnson, Independence City Recorder;
  - o Morgan Smith, Polk County Counsel;
- A representative of broadcasters: Adrienne Roark, Vice-President and General Manager, KPTV Fox 12;
- A representative of professional journalists: Brent Walth, Journalism Professor, University of Oregon;
- A representative of newspaper publishers: currently vacant after the resignation from the Sunshine Committee of Christian Wihtol, Senior Editor, Register Guard;
- A representative from a nonprofit open government or public interest group: Charlie Fisher, OSPIRG State Director.

Mr. Kron was elected to serve as Chair of the Sunshine Committee, and Ms. Matasar was elected Vice Chair. Staff support includes Cameron Miles of the Office of Legislative Counsel, and Oregon Department of Justice Public Records Counsel Andy Foltz.

### **Meetings to Date**

The Sunshine Committee has held three meetings so far, in January, March and May of 2018.

At the January meeting, Attorney General Rosenblum welcomed the members and made introductory remarks. Members introduced themselves and discussed the statutory role of the Sunshine Committee, focusing on the need to establish a coherent methodology for reviewing more than 500 statutory exemptions. The Sunshine Committee also took care of some basic

administration, selecting Mr. Kron to chair the group and adopting parliamentary rules to govern its proceedings.

At its March meeting, the Sunshine Committee elected Ms. Matasar as vice chair. It then considered a report from Chair Kron outlining various possible approaches for structuring the review of exemptions. After discussion, the Sunshine Committee decided on a categorical approach to this task. That approach, and the reasoning behind the Sunshine Committee's decision, is discussed in detail later in this report. In summary, discussing exemptions by category should make it easier to identify inconsistent or redundant exemptions. It should also make it easier and more convenient for members to prepare for meetings and for outside stakeholder to present their views to the Sunshine Committee. At its March meeting, the Sunshine Committee also decided that it would prioritize review based on available information about which exemptions have generated the most appellate court decisions and Attorney General Public Records Orders. In addition, the Sunshine Committee discussed the need for general criteria to evaluate exemptions, and agreed that it would take testimony – orally, to the extent possible – from stakeholders interested in the exemptions being considered.

The May meeting featured further discussion of the proposal to adopt criteria for review of exemptions. Although there seemed to be general consensus about the type of questions the Sunshine Committee should be asking, members did not feel that the proposed criteria could be adopted, and time did not permit the Sunshine Committee to edit the proposal as a group. Mr. Walth indicated that he would send comments to Chair Kron between meetings, and others were invited to do the same. Time was short because the May meeting also included the Sunshine Committee's first formal public comment period. Six witnesses offered oral testimony regarding a number of different exemptions for certain individuals' personal contact information. The Sunshine Committee had also received nine written comments concerning those exemptions. In addition, the Sunshine Committee approved a draft of this report and authorized Chair Kron to make a handful of changes and submit it on behalf of the Sunshine Committee.

## **Exemption Review: Methodology and Schedule**

As mentioned above, the Sunshine Committee has adopted a categorical approach to exemption review. Under this method, exemptions are grouped into categories – and subcategories – which will then be reviewed as groups. To assist in the categorizing effort, the Sunshine Committee has adopted work done by the Attorney General’s Public Records Law Reform Task Force to group similar exemptions. The Sunshine Committee members remain free to re-categorize exemptions. But for now, the categorization of exemptions is as follows:

### **Administration of Government Exemptions**

- Computer Programs
- Civil Prosecuting Attorney Material
- Competitive Procurement
- Confidential Submissions
- Reports to Public Bodies
- Test Materials
- Civil and Regulatory Investigations
- Legislative Process
- Dispute Regulation and Litigation
- Accident Reports
- Business Transactions
- Voter Pamphlet Material
- Natural Resource/Species Protection
- Archeological Information
- Information Sharing
- Correctional Institutions
- Requirements of Other Laws
- Human Resources

### **Public Safety and Law Enforcement Exemptions**

- Security
- Undercover Law Enforcement
- Intercepted Communications
- Criminal Investigatory Information

### **Personal Privacy and Safety Exemptions**

- Background Check Records
- Contact Information
- Offender Information
- Decedent/Survivor Information
- Disability Information

Education Records  
Family Law  
Financial Information  
Health  
Interpreter Information  
Juvenile  
Mental Health  
Miscellaneous

Economic Affairs Exemptions  
Agriculture Industry  
Tax Records  
Contractors with Public Bodies  
Energy Industry  
Export Industry  
Finance Industry  
General Business  
Health Industry  
Insurance Industry  
Licensed Professions  
Resource Extraction  
Subsidies  
Telecommunications  
Waste Management  
Miscellaneous

To make its way through this material, the Sunshine Committee will be guided by a combination of (1) available data concerning the extent to which various exemptions have generated disputes between requesters and public bodies and (2) the expertise of Sunshine Committee members. Specifically, the Sunshine Committee delegated to Chair Kron the task of determining which categories and subcategories include the greatest number of exemptions that have been the subject of appellate review and Attorney General orders. This information is culled from the electronic catalog of public records exemptions created by the Attorney General pursuant to ORS 192.340.

