STATE OF OREGON
DEPARTMENT OF JUSTICE

ATTORNEY GENERAL'S

PUBLIC RECORDS

AND

MEETINGS MANUAL

"Knowledge will forever govern ignorance.
And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."
James Madison (1822)

HARDY MYERS
Attorney General

January 2008

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TABLE OF CONTENTS

TABLE OF CONTENTS — Continued

Page

TABLE OF CONTENTS — Continued

TABLE OF CONTENTS — Continued

Page

TABLE OF CONTENTS — Continued

II. PUBLIC MEETINGS

TABLE OF CONTENTS — Continued

TABLE OF CONTENTS — Continued

Page

INTRODUCTION

The Public Records and Public Meetings Laws were enacted by the Oregon legislature in 1973. These laws underscore the state's policy that the public is entitled to know how the public's business is conducted. Thus, the written record of the conduct of the public's business is, with some important exceptions, available to any citizen. Similarly, the deliberations and decisions of public bodies are, for the most part, open to attendance by any interested persons.

The Public Records Law requires the Attorney General to adopt a Uniform Rule describing the evidence to be submitted to support a request for exemption of a home address, personal telephone number, or electronic mail address because of a danger to the personal safety of an individual or a family member residing with the individual. That rule is included in appendix H of this manual.

Following each legislative session, the Attorney General reviews and updates this manual for consistency with legislative changes to the Public Records and Public Meetings Laws, recent appellate court decisions interpreting these statutes, and Public Records Orders applying the statutes and issued since this manual's last publication. This review also includes consideration of comments received from state agencies and local government bodies, assistant attorneys general and the public based on their experience using the manual. The Attorney General's Uniform Rule is amended, as necessary, based on this review.

The 2007 legislature enacted several important amendments to the Public Records Law. One that is particularly significant for all public bodies is a requirement that a public body promptly respond to written public records requests by acknowledging receipt of the request and providing information about the status of the public body's processing of the request. ORS 192.440(2) (Or Laws 2007, ch 467). The public body must also make available a written procedure for making a public record request, identifying the person to whom requests should be directed, and explaining how the public body calculates fees for responding to requests. ORS 192.440(7) (Or Laws 2007, ch 467). These requirements are effective January 1, 2008. To assist public bodies in complying with these requirements, we have developed sample templates that are set out in Appendix B of the Public Records Law section of this manual.

The legislature amended the state law "catchall" exemption to limit use of the attorney-client privilege to exempt from disclosure factual information developed during investigations into allegations of wrong doing by the public body. ORS 192.501(9) (Or Laws 2007, ch 513). Under circumstances described in the statute, the public body will be required to disclose the factual information or to prepare and disclose a condensation of the facts. ORS 192.423, 192.501(9) (Or Laws 2007, ch 513). These requirements apply to records created on or after June 20, 2007.

The legislature repealed the existing exemption for the home address, home telephone number and electronic mail address of a public safety officer (ORS 192.502(34)), and replaced it with two new exemptions that apply to district attorneys, deputy district attorneys and assistant attorneys general as well as public safety officers, but that also apply to a narrower range of records and information. ORS 192.501(30), (31) (Or Laws 2007, ch 687). Because the new exemptions are in ORS 192.501, they are subject to the public interest balancing test. The legislature amended the existing exemption for State Treasurer and Oregon Investment Council investment information (ORS 192.502(13)), dividing the existing exemption into separate exemptions applying to publicly traded investments (ORS 192.502(13)) and investments in private funds or assets (ORS 192.502(14)). It is important to note that this amendment renumbers the exemptions in ORS 192.502 that follow new ORS 192.502(14). (Or Laws 2007, ch 152). The legislature also amended ORS 192.502(22) (now ORS 192.502(23)) pertaining to library patron records to exempt patron e-mail addresses (Or Laws 2007, ch 181). Finally, the legislature created a new exemption for land management plans required for voluntary stewardship agreements entered into under ORS 541.423. (ORS 192.501(33)) (Or Laws 2007, ch 608). The changes described in this paragraph are effective January 1, 2008.

Four bills enacted by the 2007 legislature amend the Public Meetings Law. The first, effective January 1, 2009, amends ORS 192.690 to add the "Health Professionals Program Supervisory Council established under ORS 677.615" to the list of government entities exempt from the Public Meetings Law. (Or Laws 2007, ch 796). The second, effective January 1, 2008, amends ORS 192.630(3) to prohibit governing bodies from holding meetings at places that discriminate on the basis of "sexual orientation." (Or

Laws 2007, ch 100). The third, also effective January 1, 2008, amends ORS 192.630(5)(a) by respectively replacing "the disabled" with "persons with disabilities" and the "deaf or hard-of-hearing" with "persons who are deaf or hard of hearing." (Or Laws 2007, ch 70). The fourth, effective January 1, 2009, makes a clerical change to ORS 192.660(2)(c) (replacing "[ORS] 441.990(3)" with "ORS 441.990(2))." (Or Laws 2007, ch 602).

None of these changes, however, altered the fundamental premise underlying both the Public Records and Public Meetings Laws: any doubts in interpreting the legislation should be resolved in favor of providing the public with information. The authority to hold private meetings, executive (closed) and emergency sessions, as well as to claim confidentiality of records, are exceptions to the general rule of openness and must be narrowly interpreted. Even when public bodies have the ability to operate in secret, they generally are not required to do so.

This manual is an opinion of the Attorney General interpreting the Public Records and Public Meetings Laws. Its principal purpose is to provide general legal advice to state agencies. As in the case of any Attorney General's opinion, it is intended also to provide substantial assistance to local governments and to the public generally.

We would appreciate continued comments and suggestions from users of this manual. These observations have greatly assisted us in revising the manual, as well as providing perspectives on corrective legislation.

I gratefully acknowledge the substantial assistance of Joe McNaught, Amy Alpaugh, Steven Wolf, Serena Hewitt, Robin Stender and Tonie Cotell of the Department of Justice in preparing this latest revision.

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January 2008

PREFACE

This Manual is organized in two parts: Part I discusses the Public Records Law; Part II discusses the Public Meetings Law. Each part is followed by its own set of appendices which include answers to commonly asked questions about the law, sample forms, summaries of court decisions, Attorney General opinions, and a reprint of the statutes. Each part of the manual also has a table of cases and a topic index.

I

PUBLIC RECORDS

A. Who Has the Right to Inspect Public Records?

Under ORS 192.420 "every person" has a right to inspect any nonexempt public record of a public body in Oregon. This right extends to any natural person, any corporation, partnership, firm or association, and any member or committee of the Legislative Assembly. ORS 192.410(2).[1] The definition of "person" in ORS 192.410(2) does not mention a "public body," and we have concluded that a public body may not use the Public Records Law to obtain public records from another public body.[2] Similarly, a public official, other than a legislator, acting within his or her official capacity may not rely on the Public Records Law to obtain records, although the individual could do so in his or her individual capacity.

Generally, the identity, motive and need of the person requesting access to public records are irrelevant.[3] Interested persons, news media representatives, business people seeking access for personal gain, busybodies on fishing expeditions, persons seeking to embarrass government agencies, and scientific researchers all stand on an equal footing.[4]

However, the identity and motive of the person seeking disclosure of a particular public record may be relevant in determining whether a record is exempt from disclosure under a conditional exemption. ORS 192.501 conditionally exempts certain records from disclosure "unless the public interest requires disclosure in the particular instance." As the discussion of exemptions below demonstrates, many of the exemptions listed in ORS

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[1] A legislative committee also may compel the production of public documents by means of a legislative summons. ORS 171.505 to 171.530.

[2] Letter of Advice dated June 26, 1987, to Wanda Clinton, Department of Revenue (OP-6049) at 8 (see App E-5); Public Records Order, October 7, 2002, Snow (see App F-50).

[3] *See, e.g., State ex rel Frohnmayer v. Oregon State Bar*, 307 Or 304, 767 P2d 893 (1989) (lawyer who is subject of bar disciplinary proceeding may use Public Records Law to gather records) (see App C-9); *State v. Spada*, 286 Or 305, 594 P2d 815 (1979); *Smith v. School Dist. No. 45*, 63 Or App 685, 692, 666 P2d 1345, *rev den* 295 Or 773, 670 P2d 1036 (1983) (see App C-6).

[4] *MacEwan v. Holm, et al.*, 226 Or 27, 359 P2d 413 (1961) (see App C-1).

192.502 call for a balancing of privacy rights, governmental interests, and other confidentiality policies, on the one hand, and the public interest in disclosure on the other. In cases requiring a balancing of interests, the identity of the requester and the use to be made of the record may be relevant in determining the weight of the public interest in disclosure.[5] See What Is "The Public Interest in Disclosure," discussed below.

B. Who is Subject to the Public Records Law?

1. Public Bodies

ORS 192.420 broadly extends the coverage of the Public Records Law to any public body in this state. For purposes of the records law, ORS 192.410(3) defines the term "public body" as *including*:

> every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.

ORS 192.410(5) defines the term "state agency" to mean:

> any state officer, department, board, commission or court created by the Constitution or statutes of this state but does not include the Legislative Assembly or its members, committees, officers or employees insofar as they are exempt under section 9, Article IV of the Oregon Constitution.

Thus, all state and local government instrumentalities are subject to the Public Records Law, including "public corporations" such as the Oregon State Bar, the SAIF Corporation, and the Oregon Health and Science University.[6]

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[5] *Jordan v. MVD,* 308 Or 433, 443, 781 P2d 1203 (1989) (see App C-10); *Guard Publishing Co. v. Lane County School Dist.,* 96 Or App 463, 774 P2d 494 (1989) (see App C-10), *rev'd on other grounds* 310 Or 32, 791 P2d 854 (1990) (see App C-10); *Turner v. Reed,* 22 Or App 177, 180 n 2, 538 P2d 373 (1975) (see App C-3); 37 Op Atty Gen 126, 128 (1974) (see App E-1).

[6] *State ex rel Frohnmayer,* 307 Or at 304 (see App C-9); *see also Frohnmayer v. SAIF,* 294 Or 570, 660 P2d 1061 (1983) (examples of state officers, boards and commissions listed in ORS 180.220 meant to illustrate, not to limit); *but see* Public Records Order, February 25, 1992, Loeb (Columbia River Gorge Commission is not a public body subject to Oregon Public Records Law) (see App

Generally, legislative records are public records subject to inspection.[7] However, a person may not demand disclosure of legislative records through a petition for disclosure to the Attorney General or to the circuit court during the period the legislature is in session and the 15 days immediately preceding the start of the session. *See* ORS 192.410(5).[8]

2. Private Bodies

On its face, the Public Records Law does not apply to private entities such as nonprofit corporations and cooperatives. However, in a 1994 case, the Oregon Supreme Court held that if the ostensibly private entity is the "functional equivalent" of a public body, the Public Records Law applies to it. The court found that the following factors, although not exclusive, are relevant in determining whether a private entity is the functional equivalent of a public body:

- the entity's origin (was it created by government or was it created independently?);
- the nature of the function(s) assigned and performed by the entity (are these functions traditionally performed by government or are they commonly performed by a private entity?);
- the scope of the authority granted to and exercised by the entity (does it have the authority to make binding decisions or only to make recommendations to a public body?);
- the nature and level of any governmental financial and nonfinancial support;
- the scope of governmental control over the entity;
- the status of the entity's officers and employees (are they public employees?).[9]

F-26).

[7] *But see* ORS 171.430(1) (legislative records designated confidential by statute, rule or resolution of Legislative Assembly, Emergency Board, Legislative Administration Committee, Legislative Counsel or Joint Committee on Ways and Means).

[8] Or Const Art IV, § 9 (legislators not subject to civil process at certain times).

[9] *Marks v. McKenzie High School Fact-Finding Team,* 319 Or 451, 878 P2d 417 (1994) (see App C-12); *Laine v. City of Rockaway Beach,* 134 Or App 655, 896 P2d 1219 (1995) (see App C-13). Public Records Order, January 31, 2001,

As government "privatizes" various governmental functions, as the Legislative Assembly exempts state agencies from the application of various statutes and as government is directed to perform various functions through contracts with private entities, numerous quasi-public entities are being created. A similar analysis would be used to determine if a quasi-public entity is a public body.

Even if a private entity is not the functional equivalent of a public body, if it contracts with a public body, its records may be obtained under the Public Records Law from the public body if the public body has custody of copies of the records.[10] In addition, a public body by rule or contract may require private bodies with which it deals to make pertinent records available for public inspection.[11]

C. What Records Are Covered by the Law?

The definition of "public record" in ORS 192.410(4) and the policy statement in ORS 192.420 make it clear that the records law applies to all government records of any kind.[12] ORS 192.410(4)(a) defines a "public record" as *including*:

> any writing that contains information relating to the conduct of the public's business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.

Hinkle (see App F-46); Public Records Order, September 3, 2002, Long (see App F-49); Public Records Order, November 19, 2002, Forrester (see App F-50); Public Records Order, March 29, 2004, Redden (see App F-53). See also 46 Op Atty Gen 155 (1989) (Oregon Medical Insurance Pool not a "public body" subject to Public Records Law) (see App E-6). However, we believe our opinion that the Oregon Trade and Marketing Center is not a "public body" subject to the Public Records Law, 46 Op Atty Gen 97 (1988) (see App E-6), is no longer correct in light of *Marks*.

[10] 46 Op Atty Gen 97 (1988) (see App E-6).

[11] *Cf.* Public Records Order, December 11, 1992, Smith (reports are public records when contract makes all work products resulting from contract the property of Department of Human Services) (see App F-27).

[12] ORS 192.410(4)(b) specifies that writings not related to the conduct of the public's business and contained on a privately-owned computer do not constitute "public records."

The definition of "public record" includes "court records," paralleling the express reference to courts in the definition of "state agency." ORS 192.410(5). The intended scope of the term "court records" in ORS 192.410(4) is not clear from the legislative history of this statute. There is evidence in the legislative history that the legislature intended the term to embrace only those records enumerated in ORS 7.010(1) and (2) ("The records of the circuit and county courts include a register, judgment docket and jury register"; and "The records of the Supreme Court and the Court of Appeals is a register.")[13] However, evidence in the history also suggests that the legislature intended for the Public Records Law to provide access to the materials submitted into evidence in a judicial proceeding. We leave this question for future resolution.

1. Writing

Public records include any "writing" containing information relating to the conduct of the public's business. ORS 192.410(4). The term "writing" is defined expansively by ORS 192.410(6) to mean:

> handwriting, typewriting, printing, photographing and every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or .0 recordings.

Note also that "writing" includes information stored on computer tape, microfiche, photographs, films, tape or videotape and virtually any other method of recording information. ORS 192.440(2) expressly recognizes that public records may be in "machine readable or electronic form."

Many public bodies use electronic mail (e-mail) for communications. E-mail is a public record. Even after individual e-mail messages are "deleted" from an individual's computer work area, the messages generally continue to exist on computer back-up tapes, which are also public records. As with any public record, a public body must make all nonexempt e-mail available for inspection and copying regardless of its storage location.

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[13] Or Laws 1989, ch 377, § 1. *See also Jury Service Resource Center v. Carson,* 199 Or App 106, 111 n 2; 110 P3d 594 (2005), *rev'd in part on other grounds, Jury Service Resource Center v. De Muniz,* 340 Or 423, 429, 134 P3d 948 (2006) (jury pool records consisting of "source lists," "master lists," and "term lists" are not subject to disclosure under the Public Records Law).

The Public Records Law does not impose on public bodies the duty to *create* public records. Public bodies are not required to create a record to disclose the "reasoning" behind their actions, or other "knowledge" their staff might have. Nor does the Public Records Law require public bodies to explain or to answer questions or provide legal research or analysis on about their public records.[14]

The distinction between disclosing an existing record and creating a record is especially important in relation to computer-stored data. We have concluded that although computer data and printouts generated for use by the public body are public records, a public body is not obligated to create new information using its computer programs or to create a new program to extract the data in its computer in a manner requested by the public.[15]

Since we first addressed this issue, we have observed public bodies at every level of government move toward computerization and electronic storage of information. The public's access to this information is increasingly dependent upon its retrieval by public bodies through the use of computer software or programs developed or acquired by the public bodies at public expense. We believe that the Public Records Law imposes a duty on public bodies to retrieve and make available nonexempt computer or electronically stored data and information, when requested, through the computer software or programs in use by the public body. *See* ORS 192.440(2). This does not mean that public bodies must develop or acquire new or additional software or programs in order to retrieve the requested information.[16] We merely conclude that when a public body uses computer software or programs to retrieve information for its own purposes, the public body must use that same software or program to retrieve and make available data or information stored by it in computer or electronic form in response to a public records request. To the extent that our prior advice has suggested otherwise, we now clarify our interpretation of the Public Records Law.

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[14] Public Records Order, May 26, 2005, Andrade (see App F-57); Public Records Order, February 23, 2006, Kane (see App F-59).

[15] Letter of Advice dated June 1, 1987, to Jim Kenney, Supervisor, Urban-Renewal Section, Department of Revenue (OP-6126) (see App E-5).

[16] Public Records Order, July 17, 2000, Forgey (see App F-45); Public Records Order, October 13, 2004, Johansen (see App F-55).

2. Prepared, Owned, Used or Retained

Records need not have been prepared originally by the public body to qualify as public records. If records prepared outside government contain "information relating to the conduct of the public's business," and are "owned, used or retained" by the public body, the records are within the scope of the Public Records Law. For example, we concluded that a contract giving an agency ownership of everything created by the contractor meant that a record never in the agency's possession was a public record subject to disclosure under the Public Records Law.[17] We also concluded that a letter from the American Assembly of Collegiate Schools of Business to Portland State University (PSU) was a public record because it was retained and used by PSU.[18]

However, a document prepared by a private entity does not become a public record merely because a public official reviews the document in the course of official business so long as the official neither uses nor retains the document. For example, we concluded that sample advertising materials, prepared and owned by a private advertising company, did not become "public records" when the materials were in the temporary custody of a public official for purposes of preliminary review, prior to any official decision to use the materials in a public information campaign.[19]

All documents in the possession of a public officer or agency employee are not necessarily public records. For instance, correspondence between the Oregon Government Ethics Commission (OGEC)[20] and a public official concerning the official's possible violation of ethical obligations in ORS chapter 244 is not a public record in the hands of the

[17] Public Records Order, December 11, 1992, Smith (see App F-27); *but see* Public Records Order, March 23, 2005, Har (state agency's right to access records maintained by contractor not sufficient by itself to qualify records as "public records") (see App F-57).

[18] Public Records Order, April 28, 1988, Koberstein (see App F-12). *See also AA Ambulance Co., Inc. v. Multnomah County,* 102 Or App 398, 794 P2d 813 (1990) (even if documents developed by contractor are public records only because contract gave county perpetual use of them, contract cannot create exemption to public records law) (see App C-11).

[19] Public Records Order, August 6, 1987, Larson (see App F-9).

[20] Oregon Laws 2007, chapter 865, subsection 40b(1) amends ORS 244.250 to change the name of the "Oregon Government Standards and Practices Commission" to the "Oregon Government Ethics Commission."

public official because the OGEC investigation pertains to the official in his or her private capacity.[21]

D. How Can a Person Inspect or Obtain Public Records?

1. Making a Request

Requests for records of Oregon public bodies must be made under the Oregon Public Records Law, not the federal Freedom of Information Act (FOIA).[22] Nevertheless, public bodies should not deny a request for their records merely because the requester calls it a FOIA request. Oregon public bodies are not, however, bound by FOIA timeframes or any other requirements of that federal act.

Beginning January 1, 2008, a public body may require the records request to be in writing. See page B-2 for a sample form of written records request. If it chooses to require written requests, a state agency should adopt such a requirement in compliance with the state Administrative Procedures Act.[23] This assists in identifying the records requested. It also establishes the reason the public body released the record, if releasing the record results in a legal challenge.

Beginning January 1, 2008, a public body must make available to the public a written procedure for making public record requests that includes: 1) the name of one or more persons to whom public record requests may be sent, with addresses; and 2) the amounts of and the manner of calculating fees that the public body charges for responding to requests for public records.[24] See page B-3 for a sample procedure.

When a person who is a party to litigation involving a public body or who has filed a tort claim notice under ORS 30.275(5)(a) uses the Public Records Law, instead of discovery tools, to request information relating to the litigation or notice, the party must notify the attorney for the public body. ORS 192.420(2).[25] An attorney may request public records directly from a public body without consent of the public body's legal counsel, but

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[21] Public Records Order, June 28, 2001, Zaitz (see App F-46).

[22] State statutes outside the Public Records Law may also provide a right to request disclosure of records from a particular public body. *Oregonians for Sound Economic Policy v. SAIF*, 187 Or App 621, 69 P3d 742 (2003) (see App C-21).

[23] ORS 183.310(9), 183.335, 183.355.

[24] ORS 192.440(7); Or Laws 2007, ch 467, § 1.

[25] The attorney for a state agency is the Attorney General. ORS 192.420(2).

the attorney could violate DR 7-104 of the Code of Professional Responsibility by asking questions about the meaning of records or attempting to elicit admissions when the attorney knows that the public body is represented by legal counsel on a matter to which the records are relevant.[26]

2. Records Custodian

The duty to make nonexempt public records available for inspection and copying under the Public Records Law is on the "custodian" of the public records. The term "custodian" is defined as that public body mandated to create, maintain, care for or control the records. ORS 192.410(1)(b). However, the term does not include a public body that has custody of a public record as an agent for another public body that is the custodian, unless the record is not otherwise available.[27] ORS 192.410(1)(b). When a public body that is a custodian of public records has received the records from another public body, it should consult with the originating body regarding whether the records may be exempt from disclosure. *See* ORS 192.502(10).

3. Responding to a Request

Beginning January 1, 2008, if a request is made in writing, the public body must provide a response acknowledging receipt of the request "as soon as practicable and without unreasonable delay." The response must also include one of the following:

- A statement that the public body does not possess, or is not the custodian of, the public record.
- Copies of all requested public records for which the public body does not claim an exemption from disclosure under ORS 192.410 to 192.505.
- A statement that the public body is the custodian of at least some of the requested public records, an estimate of the time the public body requires before the public records may be inspected or copies of the records will be provided and an estimate of the fees that the requester must pay as a condition of receiving the public records.

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[26] Oregon State Bar Formal Opinion No. 1996-144.

[27] Public Records Order, December 17, 1999, Sheketoff (see App F-43).

- A statement that the public body is the custodian of at least some of the requested public records and that an estimate of the time and fees for disclosure of the public records will be provided by the public body within a reasonable time.
- A statement that the public body is uncertain whether the public body possesses the public record and that the public body will search for the record and make an appropriate response as soon as practicable.
- A statement that state or federal law prohibits the public body from acknowledging whether the record exists or that acknowledging whether the record exists would result in the loss of federal benefits or other sanction. A statement under this paragraph must include a citation to the state or federal law relied upon by the public body.

See page B-5 for a sample form of response to a public records request. The public body may request additional information or clarification from the requester for the purpose of expediting the public body's response to the request.[28]

4. Proper and Reasonable Opportunity to Inspect

ORS 192.430 requires a custodian of public records to provide "proper and reasonable opportunities for inspection and examination of the records in the office of the custodian" during usual business hours to persons seeking access to public records. See page B-8 for Helpful Hints for Responding to Public Records Requests.