Under the current plan the Sunshine Committee will take the exemption categories in this order:

- Personal Privacy and Safety Exemptions
- Administration of Government Exemptions

- Economic Affairs Exemptions
- Public Safety and Law Enforcement Exemptions

An Appendix attached to this report goes into further detail regarding the order of review. However, Sunshine Committee members may propose specific exemptions to take out of order. And Chair Kron retains discretion to set meeting agendas. If member suggestions are accepted, then other related exemptions will also be moved out of order, helping to insure that similar exemptions in a particular category will still be considered together.

### **Criteria for Review**

In considering the numerous exemptions, Sunshine Committee members agree that uniform criteria will be helpful to insure consistent review and provide a framework for discussion. This is consistent with what similar groups have done in other states. Discussions concerning specific final criteria are ongoing as of the date of this report, though there appears to be general agreement that the criteria should touch on whether exemptions are necessary, clear, consistent and appropriately limited in scope.

### **Other Work**

In addition to its exemption review work, the Sunshine Committee has discussed its charge to make recommendations for improving government transparency. Given the scope of the exemption review project, and the fact that the 2017 legislature separately created the Public Records Advisory Council with duties similar to the Sunshine Committee's broader responsibilities, it seems likely that the Sunshine Committee will need to focus on its large project – at least until members are comfortable that the exemption review is adequately under way. Nevertheless, members are very interested in broader Public Records Law issues. Consequently, the Sunshine Committee intends to stay apprised of the work of the Public Records Advisory Council, and will coordinate with that body as appropriate. In addition, Sunshine Committee members can ask the chair to add items other than exemption review to

meeting agendas. But, for the time being, the subcommittee should expect this Committee's work and reports to focus primarily on exemption review.

### **Conclusion**

The Oregon Sunshine Committee has embarked on a large project to improve a very important tool for assuring public access to information about the activities of state and local government. Members look forward to making recommendations to the subcommittee for improving government transparency in Oregon, while also making the Oregon Public Records Law easier to administer. The Sunshine Committee believes that its efforts in its first three meetings have created a solid foundation for the significant work to come.



## **Appendix: Order of Planned Review of Exemption Subcategories**

- I. Personal Information Exemptions
  - 1. Contact Information
  - 2. Financial Information
  - 3. Miscellaneous
  - 4. Family Law
  - 5. Health
  - 6. Mental Health
  - 7. Background Check Records
  - 8. Disability Information
  - 9. Juvenile Records
  - 10. Offender Information
  - 11. Education Records
  - 12. Decedent/Survivor Information
  - 13. Interpreter Information
  
- II. Economic Affairs Exemptions
  - 14. Licensed Professions
  - 15. Insurance Industry
  - 16. Finance Industry
  - 17. General Business
  - 18. Miscellaneous
  - 19. Tax Records
  - 20. Subsidies
  - 21. Health Industry
  - 22. Agriculture Industry
  - 23. Energy Industry
  - 24. Resource Extraction Industry
  - 25. Contractors with Public Bodies
  - 26. Telecommunications Industry
  - 27. Waste Management Industry
  - 28. Export Industry
  
- III. Administration of Government Exemptions
  - 29. Civil and Regulatory Investigations
  - 30. Dispute Regulation and Litigation
  - 31. Reports to Public Bodies
  - 32. Business Transactions
  - 33. Competitive Procurement
  - 34. Legislative Process
  - 35. Information Sharing
  - 36. Computer Programs

- 37. Requirements of Other Laws
- 38. Accident Reports
- 39. Natural Resource/Species Protection
- 40. Archeological Information Protection
- 41. Civil Prosecuting Attorney Material
- 42. Confidential Submissions
- 43. Test Materials
- 44. Voter Pamphlet Material
- 45. Correctional Institutions
- 46. Human Resources

- IV. Public Safety and Law Enforcement Exemptions
  - 47. Security
  - 48. Criminal Investigatory Information
  - 49. Undercover Law Enforcement
  - 50. Intercepted Communications

**Report of the Oregon Sunshine Committee**  
**July 1, 2020**

## Introduction

The Oregon Sunshine Committee is pleased to submit its second biannual report to the Public Records Subcommittee of the Legislative Counsel Committee. The Sunshine Committee is proud of its accomplishments over the past two years. Though it faces some challenges in its work, the Sunshine Committee is optimistic about the role it can play advocating for improved government transparency over the next several years. Should the Public Records Subcommittee have questions about this report the Sunshine Committee would be happy to address those at an upcoming meeting or through a supplemental report.