Although as discussed above a public body must provide a preliminary response to a request "as soon as practicable and without unreasonable delay," the public's "reasonable" opportunity to inspect records correspondingly allows the public body a "reasonable" time to actually provide copies of the requested records or make them available for inspection. The amount of time that is reasonable will depend upon the volume of records requested, the staff available to respond to the records request and the difficulty in determining whether any of the records are exempt from disclosure. The public body's need to consult with another agency from which it received requested records may also need to be taken

[28] ORS 192.440(2); Or Laws 2007, ch 467, § 1.

into account.[29] The public body may consult with its legal counsel to determine whether records are exempt from disclosure and to receive advice on other questions relating to the Public Records Law. See Consultation with Legal Counsel, below. The public records custodian acts reasonably even if the custodian does not comply with timelines imposed by the requester, so long as the custodian provides access to the nonexempt records within a reasonable period of time. It is not a denial entitling the requester to petition for release of the records if the custodian does not provide access to the nonexempt records within the timeframe set by the requester.[30]

The custodian's duty to provide reasonable opportunities for inspection of records expressly extends to records "maintained in machine readable or electronic form." ORS 192.430(1). The law also requires the custodian of records to provide persons inspecting records with "reasonable facilities" for making memoranda or abstracts from the records. In short, the law directs public bodies to take reasonable steps to accommodate members of the public while they inspect public records. However, the public body need not bring the records to the requester's place of business.[31]

The Americans with Disabilities Act (ADA) prohibits discrimination against persons with disabilities in governmental activities and requires public bodies to ensure that their communications with individuals with disabilities are as effective as communications with others.[32] Providing nonexempt public records under the Oregon Public Records Law is a governmental activity covered by the ADA. Thus, when making public records available, a public body must provide an opportunity for individuals with disabilities to request an alternative form (large print, Braille, audio tape, etc.).[33] The public body must give primary consideration to the choice expressed by the individual, but is not required to provide personal devices such as prescription glasses or readers for

[29] Public Records Order, December 9, 2004, Redden (see App F-57).

[30] *Morse Bros., Inc. v. ODED*, 103 Or App 619, 798 P2d 719 (1990) (see App C-11).

[31] Public Records Order, April 3, 1989, Harrison (see App F-19).

[32] 42 USC §§ 12131–12132; 28 CFR § 35.160.

[33] 28 CFR § 35.104.

personal use or study.[34] The public body is entitled to consider the resources available for use in the funding and operation of the program from which the records are sought in responding to a request for alternative format, and may conclude that compliance with the request would result in a fundamental alteration of the nature of the program or in undue financial or administrative burdens.[35] Public bodies should consult with legal counsel if they are uncertain of their obligation to honor the requester's choice.

Note that a public body may not charge a person with a disability to cover any additional costs of providing records in an alternative form, although the public body may charge a fee for all other "actual costs" that may be recovered under the Public Records Law just as it would for any other requester. See Waiver or Reduction of Fees, discussed below.

5. Copying

A person may request that the public body provide a copy of a requested record if the record is susceptible to copying.[36] The rights of the public, however, are not limited to a right to receive certified copies on demand. ORS 192.440(1) not only requires the public records custodian to furnish copies on request, but also to furnish "reasonable opportunity to inspect or copy" public records. This duty extends to allowing requesters to use their own equipment to make copies, subject to reasonable restrictions imposed by the public body in order to protect the integrity of

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[34] 28 CFR §§ 35.135, 35.160.

[35] 28 CFR § 35.164; *Nelson v. Thornburgh,* 567 F Supp 369 (ED Pa 1983), aff'd 732 F2d 146 (3rd Cir 1984), *cert den* 469 US 1188 (1985).

[36] Beginning January 1, 2008, the Public Records Law no longer requires a custodian of a public record to furnish a *certified* copy of the record on demand. ORS 192.440(1); Or Laws 2007, ch 467, § 1. Public bodies may, however, continue to offer certification as a courtesy to requesters. Certification is not difficult and may be included as a statement on the cover sheet or last sheet of the copy. See page B-6 for a sample certification.

Copies of electronic records are more readily susceptible to being modified after a certified copy has been provided by the public body than are hard copies of records. In certifying an electronic record, the custodian may state that the copy provided in electronic form on a specified date is a true and correct copy of the original, but that the custodian cannot ensure that the electronic record will not be modified after its release from the custody of the custodian. See page B-6 for a sample certification.

the records and to prevent interference with the regular duties of the public body. We concluded that, subject to these conditions, a requester must be allowed to use his or her own equipment to copy records, and cannot be compelled to accept records in the form that the custodian would provide.[37]

Although an individual's signature submitted under ORS chapter 247 for the purpose of registering to vote is subject to *inspection* as a public record, it is *not* subject to the copying requirements. ORS 192.440(8). Oregon election law specifically prohibits the copying of such a signature, except by elections officials acting in their official capacity for purposes of administering election laws and rules.[38]

ORS 192.440(3) specifically explains a custodian's duty to provide copies of records maintained in machine readable or electronic form:[39]

> If the public record is maintained in a machine readable or electronic form, the custodian shall provide a copy of the public record in the form requested, if available. If the public record is not available in the form requested, the custodian shall make the public record available in the form in which the custodian maintains the public record.

See page A-1 for discussion of copyrighted materials. See also Fees, below, for discussion of costs.

6. Public Body Prerogatives

The statutes implementing the public's right to inspect nonexempt public records use the term "reasonable" to allow limits on inspection, examination and copying of public records. Those "reasonable" limits are allowed in order to protect identified governmental interests.

a. Protective Rules

The Public Records Law expressly authorizes a public body to take reasonable measures to preserve the integrity of its records and to maintain office efficiency and order:

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[37] 39 Op Atty Gen 721 (1979) (see App E-3).

[38] ORS 247.973.

[39] 49 Op Atty Gen 210 (2000) (see App E-7); Public Records Order, April 22, 2004, Birhanzl (see App F-53).

> The custodian of the records may adopt reasonable rules necessary for the protection of the records and to prevent interference with the regular discharge of duties of the custodian.

ORS 192.430(2). When public bodies establish protective rules to maintain the integrity of public records or to prevent interference with the duties of the records custodian, we recommend they do so with notice and opportunity for public comment. This avoids the appearance of arbitrary action. State agencies should adopt their protective rules in compliance with the state Administrative Procedures Act.[40] A rule designed solely to make public access to records more difficult is not valid. A rule or regulation carefully designed to prevent destruction of public records or to expedite staff identification of requested records would be lawful. For example, we denied a petition for disclosure of records where the requester failed to comply with the Department of Corrections' administrative rule requiring that requests be in writing and "specify the record(s) from which information is requested, if known."[41] However, we doubt that a rule flatly requiring a requester to specify individual records would be reasonable, given that a requester may be able to specify the subject matter or other defining common characteristics of the records being sought but not have sufficient information to specifically identify individual records.

Again the crucial term is "reasonable." The statutory right to inspect public records encompasses a right to examine original records, and inspection of originals ordinarily should be allowed if requested. But the right to inspect does *not* include a right to rummage through file cabinets, file folders or electronic files,[42] and a public body may adopt administrative measures to supervise original document review. Nor does the right to examine original records require inspection of an original record that contains some information that is exempt from disclosure. In such a case, a public body acts reasonably if it furnishes a copy of the original, with the exempt material blanked out. *See* ORS 192.505. Furthermore, a public body's rule or determination under ORS 192.430 that copies will be furnished in lieu of inspection of original documents would be valid if "necessary for the protection of the records and to prevent interference with the regular discharge of [the public body's]

[40] ORS 183.310(9), 183.335, 183.355.

[41] Public Records Order, July 7, 1989, Baker (see App F-20).

[42] Public Records Order, May 10, 1996, Kelley (see App F-35).

duties."[43] However, a rule or determination that required inspection of records on the premises of the public body regardless of the circumstances likely would not be reasonable.

b. Fees

The Public Records Law expressly authorizes a public body to establish fees "reasonably calculated to reimburse the public body for the public body's actual cost of making public records available." ORS 192.440(4)(a). The statute also expressly permits a public body to include in its fees "costs for summarizing, compiling or tailoring the public records, either in organization or media, to meet the person's request." ORS 192.440(4)(a). A public body has authority to charge a fee in excess of $25 only if it first provides a written cost estimate to the requester and receives confirmation that the requester wants the public body to proceed with responding to the request. ORS 192.440(4)(c). A public body may require prepayment of its estimated charges before taking further action on a request.[44] Of course, if the actual charges are less than the prepayment, any overpayment should be refunded promptly.

"Actual cost" may include a charge for the time spent by the public body's staff in locating the requested records, reviewing the records in order to delete exempt material, supervising a person's inspection of original documents in order to protect the records, copying records, certifying documents as true copies, or sending records by special methods such as express mail.[45] "Actual cost" also may include the cost of time spent by the public body's attorney reviewing, redacting and segregating records at the public body's request, although the cost of the attorney's time spent determining the application of the Public Records Law is not a recoverable cost.[46] ORS 192.440(4)(b).

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[43] Public Records Order, July 19, 1982, Baucom (see App F-5).

[44] Public Records Order, April 7, 1989, Martin (see App F-19); Public Records Order, June 30, 2005, Mills (see App F-58).

[45] *But see Lane Transit District v. Lane County*, 146 Or App 109, 123, 932 P2d 81 (1997), *rev'd in part on other grounds* 327 Or 161, 957 P2d 1217 (1998) (public body may not charge labor costs even if permitted by Public Records Law when responding to discovery request for document under ORCP 43) (see App C-15).

[46] Public Records Order, May 19, 1993, Smith (see App F-28).

Public bodies may charge for search time even if they fail to locate any records responsive to the request or even if the records located are subsequently determined to be exempt from disclosure.[47] However, public bodies may *not* include charges for any additional costs incurred to provide records in an alternative format to individuals with vision or hearing impairments when required by the Americans with Disabilities Act.[48]

(1) Fee Schedules

As noted above, beginning January 1, 2008, public bodies must make available to the public the amounts of and the manner of calculating fees that the public body charges for responding to requests for public records. We recommend that public bodies establish their fees for public record inspection and copying with notice and opportunity for public comment so that the public is aware of the justification for the fees. State agencies should adopt their fee schedules in compliance with the state Administrative Procedures Act.[49]

A public body may wish to consider adopting a fee schedule that provides some degree of flexibility in assessing fees, but it may not charge more than its actual cost.[50] A per-page charge for copies may include the reasonably calculated cost of a routine file search, and in that case no additional charge should be made except where the public body incurs additional costs due to extraordinary circumstances.

Whether a per-page or other fee approach is adopted, public bodies must be prepared to demonstrate that their fee schedules are based upon an evaluation of their actual costs in making public records available for inspection or copying.[51] While there is no provision in the Public Records Law that authorizes a person to petition the Attorney General to review an

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[47] 39 Op Atty Gen 61, 68 (1978) (see App E-2).

[48] 42 USC §§ 12131 *et seq*.

[49] ORS 183.310(9), 183.335, 183.355.

[50] *Davis v. Walker*, 108 Or App 128, 131–33, 814 P2d 547 (1991) (see App C-12); 39 Op Atty Gen 721, 725 (1979) (see App E-3); and Public Records Order, March 9, 1989, Smith (see App F-17).

[51] *See Davis*, 108 Or App 128, 131–33 (public body has burden of proving that fees charged were reasonably related to its actual costs; fees charged by city police bureau to provide edited copies of bureau's records held not reasonably calculated to reimburse bureau for its actual costs when bureau's fee schedule not supported by study determining actual cost of providing records) (see App C-12).

agency's fees established under ORS 192.440(4),[52] the Oregon Court of Appeals has held that state courts have jurisdiction to review the reasonableness of a public body's fees.[53]

(2) Waiver or Reduction of Fees

ORS 192.440(5) and (6) allow a waiver or reduction of fees and provide a process for petitioning from unreasonable denials of fee waivers or reductions:

> (5) The custodian of any public record may furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public.
>
> (6) A person who believes that there has been an unreasonable denial of a fee waiver or fee reduction may petition the Attorney General or the district attorney in the same manner as a person petitions when inspection of a public record is denied under ORS 192.410 to 192.505. The Attorney General, the district attorney and the court have the same authority in instances when a fee waiver or reduction is denied as it has when inspection of a public record is denied.

A three-part analysis should be used to evaluate fee waiver or reduction requests. Under this analysis, a public body determines (a) whether a waiver or reduction is prohibited by law, (b) whether the "public interest" test is met, and (c) whether to grant a fee waiver or reduction.

(a) Prohibitions on Fee Waivers/Reductions

Some public bodies *cannot* waive or reduce the fees for making records available, even if the provisions of ORS 192.440(5) are met. If a public body's sole funding for a particular program is from statutorily or constitutionally dedicated funds, the public body may not provide public records at less than its actual costs because to do so would be an illegal diversion of those funds. For example, we have advised the Motor

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[52] Likewise, the Attorney General has no authority to determine whether fees charged by a state agency represent the agency's actual cost of making the records available. Public Records Order, March 29, 2000, Mayes (see App F-44).

[53] *In Defense of Animals v. OHSU*, 199 Or App 160, 182–83, 112 P3d 336 (2005) (see App C-21).

Vehicles Division that because it is supported by funds dedicated by Article IX, section 3a of the Oregon Constitution to specific "highway purposes," the division must charge a fee to cover its actual costs in responding to public record requests, except when the cost of charging for the records would approach or be greater than the cost of furnishing the information.[54] Public bodies that believe they may be prohibited from providing public records without charge should consult their legal counsel. If a fee waiver or reduction is not legally prohibited, public bodies should proceed with the analysis below.

(b) Public Interest Test

Under ORS 192.440(5), a public body may reduce or waive fees if it determines that doing so is in "the public interest because making the record available primarily benefits the general public." The Oregon Court of Appeals construed the public interest requirement for granting a fee waiver or reduction in a 2005 decision.[55] It concluded that "[a] matter or action is commonly understood to be 'in the public interest' when it affects the community or society as a whole, in contrast to a concern or interest of a private individual or entity."[56] In addition, it stated that "a matter or action 'primarily benefits the public,' * * * when its most important or significant utility or advantage accrues to the public."[57] Therefore, the public interest test is satisfied "when the furnishing of the record has utility – indeed, its greatest utility – to the community or society as a whole."[58]

The Court of Appeals' analysis aligns with that of federal courts' construction of former 5 USC § 552(a)(4)(A), the fee waiver standard contained in the federal Freedom of Information Act before that section was amended in 1986.[59] The public interest test in ORS 192.440(5) was modeled on the former federal statute. The Court of Appeals interpreted the standard to be met under ORS 192.440(5) but did not apply it to the

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[54] 39 Op Atty Gen 61, 64–65 (1978) (see App E-2); Public Records Order, March 10, 2000, Suo/Mayes (see App F-44).

[55] *In Defense of Animals*, 199 Or App at 187–89 (see App C-21).

[56] *Id.* at 188, *citing* BLACK'S LAW DICTIONARY 1266 (8th ed 2004) (see App C-21).

[57] *Id.* at 189, *citing* WEBSTERS' THIRD NEW INT'L DICTIONARY 204, 1800 (unabridged ed 2002) (see App C-21).

[58] *Id.* at 189 (see App C-21).

[59] Pub L No. 99-570.

facts of the case before it. Therefore, we continue to look to the federal construction for guidance as to how Oregon courts may apply the state standard.

Application of the public interest test requires analysis of whether disclosure of a record will benefit the interests of the community or society as a whole, *i.e.*, "the public." A personal benefit to be derived by the requester alone is insufficient to permit a fee waiver. Under federal law, if a requester seeks information relating solely to the requester in order to aid his or her defense against criminal prosecution, there is insufficient public benefit to require a fee waiver.[60] This conclusion has been adopted in the Attorney General's Public Records Orders.[61]

Similarly, if a requester seeks records relating to the requester, a mere allegation that the public body has treated the individual oppressively, absent a broader public interest, does not satisfy the public interest standard.[62] On the other hand, investigative reporters with established credentials, seeking records concerning military aviation safety with the intent of reporting on those records, who demonstrated that fee requirements inhibited their ability to obtain government records, satisfied the public interest standard.[63] And a requester who intended to use records in connection with lectures and articles on the history of the labor movement, with no financial benefit to himself, demonstrated sufficient public interest.[64]

However, the public interest in the subject matter covered in the requested records is insufficient when the requester fails to demonstrate the ability to disseminate the information to the public.[65] Additionally, if the requester seeks technical information, the public interest standard

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[60] *Diamond v. F.B.I.*, 548 F Supp 1158 (SD NY 1982).

[61] Public Records Order, October 14, 2004, Jeans (see App F-56).

[62] *See Conklin v. U.S.*, 654 F Supp 1104 (D Colo 1987) (applying pre-1986 statute).

[63] *Badhwar v. United States Dept. of Air Force,* 615 F Supp 698 (D DC 1985), *aff'd in part and vacated in part* 829 F2d 182 (DC Cir 1987).

[64] *Diamond,* 548 F Supp 1158.

[65] *See Judicial Watch, Inc. v. Rossotti*, 326 F3d 1309 (DC Cir 2003) (contrasting sufficient and insufficient demonstrations of ability to disseminate information to public).

demands a showing that the requester is able to understand that information and disseminate it to the public in a meaningful form.[66]

The federal courts have required requesters to identify the asserted public interest in disclosure with reasonable specificity, and have permitted federal agencies to infer a lack of sufficient public interest when a requester fails to do so.[67] Public bodies may seek additional information from a requester when attempting to clarify the basis for a claim to a fee waiver. In determining whether sufficient public interest is demonstrated, relevant factors include: the requester's identity, the purpose for which the requester intends to use the information, the character of the information, whether the requested information is already in the public domain, and whether the requester can demonstrate the ability to disseminate the information to the public. The requester's inability to pay is also a factor, but is not alone a sufficient basis for a fee waiver.

Ultimately, public bodies must act reasonably when evaluating criteria under the public interest test.

(c) Decision on Fee Waiver or Reduction

ORS 192.440(5) does not require a public body to grant a complete fee waiver, even if the public interest test is met.[68] Instead, the decision to waive or reduce fees is discretionary with the public body, although it must act reasonably.[69] The Oregon Court of Appeals has said that reasonableness is "an objective standard," which requires examination of "the totality of the circumstances presented."[70] All requests for a fee waiver or reduction must be evaluated on a case-by-case basis.

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[66] *McClellan Ecological Seepage Situation v. Carlucci,* 835 F2d 1282 (9th Cir 1987).

[67] *National Treasury Employees Union v. Griffin*, 811 F2d 644, 647 (DC Cir 1987) (applying pre-1986 statute); *Judicial Watch, Inc.,* 326 F3d 1309 (example of reasonably specific fee waiver request).

[68] Public Records Order, July 8, 1991, Marr/Rees (see App F-25).

[69] *In Defense of Animals*, 199 Or App at 189–90 (see App C-21). Public Records Order, May 19, 1993, Smith (see App F-28). *See also Lybarger v. Cardwell*, 438 F Supp 1075, *aff'd* 577 F2d 764 (1st Cir 1978) (FOIA vests considerable discretion in agencies to determine whether to charge reduced fee and complete discretion as to amount of reduction).

[70] *In Defense of Animals*, 199 Or App at 190 (see App C-21).

Even if a fee waiver is not prohibited by law and the public body determines that making the records available is in the public interest, a public body may still reasonably deny a fee waiver or reduction if certain factors warrant a denial. With ORS 192.440 being silent as to what factors are relevant to a public body's exercise of discretion, we have identified such factors to include: any financial hardship on the public body, the extent of time and expense and interference with the business of the public body, the volume of the records requested, the necessity to segregate exempt from nonexempt materials, and the extent to which an inspection of the records is insufficient for the public interest or for the particular needs of the requester.[71]

Under ORS 192.440(6), a person challenging a public body's denial of a fee waiver or reduction follows the same procedure as in challenging the denial of the right to inspect public records. The Attorney General, the district attorney and the court have the same authority in reviewing denials of fee waivers as in reviewing denials of the right to inspect public records. On review, the issue is whether there has been an "unreasonable" denial of a fee waiver or fee reduction. ORS 192.440(6).

We have concluded, under the facts of several cases, that fee reductions of approximately 25 percent were not unreasonable.[72] We will review petitions challenging fee waiver denials or reductions on a case-by-case basis.[73]

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[71] Public Records Order, May 19, 1993, Smith (see App F-28); Public Records Order, March 10, 2000, Suo/Mayes (see App F-44); Public Records Order, October 31, 2001, Miller (see App F-47); Public Records Order, March 27, 2002, Zaitz (see App F-47).

[72] Public Records Order, July 8, 1991, Marr/Rees (see App F-25); Public Records Order, August 1, 1991, Larson (see App F-25); Public Records Order, May 4, 1994, Dixon (see App F-30); Public Records Order, September 18, 1996, Tuttle (see App F-35); Public Records Order, June 16, 2004, Meyer (see App F-54).

[73] In assessing the reasonableness of a state agency's denial of a fee waiver request where it had already provided requested records, we considered the fact that the agency's insistence on payment did not prevent disclosure of the records and thereby defeat the underlying purpose of the Public Records Law. Public Records Order, March 27, 2002, Zaitz (see App F-48).

c. Consultation with Legal Counsel

We believe that public bodies do not violate the Public Records Law when they briefly postpone action on a public records disclosure request because they first need to consult with their legal counsel. It is reasonable for a public body to obtain legal advice before responding to an extensive public records disclosure request when compliance will seriously disrupt the records custodian's operations. Similarly, it is reasonable for a public body to consult counsel about disclosure of documents that appear to be exempt, in whole or in part, from the disclosure requirements of the Public Records Law. When a public body receives a request for records that the public body believes may be pertinent to a legal claim or litigation against the public body, it is also reasonable to consult counsel.

We advise public bodies to consult with counsel when presented with physically extensive or legally complex requests for disclosure of public records. We have concluded that "when a public body does so, it does not thereby actually or constructively deny the request. Nor does a public body deny a request merely because it fails to comply with a deadline the requester seeks to impose."[74] However, it is unreasonable to use consultation with counsel merely as a tactic to delay or to frustrate the inspection process.

d. Destruction of Public Records

ORS 192.410 to 192.505, the statutes to which we refer in this manual, do not govern the retention and destruction of public records. The statutes regulating the custody and maintenance of public records by state agencies and political subdivisions of the state are ORS 192.001 to 192.190. Those provisions also confer rulemaking authority relating to retention and destruction on the State Archivist. For purposes of the record retention and destruction laws, "public record" includes correspondence, but excludes extra copies of a document preserved only for convenience. ORS 192.005(5)(d). The State Court Administrator is authorized to prescribe minimum retention schedules for all records of the state courts and the

[74] Public Records Order, May 9, 1989, Hribernick (see App F-20). *See Morse Bros., Inc.,* 103 Or App 622 ("Public Records Law clearly contemplates that agencies have the opportunity to review the requested records and to act on the request before the Attorney General or the courts can review the matter.") (see App C-11).

administrative offices of the state courts.[75] Legislative records are excluded from the provisions on retention in ORS 192.001 to 192.190, but there are other provisions that apply specifically to legislative records.[76]

Under the retention and destruction provisions, state agencies and political subdivisions must follow the document retention schedule rules promulgated by the State Archivist under ORS 192.105. Even public records exempt from disclosure are subject to the retention schedules. The only exceptions to this requirement are correspondence with the public not otherwise required to be preserved; duplicates (photocopies) of public records; or letters, notes and correspondence pertaining to "reservations of accommodations or scheduling of personal visits or appearances." ORS 192.170. For more information about document retention schedules and preservation of public records, contact the State Archivist, 800 Summer Street, Salem, OR 97310.

It is a crime to knowingly destroy, conceal, remove or falsely alter a public record.[77]

E. What Public Records Are Exempt from Disclosure?

1. The Nature of the Exemptions

The Public Records Law is primarily a *disclosure* law, rather than a confidentiality law. Exemptions in ORS 192.501 and 192.502 are limited in their nature and scope of application because the general policy of the law favors public access to government records.[78] Accordingly, a public body that denies a records inspection request has the burden of proving that the record information is exempt from disclosure. ORS 192.490(1). Oregon courts interpret the exemptions of the Public Records Law *narrowly*, and the courts "presume" that the exemptions do not apply.[79]

Moreover, the fact that particular information qualifies for exemption from disclosure does *not* necessarily mean that a public body is prohibited from disclosing the information. In most cases, a public body has

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[75] ORS 8.125; ORS 7.010, 7.120.

[76] ORS 171.410 to 171.430.

[77] ORS 162.305.

[78] *Jordan*, 308 Or at 438 (see App C-10).

[79] ORS 192.490(1); *Coos County v. Ore. Dept. of Fish and Wildlife*, 86 Or App 168, 173, 739 P2d 47 (1987) (see App C-8); *Morrison v. School District No. 48,* 53 Or App 148, 152, 631 P2d 784 (1981) (see App C-4).

discretion to disclose a record that qualifies for exemption from disclosure under the Public Records Law.[80] In short, no public body validly may say, in every case, "This record is exempt from disclosure under ORS 192.501 or 192.502, and therefore we may not disclose it."

There are only a few instances in which a public body is barred from disclosing information that is exempt from inspection under the Public Records Law. ORS 192.445 *prohibits* a public body from disclosing a home address, personal telephone number or electronic mail address if the requirements of that section are met. ORS 192.447 prohibits a public body from disclosing an employee's identification badge or card without that employee's written consent if the badge or card meets the criteria of the section.[81] Also, the "catch-all" exemption in ORS 192.502(9) incorporates Oregon statutes, outside the Public Records Law, that prohibit the public release of certain types of information. For example, ORS 192.502(9) incorporates ORS 314.835, which prohibits and criminally punishes the disclosure of income tax return information to other than certain public officials. Similarly, the federal law exemption in ORS 192.502(8) incorporates federal laws that bar public dissemination of particular types of records, such as student record information prohibited from disclosure under 20 USC § 1232g. Finally, because outright release of trade secret information exempt under ORS 192.501(2), financial transfer information exempt under ORS 192.501(27), Social Security numbers exempt under ORS 192.501(28) and ORS 192.502(3), personal privacy information exempt under ORS 192.502(2), information in paternity or support judgments or orders exempt under ORS 192.502(33), or public safety officer information exempt under ORS 192.502(34) could result in claims of liability for damages or claims for declaratory or injunctive relief,[82] a

[80] *See Guard Publishing Co.*, 310 Or at 37–38 ("If the public body is satisfied that a claimed exemption from disclosure is justified, it may, *but is not required to*, withhold disclosure of the information") (see App C-10); *Portland Adventist Medical Center v. Sheffield*, 303 Or 197, 199 n 2, 735 P2d 371 (1987) ("An exemption from the Public Records Act means that the custodian of the information is not *obliged* to disclose it. Exemption from disclosure does not necessarily mean that the custodian is required *not* to disclose it.") (see App C-8).

[81] In ORS 192.447 "public body" has the meaning given the term in ORS 174.109, not ORS 192.410(3).

[82] *AFSCME v. DAS*, 150 Or App 87, 945 P2d 102 (1997) (see App C-16).

public body should consult its lawyer before disclosing these types of information.

Nevertheless, the guiding principle is: *Exemptions do not prohibit disclosure*; they merely exempt the public body from the Public Record Law's mandate to disclose public records. Records custodians presented with a records disclosure request first should ask themselves whether disclosure is prohibited by ORS 192.445, ORS 192.447, or by a state or federal law outside the Public Records Law. If not, the next question should be: Is there any good reason not to disclose the requested record? Only if the answer is yes, is it necessary to inquire whether the Public Records Law allows nondisclosure. And even at this stage of analysis, custodians should remember that most of the exemptions in the Public Records Law are not stated in absolute terms. As explained below, most exemptions are *conditional* and disclosure is favored. The applicability of most exemptions depends on a case-by-case balancing of competing public interests, weighted in favor of disclosure. In view of the purposes of the Public Records Law, disclosure should be favored, if there is a choice, even when a record may be withheld from disclosure.

When a public body discloses less than all of the information requested because it determines that one or more records, or portions of records, are exempt from disclosure, the public body should inform the requester that there are records that are not being disclosed. In addition, the public body should state the reason for nondisclosure.[83] Communicating with the requester places the requester on notice that additional records exist and gives the requester the opportunity to petition the Attorney General or District Attorney for review of the decision to deny disclosure. Stating the basis for nondisclosure also assists the Attorney General or District Attorney in assessing whether the requirements for exemption exist.

2. What Are Conditional and Unconditional Exemptions from Disclosure?

All of the exemptions described in ORS 192.501 are *conditional*; they exempt certain types of information from disclosure "unless the public

[83] Public Records Order, October 16, 2007, Davis (see App F-61) (a public body must specify which exemption applies to each document that it intends to withhold from disclosure).

interest requires disclosure in the particular instance." The applicability of several of the exemptions described in ORS 192.502 is conditioned on the extent to which recognized governmental and private interests in confidentiality outweigh the public interest in disclosure. In other words:

> [T]he policy [underlying the conditional exemption statutes] is that disclosure decisions should be based on balancing those public interests that favor disclosure of governmental records against those public interests that favor governmental confidentiality, *with the presumption always being in favor of disclosure.*[84]

The conditional exemptions, therefore, require public bodies to conduct a careful balancing of confidentiality interests against public disclosure interests. In contrast, no such balancing is required with regard to information covered by the remaining, so-called "unconditional" exemptions, because the legislature already has struck the balance of these competing interests and has concluded that confidentiality interests outweigh public disclosure interests as a matter of law.

In determining whether a conditional exemption applies, public bodies should be aware that the identity of the requester and the circumstances surrounding the request are irrelevant to the question whether the information fits within the category of the exemption.[85] The circumstances of a particular request become relevant only if the requested information comes under an exemption that requires a balancing of interests.[86] In that context, the requester's purpose in seeking disclosure may be relevant to determining whether the public interest requires disclosure.[87]

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[84] *Turner*, 22 Or App at 177, 187 (emphasis added) (App C-3).

[85] *Guard Publishing Co.*, 96 Or App 463 (see App C-9), 310 Or at 32 (see App C-10); *see also Morrison v. School District No. 48*, 53 Or App at 153 (initial determination whether information is of "personal nature" does not depend upon who requests the information or circumstances existing at time of request) (see App C-4).

[86] *Jordan,* 308 Or at 442–43 (see App C-10); *see also Guard Publishing Co.,* 96 Or App at 469 (otherwise nonpersonal information cannot become personal by reason of the context of particular public records request, such as existence of a strike) (see App C-9).

[87] *In Defense of Animals*, 199 Or App at 176 (see App C-21), *citing Jordan*, 93 Or App 651, 655 n 2, 307 Or App 651, 763 P2d 420 (1988), *aff'd* 308 Or 433,

3. What Is "The Public Interest in Disclosure"?

To properly balance public and private interests in confidentiality against the public interest in disclosure, a public body must know what the term "public interest in disclosure" means. The term is not defined in the Public Records Law. However, the Oregon Court of Appeals has stated that "the Public Records Law expresses the legislature's view that members of the public are entitled to information that will facilitate their understanding of how public business is conducted."[88] Similarly, the Court of Appeals previously characterized the public interest in disclosure as "the right of the citizens to monitor what elected and appointed officials are doing on the job."[89] This might include, for example, the right to inspect records of alleged misuse and theft of public property by public employees or to inspect records that bear directly on the integrity of a high ranking police officer to enforce the law evenhandedly.[90] Moreover, the term "public" means that the "focus is on the effect of the disclosure in general, not disclosure to a particular person at a particular time."[91] For example, we concluded that a labor organization's interest was private and did not represent the public interest when the interest of the organization's membership in obtaining disciplinary documents could be remedied under state collective bargaining laws.[92]

Accordingly, we advise public bodies to measure confidentiality interests against the public interest in learning not only how the public bodies generally are conducting their business but also how they are administering particular programs. In analyzing the public interest in disclosure, public bodies should examine the statutory uses of the records at issue. If none of those uses is involved in the request, it is unlikely that there is any overriding public interest in disclosure.[93] And, if disclosure

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781 P2d 1203 (1989).

[88] *Guard Publishing Co.,* 96 Or App at 468–69 (see App C-9).

[89] *Jensen v. Schiffman*, 24 Or App 11, 17, 544 P2d 1048 (1976) (see App C-4).

[90] *Oregonian Publishing v. Portland School Dist. No. 1J*, 144 Or App 180, 925 P2d 591 (1996), *modified* 152 Or App 135, 952 P2d 66 (1998), *aff'd on other grounds* 329 Or 393, 987 P2d 480 (1999) (see App C-17); *City of Portland v. Anderson*, 163 Or App 550, 988 P2d 402 (1999) (see App C-19).

[91] *Morrison*, 53 Or App at 156 (see App C-4).

[92] Public Records Order, July 3, 1995, Garrettson (see App F-33).

[93] *Jordan,* 308 Or at 443 (see App C-10).

would prejudice or prevent the carrying out of the public body's functions, that would *always* be relevant.

Although a requester is not legally bound to reveal the reasons for requesting public records, providing that information aids in the evaluation of the public interest. For example, when a requester did not state the reason for the request, the lack of information prevented our office from finding that the public interest, by clear and convincing evidence, required disclosure of the names and addresses of some employees of the Oregon Department of Human Services who the requester had threatened to harass.[94]

4. The Catalogue of Exemptions

a. The Personal Safety Exemption

ORS 192.445(1) prohibits disclosure of certain information from public records. This provision states:

> An individual may submit a written request to a public body not to disclose a specified public record indicating the home address, personal telephone number or electronic mail address of the individual. A public body *may not disclose* the specified public record if the individual demonstrates to the satisfaction of the public body that the personal safety of the individual or the personal safety of a family member residing with the individual is in danger if the home address, personal telephone number or electronic mail address remains available for public inspection.

(Emphasis added.)

See also discussion below of ORS 192.501(20), requiring the county clerk to keep an elector's residence address exempt from disclosure on similar grounds. The exemption in ORS 192.445 does not apply to county property and lien records.[95]

Under ORS 192.445(3) a request for nondisclosure of home address, personal telephone number or electronic mail address information in voter

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[94] Public Records Order, May 31, 1990, Heilman/Boles (see App F-21).

[95] *But see* ORS 192.501(32), conditionally exempting from disclosure, upon request, the name of a public safety officer, district attorney, deputy district attorney or an assistant attorney general contained in county real property assessment or taxation records.

registration records remains in effect until the individual must update the individual's voter registration, at which time the individual may apply for another exemption. A request for nondisclosure of this information in other public records remains in effect for five years from the date the public body receives the request, unless the public body receives a request for termination. Similarly, an individual may make another request for nondisclosure at the end of the five-year period.[96]

Unlike most other exemptions, which merely permit a public body to refuse to disclose records, ORS 192.445 *prohibits* a public body from disclosing records if the requirements of this section have been met. However, ORS 192.445(4) permits a public body to disclose an exempt home address, personal telephone number or electronic mail address if the public body is responding to a court order or a request from a law enforcement agency, or if the individual has consented to the disclosure.

Under ORS 192.445, the Attorney General must adopt uniform rules prescribing the procedures for an individual to submit a request to a public body that a home address, personal telephone number or electronic mail address not be disclosed, the evidence an individual must provide to establish that disclosure of the information would constitute a danger to personal safety, and the procedures for an individual to notify the public body that disclosure would no longer constitute a danger. These rules are found in OAR 137-004-0800 and are reprinted in Appendix H. These uniform rules are effective without further rulemaking by state agencies and must be followed by all public bodies without modification.

Uniform Rule 137-004-0800 requires that documentary evidence support a request for nondisclosure based on a danger to personal safety. Documentary evidence needs to establish to the satisfaction of the public body that disclosure of a home address, personal telephone number or electronic mail address would constitute a danger to the personal safety of the individual or of a family member residing with the individual. OAR 137-004-0800(2)(c)(A). The rule also lists specific documents that are acceptable. OAR 137-004-0800(2)(c)(B)-(L). When a state agency, following the requirements of the uniform rule, concludes that disclosure

[96] *See also* ORS 192.501(31), conditionally exempting from disclosure, upon request, the home address and home telephone number of a public safety officer, district attorney, deputy district attorney or an assistant attorney general contained in voter registration records.

of a home address, personal telephone number or electronic mail address is prohibited under ORS 192.445, the Attorney General's office will not substitute its judgment for the agency's when responding to a request to review the agency's decision under ORS 192.450(1).[97]

OAR 137-004-0100(3) requires the public body to notify the individual requesting nondisclosure of its decision. A public body may ask the individual to submit additional information to assist it in making its decision.

ORS 192.445(5) provides that a public body may not be liable for granting or denying an exemption from disclosure of an individual's home address, personal telephone number or electronic mail address, or for releasing that information if an exemption is granted.

b. The Public Employee Photo ID Badge and Card Exemption

ORS 192.447 prohibits disclosure of a public employee identification badge or card without the employee's written consent. This provision states:

> (1) As used in this section, "public body" has the meaning given that term in ORS 174.109.
>
> (2) A public body may not disclose the identification badge or card of an employee of the public body without the written consent of the employee if:
>
> (a) The badge or card contains the photograph of the employee; and
>
> (b) The badge or card was prepared solely for internal use by the public body to identify employees of the public body.
>
> (3) The public body may not disclose a duplicate of the photograph used on the badge or card.

Unless an employee consents in writing, this provision *prohibits* a public body from disclosing the employee's identification badge or card if it contains a photograph of the employee and was prepared solely for internal use by the public body to identify its employees. The provision

[97] Public Records Order, November 19, 1999, Birhanzl (see App F-43).

also prohibits disclosure of a duplicate of the photograph appearing on the badge or card.

This prohibition applies to a "public body" as defined in ORS 174.109, which differs slightly from the definition of "public body" that applies to the remainder of the Public Records Law. See ORS 192.410(3). For example, the following entities are statutorily excluded from the definition of "public body" in ORS 174.109, so the prohibition in ORS 192.447 does not apply to them:

> Oregon Health and Science University, the Oregon State Bar, any intergovernmental entity formed by a public body with another state or with a political subdivision of another state, or any intergovernmental entity formed by a public body with an agency of the federal government.

See ORS 174.108(3). An entity uncertain of its status under ORS 174.109 should consult with its legal counsel.

c. The "Conditional" Exemptions of ORS 192.501

Each of the conditional exemptions listed in ORS 192.501 exempts a specific type of record or information "unless the public interest requires disclosure in the particular instance." Thus, for each of these exemptions, public bodies must always apply a balancing test on a case-by-case basis.

(1) Public Records Pertaining to Litigation

ORS 192.501(1) conditionally exempts:

> Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation[.]

The purpose of this exemption is to place governmental bodies on an even footing with private parties before and during *court* litigation. Therefore, the Attorney General recommends that public bodies invoke this exemption only on the advice of legal counsel.

The Court of Appeals has construed this exemption very narrowly, in order "to further the statutory policy that government records be open to the public." The court held that the litigation exemption applies only to records "compiled or acquired by the public body for use in ongoing litigation or * * * litigation [that] is reasonably likely to occur." In the court's view, the exemption applies only to records developed or compiled by the public body for use in the litigation and not records collected in the ordinary course of business, even if those records subsequently become relevant to litigation.[98]

Public bodies need to investigate and prepare in advance for expected litigation. Consequently, we think it appropriate to interpret the phrase "reasonably likely" to mean "more likely than not," rather than "imminent." One indication that litigation is reasonably likely to occur is that a person has filed a notice of tort claim against the public body. Notes or reports prepared in response to such a notice would fall within the exemption.[99]

The legislative history makes clear that the litigation exemption does not apply to administrative proceedings, such as contested case hearings. The fact that any administrative proceeding *may* lead to litigation does not justify claiming this exemption. If, however, the public body objectively can show that court litigation is "reasonably likely to occur," the exemption may be claimed for information gathered for that litigation, regardless of whether an administrative proceeding also may be involved.

The litigation records exemption is conditional. The public body must determine whether the "public interest requires disclosure in the particular instance." Generally, the availability of ordinary tools of discovery would negate any need for an individual to use the Public Records Law to gain access to records for purposes of pursuing private litigation.[100] An interest in private litigation does not qualify as a public interest requiring disclosure.[101]

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[98] *Lane County School District v. Parks,* 55 Or App 416, 419–20, 637 P2d 1383 (1981) (see App C-5).

[99] Public Records Order, January 12, 1990, Bischoff (see App F-21); Public Records Order, June 8, 1990, Madrid (see App F-23); Public Records Order, October 1, 2003, Franzen (see App F-52).

[100] Public Records Order, January 12, 1990, Bischoff (see App F-21).

[101] Public Records Order, June 8, 1990, Madrid (see App F-23); Public

The litigation exemption in ORS 192.501(1) does not apply to litigation that has been concluded. Litigation has not been concluded until there is a final judgment and all appeal rights have been exhausted.

We note that records that may not be exempt under this exemption could be exempt under ORS 192.502(9), which incorporates limitations on discovery of client information made confidential and privileged under ORS 40.225. We also note that a public body or officer that is a defendant in a tort action under ORS 30.260 to 30.300, or in an action under ORS 294.100 for unlawful expenditure of public funds, may not enter into a settlement or compromise of that action that requires the terms of the settlement or compromise to be confidential, unless the court makes written findings that specific privacy interests of a private individual outweigh the public's interest in the terms of the settlement or compromise.[102]

Lastly, we note that when a party to litigation involving a public body uses the Public Records Law, instead of discovery tools, to request information relating to the litigation, the party must send a written request to *both* the public body and its attorney. ORS 192.420(2). This rule also applies when the requester has filed a notice of tort claim under ORS 30.275(5)(a). (See discussion above, p. 32).

(2) Trade Secrets

ORS 192.501(2) conditionally exempts:

> Trade secrets. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it[.]

Records withheld from disclosure under this provision must meet all four of the following criteria:

Records Order, August 16, 2004, Bobbit (see App F-55).

[102] ORS 17.095.

- the information must not be patented;
- it must be known only to certain individuals within an organization and used in a business the organization conducts;
- it must be information that has actual or potential commercial value; and
- it must give its users an opportunity to obtain a business advantage over competitors who do not know or use it.

We have concluded that fee schedules and price lists provided in response to a request for proposal can meet the criteria for exemption as trade secrets.[103] We have also concluded that lightning strike data made available to the Oregon Department of Forestry under a license with a private corporation met the criteria.[104] More recently, we have concluded that an insurer's projections of trend, target loss ratios, and accidental death rates, submitted to the Insurance Division as part of the insurer's rate filing, were exempt as trade secrets.[105]

The Uniform Trade Secrets Act[106] defines "trade secret" in terms that may be broader than the definition in the Public Records Law. Its definition, ORS 646.461(4), states:

> "Trade secret" means information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The relationship between the treatment of trade secrets under ORS 192.501(2) and under the Uniform Trade Secrets Act is not entirely

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[103] Public Records Order, December 7, 1989, Baldwin (see App F-21); *see also* Public Records Order, March 4, 2004, Zaitz (pro formas related to sale of surplus state property) (see App F-52).

[104] Public Records Order, September 4, 1998, Spatz (see App F-42).

[105] Public Records Order, August 8, 2007, Kirsch (see App F-60).

[106] ORS 646.461 to 646.475.

clear.[107] ORS 192.501(2) authorizes, but does not require, a public body to refuse to disclose a trade secret, unless the public interest requires otherwise in a particular case. On the other hand, the Uniform Trade Secrets Act prohibits "misappropriation" of a trade secret, and provides civil sanctions for such misappropriation.[108] We believe that by retaining the conditional exemption for trade secrets, and at the same time enacting the Uniform Trade Secrets Act, the legislature has, in effect, called for heightened scrutiny of contentions that the public interest requires the disclosure of records asserted to be trade secrets.

If a public body's disclosure of a trade secret would constitute "misappropriation" under the Uniform Trade Secrets Act, disclosure would be prohibited under that act and the records would be exempt under the "catch-all" exemption of ORS 192.502(9). However, the Uniform Trade Secrets Act also provides immunity from a claim or action for misappropriation in cases where the information is released under an order issued under the Public Records Law or on the advice of an attorney authorized to advise the public body. ORS 646.473(3). A public body should not release any trade secret information without a determination that the public interest requires disclosure, and without first consulting with an attorney authorized to give it legal advice.

Public bodies that anticipate receiving some trade secret information in response to a request for proposal or other bidding request should specify in their solicitation documents that any trade secret information must be specifically identified. However, the Public Records Law does not require a trade secret to be specifically labeled to be exempt from disclosure under ORS 192.501(2), and the Uniform Trade Secrets Act does not require such labeling as an indispensable step to preserve protection of trade secrets.[109] The public body may only assure the proposer that it will protect the information to the extent permitted by the Public Records Law.

(3) Criminal Investigatory Material

ORS 192.501(3) conditionally exempts:

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[107] *See* Public Records Order, September 4, 1998, Spatz (discussion of intersection of Public Records Law and Uniform Trade Secrets Act) (see App F-42).

[108] ORS 646.463 and 646.465.

[109] Public Records Order, March 10, 2000, Suo/Mayes (see App F-44).

> Investigatory information compiled for criminal law purposes. 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. Nothing in this subsection shall limit any right constitutionally guaranteed, or granted by statute, to disclosure or discovery in criminal cases. For purposes of this subsection, the record of an arrest or the report of a crime includes, but is not limited to:
>
> (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[.]

Unlike the litigation exemption in ORS 192.501(1), the criminal investigation exemption does *not* expire when litigation is completed or abandoned. If law enforcement officials have closed an investigation or decided not to prosecute, however, the governmental interest in maintaining confidentiality of investigation records will be diminished.[110] The Court of Appeals has outlined its interpretation of the exemption for criminal investigatory information as follows:[111]

- information compiled in investigations connected with pending or contemplated prosecutions ordinarily will remain confidential

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[110] *See* Public Records Order, July 3, 1995, Garrettson (records exempt when district attorney has reserved possible prosecution) (see App F-31).

[111] *Jensen*, 24 Or App at 11, 16 (see App C-4).

because disclosure likely would interfere with law enforcement proceedings;[112]

- information compiled in investigations *not* connected with pending or contemplated prosecution will remain secret only if the public body establishes that disclosure would:
  - — deprive a person of a right to a fair trial;
  - — constitute an unwarranted invasion of privacy;
  - — disclose the identity of a confidential source or confidential information furnished only by the confidential source;
  - — disclose investigative techniques and procedures; or
  - — endanger the life or physical safety of law enforcement personnel.[113]

Under an exception to the exemption, a "record of an arrest or the report of a crime" is treated differently than other criminal investigatory records and ordinarily is *not* exempt from disclosure. The statute clarifies this exception by setting out a nonexclusive list of examples of information contained in arrest records and crime reports. Such records must be disclosed unless there is a clear need to delay disclosure in the course of a specific investigation, or unless another statute restricts or prohibits disclosure.[114]

This "arrest records" exception does not apply to juvenile records. Although ORS 192.501(3) does not by its own terms distinguish between juvenile and adult records, the juvenile code authorizes "custody," rather

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[112] *See* Public Records Order, August 15, 2001, Padgett/Eller (records exempt during defendant's appeal of conviction) (see App F-47).

[113] Public Records Order, November 13, 2001, Forgey (see App F-47). In addition to information related to law enforcement personnel safety that may be exempt under ORS 192.501(3), the legislature has restricted the disclosure of certain information about law enforcement and public safety employees. ORS 181.852 and 181.854. *See also* ORS 192.502(34) (home address, telephone number and electronic mail address exempt at request of public safety officer); ORS 192.501(31) (conditional exemption for home address and home telephone number of public safety officer contained in voter registration records); ORS 192.501(32) (conditional exemption for name of public safety officer contained in county real property assessment or taxation records).

[114] *See, e.g.*, ORS 419B.035 (child abuse reports).

than "arrest," of juveniles for criminal law violations.[115] We therefore believe that under ORS 192.501(3), the record of an "arrest" does *not* include the record of "custody" of a juvenile. Such "custody" records compiled by law enforcement agencies for criminal law purposes would therefore fall within the ORS 192.501(3) exemption. We note, however, that the juvenile code requires disclosure of information that parallels the arrest record information described in ORS 192.501(3). It also permits disclosure of additional information from juvenile *court* records.[116]

A public record need not have originated as part of a criminal investigation to come within the exemption. In a public records order, we concluded that the scope of the exemption for criminal investigatory information extends to prevent disclosure of records not originally created, but later gathered, for criminal law enforcement purposes.[117] In reaching our conclusion, we noted that the United States Supreme Court construed the nearly identical provision in the federal Freedom of Information Act exempting "records or information compiled for law enforcement purposes" to extend to such records.[118] Because the state and federal disclosure exemptions are comparable, we believe that Oregon courts would reach the same conclusion.[119]

Also, the exemption is not limited to records in the custody of a law enforcement agency or official. If, as part of a criminal investigation, a law enforcement agency has collected or gathered records from another public body, that public body (or any other public body that is also a "custodian" of the same records) may apply the exemption in reliance on the law enforcement agency's representation that public disclosure of records would interfere with the pending criminal prosecution.[120]

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[115] ORS 419C.080, 419C.091 and 419C.094.