### -Statutory basis

ORS 192.511 establishes the Sunshine Committee and sets out its purposes. The Sunshine Committee's single largest charge is to review essentially all existing public records disclosure exemptions by 2026. But the Sunshine Committee is also empowered to "[s]tudy and identify any inefficiencies and inconsistencies in the application of public records laws that impede transparency in public process and government." And it is charged with making "recommendations on changes in existing law, policy and practice to enhance transparency and facilitate rapid fulfillment of public records requests made to public bodies." Finally, it is required to make a report to the Public Records Subcommittee every other year.

### -Committee membership

Statutorily, the Sunshine Committee consists of fifteen members. The four members of the Public Records Subcommittee participate *ex-officio*. Nine members are selected by the Attorney General to represent various stakeholder groups. And both the Governor and Secretary

of State designate a member. These are the non-legislative members currently serving on the Sunshine Committee:

- Selena Deckelmann, Mozilla Firefox
- Eileen Eakins, Law Office of Eileen Eakins
- Charlie Fisher, Oregon State Public Interest Research Group
- Bennett Hall, Corvallis Gazette-Times
- Mary Beth Herkert, Office of the Secretary of State
- Karin Johnson, City of Independence
- Michael Kron, Office of the Attorney General
- Emily Matasar, Office of the Governor
- Adrienne Roark, KPTV/KPDX
- Morgan Smith, Polk County
- Brent Walth, University of Oregon School of Journalism and Communication

Collectively, these members represent the interests of a wide array of stakeholders.

#### -Structure of report

Following this introductory section, this report will describe the Sunshine Committee's work and recommendations over the past two years, as well as its plans. Exemption review work is discussed first, starting with an explanation of exemptions reviewed to date and recommendations of the Sunshine Committee based on that review. An update on the Sunshine Committee's plans to finish its review follows. After discussing exemptions, this report continues with a description of the Sunshine Committee's broader work. That includes both general recommendations adopted to date, along with a description of areas that Sunshine

Committee members are interested in – and challenges that the Sunshine Committee foresees. The final section of the report examines various ways in which the Sunshine Committee can continue to serve Oregonians, and the Public Records Subcommittee, going forward. The specific recommendations approved by the Oregon Sunshine Committee are attached after the conclusion of the report.

## Exemption Review

The Attorney General’s catalog of public disclosure exemptions, which contains the statutes the Sunshine Committee must review, contains 651 entries. As explained in the Sunshine Committee’s 2018 report, those have been divided into categories based on subject matter, and the Sunshine Committee has established the order in which they will be reviewed. The Sunshine Committee has also adopted criteria by which it will assess exemptions:

- Why should this information be kept from the public? What public policy interests are served?
- What interests suffer if this information is not available to the public? To what extent does it hinder government accountability?
- Is the exemption appropriately written in light of the above? Does it adequately balance the relevant interests?
- If there are multiple exemptions, do there need to be? Are the various exemptions written in a way that captures the relevant differences?

These have not been adopted as questions that the Sunshine Committee will formally answer with respect to every exemption. Instead, they are the principles that inform the Sunshine Committee’s consideration of exemptions and underlie its recommendations.

## -Exemptions reviewed so far

To date the Sunshine Committee has reviewed more than sixty exemptions relating to various categories of personal information. These include exemptions for contact information, exemptions that govern personal financial information, exemptions that protect various family-related legal matters, and exemptions that pertain to health information. These areas concern the difficult overlap between transparency and government accountability, on the one hand, and public policies in favor of personal privacy, on the other. In considering its recommendations on these subjects, the Committee has heard from members of the public, from media, from various interest groups, and from government representatives.

## -Recommendations to date

### --General

The Sunshine Committee's recommendations reflect that these exemptions for personal information touch on legitimate personal privacy matters. For the most part, recommendations in these areas focus on the need to reduce the overall number of exemptions, treat similar information similarly, and make it easier for both governments that administer the law and members of the public who request records to understand what information is exempt from public disclosure. The Sunshine Committee generally feels that these goals could be furthered by combining related exemptions and insuring that the Oregon Public Records Law itself contains at least an explicit reference to the relevant statutes.