[116] ORS 419A.255(5), (6); *see also* ORS 419C.239(2) (certain information contained in "formal accountability" agreements not confidential and not exempt from disclosure). The remainder of the juvenile court records are generally confidential under ORS 419A.255(1)-(2) and, therefore, exempt from disclosure under ORS 192.502(9), which is discussed below.

[117] Public Records Order, December 23, 1991, Mayes (see App F-25); Public Records Order, October 10, 1996, Reed (see App F-36).

[118] *John Doe Agency v. John Doe Corp.*, 493 US 146, 110 S Ct 471, 107 L Ed2d 462 (1989).

[119] *Jensen*, 24 Or App 11 (see App C-4).

[120] Public Records Order, December 18, 2002, Crombie (see App F-50);

The exemption for criminal investigatory information should be distinguished from the laws governing disclosure of criminal offender information. ORS 181.560 establishes a procedure for obtaining specified criminal offender information from the Department of State Police. ORS 181.534 makes criminal offender information obtained by public bodies for non-criminal justice purposes, e.g., employment, confidential. Public bodies affected by ORS 181.534 are identified in Appendix G.

(4) Tests and Examination Material

ORS 192.501(4) conditionally exempts:

> Test questions, scoring keys, and other data used to administer a licensing examination, employment, academic or other examination or testing procedure before the examination is given and if the examination is to be used again. Records establishing procedures for and instructing persons administering, grading or evaluating an examination or testing procedure are included in this exemption, to the extent that disclosure would create a risk that the result might be affected[.]

The obvious purpose of this exemption is to protect the integrity of examinations administered by various public bodies for licensing,[121] employment and other purposes. Information used to administer the test is confidential until the test has been given. Examination information remains confidential if the test will be reused.[122] We have concluded that records of the oral answers to test questions must be released if the answers do not indirectly reveal the questions.[123] Likewise, a completed answer sheet is not exempt if disclosure would not compromise the integrity of the examination.[124] However, we also have concluded that the

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Public Records Order, July 8, 2004, Meyer (see App F-55); Public Records Order, February 27, 2007, Zaitz (see App F-60).

[121] Licensing examinations, test questions and related material may also be protected by the U.S. Copyright Act (17 USC §§ 101-810) or qualify as trade secrets protected by the Uniform Trade Secrets Act (ORS 646.461 to 646.475) or conditionally exempt from disclosure under ORS 1921.501(2).

[122] Public Records Order, January 12, 2001, Varenhorst (see App F-46); Public Records Order, February 28, 2002, Perry (see App F-48).

[123] Public Records Order, January 24, 1989, Wilson/Parsons (see App F-17).

[124] Public Records Order, November 19, 1999, Jacobs/Birhanzl (see App F-43).

scoring sheet for a practical examination that lists the items on which a licensing applicant is being evaluated is the equivalent of written test questions and exempt when disclosure would jeopardize the integrity of subsequent examinations.

Although primarily applicable to licensing or academic examinations, this exemption will apply to any "examination" for which test questions, scoring keys or other data will be used again to grade or evaluate applicants. Thus, we concluded that when authorization of tax credits in a competitive funding cycle is based on an evaluation of written questions that elicit information about a project's qualifications, the scoring sheets and evaluation materials are exempt because disclosure would identify precisely what the applicant needed to state to obtain a maximum score.[125]

(5) Business Records Required to be Submitted

ORS 192.501(5) conditionally exempts:

> Information consisting of production records, sale or purchase records or catch records, or similar business records of a private concern or enterprise, required by law to be submitted to or inspected by a governmental body to allow it to determine fees or assessments payable or to establish production quotas, and the amounts of such fees or assessments payable or paid, to the extent that such information is in a form which would permit identification of the individual concern or enterprise. This exemption does not include records submitted by long term care facilities as defined in ORS 442.015 to the state for purposes of reimbursement of expenses or determining fees for patient care. Nothing in this subsection shall limit the use which can be made of such information for regulatory purposes or its admissibility in any enforcement proceeding[.]

This exemption applies only to business records required to be submitted to a governmental body for use in setting fees or assessments or for establishing production quotas, and to the amount of the fees or assessments, if this information would permit identification of the business. It is intended to protect information that would allow determination of a particular business's production levels. This exemption does not cover business records that a person or business may submit in

[125] Public Records Order, March 17, 1997, Chastain (see App F-38).

connection with an application for a license or permit, even if the information is a required part of the application, unless the amount of the license or permit fee is based on the production levels. The exemption is limited to information furnished to allow the governmental agency "to determine fees or assessments payable or to establish production quotas."

(6) Real Estate Appraisal Information

ORS 192.501(6) conditionally exempts:

> Information relating to the appraisal of real estate prior to its acquisition[.]

This exemption permits public bodies to obtain information in confidence concerning the value of real estate that the public body may purchase or condemn.[126] A parallel provision exists under the Public Meetings Law, which exempts from open meetings requirements "deliberations with persons designated by the governing body to negotiate real property transactions." ORS 192.660(2)(e). Even after the real estate is acquired, the exemption may continue to apply to the appraisal if the information and analysis in the record is relevant to later appraisals of similarly situated properties that the public body may acquire.[127]

(7) Employee Representation Cards

ORS 192.501(7) conditionally exempts:

> The names and signatures of employees who sign authorization cards or petitions for the purpose of requesting representation or decertification elections[.]

This exemption does not extend to records showing the number of persons who have signed such cards or to checklists of eligible employees who vote in such elections that do not disclose how individual employees voted.[128]

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[126] ORS 35.346(2) requires an offer to purchase property preliminary to a condemnation action to be accompanied by any written appraisal upon which the condemner relied in establishing the amount of compensation offered. If the compensation is less than $20,000, the condemner may instead provide a written explanation of the valuation.

[127] Public Records Order, December 2, 1994, Parks (see App F-31).

[128] Public Records Order, March 6, 1981, Bishoff (see App F-1); Letter of Advice dated February 26, 1987, to Wendy Greenwald, ERB Board Agent (OP-

(8) Civil Rights Investigation Material

ORS 192.501(8) conditionally exempts:

> Investigatory information relating to any complaint filed under ORS 659A.820 or 659A.825, until such time as the complaint is resolved under ORS 659A.835, or a final order is issued under ORS 659A.850[.]

ORS 659A.820 and 659A.825 relate to complaints filed with the Commission of the Bureau of Labor and Industries alleging unlawful employment practices or other civil rights violations. ORS 659A.835 and 659A.850 relate to investigations and hearing procedures for such complaints.

This provision of the Public Records Law does not exempt the complaint itself or information contained in the complaint. Nor does the exemption extend to names and addresses of employers against whom unlawful employment practices complaints are pending.[129]

(9) Unfair Labor Practice Complaints

ORS 192.501(9) conditionally exempts:

> Investigatory information relating to any complaint or charge filed under ORS 243.676 and 663.180[.]

ORS 243.676 relates to processing complaints by public employees or employers of unfair labor practices listed in ORS 243.672(1) and (2), and complaints of refusal to comply with any provision of a final and binding arbitration award, which is an unfair labor practice under ORS 243.752(1). ORS 663.180 relates to unfair labor practice investigations and complaints before the Employment Relations Board. However, the complaint itself would not be exempt from disclosure.[130]

(10) Debt Collection Agency Investigation Records

ORS 192.501(10) conditionally exempts:

6087) (see App E-5).

[129] *Pace Consultants v. Roberts,* 297 Or 590, 595, 599, 687 P2d 779 (1984) (see App C-6).

[130] *Id.*

> Records, reports and other information received or compiled by the Director of the Department of Consumer and Business Services under ORS 697.732[.]

ORS 697.732 relates to investigations and enforcement by the Director of the Department of Consumer and Business Services of laws concerning debt consolidating agencies. The language used in this exemption—"records, reports and other information"—is broader than the "information relating to any complaint" language used in the civil rights and unfair labor practice exemptions discussed above. Accordingly, this exemption may include information in a complaint.[131]

(11) Archaeological Site Information

ORS 192.501(11) conditionally exempts:

> Information concerning the location of archaeological sites or objects as those terms are defined in ORS 358.905, except if the governing body of an Indian tribe requests the information and the need for the information is related to that Indian tribe's cultural or religious activities. This exemption does not include information relating to a site that is all or part of an existing, commonly known and publicized tourist facility or attraction[.]

ORS 358.905(1) defines the terms "archaeological site" and "archaeological object." The statutes following these definitional provisions concern protection of archaeological sites and objects.

(12) Personnel Discipline Actions

ORS 192.501(12) conditionally exempts:

> A personnel discipline action, or materials or documents supporting that action[.]

Only completed disciplinary actions when a sanction is imposed, and materials or documents that support that particular disciplinary action, fall within the scope of this exemption.[132] The exemption does not apply when an employee of a public body resigns during an employer investigation or in lieu of disciplinary action. The policy underlying this narrowly construed exemption is to "protect[ ] the public employee from ridicule for

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[131] *Cf. Pace Consultants*, 297 Or 590 (see App C-6).

[132] *City of Portland v. Rice*, 308 Or 118, 775 P2d 1371 (1989) (see App C-9).

having been disciplined but does not shield the government from public efforts to obtain knowledge about its processes."[133]

Consistent with this policy, there are situations when the public interest in disclosure outweighs the public interest in confidentiality, despite the imposition of a disciplinary sanction. For example, the public interest typically favors disclosure if the conduct potentially constitutes a criminal offense or if the records relate to alleged misuse and theft of public property by public employees.[134] Other factors to consider in weighing the public interest in disclosure against the employee's interest in confidentiality include the employee's position, the basis for the disciplinary action, and the extent to which the information has already been made public.

We concluded that disclosure of a disciplinary action and related materials was required when the employee was a law enforcement officer who provided instruction to persons seeking to become certified as public safety personnel and the incident for which the employee was disciplined was already well publicized and was antithetical to the minimum fitness standards the officer was expected to teach and to model. However, the public interest did not require disclosure of the employee's entire disciplinary history.[135] If violation of the criminal laws is not involved and the conduct of the public officials has not been publicized, the fact that the officials are high-level administrators will not, by itself, require disclosure of the facts supporting their terminations.[136]

In a case involving records pertaining to an investigation and disciplinary action against a police captain who allegedly had engaged in sexual conduct through an escort service that might serve as a front for prostitution, the Court of Appeals held that the public interest required disclosure. The court reasoned that the public has a legitimate interest in

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[133] *Id.* at 124 n 5.

[134] *Oregonian Publishing v. Portland School Dist.*, 144 Or App 180, 187, 925 P2d 591 (1996), *modified* 152 Or App 135, 952 P2d 66 (1998), *aff'd on other grounds* 329 Or 393, 987 P2d 480 (1999) (see App C-17); Public Records Order, November 26, 1990, Nealy/Hogan (see App F-23); Public Records Order, January 27, 1992, Moody (see App F-26).

[135] Public Records Order, October 11, 1996, Foster/Bennett (see App F-36).

[136] Public Records Order, April 29, 1993, Haas (see App F-28). Public Records Order, July 3, 1995, Garrettson (see App F-33).

confirming the police captain's integrity and ability to enforce the law evenhandedly, and that the information sought bore materially on his integrity and on the risk that its compromise could affect the administration of his duties.[137]

Neither ORS 192.501(12) nor the relevant court decisions specify how the statute applies when a person seeks records in a file in a pending personnel disciplinary matter. We believe, however, that in those circumstances a public body may postpone action on the request until the personnel matter is finally resolved, in order to determine whether those records are exempt.[138]

That practice would be consistent with ORS 192.430, which requires a custodian of public records to furnish a reasonable opportunity to inspect or copy public records and impliedly provides the custodian a reasonable time to respond to a records request.[139] Under the circumstances discussed, it would be entirely reasonable for a public body to delay responding to a records request until it had the facts—the resolution of the personnel disciplinary matter—necessary to determine whether the records are exempt. We believe that the reasonable time to respond to a request for this type of record begins when the personnel matter is finally resolved.[140] Moreover, a contrary reading of ORS 192.501(12) effectively would eviscerate the exemption by compelling the disclosure of records that later could be exempt from disclosure.

We recommend that a public body consult with its legal counsel for advice in responding to a request for records potentially exempt under the personnel discipline exemption.

(13) Information about Threatened or Endangered Species

ORS 192.501(13) conditionally exempts:

> Information developed pursuant to ORS 496.004, 496.172 and 498.026 or ORS 496.192 and 564.100, regarding the habitat,

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[137] *City of Portland,* 163 Or App 550 (see App C-19).

[138] *But see* Public Records Order, November 9, 2000, Simpson (agency with records was not the employer and had records to carry out its own statutory duty) (see App F-45).

[139] *See* discussion, page 9 above.

[140] Public Records Order, April 3, 1995, Larson (see App F-32).

> location or population of any threatened species or endangered species[.]

ORS 496.004, 496.172, 498.026, 496.192 and 564.100 relate to the definition, identification and management of threatened and endangered animal and plant species. These activities generally fall within the jurisdiction of the State Fish and Wildlife Commission for animals, and the State Department of Agriculture for plants.

In creating this exemption, the legislature likely intended to prevent disclosure of information regarding threatened or endangered species to persons who might use the information in a manner adverse to the survival of the species. While the motive of the requester and the circumstances surrounding the request are irrelevant in determining whether the information sought falls within the exemption, the motive of the requester may be relevant to whether the public interest requires disclosure.[141] A requester's benevolent intention and promise not to disclose the records to anyone else, however, do not necessarily mean that the public body must disclose the record, because the body may have little basis to evaluate the requester's intentions and no means to enforce the requester's promise.[142]

(14) Faculty Research

ORS 192.501(14) conditionally exempts:

> Writings prepared by or under the direction of faculty of public educational institutions, in connection with research, until publicly released, copyrighted or patented[.]

"This exemption is designed primarily to protect public educational institutions from 'piracy'" of research ideas and data collected by faculty members.[143] It also authorizes faculty to withhold data to assure its accuracy and to avoid the potential detriment to the public interest of releasing misleading or inaccurate data prior to final public release.[144] Even if preliminary results have been published, the exemption will

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[141] *Guard Publishing Co.*, 96 Or App 463 (see App C-9).

[142] Public Records Order, June 22, 1993, Lear/Hyman (see App F-29).

[143] Letter of Advice dated March 29, 1988, to W.T. Lemman, Executive Vice Chancellor (OP-6217) (see App E-5); Public Records Order, July 7, 1989, McCleery (see App F-20).

[144] OP-6217 at 4; Public Records Order, September 25, 2003, Bridges (see App F-51).

continue to apply to the underlying data if further research and publication will be undertaken using the same data.[145]

At least one circuit court has rejected this interpretation and held that the exemption "terminates and no longer applies to writings prepared by or under the direction of faculty or public educational institutions at the time when such writings are publicly released, copyrighted or patented, regardless of ongoing or planned future research using such writings."[146] The court ordered disclosure of videotapes recording behavior of rhesus monkeys that formed part of the basis of a published scientific research paper. The court concluded that even though the videotapes were being used in ongoing research and additional scientific publications were anticipated, the exemption provided in ORS 192.501(14) no longer applied because the results of the research had been at least partially published and copyrighted.

(15) Computer Programs for the Use of Public Bodies

ORS 192.501(15) conditionally exempts:

> Computer programs developed or purchased by or for any public body for its own use. As used in this subsection, "computer program" means a series of instructions or statements which permit the functioning of a computer system in a manner designed to provide storage, retrieval and manipulation of data from such computer system, and any associated documentation and source material that explain how to operate the computer program. "Computer program" does not include:
>
> (a) The original data, including but not limited to numbers, text, voice, graphics and images;
>
> (b) Analyses, compilations and other manipulated forms of the original data produced by use of the program; or
>
> (c) The mathematical and statistical formulas which would be used if the manipulated forms of the original data were to be produced manually[.]

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[145] Public Records Order, June 19, 1995, Speede (see App F-32).

[146] *In Defense of Animals v. Oregon Health Sciences University*, No. 95C-13740 (Order and Judgment of Marion Cty. Cir. Ct., August 27, 1996).

The legislature added this provision to prevent persons from obtaining from public bodies computer programs that they otherwise would have to purchase or develop themselves. We have concluded that the exemption includes information that would permit computer access.[147] The exclusions from the definition of computer program specified in subsections (a)–(c) are to ensure public access to information that is stored on, produced or used by a computer during a public body's normal use that would be public records subject to disclosure if stored, produced or used in hard copy.

(16) Agricultural Producer Indebtedness Mediation Data

ORS 192.501(16) conditionally exempts:

> Data and information provided by participants to mediation under ORS 36.256[.]

ORS 36.256 authorizes mediation services for agricultural producers in danger of foreclosure on agricultural property and for their creditors. All "memoranda, work products and other materials contained in the case files of a mediator or mediation service" under this program are also confidential, ORS 36.262, and would be exempt from disclosure under ORS 192.502(9) discussed below.

(17) Unsafe Workplace Investigation Materials

ORS 192.501(17) conditionally exempts:

> Investigatory information relating to any complaint or charge filed under ORS chapter 654, until a final administrative determination is made or, if a citation is issued, until an employer receives notice of any citation[.]

ORS chapter 654 governs safety and health in places of employment. This exemption covers investigatory information relating to complaints and charges of violations of laws governing workplace safety and health. A "complaint" or "charge" includes any report or notice to the Oregon Occupational Safety and Health Division from any person describing or alleging a possible violation of the Oregon Safe Employment Act.[148] As with, for instance, ORS 192.501(8), the exemption does not cover the

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[147] Public Records Order, December 23, 1988, Eastlund (see App F-16).

[148] Public Records Order, September 19, 1997, Long (see App F-40).

complaint itself.[149] However, ORS 654.062(4) provides for confidentiality of the identity of the employee making a complaint of employer safety or health violations.

(18) Public Safety Plans

ORS 192.501(18) conditionally exempts:

> Specific operational plans in connection with an anticipated threat to individual or public safety for deployment and use of personnel and equipment, prepared or used by a public body, if public disclosure of the plans would endanger an individual's life or physical safety or jeopardize a law enforcement activity[.]

This exemption applies to operational plans of public bodies, such as a law enforcement agency's tactical plans to carry out "sting" operations, to protect individuals and groups during high-profile court cases, demonstrations or visits by dignitaries, or to maintain order after natural disasters. The exemption permits consideration of the endangerment of the life or physical safety of any individual, as well as the jeopardizing of law enforcement activities, caused by disclosure of security plans.[150]

(19) Telecommunications Utility Audits

ORS 192.501(19) conditionally exempts:

> (a) Audits or audit reports required of a telecommunications carrier. As used in this paragraph, "audit or audit report" means any external or internal audit or audit report pertaining to a telecommunications carrier, as defined in ORS 133.721, or pertaining to a corporation having an affiliated interest, as defined in ORS 759.390, with a telecommunications carrier that is intended to make the operations of the entity more efficient, accurate or compliant with applicable rules, procedures or standards, that may include self-criticism and that has been filed by the telecommunications carrier or affiliate under compulsion of state law. "Audit or audit report" does not mean an audit of a cost study that would be discoverable in a contested case proceeding and that is not subject to a protective order of; and

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[149] *Pace Consultants,* 297 Or 590 (see App C-6).

[150] Public Records Order, January 27, 2006, Laws (see App F-59).

> (b) Financial statements. As used in this paragraph, "financial statement" means a financial statement of a nonregulated corporation having an affiliated interest, as defined in ORS 759.390, with a telecommunications carrier, as defined in ORS 133.721[.]

This provision was proposed by telecommunications utilities with the concurrence of the Public Utility Commission (PUC) to protect the affiliates' financial statements and audits that become public records when the telecommunications carrier provides them to the PUC.[151] Release of the information may also provide a competitor of an affiliate with an unfair business advantage if this information is a trade secret.

(20) Residence Address of Elector

ORS 192.501(20) conditionally exempts:

> The residence address of an elector if authorized under ORS 247.965 and subject to ORS 247.967[.]

ORS 247.965 requires the county clerk to keep the elector's residence address exempt from disclosure if requested by an elector who demonstrates to the satisfaction of the county clerk that the elector's personal safety or that of any family member residing with the elector is in danger if the address remains available for public inspection. See discussion above of ORS 192.445, requiring a public body to keep an individual's home address, personal telephone number, or electronic mail address exempt from disclosure on similar grounds. ORS 247.967 allows disclosure of the exempt address in certain circumstances.

The Secretary of State is required to adopt rules defining when "the personal safety" of the elector or a family member is in danger. ORS 247.969. *See* OAR 165-005-0130.

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[151] *See* ORS 759.060 which permits the PUC, by rule, to specify other information submitted by local exchange telecommunications utilities or cooperatives as exempt from disclosure unless the public interest requires disclosure in the particular instance.

(21) Housing Authority and Urban Renewal Agency Records

ORS 192.501(21) conditionally exempts:

> The following records, communications and information submitted to a housing authority as defined in ORS 456.005, or to an urban renewal agency as defined in ORS 457.010, by applicants for and recipients of loans, grants and tax credits:
>
> (a) Personal and corporate financial statements and information, including tax returns;
>
> (b) Credit reports;
>
> (c) Project appraisals;
>
> (d) Market studies and analyses;
>
> (e) Articles of incorporation, partnership agreements and operating agreements;
>
> (f) Commitment letters;
>
> (g) Project pro forma statements;
>
> (h) Project cost certifications and cost data;
>
> (i) Audits;
>
> (j) Project tenant correspondence requested to be confidential;
>
> (k) Tenant files relating to certification; and
>
> (L) Housing assistance payment requests[.]

This exemption applies to certain records submitted to local housing authorities and urban renewal agencies by individuals or businesses applying for or receiving certain funding to develop, rehabilitate, or otherwise finance affordable, government-subsidized housing or urban renewal projects. It was proposed to encourage participation by developers, contractors, financial institutions and others in publicly-financed low income housing and urban renewal transactions. This provision is somewhat similar to the exemption in ORS 192.502(23) for records obtained by the Oregon Housing and Community Services Department. Unlike ORS 192.502(23), however, this exemption is conditional, requiring consideration of the public interest in disclosure.

(22) Interference with Property or Services

ORS 192.501(22) conditionally exempts:

> Records or information that, if disclosed, would allow a person to:
>
> (a) Gain unauthorized access to buildings or other property;
>
> (b) Identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, services; or
>
> (c) Disrupt, interfere with or gain unauthorized access to public funds or to information processing, communication or telecommunication systems, including the information contained in the systems, that are used or operated by a public body[.]

In part, this provision is intended to protect the delivery of the state's public services. It exempts from disclosure information that would allow a person to gain unauthorized access to buildings, public funds or information processing systems, or to identify areas of vulnerability that would permit unlawful disruption to or interference with public services or a public body's information processing systems. A public body also may use the exemption to protect the security of property and services generally; its application is not limited to records pertaining to property and services owned, used or provided by a public body.

(23) Security Measures

ORS 192.501(23) conditionally exempts from disclosure:

> Records or information that would reveal or otherwise identify security measures, or weaknesses or potential weaknesses in security measures, taken or recommended to be taken to protect:
>
> (a) An individual;
>
> (b) Buildings or other property;
>
> (c) Information processing, communication or telecommunication systems, including the information contained in the systems; or
>
> (d) Those operations of the Oregon State Lottery the security of which are subject to study and evaluation under ORS 461.180(6)[.]

This provision is also intended, in part, to protect the delivery of the state's public services by exempting from disclosure information that would reveal the security measures taken or recommended to be taken to protect public employees, buildings and information processing systems. It exempts not only actual or recommended security measures but also weaknesses or potential weaknesses in those measures. The exemption also applies to records concerning individuals, property and systems beyond those connected to a public body. Finally, the measure specifically exempts from disclosure information that would reveal security measures of the Oregon State Lottery.

(24) OHSU and OUS Donation Records

ORS 192.501(24) conditionally exempts:

> Personal information held by or under the direction of officials of the Oregon Health and Science University or the Oregon University System about a person who has or who is interested in donating money or property to the university, the system or a state institution of higher education, if the information is related to the family of the person, personal assets of the person or is incidental information not related to the donation[.]