In many cases, removing confidentiality statutes from their existing locations and instead placing them in the Oregon Public Records Law would not be advisable. That is because many confidentiality provisions are part of a larger statutory framework. They also need to be

understood by people working within that framework. Plus, simply providing that something is exempt from disclosure under the Oregon Public Records law may not accomplish the primary goal of the statute. For example, the Oregon Public Records law currently incorporates the evidentiary privileges that apply in courtrooms, which are codified in ORS Chapter 40. *See* ORS 192.455(9)(a). But the reverse is not true: courts do not apply public records exemptions when they decide whether evidence is admissible or must be turned over to a different party. As a result, removing evidentiary privileges from ORS Chapter 40 and placing them in the Oregon Public Records Law would not be advisable. But the Oregon Public Records Law nevertheless could be more specific in identifying nondisclosure laws that are codified elsewhere. This would, of course, significantly increase the size of the Oregon Public Records Law. But it would enable users of the law – including both governments and public records requesters – to more readily understand what information is exempted from disclosure requirements, especially if those references were sensibly organized.

--Specific

Where the Sunshine Committee has made more specific recommendations, it is generally out of concern that exemptions ostensibly designed to protect personal privacy may be written too broadly. For example, an exemption designed to protect privacy should not prevent the disclosure of dis-identified statistical information, or anonymous information that shows how a government program is working. Where there is concern that a public body may be obtaining information that implicates personal privacy, it may be possible to use narrow exemptions that enable private information to be redacted without also exempting other information that could be disclosed without unreasonably invading privacy. The Sunshine Committee is offering a couple of recommendations along these lines.



-Scheduled for upcoming review

The Sunshine Committee's review of health-related exemptions is ongoing. Mental health record exemptions are next on the schedule, and the Sunshine Committee will then work its way through the remaining categories of exemptions for personal information:

- Background Check Records (records documenting criminal background check processes and findings, typically in connection with employment)
- Disability Information (records pertaining to individuals' disabilities)
- Juvenile Records (records relating to juvenile dependency and/or delinquency matters)
- Offender Information (records that relate to those convicted of crimes)
- Education Records (records pertaining to students and schools)
- Decedent/Survivor Information (records pertaining to people who have died, and those who survive them)
- Interpreter Information (records stemming from a relationship with an interpreter, often in the context of a legal proceeding)

The remaining larger categories of exemptions cover (1) economic affairs (generally of private businesses), (2) the administration of government programs, and (3) public safety and law enforcement.

Other issues

Although the review of 651 exemptions is a daunting task that requires sustained concentration, the Sunshine Committee does have a broader purpose as well. Again, the statutes creating the Sunshine Committee authorize it to develop "recommendations on changes in existing law, policy and practice to enhance transparency and facilitate rapid fulfillment of public

records requests made to public bodies.” Unsurprisingly, Sunshine Committee members uniformly feel that it is important for the Sunshine Committee to keep sight of this wider purpose – not only to lend some spice to the difficult work of exemption review, but also because members recognize that there are many interesting, important, and timely issues around the subject of government transparency.

#### -Recommendations so far

One example concerns the question of using public records requests to obtain personal contact information in bulk from government agencies. Governor Brown asked the Sunshine Committee to look into this issue and make a recommendation, which the Sunshine Committee, after several meetings of the Sunshine Committee and a subcommittee, was very pleased to do. And various collateral issues have come up in the context of the Sunshine Committee’s work reviewing exemptions; the Sunshine Committee is maintaining a list of such recommendations as an evolving list. Both the recommendation to Governor Brown regarding bulk requests for personal information, and a current version of the Sunshine Committee’s general recommendations are attached to this report.

#### -Areas of committee interest

##### Areas of concern

Although the Sunshine Committee is generally optimistic about its work, it faces some undeniable challenges. An obvious one is the sheer number of statutes to be reviewed, particularly considering the often specific, and sometimes highly specialized, nature of exemptions. If the ten-year project of exemption review specifically contemplated by ORS 192.511(3)(a) is intimidating, then the prospect that it may not be completed within that time

despite the work members are putting in is simply horrifying. Alongside that existential question sit more pedestrian difficulties.

#### --Stakeholder participation

When House Bill 2021 (2017), which ultimately created the Sunshine Committee, was first proposed, it contemplated that the legislature would conduct the review that the Sunshine Committee was ultimately tasked with. See <https://olis.oregonlegislature.gov/liz/2017R1/Downloads/MeasureDocument/HB2101/Introduced>. Because the Sunshine Committee cannot actually amend laws, an obvious concern when this change was made was whether stakeholders would appear before the Sunshine Committee to explain their interests, or whether they might simply wait to see whether the Legislative Assembly took up their particular exemption before participating in the process. The Sunshine Committee's experience to date suggests – although not conclusively – that stakeholders are not particularly motivated to provide it with information. The Sunshine Committee's review of exemptions for personal contact information did elicit a decent amount of input from interest groups and affiliated individuals. But direct outreach to stakeholder groups in other contexts (such as family law exemptions and health exemptions) yielded no public testimony. Consequently, members of the Sunshine Committee have had to largely rely on the Department of Justice and other agencies to supplement whatever preexisting knowledge members may have, in a wide variety of legal arenas. (The Public Records Advocate's office has been particularly helpful in this regard, though that office has recently been short staffed.) This makes it more difficult for the Sunshine Committee to be confident in its recommendations. And it raises the prospect that stakeholders may appear during the legislative process to derail Sunshine Committee recommendations.

#### --Continued enactment of exemptions

Also, the sense of dread engendered by the lurking mass of still-unreviewed exemptions is heightened by the knowledge that more exemptions can be enacted during each session (or special session) of the legislature. Though the implosion of the 2020 session prevented additional exemptions being passed, the 2019 session resulted in several new exemptions the Sunshine Committee must review. Although the Sunshine Committee understands and respects the clear authority of the Legislative Assembly to continue to legislate in this area, the Sunshine Committee would respectfully request that any new exemptions should be adopted only after the Legislative Assembly carefully considers whether they are truly necessary.

--Overlap with mission of Public Records Advisory Council

As noted above, the Public Records Advocate has provided significant assistance to the Sunshine Committee, and the Sunshine Committee is very grateful for that work. Moreover, the Public Records Advisory Council, which works with the Public Records Advocate, has produced work that the Sunshine Committee has been pleased to endorse. See <https://olis.oregonlegislature.gov/liz/2020R1/Downloads/CommitteeMeetingDocument/215288>. There is, however, some question whether it makes sense to have two public bodies with substantially overlapping portfolios.

Going forward

-Willing to vet legislative proposals

-Attempt to intersperse exemption review with other projects

-Openness to hearing from Legislative Counsel Committee subcommittee re our best use

Attachments (approved recommendations)

**Report of the Oregon Sunshine Committee**  
**July 1, 2024**

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## **Statutory Basis**

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## **Committee Membership**

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of State designate a member. These are the non-legislative members currently serving on the Sunshine Committee:

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- Mark Landauer, Special Districts Association of Oregon
- Charlie Fisher, Oregon State Public Interest Research Group
- Emily Cureton Cook, Oregon Public Broadcasting
- P.K. Runkles-Pearson, Office of the Secretary of State
- Karin Johnson, City of Independence
- Michael Kron, Office of the Attorney General
- Cameron Miles, Office of the Governor
- Morgan Smith, Polk County
- Elliot Njus, The Oregonian
- Cherril Crosby, Statesman Journal

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## **Structure of Report**

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Records Subcommittee, going forward. The specific recommendations approved by the Oregon Sunshine Committee are attached after the conclusion of the report.

## **Exemption Review**

The Attorney General's catalog of public disclosure exemptions — the statutes the Sunshine Committee must review — contains over 600 entries. As explained in the Sunshine Committee's previous reports, those have been divided into categories based on subject matter, and the Sunshine Committee has established the order in which they will be reviewed. The Sunshine Committee has also adopted criteria by which it will assess exemptions:

- Why should this information be kept from the public? What public policy interests are served?
- What interests suffer if this information is not available to the public? To what extent does it hinder government accountability?
- Is the exemption appropriately written in light of the above? Does it adequately balance the relevant interests?
- If there are multiple exemptions, do there need to be? Are the various exemptions written in a way that captures the relevant differences?

These have not been adopted as questions that the Sunshine Committee will formally answer with respect to every exemption. Instead, they are the principles that are guiding the Sunshine Committee's consideration of exemptions and underlie its recommendations.