This exemption was amended by Oregon Laws 2005, chapter 203, sections 1 and 2 to apply to OHSU records as well as those of OUS and its institutions. The exemption protects from disclosure particular information that is personal in nature about individuals who either have made or are interested in making a donation of money or property to OHSU, OUS or a particular state institution of higher education. To qualify for exemption, the information must be held by or under the direction of OHSU or OUS officials.

(25) OUS Donation Records

ORS 192.501(25) conditionally exempts:

> The home address, professional address and telephone number of a person who has or who is interested in donating money or property to the Oregon University System[.]

The provision protects specific information about individuals who either have made or are interested in making a donation of money or property to OUS. Unlike the exemption in ORS 192.501(24), records need

not be held by or under the direction of OUS officials to qualify for exemption.

(26) Commodity Commission Filers

ORS 192.501(26) conditionally exempts:

> Records of the name and address of a person who files a report with or pays an assessment to a commodity commission established under ORS 576.051 to 576.455, the Oregon Beef Council created under ORS 577.210 or the Oregon Wheat Commission created under ORS 578.030[.]

This provision exempts from disclosure the names and addresses of persons filing reports with or paying assessments to certain agricultural or other commodity commissions. The laws concerning reporting to commodity commissions include ORS 576.335 and 576.345. The laws concerning payment of assessments include ORS 576.325. The legislature substantially revised Oregon's commodity commission laws in Oregon Laws 2003, chapter 604.

(27) Financial Transfer Records

ORS 192.501(27) conditionally exempts:

> Information provided to, obtained by or used by a public body to authorize, originate, receive or authenticate a transfer of funds, including but not limited to a credit card number, payment card expiration date, password, financial institution account number and financial institution routing number[.]

This exemption is intended to protect against unauthorized access to, and fraudulent use of, information that a public body possesses in relation to fund transfers. A public body may transfer funds to or receive a transfer of funds from members of the public as well as other public entities. To execute such transfers, the public body may have records containing information that could allow a person to access funds maintained in a private or public account. This provision protects that information from disclosure.

(28) Social Security Numbers in Particular Court Records

ORS 192.501(28) conditionally exempts:

> Social Security numbers as provided in ORS 107.840[.]

This exemption applies to Social Security numbers of parties to judicial proceedings for marital annulment, dissolution or separation under ORS 107.085 or 107.485.

(29) Student Electronic Mail Addresses

ORS 192.501(29) conditionally exempts:

> The electronic mail address of a student who attends a state institution of higher education listed in ORS 352.002 or Oregon Health and Science University[.]

This exemption applies to electronic mail addresses of students attending University of Oregon, Oregon State University, Portland State University, Oregon Institute of Technology, Western Oregon University, Southern Oregon University, Eastern Oregon University, or Oregon Health and Science University.

(30) OHSU Medical Researcher Records

ORS 192.501(30) conditionally exempts:

> The name, home address, professional address or location of a person that is engaged in, or that provides goods or services for, medical research at Oregon Health and Science University that is conducted using animals other than rodents. This subsection does not apply to Oregon Health and Science University press releases, websites or other publications circulated to the general public[.]

The exemption protects specific identifying information about individuals who engage in medical research using animals at OHSU, or who provide goods or services for that research. It was amended by Oregon Laws 2005, chapter 455, section 1, to except OHSU press releases, websites and other generally circulated publications. The exemption is temporary. Under Oregon Laws 2005, chapter 455, section 4, its duration was extended through January 1, 2010.

With OHSU personnel testifying as to incidents of "harassing" and "threatening" behavior by animal rights activists who had no definite association with the nonprofit organization seeking disclosure of names of staff for OHSU's Oregon Regional Primate Research Center, the Oregon Court of Appeals held that the public interest did not require disclosure.[152] Relevant to the court's holding was its conclusion that the requester's

[152] *In Defense of Animals*, 199 Or App at 178–79 (see App C-21).

purpose in seeking disclosure – ensuring the proper treatment of animals at the facility – was not dependent on knowing the names of particular employees.

(31) Public Safety Officer and Attorney Voter Registration Records

ORS 192.501(31) conditionally exempts:

> If requested by a public safety officer as defined in ORS 181.610, by a district attorney or deputy district attorney or by an assistant attorney general designated by the Attorney General, the home address and home telephone number of the public safety officer or attorney contained in the voter registration records for the public safety officer or attorney[.]

This provision exempts from disclosure the home addresses and home telephone numbers of public safety officers and district attorneys, deputy district attorneys and assistant attorneys general designated by the Attorney General as contained in voter registration records. ORS 181.610(16) defines "public safety officer" to include corrections officers, youth correction officers, emergency medical dispatchers, parole and probation officers, police officers, certified reserve officers, telecommunicators and fire service professionals. In contrast with ORS 192.445(3), a public safety officer or attorney's request for non-disclosure need not be renewed upon updating the public safety officer or attorney's voter registration record.

(32) Public Safety Officer and Attorney Names Contained in County Real Property Assessment or Taxation Records

ORS 192.501(32) conditionally exempts:

> If requested by a public safety officer as defined in ORS 181.610, by a district attorney or deputy district attorney or by an assistant attorney general designated by the Attorney General, the name of the public safety officer or attorney contained in county real property assessment or taxation records. This exemption:
>
> (a) Applies only to the name of the public safety officer or attorney and any other owner of the property in connection with a specific property identified by the

officer or attorney in a request for exemption from disclosure;

(b) Applies only to records that may be made immediately available to the public upon request in person, by telephone or using the Internet;

(c) Applies until the public safety officer or attorney requests termination of the exemption;

(d) Does not apply to disclosure of records among public bodies as defined in ORS 174.109 for governmental purposes; and

(e) May not result in liability for a county if the name of a public safety officer or attorney is disclosed after a request for exemption from disclosure is made under this subsection[.]

This provision exempts from disclosure the name of public safety officers, district attorneys, deputy district attorneys and assistant attorneys general designated by the Attorney General, as contained in real property assessments and tax rolls. ORS 181.610(16) defines "public safety officer" to include corrections officers, youth correction officers, emergency medical dispatchers, parole and probation officers, police officers, certified reserve officers, telecommunicators and fire service professionals. HB 3407, § 2, amended ORS 192.502(34) and moved the provision to ORS 192.501, subjecting the provision to the public interest test. The amended exemption now applies to county real property and lien records but includes only those records that may be made immediately available to the public upon request in person, by telephone or by using the Internet.

(33) Land Management Plans

ORS 192.501(33) conditionally exempts:

Land management plans required for voluntary stewardship agreements entered into under ORS 541.423.

The exemption applies to voluntary stewardship agreements entered into between a landowner or representative of the landowner and the State Department of Agriculture or the State Board of Forestry, by which "the landowner will self-regulate to meet and exceed applicable regulatory requirements and achieve conservation, restoration and improvement of

fish and wildlife habitat or water quality." ORS 541.423(1). The land management plan includes a comprehensive description and inventory of the subject property, its features and uses, and a prescription for the protection of resources.

d. The Exemptions of ORS 192.502

ORS 192.502 provides:

> The following public records are exempt from disclosure under ORS 192.410 to 192.505[.]

Note that ORS 192.502 does not contain the condition, "unless the public interest requires disclosure in the particular instance," which applies to all exemptions in ORS 192.501. However, the exemptions in paragraphs (1)–(6) of ORS 192.502 contain language of condition making them subject to a weighing of the public interest in disclosure.

(1) Internal Advisory Communications

ORS 192.502(1) exempts:

> Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

This exemption, substantially narrowed by the conditions for its application, is designed to encourage frankness and candor in communications within or between governmental agencies. "Frank" communication is that which is "marked by free unrestrained willing expression of * * * opinions, or feelings without reticence, inhibition, or concealment." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) at 903.

Under this exemption, a public record is exempt from disclosure if it meets all of the following criteria:

- it is a communication within a public body or between public bodies;
- it is of an advisory nature preliminary to any final agency action;
- it covers other than purely factual materials; and

- in the particular instance, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure.

The central thrust of this exemption is to protect the confidentiality of frank and uninhibited advice and observations a public employee gives to a superior or associate. The test of whether there are grounds for asserting the exemption is whether disclosure would inhibit the employee so as to interfere with the free flow of information and ideas that the agency needs for its efficient operation, as distinguished from mere embarrassment of the employee or agency.

If the communication contains factual material together with the advisory recommendations, then the agency is under a duty to segregate the factual material and make it available for inspection. ORS 192.505.

The burden is on the agency to justify application of this exemption. The exemption does not apply unless the agency can show that in the particular instance the public interest in encouraging frank communications *clearly* outweighs the public interest in disclosure. For the exemption to apply, the agency need not show the extent to which, in the particular instance, frank communication helped to actually advance the work of the agency.[153]

(a) Types of Records

Public agencies often erroneously take the view that preliminary reports or recommendations, containing nothing that justifies nondisclosure, will be withheld until after they are reviewed or acted upon by the recipient. This is improper. The need for further checking of data is also not a valid ground for nondisclosure. Such a document is a public record. Therefore, a requester is entitled to see the document and to obtain a copy upon request, unless another exemption applies.[154] If, for example, the report is to a board, it may be annoying to the board to read a newspaper story about it before its members receive their copies, but this does not justify any delay in disclosure.

Even before adoption of the Public Records Law, the Oregon Supreme Court held that data collected by a state agency in the course of carrying

[153] Public Records Order, February 1, 2001, Zaitz (see App F-46).
[154] Public Records Order, September 27, 1996, Davis/White (see App F-36).

out a study were subject to inspection before the study was completed. The fact that a record is "preliminary" is not itself grounds for nondisclosure.[155]

We also have concluded that preliminary or incomplete working drafts are public records subject to disclosure and that they should be judged by the same standards as a completed "advisory communication." An employee or official may prepare a half dozen drafts before submitting a final version, and often may submit preliminary "discussion drafts." We know from experience that disclosure of an incomplete or discussion draft, in any case in which there is significant media or public curiosity about the result, may have serious adverse effects upon the ability of the person to complete the work. If disclosure would lead to interference with the work of the agency, this is a factor to be weighed into the "public interest" equation.[156] The fact that the public (or news media) is "interested" in the sense of being curious about the matter or issue is of only minimal relevance to a determination of where the "public interest" lies under this or any other conditional exemption.

(b) Balancing Disclosure and Nondisclosure

Three Oregon Court of Appeals opinions relate to the internal advisory communications exemption and demonstrate the weight given to the presumption in favor of disclosure. The court first applied the public interest balancing test in a case in which a hospital subject to the Public Records Law brought a declaratory judgment action to determine whether a certain record was exempt from disclosure. The record in dispute was a portion of a consultant's study of operating room procedures and staffing levels, based in part on interviews with hospital staff. The hospital relied on the internal advisory communications exemption, among others.

The court found that the report was a communication within a public body of an advisory nature preliminary to a final agency action, and that it contained both factual and nonfactual information. In applying the public interest balancing test, the court found no evidence that the nonfactual information resulted from "frank communications" within the hospital. Because the only public interest in nondisclosure considered was the interest in candor within the hospital and candor would not be chilled

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[155] *MacEwan,* 226 Or at 27 (see App C-1); 38 Op Atty Gen 1761 (1978) (see App E-2).

[156] Public Records Order, June 25, 1981, Wendelbo (see App F-2).

when information did not result from frank communications, the public interest test weighed in favor of disclosure. The court also noted that even had the nonfactual material resulted from frank communications, the "presumption favoring disclosure outweighs any evidence to the contrary."[157]

In the second case, the records in dispute were individual questionnaire responses to a survey sent by the Department of Fish and Wildlife to biologists, to solicit their ratings of the effectiveness of the Forest Practices Act. The case dealt solely with balancing the public interests, because it was undisputed that the responses were communications within a public body, at least in part advisory, and contained other than purely factual material.

After examining the responses at issue, the court ordered disclosure based on its assessment of the public interest, stating:

> Any "chilling effect" that disclosure may have on future communications within the agency, because of potential embarrassment to the agency or its employees, is not sufficient, in and of itself, to overcome the presumption favoring disclosure. *See, e.g., Turner v. Reed*, [22 Or App 177]. To hold otherwise would effectively exempt from disclosure all interagency communications that are advisory in nature and cover other than purely factual matters.

The court also held that summaries of internal advisory communications, rather than the records themselves, cannot satisfy the public interest in disclosure.[158]

Most recently, the court held that Portland Police Bureau records concerning the investigation and discipline of a police officer who killed a civilian during a traffic stop were not exempt from disclosure.[159] The court focused on the balancing of the public's interests and primarily based its holding on the conclusion that none of the requested records contained

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[157] *Bay Area Health District v. Griffin,* 73 Or App 294, 301, 698 P2d 977 (1985) (see App C-7).

[158] *Coos County v. Ore. Dept. of Fish and Wildlife*, 86 Or App 168, 173, 739 P2d 47 (1987) (see App C-8).

[159] *City of Portland v. Oregonian Publishing Co.*, 200 Or App 120, 112 P3d 457 (2005) (see App C-23).

material that, if disclosed, would have a "seriously chilling effect" on future investigations. For example, in describing the contents of the requested records, the court stated that disclosure would not reveal anonymous whistle blowers, personal criticism, or supervisory personnel judgments that were other than "clinical and detached." The court also stressed the public interest in disclosure, given the "highly inflammatory and widely reported" nature of the underlying incident. The court found that the value of transparency to public confidence that a "thorough and unbiased" investigation had been undertaken was not "outweighed by the speculation that transparency will quell candor at some future date."[160]

These cases indicate that to justify an exemption under ORS 192.502(1), there must be a strong showing of a "chilling effect." For example, we concluded in a public records order regarding a pending disciplinary proceeding against an attorney, that the public interest in allowing the Oregon State Bar to exchange frank comments and recommendations concerning proposed disciplinary action would be seriously undermined if the accused attorney could obtain access to the candid analysis of the charges, strategies and recommendations on the disposition of the charges during the pendency of the disciplinary proceedings.[161]

With regard to disciplinary investigations, we concluded that the candid evaluations and recommendations of supervisors and investigators are the types of communications protected by this exemption. The public interest in disclosure may often be outweighed by the public interest in encouraging a frank and uninhibited assessment of the allegations and evidence so that the public body may make an appropriate decision about disciplinary action.[162] However, in relation to disciplinary investigations and other factual situations, it is important to note that, in most instances, a public body cannot make a public interest determination based solely on the *nature* of the requested records. Instead, the public body also must consider the content of the particular records.[163] *Oregonian Publishing*

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[160] *Oregonian Publishing Co.*, 200 Or App at 125–27 (see App C-23).

[161] Public Records Order, March 30, 1989, Howser (see App F-18).

[162] Public Records Order, June 26, 1998, Scheminske/Fraser (see App F-41); Public Records Order, October 17, 1997, Fenrich (see App F-40).

[163] *Kluge v. Oregon State Bar*, 172 Or App 452, 19 P3d 938 (2001) (see App C-20).

exemplifies how the contents of particular records and the situation surrounding a particular investigation may fail to demonstrate that the public interest in encouraging frank communications clearly outweighs the public interest in disclosure.

With regard to another aspect of public employment, we concluded that the public interest in frank and candid communications between prior public employers and a prospective public employer about a former employee's work outweighed the public interest in ensuring that the prospective public employer made an unbiased, fair and informed hiring decision when it decided not to offer the former employee employment.[164] Because the internal advisory exemption does not apply to purely factual material, we determined that the public interest in maintaining the confidentiality of the references extended only to the forthright, subjective evaluations provided by the former public employers, and did not extend to the purely factual information found in the record at issue. Subsequently, we concluded with respect to another request for the references relied upon to deny employment that in the particular instance the public interest in ensuring frank communication could be protected by redacting the source-identifying information, but disclosing the substance of the references.[165]

In the context of rulemaking, we concluded that the exemption applied to speculation by agency employees about the implications or impact of proposed orders.[166] With respect to a proposed hearing order, however, we concluded that the exemption did not apply to the proposed opinion and order in a Department of Revenue appeal. The proposed order in this situation included a tentative recommendation by the hearings officer on a suggested Department of Revenue policy change. As such, it satisfied all

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[164] Public Records Order, January 15, 1997, Burr/Freshour (see App F-37); *see also* Public Records Order, February 9, 2000, Schneiderman (subjective assessment of person investigating background of applicant for public employment) (see App F-44).

[165] *See* Public Records Order, July 17, 1997, Wilker (see App F-39) (relying in part upon analysis of public interest discussed in *Gray v. Salem-Keizer School District*, 139 Or App 556, 912 P2d 938, *rev den* 323 Or 265, 918 P2d 846 (1996) (see App C-14).

[166] Public Records Order, August 2, 1999, Vickers (see App F-42); *see also* Public Records Order, June 4, 2004, Meyer (agency staff opinions and recommendations on proposed rule amendments) (see App F-53).

of the elements of the exemption, except one. The public interest in nondisclosure in this case was insubstantial because the Department of Revenue already had revealed records that discussed the proposed order in some detail.[167]

The public's interest in encouraging frank inter-agency communication in order to advance the Public Utility Commission's (PUC) ability to accomplish its regulatory mission clearly outweighed the public interest in disclosure of records prepared by the PUC staff for an administrative proceeding. In this proceeding, PUC staff was challenging a utility's proposed undertaking. This challenge would have been significantly undermined if the utility could obtain wholesale access to the PUC staff's candid comments, evaluations and strategies while the contested case proceeding was pending. Therefore, we denied the petition except as to "purely factual material" contained in the records sought.[168]

We concluded that a record describing the advantages and disadvantages of various program options for a public body to deal with its budget deficit, including possible budget cuts, was exempt from disclosure. Because managers would be reluctant to engage in frank discussions of potentially unpopular decisions, the public's interest in allowing a frank exchange concerning budget options and potential cuts would be substantially undermined if the record were disclosed before the difficult program decisions were made.[169]

(2) Personal Privacy Exemption

ORS 192.502(2) exempts:

> Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the

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[167] Public Records Order, February 24, 1989, Weill (see App F-17). *See also* Public Records Order, October 2, 1990, Katz/Estevez (disclosure of draft report by PUC and ODOE on costs of early shutdown of Trojan not exempt when final report containing essentially the same material already public, notwithstanding that some information in draft report did not garner consensus within agency) (see App F-23).

[168] Public Records Order, October 21, 1988, Best (see App F-14).

[169] Public Records Order, August 6, 1997, Parrish (see App F-40). *See also* Public Records Order, July 10, 2002, Tucker (portions of planning document that resulted from "brainstorming" efforts exempt from disclosure) (see App F-49).

> public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

The purpose of this exemption is to protect the privacy of individuals from unreasonable invasion.[170] It reflects a policy that persons working for or dealing with the government should not be subject to indiscriminate disclosure of personal information merely because of that association. We emphasize that the exemption protects only the privacy of the person about whom the record contains information. Unlike the internal advisory communications exemption, ORS 192.502(1), the personal privacy exemption is not intended for the benefit of the public body. To illustrate, even though files containing personal information generally are exempt from public inspection, there is no ground under this section of the law to deny an individual access to his or her own file.[171] However, portions of the file may be exempt from the individual's inspection under other exemptions.

ORS 192.502(2) does not exempt all information in a personal or medical file. Information in such a file that is *not* personal, or the disclosure of which would not be an unreasonable invasion of privacy is not exempt. Information in other types of files that *is* personal, and the disclosure of which would be an unreasonable invasion of privacy, is exempt.[172]

(a) Personal Information

The exemption applies to "personal" information. "Personal" information includes all information "relating to a particular person," such as a person's home address, age, weight, and residential telephone number. The fact that information is contained in a public record "would not

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[170] *Jordan,* 308 Or at 441 (see App C-10).

[171] *See Stivahtis v. Juras,* 13 Or App 519, 511 P2d 421 (1973) (decided under predecessor statute) (see App C-2).

[172] *See* 41 Op Atty Gen 435 (1981) (public library circulation records exempt under ORS 192.502(2), personal privacy exemption) (see App E-3). Library records are covered now by a specific exemption. ORS 192.502(22).

prevent it from being of a personal nature if it otherwise would fit that classification."[173]

(b) Unreasonable Invasion of Privacy

Not all personal information is exempt from disclosure; only personal information that "would constitute an unreasonable invasion of privacy" if publicly disclosed comes under this exemption.

The exemption is not limited only to those cases in which disclosure would give rise to a tort action for invasion of privacy. The Oregon Supreme Court concluded that the legislature intended to use the words "unreasonable invasion of privacy" in "their common meaning as a generic description."[174] Whether disclosure will constitute an unreasonable invasion of privacy involves an objective test, in which the court will examine the facts presented in each instance. The mere fact that "the information would not be shared with strangers is not enough to avoid disclosure."[175] An invasion of privacy will be unreasonable where "an ordinary reasonable person would deem [it] highly offensive."[176]

The Supreme Court concluded that the "unreasonable invasion of privacy" test was satisfied when release of a citizen's home address to the requester would allow the requester "to harry [the citizen] incessantly to the extent that an ordinary reasonable person would deem [it] highly offensive."[177] Under the court's analysis, it appears that the exemption is not limited only to circumstances in which the public body's disclosure itself would unreasonably invade a person's privacy. Concurring in the majority opinion, Justice Gillette explained an aspect of the majority's decision left unstated:[178]

> [A] disclosure "constitutes" an unreasonable invasion of privacy if the agency's act of releasing the information, *or the acts of those*

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[173] *Jordan,* 308 Or at 441 (see App C-10) (citing *Morrison v. School District No. 48*, 53 Or App 148, 154–55, 631 P2d 784, *rev den* 291 Or 893 (1981)) (see App C-4).

[174] *Id.* at 442.

[175] *Jordan,* 308 Or at 441 (see App C-10). *See also Id.* at 444 (Gillette, J., concurring) ("A general desire 'to be let alone' * * * will not be sufficient.") (see App C-10).

[176] *Id.* at 442.

[177] *Id.*

[178] *Id.* at 444 (Gillette, J., concurring) (emphasis in original).

> *to whom the information is released*, are reasonably anticipated by the agency to lead to such an invasion of privacy. Thus, in this case, the agency could reasonably anticipate that, should it release the sought-after information to Jordan, that person would immediately and unreasonably invade the privacy of Citizen.

The Court of Appeals has stated that disclosure of personal information regarding a public official's ostensibly private conduct does not constitute an unreasonable invasion of privacy where the conduct involved directly bears on the possible compromise of a public official's integrity in the context of his public employment.[179]

(c) Balancing Disclosure and Nondisclosure

An agency must determine that disclosure of personal information would be an unreasonable invasion of privacy before this exemption will apply. Even if disclosure would constitute an unreasonable invasion of privacy, however, the public body also must determine whether the public interest by clear and convincing evidence requires disclosure in the particular instance.[180] Only when there is no overriding public interest in disclosure may the public body lawfully withhold the information.

Moreover, the information is not exempt absent an individualized justification for exemption.[181] Thus, ORS 192.502(2) requires a public body to consider the merits of each request for nondisclosure on a case-by-case basis; a blanket policy of nondisclosure of public records does not comply with the Public Records Law. For example, the Oregon Supreme Court concluded that a public body violated the Public Records Law when it had a blanket policy of refusing to disclose the names and addresses of replacement teachers during a strike.[182]

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[179] *City of Portland,* 163 Or App 550 (records pertaining to investigation of police captain's use of escort service that may have served as a front for prostitution) (see App C-19).

[180] *Jordan,* 308 Or at 443 (see App C-10).

[181] *Guard Publishing Co.,* 310 Or 32, 39–40 (see App C-10).

[182] *Id. See also* Public Records Order, April 5, 2002, Meadowbrook/Myton (information of a highly personal nature not exempt when person to whom information pertains provides it to public body after being told that it may be disclosed) (see App F-48).

(d) Application of Exemption

We have issued opinions and public records orders applying ORS 192.502(2) to names, personal financial information, personal medical information and other records. We believe these decisions illustrate the proper application of the personal privacy exemption.