## **Exemptions Reviewed Since the Last Report**

To date the Sunshine Committee has reviewed a vast swath of public records exemptions, which as noted above were grouped together by subject matter. In an effort to keep this report



somewhat digestible, individual exemptions will be referenced by the subject matter which the exemptions fell under, rather than specific statutory citations of each individual exemption. The fact that this is the most practical method to provide a summary of existing public records exemptions highlights one of the continuing themes of the Sunshine Committee's work. Specifically, it is incongruent for the public records law to start with the basic premise that all records possessed by state and local governments in Oregon are open to public inspection while at the same time having over 600 specific exemptions of this general rule. This creates an unwieldy legal framework for governmental entities to manage requests which can delay or obstruct transparency.

## **Recommendations**

The Committee reviewed exemptions related to adoption, child custody, child support and child welfare, collectively referenced as family law exemptions. The exemptions for child support materials are largely driven by federal law and accordingly outside the scope of the Sunshine Committee's work. It was recommended that exemptions related to child welfare allow for alleged victims' access to information held by state agencies but at the same time the records should not be accessible to the general public. The Committee found the remainder of family law exemptions were rooted in solid policy decisions but recommends they be converted to conditional exemptions to allow for the narrow instances where the public interest outweighed the privacy interests in the specific record.

Trade secrets exemptions were examined by the Committee in the wake of litigation between a media company and an Oregon city related to records possessed by the City but considered a trade secret by a business with facilities within the City. The Committee found that there were two statutory exemptions to trade secrets which did not coherently operate in tandem,

one exemption being conditional and the other not. It was also noted that the governmental entity possessing information that could be considered a trade secret was often in an information deficit to determine of the validity of the trade secret claim by a private business, and private business may be overbroadly classifying information as a trade secret. Accordingly, the Committee recommended the two statutory exemptions be consolidated into one conditional exemption. Further, the committee recommends that when a private entity purports that their information possessed by a entity subject to the public records law the private entity provide the public entity with a form of attestation to the validity of the trade secret designation and to require clear notations within a collection of information which information within that collection is a trade secret and that which is not.

As a timely offshoot of the COVID pandemic, the Committee endeavored to review a vast swath of healthcare record related exemptions, typically stemming from State possession of health records underlying a multitude of health and healthcare oversight functions. The Committee recognized the policy position of protecting individual health care records and the federal and state laws providing those protections. However, it was determined that a number of the exemptions were sufficiently broad to allow for a complete bar to release of any information. A recommendation was made to either consolidate or rewrite the exemptions in such a way as to allow broader transparency by permitting the release of aggregated data that has been deidentified in such a way to not implicate the personal identifying information of patients.

Criminal investigatory records were considered under the exemption granted under ORS § 192.345(3). The law provides for the exemption of materials compiled by a law enforcement agency for the investigation of a potential crime be exempt, but that a delineated list of information considered a “record of an arrest or the report of a crime” may be released to the

public unless there is an articulable need to withhold it. It was determined by the Committee that what is or is not considered a record of an arrest or report of crime, and what is beyond that, is not well understood by law enforcement agencies throughout the state and inconsistently applied or interpreted. It was recommended that a statutory template be created which contained the information that could be released as a record of an arrest be created to provide uniformity for what information would be released. The Committee also considered the dual possession of criminal investigatory information during the pendency of a criminal prosecution by both the investigating agency and the prosecutor's office creates confusion as to who is the appropriate custodian of the records under the law. It was recommended that once an investigating agency has presented their investigatory information to the appropriate prosecutor's office, then the prosecuting office be the appropriate agency to direct requests for information.

The most recent exemptions reviewed surrounding professional licensing records in the possession of myriad differing licensing agencies within the State. The general state of the law surrounding these exemptions center on the premise that complaints against licensees are exempt from disclosure until such time as there is a resolution to the complaint in some fashion. The most informative information received in the Committee's work came from the Oregon State Bar, which licenses attorney to practice law in the state. The approach the Bar Association took to complaint confidentiality was in stark contrast to the exemptions currently present for other licensed occupations in the state. The Bar considers all information received regarding an attorney to open for public inspection. This runs in the face of the policy justifications for exempting other complaints and investigatory information as the Bar does not believe that such transparency operates as a chilling effect to potential claimants. Accordingly, for the vast majority of regulated professions the Committee has recommended the removal of such

exemptions related to investigations and align themselves more closely to the practice of the Bar Association. Recommendations on the regulation of law enforcement officers, educators and health care professions continue to be a focus of the Committee and are not included in this recommendation.