The names, home addresses and telephone numbers of licensees and other persons contained in a public body's records are "personal" information. Whether a public body may withhold that information depends, in part, upon whether disclosure would constitute an invasion of privacy that an ordinary reasonable person would deem highly offensive.[183]

Generally, disclosure of a name itself would not constitute an unreasonable invasion of privacy.[184] Nevertheless, in a letter of advice we concluded that an Oregon State System of Higher Education Presidential Search Committee and its members may withhold the identities of individuals who are candidates for president.[185] The fact that a person is a candidate for university president is personal information. In the particular context, disclosure of that information may constitute an unreasonable invasion of privacy, because the revelation could seriously threaten the person's current employment relationship and professional standing. Because disclosure could interfere unduly with the work of the committee

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[183] Note that ORS 192.502(3) now specifically exempts addresses, telephone numbers, Social Security numbers and dates of birth of public bodies' employees and volunteers contained in the public bodies' personnel records. ORS 192.502(12) exempts employee and retiree address, telephone number and other nonfinancial membership records and employee financial records maintained by the Public Employees Retirement System. In addition, ORS 802.177, which is incorporated into the Public Records Law by ORS 192.502(9), prohibits disclosure of names and addresses, and telephone, driver license, driver permit and identification card numbers in motor vehicle records of the Department of Transportation, with certain exceptions.

[184] *See* Public Records Order, April 14, 1995, Mayes (names of CSD employees involved in Whitehead case not exempt from disclosure) (see App F-32).

[185] Letter of Advice dated October 13, 1988, to W.T. Lemman, Chancellor (OP-6248) (see App E-6).

and prevent many qualified individuals from applying, there was no overriding public interest in disclosure.[186]

As for telephone numbers, disclosure by a public body of an individual's telephone number generally would not be highly offensive so as to come within this exemption. We concluded that a public body could not refuse to disclose the telephone numbers of hunting and fishing license holders because the decision not to disclose was based on a blanket policy of nondisclosure.[187] On another occasion we concluded that the trial court administrator's blanket denial of access to juror information forms was not justified under the personal privacy exemption.[188]

A person's address is also information of a personal nature, but it is generally not exempt because reasonable persons routinely provide their addresses for a variety of purposes—they are imprinted on checks, placed on outgoing letters and found in telephone directories, land records and voter registration records.[189] Again, while a blanket policy of nondisclosure would not comply with the Public Records Law, situations may exist in which disclosure of addresses would be highly offensive and not in the public interest. For example, prior to the adoption of ORS 192.502(3), which exempts public employees' addresses, we concluded that the addresses of employees of a particular state agency were exempt from disclosure because the public body knew of facts from which it reasonably anticipated that disclosure of the information could lead to harassment or physical harm of the employees.[190]

ORS 192.502(2) expressly exempts from disclosure personal information in a medical file, if the other statutory criteria are met. We upheld an agency's denial of a request for all information in a particular person's medical files.[191] Personal medical information plainly is

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[186] *See also* Public Records Order, August 12, 1988, Dean (names of nonfinalist applicants to Oregon State System of Higher Education for chancellor position) (App F-13); Public Records Order, March 20, 2003, Rask (names and other identifying information for individuals who contacted DMV about a person's driving ability) (App F-51).

[187] Public Records Order, September 9, 1996, Coreson/Burns (see App F-35).

[188] Public Records Order, April 2, 1991, Adams/Williamson (see App F-24).

[189] *Jordan,* 308 Or at 447 (Linde, J., dissenting) (see App C-10).

[190] Public Records Order, May 31, 1990, Heilman/Boles (see App F-22).

[191] Public Records Order, April 3, 1989, Harrison (see App F-18).

"information of a personal nature," public disclosure of which ordinarily constitutes an unreasonable invasion of privacy. In the particular instance, the public interest did not require disclosure.

Information concerning the manner in which any public officer or employee carries out the duties of the office or employment generally will not come within this exemption.[192] For example, the Court of Appeals has held that records containing allegations of misuse and theft of public property by public employees, a matter of significant public interest, were not exempt from disclosure because the information was not personal in nature and disclosure would not constitute an unreasonable invasion of privacy.[193]

In a case that primarily addressed the criminal investigatory material exemption,[194] the Court of Appeals stated:

> As for invasion of privacy, the report [of investigation of a city police department] deals primarily, if not exclusively, with the conduct of public servants * * * in the performance of their public duties. As the line of cases originating with *New York Times Co. v. Sullivan*, 376 US 254 * * * (1964) makes clear, any privacy rights that public officials have as to the performance of their public duties must generally be subordinated to the right of the citizens to monitor what elected and appointed officials are doing on the job.

Even though information concerning how a public officer or employee carries out his or her duties would not be confidential under the personal privacy exemption, if that information forms the basis for disciplinary action against the employee, it may be exempt from disclosure under the ORS 192.501(12) personnel discipline exemption discussed above.

In a public records order concerning the release of Children's Services Division supervisors' performance evaluations, we determined that the information was of a "personal nature" and that disclosure would

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[192] 41 Op Atty Gen 437 (1981) (see App E-3).

[193] *Oregonian Publishing v. Portland School Dist. No. 1J*, 144 Or App 180, 188, 925 P2d 591 (1996), *modified* 152 Or App 135, 952 P2d 66 (1998), *aff'd on other grounds* 329 Or 393, 987 P2d 480 (1999) (see App C-17); *see also City of Portland*, 163 Or App at 556–57 (disclosure of records involving off-duty conduct that bears directly on possible compromise of public official's integrity in context of his public employment) (see App C-19).

[194] *Jensen*, 24 Or App at 11, 17 (see App C-4).

constitute an unreasonable invasion of privacy because of the highly sensitive nature of the material. However, ORS 192.502(2) also requires an evaluation of the public interest in disclosure. We first noted that social service supervisors are responsible for administering, coordinating and providing a variety of social services to children and their families and the position involves a great deal of responsibility regarding every aspect of a child's life. Thus, the public has a substantial interest in knowing how these individuals as a class are performing their public duties. We also considered the public employee's role in the agency's hierarchy, concluding that there may be greater public interest in the disclosure of the evaluation of a top manager of an agency than in the disclosure of the evaluation of a line worker. Although the public also has an interest in a candid evaluation process and that interest would be furthered by nondisclosure, we concluded that the overall balance favored disclosure.[195]

We also ordered disclosure of a job-related performance evaluation of the manager of a local office of the Employment Department. Again, we compared the competing public interests and concluded that the public interest in knowing how a branch manager is performing his management functions outweighed the public interest in candid evaluations. We exempted from disclosure those items that did not describe the manager's performance, but related to his personal aspirational goals.[196]

We applied the same analysis to public employee salary information. With respect to an employee's gross pay, we concluded that the employee did not have a reasonable expectation that such information would not be subject to public scrutiny because of the public's interest in knowing the amount that a public employee is compensated for his or her services. However, the amount of voluntary payroll deductions from an employee's paycheck are exempt from disclosure under this exemption. The public does not have a legitimate interest in knowing how a public employee spends that paycheck.[197]

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[195] Public Records Order, July 28, 1992, Owen/Fraser (see App F-27).

[196] Public Records Order, May 25, 1994, Mattson/Laine (see App F-31).

[197] Public Records Order, March 27, 1992, Leighty/Ralston (see App F-26). *See also* Public Records Order, November 15, 2002, Jones/Voykto (ordering disclosure of PERS benefit information for 32 retirees in a format that does not attribute the information to individual retirees) (see App F-50).

In response to a public records petition requesting documentation of the date, hours and type of leave (i.e., sick leave, vacation, leave without pay, etc.) for correctional facility security staff, we noted that disclosure of the requested leave information would not constitute an "unreasonable" invasion of the individual's privacy and, therefore, the information would not be exempt from disclosure under ORS 192.502(2). Generally, an individual's coworkers are well aware of the general reason that an employee is off from work and the length of time that he or she is gone. This is not the type of information that an ordinary reasonable person would deem highly offensive to disclose.[198]

We applied the personal privacy exemption to a petition seeking information in a state university's cellular telephone bill about a phone used by a university athletic coach. The bill contained information about work-related and personal calls. After conducting a line-by-line analysis of the records, we denied the petition with regard to information for individual phone calls that would reveal the coach's whereabouts during nonwork hours, regardless of whether a particular call was or was not work-related. Because the whereabouts of an employee on vacation or personal leave days, holidays, weekends or other nonwork times is "personal," we concluded that an ordinary reasonable person would find disclosure highly offensive. Moreover, disclosure would reveal nothing about the individual's performance as a public employee.[199] We also denied the petition as it related to additional information about personal, as opposed to work-related, calls, to the extent that disclosure would reveal the time and duration of the call, the phone number of the other party to the call, the destination location of the call, or whether it was a conference call or forwarded to another number. The information was "personal," would reveal nothing meaningful about performance of public duties, and disclosure would be an unreasonable invasion of privacy.

Questions frequently arise concerning a public body's duty to disclose information in applications for employment or licensing.[200] Such records may include several different types of potentially exempt information,

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[198] *See* Public Records Order, May 5, 1994, Wright (petition denied as moot because agency agreed to release requested records) (see App F-30).

[199] Public Records Order, August 31, 2005, Canzano (see App F-58).

[200] Public Records Order, March 4, 1988, Board of Naturopathic Examiners (see App F-11).

such as student record information, exempt under ORS 192.502(8), (9); personal medical information, exempt under ORS 192.502(2); personal financial information;[201] the address or telephone number of an employee, exempt under ORS 192.502(3); information submitted in confidence, exempt under ORS 192.502(4); and other personal information. In responding to a request for such records, a public body sometimes must review documents line by line in order to segregate the exempt from nonexempt information pursuant to ORS 192.505. See discussion below concerning Segregation of Exempt and Nonexempt Material. We encourage public bodies that receive such a request to contact their assigned counsel for advice.

(3) Public Employee Addresses, Social Security Numbers, Birth Dates and Telephone Numbers

ORS 192.502(3) exempts:

> Public body employee or volunteer addresses, Social Security numbers, dates of birth and telephone numbers contained in personnel records maintained by the public body that is the employer or the recipient of volunteer services. This exemption:
>
> (a) Does not apply to the addresses, dates of birth and telephone numbers of employees or volunteers who are elected officials, except that a judge or district attorney subject to election may seek to exempt the judge's or district attorney's address or telephone number, or both, under the terms of ORS 192.445;
>
> (b) Does not apply to employees or volunteers to the extent that the party seeking disclosure shows by clear and convincing evidence that the public interest requires disclosure in a particular instance;
>
> (c) Does not apply to a substitute teacher as defined in ORS 342.815 when requested by a professional education association of which the substitute teacher may be a member; and
>
> (d) Does not relieve a public employer of any duty under ORS 243.650 to 243.782.

[201] *See* Public Records Order, January 2, 1985, Snell (personal financial statements submitted with application for racing license) (see App F-7).

This provision exempts from disclosure the addresses, Social Security numbers, birth dates and telephone numbers of public employees and volunteers, except for (1) the addresses, dates of birth and telephone numbers of elected officials, (2) situations where the requester demonstrates by clear and convincing evidence that the public interest requires disclosure in a particular instance, and (3) substitute teachers when the request is made by a professional education association of which the substitute teacher may be a member. The purpose of the substitute teacher provision is to enable the Oregon Substitute Teacher Association to obtain the information needed to notify potential participants about its annual conference. The exemption is not intended to exempt public employers from complying with their duty to provide information under state collective bargaining laws.

We do not interpret the exception in ORS 192.502(3)(a) to be exclusive to judges or district attorneys subject to election. We believe that any elected official may seek to exempt his or her address or telephone number from disclosure under ORS 192.445 (personal safety exemption).

(4) Confidential Submissions

ORS 192.502(4) exempts:

> Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

The purpose of this exemption is to encourage voluntary submission of relevant information to public bodies, with some reasonable assurance that the information will be kept confidential.

There are no less than five conditions that must be met for the exemption to apply:

- The informant must have submitted the information on the condition that it would be kept confidential.
- The informant must not have been required by law to provide the information.
- The information itself must be of a nature that reasonably should be kept confidential.

- The public body must show that it has obliged itself in *good faith* not to disclose the information.
- Disclosure of the information must cause harm to the public interest.

The first condition is whether the information was submitted in confidence. Many public bodies receive information that reasonably could be considered confidential, without any specific request for confidentiality. Perhaps the circumstances are such that an implied request for confidentiality can be asserted. Nevertheless, it is very difficult to justify nondisclosure under the terms of ORS 192.502(4) in such a case. The public body must be able to present evidence that there was a condition or understanding at the time the information was provided that the information would be held in confidence.[202] Thus, public bodies should specifically discuss with the person submitting the information whether it is being submitted in confidence and, if so, document that in the file. A public body should inquire about the person's intention as to confidentiality before receiving substantive information from the person. Otherwise, it may be difficult for the public body to establish whether the information was submitted in confidence.[203] This exemption clearly does not apply if the public body requests that information be submitted in confidence merely to avoid embarrassment to itself.

We denied access to the responses of a workers' compensation survey questionnaire, because we concluded that the records fell within the exemption for confidential information. We inferred from the facts (i.e., the assurance of confidentiality, use of closed envelopes and the fact that the department kept the information segregated and confidential) that the information was submitted in confidence.[204] By contrast, we granted a petition for the release of all records of an investigation conducted by the Oregon Department of Transportation, including notes of all interviews conducted by the agency. Although the representative of the agency advised the participants in the inquiry that their responses would be kept confidential, the representative concluded that they would have

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[202] *Sadler v. Oregon State Bar*, 275 Or 279, 550 P2d 1218 (1976) (see App C-3); Public Records Order, December 11, 1992, Smith (see App F-27).

[203] *Hood Technology Corp. v. OR-OSHA*, 168 Or App 293, 7 P3d 564 (2000) (see App C-19).

[204] Public Records Order, September 12, 1988, Hansen (see App F-13).

participated even without such an assurance. For that reason, we could not determine that the information had been submitted in confidence.[205]

The second condition is whether the informant is "not otherwise required by law" to provide the information. If the informant is required to submit the information pursuant to a governmental enactment such as a statute or rule, this exemption will not apply. However, an informant whose legal obligation to submit information arises solely under the terms of a contract with a public body is not "required by law" to submit the information, but by the terms of the contract, unless the informant is required by law to sign a contract with those terms.[206]

The third condition is whether the information itself should reasonably be considered confidential. This condition would generally be met if disclosure of the information is restricted by statute or contract or is exempt from disclosure under other exemptions of the Public Records Law. If the information is publicly available, obtainable or observable, it cannot reasonably be considered confidential.

The fourth condition is whether the public body obliged itself in good faith not to disclose the information. This is the other side of the first condition. The public body need not have given a written commitment, so long as there was a clear statement or understanding that the public body would not disclose the information.[207] A statement that the public body will not disclose the information unless required by law is sufficient.

The final condition is whether disclosure of the information would harm the public interest. Even if all the other conditions are met, if the public interest would not suffer by disclosure, the exemption does not apply. This condition requires consideration not only of the impact of the disclosure on the particular informant providing the information but also of

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[205] Public Records Order, November 17, 1988, Rae (see App F-15). *See also Jensen,* 24 Or App at 11, 18 (distinguishing promise not to disclose from submission of information in confidence) (see App C-4).

[206] Public Records Order, March 3, 1997, Poo-sa'-key/Willeford (see App F-37).

[207] *See* Public Records Order, April 5, 2002, Meadowbrook/Myton (private attorney captioning letter to public body "For Settlement Purposes Only – Confidential" was insufficient to exempt record from disclosure) (see App F-48); Public Records Order, November 8, 2004, Anderson (see App F-56).

the likelihood that disclosure would discourage other informants from providing information in confidence in the future.

Information submitted by manufacturers of video terminal equipment in confidence to the Oregon State Lottery and consisting of bank account numbers, tax returns and other personal information is of the type that would reasonably be considered confidential. The Oregon Court of Appeals found that the public interest would suffer by disclosure of such information, "because it could discourage video lottery terminal distributors from applying for contracts * * * thereby reducing competition for video lottery terminals." Since the lottery obligated itself in good faith not to disclose the information, the records were exempt from disclosure under ORS 192.502(4).[208]

In another case interpreting the ORS 192.502(4) exemption, the Court of Appeals concluded that disclosing employment reference forms regarding a candidate for a teaching position in a school district would not harm the public interest in maintaining the confidentiality of employment references, provided that source-identifying information was deleted from the documents. A school district refused to disclose employment references to the unsuccessful candidate on the basis that the public interest required it to maintain the confidentiality of employment references, and that disclosing the references would "chill" or deter sources from submitting candid employment evaluations in the future. The court found that disclosure of the reference forms after deleting information that revealed or tended to reveal the source's identity would serve the public interest because it "would reduce the potential for basing hiring decisions on secret, unrebuttable allegations or innuendo."[209]

Because the substance of the reference responses at issue did not identify the sources, the court was not faced with a situation where deletion of the source-identifying information was a practical impossibility. We considered that situation when an applicant for employment with a state agency requested a background report containing employment reference information. After reviewing the report, we

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[208] *Premier Technology v. Oregon State Lottery,* 136 Or App 124, 134–35, 901 P2d 883 (1995) (see App C-14); *see also* Public Records Order, March 4, 2004, Zaitz (records addressing financial status of parties responding to Request for Qualifications in sale of surplus state property) (see App F-52).

[209] *Gray*, 139 Or App at 556, 566 (see App C-14).

concluded that the responses of the applicant's former private employers were exempt from disclosure because the identities of the sources could not be adequately protected by deleting the name or other identifying information. Thus, the public interest in obtaining candid and complete employment references required the public body to keep its promise of confidentiality to the sources.[210]

In the case of an advisory committee charged with making recommendations to the Department of Insurance and Finance for reform of the Oregon Workers' Compensation Law, we determined that the public interest would suffer by the disclosure of the committee's minutes and working documents. The final report of the committee had been made public. The committee was composed of representatives of employers and workers who had been assured confidentiality by the department. Because the public interest in encouraging parties with competing interests to work together towards reaching compromise on these important public issues outweighed any public interest in disclosure of the working documents, we concluded that the exemption applied.[211]

If confidentiality has been requested and assured and the information is of a nature that generally should be kept confidential, the good faith or bad faith of the person in submitting the information is relevant to determining the public interest in disclosure of the person's identity.[212] Disclosure of the identity of a person acting in good faith is contrary to the public interest, but the public interest will require disclosure when a person provides false information for vindictive reasons.[213]

If a communication submitted and accepted in confidence contains some information that reasonably should be considered confidential and the public interest would suffer by disclosure, and the communication also contains information for which there is no reasonable ground for confidentiality, then that other information is not exempt and must be separated and disclosed. ORS 192.505. Sometimes the name of the informant, and information from which the informant's identity can be

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[210] Public Records Order, January 15, 1997, Burr/Freshour (see App F-37).

[211] Public Records Order, July 1, 1991, Juul (see App F-24).

[212] *Hood Technology Corp. v. OR-OSHA*, 168 Or App 293, 7 P3d 564 (2000) (see App C-19).

[213] *Id.*; Public Records Order, April 12, 1990, Bower/Petterson (see App F-22).

determined, is the only information for which nondisclosure can be justified. We denied a petition for the release of "actual quotations made by * * * employees when interviewed" for a study conducted by the Department of Insurance and Finance. Although only the names of employees were submitted in confidence, revelation of their recorded comments, even in an unattributed form, unreasonably would have risked disclosure of the participants' identities given the familiarity of the employees with each other.[214]

For similar reasons, we denied a petition for the release of employment references provided by private employers to a public employer regarding an applicant for employment.[215] Although the former employers did not object to disclosure of their names, they had requested confidentiality for the particular statements they made. We determined that the contents of their statements were exempt from disclosure because revealing the substance of the statements would necessarily reveal who had made the particular statements. The former employers had referred to specific events and decisions in evaluating the applicant's work and therefore deleting only the employers' names would not permit disclosure while still preserving the confidentiality requested by the citizens.

If the information received is of a law violation, in a report made to a law enforcement officer or to a legislative committee or staff member, the identity of the informant may be exempt from disclosure under ORS 192.502(9), and ORS 40.275, Rule 510 of the Oregon Evidence Code, relating to the government privilege not to disclose the identity of an informer, even if the requirements of ORS 192.502(4) for information submitted in confidence are not met.

(5) Corrections and Parole Board Records

ORS 192.502(5) exempts:

> Information or records of the Department of Corrections, including the State Board of Parole and Post-Prison Supervision, to the extent that disclosure would interfere with the rehabilitation of a person in custody of the department or substantially prejudice or prevent the carrying out of the functions of the department, if

[214] Public Records Order, July 14, 1989, Rhoten (see App F-21).

[215] Public Records Order, January 15, 1997, Burr/Freshour (see App F-37).

the public interest in confidentiality clearly outweighs the public interest in disclosure.

The test for applying this exemption is stated in the alternative: The records are exempt if disclosure would interfere with the rehabilitation of a person in custody, *or* would substantially prejudice or prevent carrying out department or board functions.[216] In either case, the public interest in confidentiality clearly must outweigh the public interest in disclosure.

If disclosure would threaten or impair the department's ability to preserve internal order and discipline in its correctional facilities, to maintain facility security against escape or unauthorized entry, or to protect the public's safety, or if disclosure would interfere with the rehabilitation of a person in the department's custody, the public interest in confidentiality will, in most circumstances, clearly outweigh the public interest in disclosure.[217] We have concluded that both the medical screening criteria used by the department in determining whether an inmate can be transferred out of state and the department's policy and procedures on the management of hunger strikes are exempt because disclosure would jeopardize the department's ability to manage and control its prison population effectively.[218]

Department and board records pertaining to a person who is or has been in the custody or under the lawful supervision of a state agency, a court or a unit of local government, are exempt from disclosure under another provision of the Public Records Law for a period of 25 years after termination of such custody or supervision *to the extent that* disclosure of the records would interfere with the rehabilitation of the person, *if* the public interest in confidentiality clearly outweighs the public interest in disclosure. ORS 192.496(3). This is an exception to the legislative policy embodied in ORS 192.495, which mandates disclosure of any public records more than 25 years old unless expressly excepted by ORS 192.496. See discussion below of Records More than 25 Years Old.

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[216] *Turner*, 22 Or App 177 (see App C-3).

[217] Public Records Order, January 26, 1993, Patten (see App F-28).

[218] Public Records Order, January 26, 1996, Gutbezahl (see App F-34).

(6) Lending Institution Records

ORS 192.502(6) exempts:

> Records, reports and other information received or compiled by the Director of the Department of Consumer and Business Services in the administration of ORS chapters 723 and 725 not otherwise required by law to be made public, to the extent that the interests of lending institutions, their officers, employees and customers in preserving the confidentiality of such information outweighs the public interest in disclosure.

ORS chapter 723 relates to credit unions. Chapter 725 relates to consumer finance.

(7) Presentence and Probation Reports

ORS 192.502(7) exempts:

> Reports made to or filed with the court under ORS 137.077 or 137.530.

ORS 137.077 governs the disclosure of presentence reports. Those reports are not public records. Under that statute, presentence reports may be disclosed only to: (1) the sentencing court; (2) other judges who participate in a sentencing council discussion of the defendant; (3) the Department of Corrections, the Board of Parole and other persons or agencies having a legitimate professional interest in information likely to be contained in the report; (4) appellate or review courts or courts hearing post-conviction relief cases; (5) the district attorney, the defendant, or counsel for the defendant; and (6) the victim.[219] ORS 137.077 also expressly permits the recipients of presentence reports to disclose information from those reports (as opposed to the reports themselves) to certain persons and agencies in specified circumstances.

ORS 137.530 relates to investigative reports made by parole and probation officers at the direction of the court and the statement of the victim taken pursuant to a presentence report.

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[219] *See Hunter v. Farmers Ins. Co.*, 135 Or App 125, 898 P2d 201 (1995) (disclosure of information from presentence report through trial testimony not permitted under statute) (see App C-14).

(8) Federal Law Exemption

ORS 192.502(8) exempts:

> Any public records or information the disclosure of which is prohibited by federal law or regulations.

The many federal laws and regulations that prohibit or limit disclosure of particular records (e.g., public assistance and unemployment insurance records, certain student records and records containing "protected health information"[220]) in the possession of public bodies of this state are beyond the scope of this manual. Individual public bodies should be familiar with the laws and regulations applicable to any federal program with which they are involved. To claim this exemption, public bodies must be able to point to a *specific* federal law or regulation that *prohibits* disclosure. For example, we concluded that the Oregon Department of Agriculture is subject to the same restrictions on disclosure of federal Food and Drug Administration (FDA) records as the FDA would be. The federal regulations prohibit disclosure of FDA law enforcement records, including FDA investigation reports and internal memoranda.[221] Also, we determined that regulations promulgated by the federal Social Security Administration (SSA) control the disclosure of SSA disability program records in the possession of the Oregon Department of Human Services.[222] We concluded that a federal law or regulation which expresses a clearly prohibitory policy, such as the Buckley Amendment to the Freedom of Information Act,[223] is to be deemed a prohibition even if the means of enforcing the federal policy—loss of federal funds—is only indirectly prohibitory.[224]

(9) Other Oregon Statutes Establishing Specific Exemptions

ORS 192.502(9)(a) exempts:

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[220] *See* 42 USC §§ 1320d to 1320d-8 and P.L. 104-191 §264(c) (Health Insurance Portability and Accountability Act of 1996); 45 CFR Parts 160 and 164.

[221] Public Records Order, May 2, 1989, Redding/Facaros (see App F-19).

[222] Public Records Order, January 21, 2003, Kubat (see App F-51).

[223] *See* 20 USC § 1232g (relating to student records).

[224] Public Records Order, September 20, 1999, Michael (see App F-43).

> Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

The confidentiality protection of any record covered by an Oregon statute outside of the Public Records Law is incorporated into the Public Records Law by ORS 192.502(9)(a). Such a record is exempt, conditionally exempt or partially exempt from disclosure to the extent provided in the incorporated statute. While the attorney-client privilege recognized by ORS 40.225 is also incorporated by this statute, its availability as an exemption to disclosure is narrowed somewhat by special rules set out in ORS 192.502(9)(b), discussed below. See Appendix G for a partial list of Oregon statutes exempting information from public disclosure.

(a) Personal Information

A survey of public record orders illustrates some of these statutory exemptions outside of the Public Records Law. A report to the Board of Nursing concerning a possible violation of the statutes regulating the nursing profession, ORS 678.010 to 678.410, is confidential and not subject to public disclosure under ORS 678.126(1).[225] ORS 179.505 prohibits disclosure of medical and psychiatric records except upon satisfaction of specified conditions, such as ORS 179.505(3)(a)–(e) which permit disclosure upon written consent of the patient.[226]

In some cases, a record may be exempt under both ORS 192.502(9), the state law exemption, and ORS 192.502(8), the federal law exemption. For example, we denied a request for disclosure of an unedited copy of the Portland State University security office daily log, which records arrests and criminal reports on campus. The university disclosed the information except for certain exempt material, i.e., students' names and personally identifiable information, which was deleted. This information was exempt under ORS 192.496(4), which exempts "[s]tudent records required by state or federal law to be exempt from disclosure." State and federal law both prohibit the release of information directly related to a student.[227] Similarly, we denied disclosure of the names and addresses of obligors in

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[225] Public Records Order, September 2, 1988, Smith (see App F-13).

[226] Public Records Order, March 28, 1989, Clark/Chapman (see App F-18).

[227] ORS 351.070(4)(e); 20 USC § 1232g; Public Records Order, January 20, 1989, Needham/Edgington (see App F-16).

the Oregon Child Support Program based on 26 USC §§ 6103(a)(2), (l)(6) and (p)(4), and ORS 314.835 and 418.135. Those federal and state prohibitions are incorporated into the Public Records Law by ORS 192.502(8) and (9).[228]

The Public Contracting Code provides for the confidentiality of *proposals* until after the contracting agency issues notice of intent to award a contract.[229] *See* ORS 279B.060(5) and OAR 137-047-0450(2) for goods and services contracts; 279C.410(1) and OAR 137-049-0330(3) for public improvement contracts. Under ORS 279B.060(5)(b), after providing notice, the contracting agency may continue to keep confidential those parts of a proposal which qualify for exemption under any provision of ORS 192.501 or 192.502. However, once the contracting agency provides notice of intent to award a contract to which ORS 279C.410 applies, it may continue to keep confidential only those parts of a proposal which qualify under the "trade secret" or "information submitted in confidence" exemptions in ORS 192.501(3) and 192.502(4), respectively. ORS 279C.410(3). Notice of intent to award is further described in the Attorney General's Model Public Contract Rules at OAR 137-047-0610 and OAR 137-049-0395.

Bids are confidential, but only prior to the close of the Invitation to Bid and the time set for bid opening. *See* ORS 279B.055(5)(a) and 279C.365(2)(a) and (3). Once bids have been opened, they are available for public inspection, except to the extent that the bidder has appropriately designated parts of the bid as trade secrets, which may then be exempt from disclosure under ORS 192.501(2), or as information submitted to a public body in confidence, which may be exempt under ORS 192.502(4). *See* ORS 279B.055(5)(c).

The Public Records Law is distinguishable from statutes that give particular persons special access to government records.[230] Even when a

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[228] Public Records Order, November 18, 1988, Dierking (see App F-15).

[229] The Public Contracting Code consists of the statutes in ORS chapters 279A, 279B and 279C. The definition of "contracting agency" is in ORS 279A.010(b).

[230] *See State ex rel Frohnmayer,* 307 Or at 304 (see App C-9) (Public Records Law disclosure distinguishable from right to access through discovery statutes); *see* Public Records Order, July 22, 1988, Goffredi (Public Records Law disclosure distinguishable from right and procedure governing access to "vital records") (see

statute grants specified persons special access to certain records, unless otherwise provided those records remain "public records" subject to other compatible provisions of the Public Records Law, including the exemptions from disclosure.

ORS 40.225 to 40.295, the "privileges" section of the Oregon Evidence Code, includes the lawyer-client privilege,[231] psychotherapist-patient, physician-patient and nurse-patient privileges,[232] school employee-student privilege, clinical social worker-client, husband-wife, clergy-penitent, stenographer-employer, public officer and identity of informant privileges. These privileges are incorporated by ORS 192.502(9)(a) into the unconditional exemptions under the Public Records Law, though the attorney-client privilege is subject to special treatment under ORS 192.502(9)(b), discussed below.

We concluded that both the psychotherapist-patient privilege and the physician-patient privilege protected the medical records of patients at Dammasch State Hospital.[233] Unless those privileges are waived by a personal representative, they remain in effect after a patient's death. However, ORS 192.495 requires the agency to release any such records that are more than 25 years old.[234]

The "public officer privilege" in ORS 40.270 provides as follows:

> A public officer shall not be examined as to public records determined to be exempt from disclosure under ORS 192.501 to 192.505.

Thus, it is not possible to nullify an exemption from the disclosure requirements by calling a public officer to testify about exempt records, or by subpoena. The court, of course, may require testimony or production if it finds that the records are not in fact entitled to exemption.

App F-13); *see* Public Records Order, April 22, 1988, Joondeph (entity with special statutory right to certain types of mental health facility records has no greater rights under Public Records Law than any member of public) (see App F-12).

[231] Public Records Order, July 6, 1982, Zaitz (see App F-5).

[232] Public Records Order, February 7, 1994, Smith (see App F-29); Public Records Order, February 5, 1996, Wright (see App F-34).

[233] Public Records Order, February 7, 1994, Smith (see App F-28).

[234] *Id.* at 5–6 (because ORS 192.495 operates "notwithstanding" ORS 192.502(9), that exemption does not apply to records more than 25 years old).

(b) Attorney-Client Privilege

Records which are protected by attorney-client privilege, ORS 40.225, are also ordinarily exempt from disclosure under the Public Records Law. For example, we have concluded that specified records in an Oregon State Bar disciplinary proceeding were covered under the attorney-client privilege and, therefore, were exempt from disclosure under ORS 192.502(9).[235] We reached the same conclusion concerning a request for memoranda sent by the Public Utility Commission staff to its legal counsel, and vice versa, containing confidential communications made for the purpose of facilitating counsel's rendition of professional services to staff in a pending contested case.[236] Communications between an agency's representatives and representatives of its legal counsel may also fall within the attorney-client privilege.[237]

Or Laws 2007, ch 513, § 5 amends ORS 192.502(9) by adding a new paragraph (b) describing a specific set of circumstances in which the attorney-client privilege does *not* exempt a document from disclosure. Under that paragraph, privileged information is *not* exempt from disclosure if *all* of the following criteria are present:

- It is **factual information** that is
    - *not* otherwise exempt from disclosure
    - *not* compiled in preparation for litigation, arbitration or an administrative proceeding likely to be initiated or actually initiated
- Compiled by or at the direction of an **attorney**
- As part of an investigation **on behalf of a public body**
- In response to "information of **possible wrongdoing by the public body**" *and*
- The holder of the privilege has "**made or authorized a public statement** characterizing or partially disclosing the factual information."[238]

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[235] Public Records Order, March 30, 1989, Howser (see App F-18).
[236] Public Records Order, October 21, 1988, Best (see App F-14).
[237] Public Records Order, September 5, 2000, Riley (see App F-45).
[238] ORS 192.502(9)(b).

In the usual case, if a record is not exempt from disclosure, it must be made available for the requester's inspection. But ORS 192.423 provides another option with regard to the information covered by new ORS 192.502(9)(b). When a public record is subject to disclosure under that provision, the public body may elect instead to "prepare and release a condensation from the record of the significant facts."[239] The statute provides no further guidance regarding the contents or format of the "condensation." But if the public body prepares and releases a condensation in lieu of disclosing the record, the requester may nevertheless petition for review of the denial of the opportunity to inspect or receive a copy of the underlying records in accordance with the procedures described in section G of this manual. In such a review, the reviewing body shall, "in addition to reviewing the records to which access was denied, compare those records to the condensation to determine whether the condensation adequately describes the significant facts contained in the records."[240]

Release of a factual condensation does not waive the attorney-client privilege.[241] Nor is the privilege waived with regard to "a communication ordered to be disclosed under ORS 192.410 to 192.505."[242] (Emphasis added). The statutes do not expressly address the status of the privilege with regard to the records themselves if they are disclosed voluntarily based on the public body's assessment of the application of new ORS 192.503(9)(b). For that reason, we recommend operating under the assumption that release of the records that is not compelled by a public records order constitutes a "voluntary disclosure" of the materials within the meaning of ORS 40.280 (OEC 511) and therefore operates as a waiver of privilege.

(10) Transferred Records

ORS 192.502(10) exempts:

> Public records or information described in this section, furnished by the public body originally compiling, preparing or receiving them to any other public officer or public body in

[239] ORS 192.423(1).
[240] ORS 192.423(2).
[241] ORS 192.423(1).
[242] ORS 40.225(7).

> connection with performance of the duties of the recipient, if the considerations originally giving rise to the confidential or exempt nature of the public records or information remain applicable.

State and local public bodies regularly exchange records with each other in connection with their mutual functions and duties. If a public body that has received records from another public body gets a request for those records, it must first determine whether it is the records custodian for purposes of the Public Records Law. A public body is not the custodian of the records if it has custody of the records merely as an agent for another public body that is the custodian. ORS 192.410(1)(b). When a public body is not the custodian of records, it has no duty to permit inspection or copying of the records, unless the records are not otherwise available, and may merely refer the requester to the public body that is custodian of the records. *Id.* It is possible that both the public body furnishing the records and the public body receiving the records are custodians because both bodies have the records for their own programmatic purposes. In that case, the receiving public body has all duties of a records custodian under the Public Records Law.

Before disclosing the records for which it is a custodian, a public body that has received records from another public body should discuss with the "furnishing" public body any exemptions that might apply to the records.[243] Under ORS 192.502(10), when the records are exempt in the hands of the "furnishing" public body, those records remain exempt in the hands of the "receiving" public body if the reasons for confidentiality remain applicable.[244]

(11) Security Programs for Transportation of Radioactive Material

ORS 192.502(11) exempts:

> Records of the Energy Facility Siting Council concerning the review or approval of security programs pursuant to ORS 469.530.

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[243] *See* Public Records Order, December 9, 2004, Redden (State Archives consulted with current governor's staff regarding request for disclosure of legal counsel records of a former governor's administration) (see App F-57).

[244] Public Records Order, November 8, 1988, Harcleroad (see App F-14); Public Records Order, April 5, 2002, Meadowbrook and Myton (see App F-48).

This provision is a part of legislation setting out the duties of the Energy Facilities Siting Council (EFSC), the state agency that permits the siting of energy facilities. EFSC and the director of the Office of Energy must review and approve security measures related to nuclear power plants, and the transportation of radioactive material pursuant to ORS 469.530. There is also an exemption from the Public Meetings Law for deliberations of EFSC on these matters. ORS 192.660(2)(m). ORS 192.502(32) exempts from disclosure records concerning review or approval of programs relating to the security of the generation, storage or conveyance of "hazardous substances," as defined in ORS 453.005(7)(a), (b) and (d), which may include radioactive material. See pages 90-91.

(12) PERS Nonfinancial Information about Members

ORS 192.502(12) exempts:

> Employee and retiree address, telephone number and other nonfinancial membership records and employee financial records maintained by the Public Employees Retirement System pursuant to ORS chapters 238 and 238A.

This type of financial and personal information is considered private and personal to PERS members and should only be released to the member or at the member's direction.

(13) Records Relating to Treasury or OIC Publicly Traded Investments.

ORS 192.502(13) provides:

> Records of or submitted to the State Treasurer, the Oregon Investment Council or the agents of the treasurer or council relating to active or proposed publicly traded investments under ORS chapter 293, including but not limited to records regarding the acquisition, exchange or liquidation of the investments. For purposes of this subsection:
>
> (a) The exemption does not apply to:
>
> (A) The information in investment records solely related to the amount paid directly into an investment by, or returned from investment directly to, the treasurer or council; or
>
> (B) The identity of the entity to which the amount was paid directly or from which the amount was received directly.

(b) An investment in a publicly traded investment is no longer active when acquisition, exchange or liquidation of the investment has been concluded.

This exemption makes confidential records provided to the State Treasurer or Oregon Investment Council (OIC) by private businesses or individuals related to proposed or active acquisition, exchange or liquidation of publicly traded investments.[245] The exemption does *not* apply to records related to concluded transactions. After a transaction is concluded, the public agency may not deny inspection or copying of records, regardless of any promises made during the course of the transaction, unless another exemption applies.

Until January 1, 2008, ORS 192.502(13) applied to all public investments. The 2007 Legislative Assembly enacted SB 64, which divided the exemption, creating one applying to transactions in publicly traded investments, ORS 192.501(13), and one applying to transactions in privately placed investment funds or private assets, ORS 192.501(14) (discussed below). Or Laws 2007, ch 152. The 2007 legislation also removed language limiting availability of the exemptions to situations where "disclosure of such records reasonably may be expected to substantially limit the ability of the Oregon Investment Council to effectively compete or negotiate for, solicit or conclude such transactions." These exemptions are intended to place the state on an equal footing with private investors in making investments, by maintaining the confidentiality of information concerning investments that still are under consideration. The provision also protects the public's right to know how public funds are invested by expressly stating that information regarding concluded investment transactions is not subject to the exemption. ORS chapter 293 addresses the administration of public funds. The exemption also does not apply to information regarding the amount of an investment, the return on an investment or the identity of entity with which the investment was placed.

[245] *But see* ORS 192.555 (relating to loan records of private customers of financial institutions provided to State Treasurer in connection with state investment in such loans).

(14) Records Relating to Treasury or OIC Investment in Private Fund or Asset

ORS 192.502(14) provides:

(a) Records of or submitted to the State Treasurer, the Oregon Investment Council, the Oregon Growth Account Board or the agents of the treasurer, council or board relating to actual or proposed investments under ORS chapter 293 or 348 in a privately placed investment fund or a private asset including but not limited to records regarding the solicitation, acquisition, deployment, exchange or liquidation of the investments including but not limited to:

(A) Due diligence materials that are proprietary to an investment fund, to an asset ownership or to their respective investment vehicles.

(B) Financial statements of an investment fund, an asset ownership or their respective investment vehicles.

(C) Meeting materials of an investment fund, an asset ownership or their respective investment vehicles.

(D) Records containing information regarding the portfolio positions in which an investment fund, an asset ownership or their respective investment vehicles invest.

(E) Capital call and distribution notices of an investment fund, an asset ownership or their respective investment vehicles.

(F) Investment agreements and related documents.

(b) The exemption under this subsection does not apply to:

(A) The name, address and vintage year of each privately placed investment fund.

(B) The dollar amount of the commitment made to each privately placed investment fund since inception of the fund.

(C) The dollar amount of cash contributions made to each privately placed investment fund since inception of the fund.

(D) The dollar amount, on a fiscal year-end basis, of cash distributions received by the State Treasurer, the Oregon Investment Council, the Oregon Growth Account Board or the agents of the

treasurer, council or board from each privately placed investment fund.

(E) The dollar amount, on a fiscal year-end basis, of the remaining value of assets in a privately placed investment fund attributable to an investment by the State Treasurer, the Oregon Investment Council, the Oregon Growth Account Board or the agents of the treasurer, council or board.

(F) The net internal rate of return of each privately placed investment fund since inception of the fund.

(G) The investment multiple of each privately placed investment fund since inception of the fund.

(H) The dollar amount of the total management fees and costs paid on an annual fiscal year-end basis to each privately placed investment fund.

(I) The dollar amount of cash profit received from each privately placed investment fund on a fiscal year-end basis.

As noted in the discussion of ORS 192.502(13), the 2007 Legislative Assembly enacted this exemption making confidential records provided to the State Treasurer or Oregon Investment Council (OIC) by private businesses or individuals related to proposed or actual investments under ORS chapter 293 or 348 in a privately placed investment fund or a private asset. This exemption is more detailed in its description of covered information and of information to which the exemption does not apply. Generally, the exemption does not apply to the identity and performance of investment funds or to the size of the state's participation in the funds.

(15) Public Employees Retirement Fund and Industrial Accident Fund Monthly Reports

ORS 192.502(15) exempts:

> The monthly reports prepared and submitted under ORS 293.761 and 293.766 concerning the Public Employees Retirement Fund and the Industrial Accident Fund may be uniformly treated as exempt from disclosure for a period of up to 90 days after the end of the calendar quarter.

This provision was submitted by the Treasury after the legislature expressed concern that *former* ORS 192.502(13) did not cover the monthly

reports that must be submitted under ORS 293.761 and 293.766. Release of the information in these monthly reports would give other investment managers information regarding investments and liquidations that would prevent the Oregon Investment Council from getting the best return for the Public Employees Retirement Fund and the Industrial Accident Fund. The time period in the exemption reflected Treasury's practice prior to the enactment of this exemption.

(16) Abandoned Property Reports

ORS 192.502(16) exempts:

> Reports of unclaimed property filed by the holders of such property to the extent permitted by ORS 98.352.

ORS 98.352(4) provides that reports of unclaimed property are exempt from public review for 12 months from the time the property is reportable and for 24 months after the property has been remitted to the Division of State Lands (DSL). Thus, information concerning unclaimed property remitted to DSL by a holder is exempt from public disclosure for two years after the date the property is received by DSL. ORS 98.352(4) also exempt all lists of records or property held by a government or public authority pursuant to ORS 98.336 until 24 months after the property is remitted to DSL. This exempts a government agency's list of uncashed warrants during the period when the agency holds the list as well as when DSL holds the list.[246] The intent is to shield such information from professional "bounty hunters" (persons who, for a commission, help owners recover unclaimed property) while the agency attempts to find the owners.

(17) Economic Development Information

ORS 192.502(17) exempts:

> The following records, communications and information submitted to the Oregon Economic and Community Development Commission, the Economic and Community Development Department, the State Department of Agriculture, the Oregon Growth Account Board, the Port of Portland or other ports, as defined in ORS 777.005, by applicants for investment funds, loans

[246] Public Records Order, December 1, 1999, Nichol (see App F-43).

or services including, but not limited to, those described in ORS 285A.224:

(a) Personal financial statements.

(b) Financial statements of applicants.

(c) Customer lists.

(d) Information of an applicant pertaining to litigation to which the applicant is a party if the complaint has been filed, or if the complaint has not been filed, if the applicant shows that such litigation is reasonably likely to occur; this exemption does not apply to litigation which has been concluded, and nothing in this paragraph shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation.

(e) Production, sales and cost data.

(f) Marketing strategy information that relates to applicant's plan to address specific markets and applicant's strategy regarding specific competitors.

(18) Transient Lodging Tax Records

ORS 192.502(18) exempts:

Records, reports or returns submitted by private concerns or enterprises required by law to be submitted to or inspected by a governmental body to allow it to determine the amount of any transient lodging tax payable and the amounts of such tax payable or paid, to the extent that such information is in a form which would permit identification of the individual concern or enterprise. Nothing in this subsection shall limit the use which can be made of such information for regulatory purposes or its admissibility in any enforcement proceedings. The public body shall notify the taxpayer of the delinquency immediately by certified mail. However, in the event that the payment or delivery of transient lodging taxes otherwise due to a public body is delinquent by over 60 days, the public body shall disclose, upon the request of any person, the following information:

(a) The identity of the individual concern or enterprise that is delinquent over 60 days in the payment or delivery of the taxes.

(b) The period for which the taxes are delinquent.

(c) The actual, or estimated, amount of the delinquency.

ORS 192.502(18) applies to records required to be submitted to or inspected by a "governmental body" in relation to determining the amount of transient lodging tax due, and requires disclosure of specified information when payment or delivery of taxes otherwise due is delinquent by over 60 days. Until 2003, only local governments imposed taxes on transient lodging. The 2003 Oregon legislature enacted a state transient lodging tax.[247] Section 8a of the 2003 legislation, codified at ORS 320.340, exempts from disclosure public records of moneys received by the Department of Revenue under the state taxing provisions. Also, under ORS 320.330 and 320.340, the pre-existing confidentiality provisions of ORS 314.835 apply to state transient lodging tax reports and returns. With limited exceptions, ORS 314.835 makes the disclosure of such reports and returns by Department of Revenue staff, or by others to whom disclosure is permitted, unlawful. By its terms and under rules of statutory construction, the 2003 legislation effectively limits the applicability of ORS 192.502(18) to records pertaining to the payment of transient lodging taxes assessed by local governments.[248] State transient lodging tax reports and returns are exempt under ORS 192.502(9).

(19) Information for Obtaining Court-Appointed Counsel

ORS 192.502(19) exempts:

> All information supplied by a person under ORS 151.485 for the purpose of requesting appointed counsel, and all information supplied to the court from whatever source for the purpose of verifying the financial eligibility of a person pursuant to ORS 151.485.

The Public Defense Services Commission administers an indigent defense program under which defendants in certain types of cases may apply for court-appointed legal counsel. ORS 192.502(19) exempts from disclosure all information supplied to the Commission or to court

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[247] Or Laws 2003, ch 818, §§ 2–9.

[248] *See Koennecke v. Lampert*, 198 Or App 444, 453, 108 P3d 653 (2005) (when two statutes potentially conflict, give effect to both if possible, ORS 174.010; generally, later-enacted statute prevails over existing statute with which it conflicts; construe two statutes harmoniously by treating later-enacted one as "legislatively intended exception" to former).

personnel to request counsel or to verify indigency under this program. Much of that information is also confidential and disclosure may violate state or federal law.

(20) Workers' Compensation Claim Records

ORS 192.502(20) exempts:

> Workers' compensation claim records of the Department of Consumer and Business Services, except in accordance with rules adopted by the Director of the Department of Consumer and Business Services, in any of the following circumstances:
>
> (a) When necessary for insurers, self-insured employers and third party claim administrators to process workers' compensation claims.
>
> (b) When necessary for the director, other governmental agencies of this state or the United States to carry out their duties, functions or powers.
>
> (c) When the disclosure is made in such a manner that the disclosed information cannot be used to identify any worker who is the subject of a claim.
>
> (d) When a worker or the worker's representative requests review of the worker's claim record.