## **Next Steps**

Currently, the Sunshine Committee stands before a lurking mass of still-unreviewed exemptions. While the members of the Committee remain committed to our charge, the task takes on a Sisyphean character by the knowledge that more exemptions can and will be enacted during each legislative session (or special session of the Legislature). While we have attempted to review pending legislation that add additional exemptions to the Committee's workload, the speed with which the legislative process moves coupled with the inherent logistical issues of convening a large committee of volunteer members has rendered that process to be limited at best. Although the Sunshine Committee understands and respects the clear authority of the Legislative Assembly to continue to legislate in this area, the Sunshine Committee would respectfully request that any new exemptions should be adopted only after the Legislative Assembly carefully considers whether they are truly necessary, particularly as new legislation appears to be creating exemptions that are realistically covered by existing exemptions.

Finally, the Sunshine Committee recommends changing the reporting structure of the Sunshine Committee. Currently, the Committee makes a report by July 1 of each even numbered year to the Public Records Subcommittee of the Legislative Counsel Committee. By September 1 of that year the Public Records Subcommittee must accept, modify or reject the Oregon Sunshine Committee report and submit its report to the Legislative Counsel Committee. However, this has

been problematic for two reasons: the Public Records Subcommittee is not a policy committee; and it does not meet between July 1 and September 1.

Therefore, the Sunshine Committee recommends that the Public Records Subcommittee should have until November 1 to complete its report and that the report should also be submitted to the respective Rules Committees for each chamber. The Rules Committees would then be required to have a hearing during the beginning of the following legislative session to adopt their own version of the Sunshine Committee report and issue their recommendations accordingly.



## **Report and Recommendations on Family Law Related Exemptions**

As an initial matter, a lot of the comments received by the Sunshine Committee on some of these records exemptions revolved around victims and victim's advocates being denied access to records exempt from disclosure under the public records law. We do not feel it is the place of the Sunshine Committee to wade into victim access to records as it is separate and distinct from general public access to government records. **Recommendation:** That being said, the Committee encourages the legislature to work with the necessary stakeholders to develop a process by which victims have a standard of access to their own records that is separate and distinct from the public records law.

Specific to the exemptions related to child support, the Committee received a large amount of input from the Department Of Justice's Child Support Division. From this the Committee learned most of these exemptions are mandated by federal law and often recitations of federal privacy requirements related to child support. Accordingly, they cannot really be modified in any meaningful way and we have no suggestions.

The remaining exemptions appear to be rooted in sound policy judgments supporting confidentiality. That being said, absolute prohibitions without the ability to make a public interest balancing test were a concern to some members of the Committee. If the exemptions were conditional the requestor would at least be able to make an argument in an extreme case that the materials should be released. **Recommendation:** The remaining exemptions could be converted to conditional exemptions, provided the requestor has the burden of demonstrating the public interest in disclosure.

## Recommendations Regarding Trade Secrets

The biggest impediments to transparency arise from the overclassification of trade secrets by private parties, public bodies making decisions regarding the appropriateness of a trade secret designations without sufficient information or expertise, and a confusing statutory exemption scheme.

**Recommendation:** Legislature require that any private entity that is submitting something to a public entity that it considers a trade secret to do two things: (1) provide the public entity with some documentation or attestation verifying the legitimacy of the trade secret protection of the information; and (2) clearly denote what of their submission is considered a trade secret and what is not. If these steps are not followed, then they do not receive the protections of the trade secret exemptions. Given that holders of a trade secret are under the obligation to take reasonable measures to protect the secrecy of that trade secret, these steps would fall in line with that obligation. Further, this will help to streamline requests for such information, and hopefully reduce the possibility of overclassifying information as trade secrets.

**Recommendation:** Regarding the specific exemptions, the Committee recommends that the multiple exemptions for trade secrets referenced in Oregon be consolidated to just one. Preference would be to only protect trade secrets under ORS § 192.345(2), as it is specific to trade secrets and it is a conditional exemption. The use of a conditional exemption only would allow requestors the opportunity to make an argument for disclosure in the public interest, rather than the exemptions under ORS 192.355(9)(a) which does not have such a component. This will help public entities and requestors have a better understanding of what can be disclosed, what cannot be disclosed, and the legal reasoning behind that decision. The current structure of multiple convoluted exemptions possibly being implicated creates confusion amongst the parties involved in the request.

**Recommendation:** It would be beneficial to make the private entity whose trade secret is being requested more formally involved in the process. This could be achieved by having them be the appropriate party for any appeals process following a denial under ORS 192.411, 192.415, as opposed to the public body. Another possibility would be to utilize a similar scheme to ORS 192.363, which requires requests for certain personal information be forwarded to the individuals whose information is being requested. This would allow for the private entity to be further involved in the process prior to disclosure. This places the obligation to properly classify potentially trade secret information and require the private entity to take reasonable steps necessary to protect their trade secrets.



## **Recommendations Regarding Personal Health Information**

Prohibiting the disclosure of aggregated or disidentified health information is unnecessary to the extent that the information cannot be linked to an individual. The legislature should eliminate unnecessary prohibitions against disclosure, and should specifically allow disclosure of aggregate and actually disidentified health information when disclosure is in the public interest.

## Recommendations Regarding Criminal Investigatory Information

The Oregon Public Records Law exempts from disclosure “[i]nvestigatory information compiled for criminal law purposes,” unless the public interest requires disclosure in the particular instance. *See* ORS 192.345(3). The Oregon Court of Appeals has indicated that, under this exemption, records pertaining to matters that are ongoing will ordinarily be exempt from disclosure, while records pertaining to concluded matters will ordinarily be exempt.

The statute specifically states that “The record of an arrest or the report of a crime shall be disclosed unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim.” A record of an arrest or report of a crime includes:

- (a) The arrested person’s name, age, residence, employment, marital status and similar biographical information;
- (b) The offense with which the arrested person is charged;
- (c) The conditions of release pursuant to ORS 135.230 to 135.290;
- (d) The identity of and biographical information concerning both complaining party and victim;
- (e) The identity of the investigating and arresting agency and the length of the investigation;
- (f) The circumstances of arrest, including time, place, resistance, pursuit and weapons used; and
- (g) Such information as may be necessary to enlist public assistance in apprehending fugitives from justice.

The Committee heard that “[t]he record of an arrest or the report of a crime” is not made available uniformly, even in the absence of a clear reason to withhold it in a particular case. Police agencies have declined on the grounds that they do not have a “record of arrest” or a “report of a crime,” or on the grounds that they do not have a record containing all relevant information.

**Recommendation:** Legislature require law enforcement agencies to also provide (unless there is a clear need to delay disclosure in the course of a specific investigation) a general explanation of what led to the agency’s involvement.

**Recommendation:** Legislature clarify that, absent clear need to delay disclosure in a particular case, the information specified in paragraphs (a) through (f), plus the explanation just described, *must* be disclosed if that information (1) exists in the particular case; (2) is known to the police agency; and if (3) the agency is the sole or the lead agency handling the matter. This requirement applies to the information, independent of any particular record or records where the information does or does not occur. If this requirement has not been met despite no clear need for delay, provide that the lead agency may not rely on the exemption for criminal investigatory information until it has disclosed this information.

**Recommendation:** Consider a statutory template for a record that would meet these requirements.

## **Recommendation Regarding Regulated Healthcare Professions**

At minimum, the legislature should ensure that basic information concerning complaints that regulating agencies receive about licensees is readily available, along with information about the result of those complaints. The available information should at least include:

- The fact that a report or complaint was made to the agency about a licensee, and the date of it.
- Category information about the report. For example, did it concern alleged dishonesty, discrimination, inappropriate interpersonal behavior, sexual misconduct, or professional misconduct? Appropriate categories for classifying reports should be further developed in consultation with agencies.
- Basic information about the disposition of the report, including the date of the disposition. Possible outcomes could include that action on the report remains pending, that the report was dismissed, resolved without discipline, resulted in suspension, or resulted in revocation.

In adopting these requirements, the legislature should retain at least the existing level of transparency when discipline is imposed. The legislature should also ensure that any statutory limitations on the disclosure of such information is conditioned upon the public interest in disclosure.

The committee also recommends that the legislature ensures that agencies have clear direction and authority to share information about licensee complaints and discipline with licensing agencies in other states.

## Other Recommendations Relating to Regulated Professions (non-healthcare):

The complaint and disciplinary process for Nursery Stock Growers and Dealers, Landscape Architects, Landscape Contractors Board and Board of Accountancy should be transparent in the way that aligns with the practices of the Oregon State Bar applies to its licensing investigations (ORS 670.317) and that the exemptions for these entities should be combined and made consistent in the ORS.

Regarding the complaint and disciplinary process for law enforcement officials, the Sunshine Committee would like to see greater transparency in the professional oversight of law enforcement officers starting at the agency level in order to increase public confidence in the regulation of law enforcement.

Regarding the complaint and disciplinary process for educators, the Sunshine Committee recommends adopting a model similar to that used by Colorado, which permits disclosure of both substantiated and unsubstantiated complaint information if the public interest requires disclosure, with the burden being upon the requester to demonstrate that the public interest requires disclosure. The Committee also recommends that the legislature ensure that aggregated de-identified data regarding teacher misconduct should be readily and regularly available to the public.