This exemption was created to prevent people from using information in public records of the Department of Consumer and Business Services (DCBS) to discriminate unlawfully against persons previously injured on the job who have filed a workers' compensation claim. The exemption has four exceptions permitting workers' compensation claim records to be disclosed in accordance with rules of the DCBS director when necessary to process claims, when necessary for governmental agencies to carry out their functions, when the disclosed information cannot be used to identify any worker who is the subject of a claim, or when a worker or his or her representative requests review of the worker's claim record. In reviewing legislative history, we interpret "claim records" to include both substantive information about a worker and a worker's claim and docketing information about a claim, such as the names of the claimant, the employer and the insurer.[249]

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[249] Public Records Order, July 9, 1998, Scheminske (see App F-41).

(21) OHSU Sensitive Business Records

ORS 192.502(21) exempts:

> Sensitive business records or financial or commercial information of the Oregon Health and Science University that is not customarily provided to business competitors.

This provision was part of the legislation that generally removed OHSU from the authority of the State Board of Higher Education and established the university as a public corporation. The corporation was granted increased operating flexibility in order to best ensure its success, while retaining principles of public accountability and fundamental public policy. The Oregon Court of Appeals has interpreted this exemption as generally applying to:

> [R]ecords or information pertaining to activities of OHSU that are commercial in nature – including medical and scientific research activities if conducted for commercial purposes or in a commercial manner – where the records or information ordinarily would not be provided to either OHSU's or its business partners' competitors.[250]

Under this interpretation, the court held that the names of particular pharmaceutical companies with which OHSU had contracted to test their experimental drugs were exempt from disclosure, as were the names of the drugs being tested.[251]

(22) OHSU Candidates for University President

ORS 192.502(22) exempts:

> Records of Oregon Health and Science University regarding candidates for the position of president of the university.

This provision was also part of the legislation removing OHSU generally from the authority of the State Board of Higher Education and establishing the university as a public corporation.

(23) Library Records

ORS 192.502(23) exempts:

> The records of a library, including:

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[250] *In Defense of Animals*, 199 Or App at 173 (see App C-21).

[251] *Id.* at 174.

(a) Circulation records, showing use of specific library material by a named person;

(b) The name of a library patron together with the address or telephone number of the patron; and

(c) The electronic mail address of a patron.

The exemption for library circulation records was moved from ORS 192.501 and the provisions for patron names and addresses was added in 1995. We had previously concluded that the disclosure of library circulation records would ordinarily be an unreasonable invasion of privacy and exempt under former ORS 192.500(2)(c), the Personal Privacy exemption.[252] However, we determined that disclosure of names and addresses of library patrons may not be an unreasonable invasion of privacy. The exemption now clearly permits libraries to shield directory information (i.e., addresses or telephone numbers linked with names) about their patrons. The 2007 legislature amended the exemption to apply to patron email addresses. Or Laws 2007, ch 181.

(24) Housing and Community Services Department Records

ORS 192.502(24) exempts:

The following records, communications and information obtained by the Housing and Community Services Department in connection with the department's monitoring or administration of financial assistance or of housing or other developments:

(a) Personal and corporate financial statements and information, including tax returns.

(b) Credit reports.

(c) Project appraisals.

(d) Market studies and analyses.

(e) Articles of incorporation, partnership agreements and operating agreements.

(f) Commitment letters.

(g) Project pro forma statements.

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[252] 41 Op Atty Gen 435 (1981) (see App E-3).

(h) Project cost certifications and cost data.

(i) Audits.

(j) Project tenant correspondence.

(k) Personal information about a tenant.

(L) Housing assistance payments.

This provision exempts from disclosure certain records obtained by the Housing and Community Services Department regarding individuals applying for government-subsidized housing or businesses applying for funding to develop affordable, government-subsidized housing and to maintain their ongoing operation of such housing. The purpose of the provision is to protect from public disclosure the detailed personal and business information that applicants and businesses must submit to the state as a condition of participating in the subsidized housing program.

(25) Forestland Geographic Information System

ORS 192.502(25) exempts:

> Raster geographic information system (GIS) digital databases, provided by private forestland owners or their representatives, voluntarily and in confidence to the State Forestry Department, that is not otherwise required by law to be submitted.

The State Forestry Department, working with a variety of interests, has developed a comprehensive database called Geographic Information Systems (GIS) which displays information about forestland conditions. This exemption addresses the concern of private landowners regarding their voluntary disclosure to the Department of Forestry of accurate and detailed information about their land for purposes of the GIS.

(26) Public Sale or Purchase of Electric Power

ORS 192.502(26) exempts:

> Sensitive business, commercial or financial information furnished to or developed by a public body engaged in the business of providing electricity or electricity services, if the information is directly related to a transaction described in ORS 261.348, or if the information is directly related to a bid, proposal or negotiations for the sale or purchase of electricity or electricity services, and disclosure of the information would cause a competitive disadvantage for the public body or its retail

electricity customers. This subsection does not apply to cost-of-service studies used in the development or review of generally applicable rate schedules.

As a result of the federal Energy Policy Act of 1992[253] and the expiration of their contracts with the Bonneville Power Administration, community-owned utilities are able to purchase their energy on a competitive open market basis. This exemption is designed to protect information the disclosure of which would adversely affect the public sale or purchase of electric power by public bodies engaged in providing electricity. The disclosure must create a competitive disadvantage to either the public body or its retail customers for the exemption to apply.

(27) Klamath Cogeneration Project

ORS 192.502(27) exempts:

> Sensitive business, commercial or financial information furnished to or developed by the City of Klamath Falls, acting solely in connection with the ownership and operation of the Klamath Cogeneration Project, if the information is directly related to a transaction described in ORS 225.085 and disclosure of the information would cause a competitive disadvantage for the Klamath Cogeneration Project. This subsection does not apply to cost-of-service studies used in the development or review of generally applicable rate schedules.

This provision was added to the Public Records Law to address the same concerns that prompted the exemption in ORS 192.502(26) discussed above. ORS 225.085 grants the City of Klamath Falls the authority to enter into certain transactions involving various aspects of the provision of electricity or fuel in relation to the ownership and operation of the Klamath Cogeneration Project. This exemption protects information pertaining to these transactions when the disclosure would cause a competitive disadvantage for the Project.

(28) Public Utility Customer Information

ORS 192.502(28) exempts:

> Personally identifiable information about customers of a municipal electric utility or a people's utility district or the names,

[253] 42 USC § 13201.

> dates of birth, driver license numbers, telephone numbers, electronic mail addresses or Social Security numbers of customers who receive water, sewer or storm drain services from a public body as defined in ORS 174.109. The utility or district may release personally identifiable information about a customer, and a public body providing water, sewer or storm drain services may release the name, date of birth, driver license number, telephone number, electronic mail address or Social Security number of a customer, if the customer consents in writing or electronically, if the disclosure is necessary for the utility, district or other public body to render services to the customer, if the disclosure is required pursuant to a court order or if the disclosure is otherwise required by federal or state law. The utility, district or other public body may charge as appropriate for the costs of providing such information. The utility, district or other public body may make customer records available to third party credit agencies on a regular basis in connection with the establishment and management of customer accounts or in the event such accounts are delinquent.

ORS 192.502(28) exempts from disclosure "personally identifiable information" about customers of municipal electric utilities and people's utility districts. It was amended by Oregon Laws 2005, chapter 659, section 1, to also exempt certain records of public bodies, as defined in ORS 174.109, that provide water, sewer or storm drain services. Specifically, the names, dates of birth, driver license numbers, telephone numbers, electronic mail addresses and Social Security numbers of customers who receive the specified services are exempt. A public body providing water, sewer or storm drain services, a municipal electric utility, or a people's utility district may disclose exempt information under any of the following circumstances: when the customer consents in writing or electronically; pursuant to a court order; as otherwise required by state or federal law; or if disclosure is necessary to provide service to the customer. In addition, any of these public bodies may disclose the exempt information to credit agencies in the establishment and management of customer accounts.

(29) Alternative Transportation Addresses

ORS 192.502(29) exempts:

> A record of the street and number of an employee's address submitted to a special district to obtain assistance in promoting an alternative to single occupant motor vehicle transportation.

The legislature added this exemption to encourage employers to turn over lists of employees and their addresses to mass transit districts, transportation districts and metropolitan service districts so that the districts can contact employees about using alternative transportation. The exemption does not apply to zip codes, but only the street and number of the employee's address.

(30) Oregon Corrections Enterprises

ORS 192.502(30) exempts:

> Sensitive business records, capital development plans or financial or commercial information of Oregon Corrections Enterprises that is not customarily provided to business competitors.

The Oregon Corrections Enterprises (OCE) is a semi-independent state agency, which is authorized to engage eligible inmates in state correction institutions in work or on-the-job training. The OCE also has the authority to enter into contracts with private persons or governmental agencies to produce, market and make available prison work products or services. The exemption in ORS 192.502(30) allows the OCE to maintain an equal footing with other competitive entities that provide the same or similar products and services by preventing the disclosure of information that is not generally available to competitors.

(31) Confidential Submissions to DCBS

ORS 192.502(31) exempts:

> Documents, materials or other information submitted to the Director of the Department of Consumer and Business Services in confidence by a state, federal, foreign or international regulatory or law enforcement agency or by the National Association of Insurance Commissioners, its affiliates or subsidiaries under ORS 646.380 to 646.396, 697.005 to 697.095, 697.602 to 697.842, 705.137, 717.200 to 717.320, 717.900 or 717.905, ORS chapter

59, 722, 723, 725 or 726, the Bank Act or the Insurance Code when:

(a) The document, material or other information is received upon notice or with an understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or other information; and

(b) The director has obligated the Department of Consumer and Business Services not to disclose the document, material or other information.

This exemption enables the Department of Consumer and Business Services to maintain the confidentiality of information received from state, federal or international regulatory or law enforcement agencies, or from the National Association of Insurance Commissioners, its affiliates or subsidiaries under Oregon statutes related to the regulation of a variety of entities offering consumer services, e.g., credit unions, debt consolidation agencies and insurance companies.

(32) County Elections Security Plans

ORS 192.502(32) exempts:

A county elections security plan developed and filed under ORS 254.074.

This provision exempts from disclosure a security plan filed by a county clerk that addresses election security issues such as a county's security procedures for transporting and processing ballots. ORS 254.074 contains a list of the required contents of a county's elections security plan.

(33) Security Programs

ORS 192.502(33) exempts:

Information about review or approval of programs relating to the security of:

(a) Generation, storage or conveyance of:

(A) Electricity;

(B) Gas in liquefied or gaseous form;

(C) Hazardous substances as defined in ORS 453.005(7)(a), (b) and (d);

(D) Petroleum products;

(E) Sewage; or

(F) Water.

(b) Telecommunications systems, including cellular, wireless or radio systems.

(c) Data transmissions by whatever means provided.

Resulting from a review of Oregon laws after the terrorist attacks of September 11, 2001, the exemption provides for maintaining the confidentiality of records that contain information about the review or approval of programs that relate to the security of (a) generating, storing or conveying certain types of materials, (b) telecommunication systems and (c) data transmissions. A separate subsection of the Public Records Law, ORS 192.502(11), exempts from disclosure records of the Energy Facility Siting Council concerning review or approval of security programs for nuclear power plants or the transportation of radioactive material. See pages 79-80.

(34) Paternity or Support Judgments or Judicial Orders

ORS 192.502(34) exempts:

> The information specified in ORS 25.020(8) if the Chief Justice of the Supreme Court designates the information as confidential by rule under ORS 1.002.

ORS 25.020(8) identifies the information to be contained in a judicial judgment or order establishing paternity or including a provision concerning support. Subsection (8)(e) of that statute authorizes the Chief Justice of the Oregon Supreme Court, in consultation with the Department of Justice, to adopt rules designating this information as confidential. ORS 192.502(34) exempts from disclosure whatever information the Chief Justice designates as confidential through rulemaking.

5. Separation of Exempt and Nonexempt Material

ORS 192.505 provides:

> If any public record contains material which is not exempt under ORS 192.501 and 192.502, as well as material which is exempt from disclosure, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination.

Often a record will contain material that is exempt and additional material that is nonexempt. The public body *must* separate the nonexempt material and make it available where it is reasonably possible to do so.[254] The public body may charge its actual costs for separating the exempt and nonexempt material. See discussion above of Fees for Record Requests. No specific request to segregate exempt and nonexempt information is necessary. However, the obligation to separate and disclose the nonexempt material may not occur to the public body, so a specific request to do so—even after a refusal to disclose—can be helpful. A public body should inform the requester when it is disclosing less than all of the information requested and state the reason for nondisclosure.

6. Records More than 25 Years Old

Generally, the Public Records Law does not exempt from disclosure records that are more than 25 years old. Except as noted below and notwithstanding any of the statutory exemptions incorporated into the Public Records Law by ORS 192.502(9), records more than 25 years old are available for inspection. ORS 192.495. The only exceptions to this requirement are provided in ORS 192.496 for:

(a) Records less than 75 years old if they contain information about the physical or mental health or psychiatric care or treatment of a living individual, if disclosure would constitute an unreasonable invasion of privacy. The party seeking disclosure has the burden of showing by "clear and convincing evidence" that the public interest requires disclosure, and that disclosure does not constitute an unreasonable invasion of privacy.

(b) Records less than 75 years old which are sealed by statute or by court order, unless a court orders disclosure.[255]

(c) Records of a person who is or has been in custody or under supervision of a state agency, court or local government are exempt from disclosure for a period of 25 years following termination of the custody or supervision, *to the extent that disclosure would interfere with rehabilitation of the person* if the public interest in confidentiality clearly

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[254] *Turner*, 22 Or App at 177, 186 (see App C-3).

[255] *See* Letter of Advice dated July 11, 2000, to Dianne Middle, DPSST Director (OP-2000-1) (see App E-7) (limits of exemption for sealed records of convictions set aside under ORS 137.225(3)).

outweighs the public interest in disclosure.[256] The exception does not prevent disclosing the fact that a person is in custody.

(d) Student records exempt from disclosure under state or federal law.

7. Health Services Records

ORS 192.493 addresses disclosure of particular records related to the state's provision of medical assistance:

> A record of an agency of the executive department as defined in ORS 174.112[257] that contains the following information is a public record subject to inspection under ORS 192.420 and is not exempt from disclosure under ORS 192.501 or 192.502 except to the extent that the record discloses information about an individual's health or is proprietary to a person:[258]

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[256] *Cf.* Public Records Order, February 7, 1994, Smith (medical records of *deceased* patients that are more than 25 years old are not exempt from disclosure despite physician-patient privilege) (see App F-29).

[257] ORS 174.112 provides as follows:

(1) Subject to ORS 174.108, as used in the statutes of this state "executive department" means all statewide elected officers other than judges, and all boards, commissions, departments, divisions and other entities, without regard to the designation given to those entities, that are within the executive department of government as described in section 1, Article III of the Oregon Constitution, and that are not:

(a) In the judicial department or the legislative department;

(b) Local governments; or

(c) Special government bodies.

(2) Subject to ORS 174.108, as used in the statutes of this state "executive department" includes:

(a) An entity created by statute for the purpose of giving advice only to the executive department and that does not have members who are officers or employees of the judicial department or legislative department;

(b) An entity created by the executive department for the purpose of giving advice to the executive department, if the document creating the entity indicates that the entity is a public body; and

(c) Any entity created by the executive department other than an entity described in paragraph (b) of this subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the executive department.

[258] The Public Records Law defines "person" to include "any natural person,

(1) The amounts determined by an independent actuary retained by the agency to cover the costs of providing each of the following health services under ORS 414.705 to 414.750 for the six months preceding the report:

(a) Inpatient hospital services;

(b) Outpatient hospital services;

(c) Laboratory and X-ray services;

(d) Physician and other licensed practitioner services;

(e) Prescription drugs;

(f) Dental services;

(g) Vision services;

(h) Mental health services;

(i) Chemical dependency services;

(j) Durable medical equipment and supplies; and

(k) Other health services provided under a prepaid managed care health services contract under ORS 414.725;

(2) The amounts the agency and each contractor have paid under each prepaid managed care health services contract under ORS 414.725 for administrative costs and the provision of each of the health services described in subsection (1) of this section for the six months preceding the report;

(3) Any adjustments made to the amounts reported under this section to account for geographic or other differences in providing the health services; and

(4) The numbers of individuals served under each prepaid managed care health services contract, listed by category of individual.

ORS chapter 414 addresses medical assistance provided by the State. ORS 192.493 relates to public records that concern amounts paid for specified health services and information about prepaid managed care health services contracts.

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corporation, partnership, firm, association or member or committee of the Legislative Assembly." ORS 192.410(2).

F. May a Public Body Voluntarily Disclose an Exempt Record to Selected Persons without Waiving Exemption Generally?

A public body occasionally may wish to disclose an exempt public record to a specific private individual, but not to the public at large. The question then arises whether, by selectively disclosing an exempt record, the public body loses its discretionary power to claim the exemption as to other requesters. We have concluded that, under certain circumstances, the public body still retains that power, stating: "[W]here limited disclosure of a public record does not thwart the policy supporting the exemption, the public body does not thereby waive its prerogative not to disclose the record to others."[259] Thus, when Oregon State University disclosed raw data on forestry research to private "cooperators" in the project (records that were conditionally exempt as faculty research materials under ORS 192.501(14)), OSU did not thereby waive the exemption as to the general public. We so concluded because the selective disclosure helped to verify the accuracy of the raw data, and thus furthered, rather than undermined, the purpose underlying the exemption.[260]

The Court of Appeals has observed that "there is no blanket principle that applies to waiver" under the Public Records Law.[261] Public bodies must therefore be sensitive to circumstances under which disclosure of information *can* act as a waiver of exemptions that might otherwise be available. For example, the Court of Appeals has determined that public disclosure of information from exempt records can operate as a waiver of the exemption for the records themselves. Consequently, when an investigating officer's testimony at an unemployment hearing disclosed substantially all of the information contained in an otherwise confidential investigation report and the testimony was available to the public, that testimony waived exemptions against disclosure of the report.[262]

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[259] Letter of Advice dated March 29, 1988, to W.T. Lemman, Executive Vice Chancellor (OP-6217) at 4–5 (see App E-5).

[260] *Id.* at 8. *See also* Letter of Advice dated June 7, 1977, to Kathleen M. Straughan (OP-3928) (personal privacy exemption does not bar a person from inspecting his or her own medical file; disclosure could not conceivably invade that person's privacy) (App E-1).

[261] *Oregonian Publishing,* 152 Or App at 135, 142 (see App C-17).

[262] *Id.* 152 Or App at 142; *see also Springfield School Dist. #19 v. Guard Publishing Co.*, 156 Or App 176, 967 P2d 510 (1998) (school district's disclosure of "charging letter" detailing circumstances of district's investigations and

G. Where and How Does a Person Proceed if Access Is Refused?

1. State Agencies and Nonelected Officials

The Public Records Law provides that a person denied the right to inspect or receive a copy of a public record by a state agency or official, *other than an elected official*, may petition the Attorney General to order the release of the public record.[263] ORS 192.450(1). Also, the right of any "person" to petition the Attorney General does not include state and local public bodies. ORS 192.410(2).[264] As a result, a state or local public body may not petition the Attorney General to inspect or receive a copy of another state or local public body's records.[265]

A requester should not always file a petition with the Attorney General immediately on first denial of access by a subordinate agency employee; rather, the requester may seek a decision at a higher agency level. This increases the probability of a favorable decision without the need to file a petition, and may encourage the agency to seek legal advice concerning disclosure of the records at issue.

In carrying out the responsibility for administrative review of state agency decisions to deny a request for public records, the Attorney General acts not as legal counsel for state agencies, but in a quasi-judicial role. Nevertheless, the Attorney General does not regard it as improper for agencies to seek the advice of his office before denying a records request and indeed encourages the practice in the hope that it may avoid the need for a person seeking records to file a petition. Of course, when the agency seeks advice, that advice will generally (but not always) be consistent with the final order unless evidence not previously available to the Attorney General is presented.

Even if the agency has denied a records request *after* discussing the request for disclosure with the Attorney General, petitioning for the

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findings of misconduct against employee waived exemptions to disclosure of investigative report) (see App C-18).

[263] *See* page 105 for discussion of petitioning a district attorney when a local government body or official denies a public records request. *See also* Public Records Order, June 16, 2004, Wilkinson (Attorney General lacks jurisdiction to review denial by local government) (see App F-54).

[264] Public Records Order, October 7, 2002, Snow (see App F-50).

[265] *See* page 1 for discussion of persons who have the right to inspect public records.

Attorney General's formal review may not be futile, for several reasons. Advice given to the agency in such circumstances, sometimes by assigned counsel without review by a public records specialist, often is expressly preliminary. The advice may be based on a description of the requested record, rather than on inspection of the record. And, sometimes, the advice is not followed by the agency. The Attorney General may also have the benefit of additional information from the requester, such as representations as to the public interest that would be served by disclosure, which would be relevant to those exemptions under ORS 192.501 and 192.502 that require a weighing of interests.

The procedure for review of a denial of a records request is described in ORS 192.450 to 192.490 and summarized below.

a. Petition for Review

There is *no* filing fee for filing a petition for review with the Attorney General. The statutory form of petition is set out at page B-7 of this manual. It is not necessary to use this or any particular form, so long as the petition:

- identifies the requester,
- identifies the public body that has the records being sought,
- identifies the records sought,[266]
- states that inspection was requested, and
- states the request was denied and, if known, the person denying the request and the date of the denial. ORS 192.470(1).

It is desirable for a petition to the Attorney General to include, if possible, a statement of the requester's grounds for believing that the statutory exemption asserted does not apply or that the state agency's burden of justifying nondisclosure under that exemption cannot be met.

When seeking information concerning a licensee or applicant contained in records of a health professional regulatory board,[267] the

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[266] *See* Public Records Order, May 10, 1982, Kane (petition must describe record sought clearly enough to allow record to be identified) (see App F-3).

[267] The health professional regulatory boards are: the Board of Examiners for Speech-Language Pathology and Audiology; Board of Chiropractic Examiners; Board of Clinical Social Workers; Board of Licensed Professional Counselors and Therapists; Board of Dentistry; Board of Examiners of Licensed Dietitians; Board

person seeking disclosure must send a copy of the petition by first class mail to the health professional regulatory board on or before the date of filing the petition with the Attorney General. ORS 182.450(4). Not more than 48 hours after receiving a copy of the petition, the board must send by first class mail to any licensee or applicant who is the subject of the records: (1) a copy of the petition, and (2) a notice that the licensee or applicant may file a written response with the Attorney General not later than seven days after the date that the notice was sent by the board. If the Attorney General receives a written response from the licensee or applicant, the Attorney General must send a copy of that response to the petitioner.

b. Attorney General's Review

Upon receipt of a petition, the Attorney General must promptly notify the agency, and the agency is then under a duty to transmit to the Attorney General the requested public record for review, together with a statement of its reasons for believing the public record should not be disclosed. The Attorney General instead may permit the agency to disclose the nature or substance of the record. ORS 192.470(2). In a difficult case, the Attorney General may seek representations of positions from the requester and the agency.

The burden is on the state agency to sustain its denial of the records, except that for records of a health professional regulatory board deemed confidential or exempt from disclosure under ORS 676.165 or 676.175, the person seeking disclosure must demonstrate to the Attorney General by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including but not limited to the public interest in nondisclosure. ORS 192.450(1), (5).

The Attorney General has seven days in which to deny or grant the petition in whole or in part, except when the petition seeks records of a health professional regulatory board deemed confidential or exempt from

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of Massage Therapists; Mortuary and Cemetery Board; Board of Naturopathic Examiners; Board of Nursing; Board of Examiners of Nursing Home Administrators; Board of Optometry; Board of Pharmacy; Board of Medical Examiners; Occupational Therapy Licensing Board; Physical Therapist Licensing Board; Board of Psychologist Examiners; Board of Radiologic Technology; Veterinary Medical Examining Board; and the Department of Human Services to the extent that it certifies emergency medical technicians. ORS 676.160.

disclosure under ORS 676.165 or 676.175, in which case the Attorney General has 15 days to issue an order. ORS 192.450(1), (5). If the Attorney General does not rule on the petition within the statutory time period, the failure to issue an order is treated as a denial for purposes of permitting judicial review. ORS 192.465(1).

The Attorney General usually is able to issue an order within the statutory time period. In cases where the deadline is a problem, the Attorney General takes the position that the petitioner may grant an extension of time if necessary.[268]

The Attorney General sends the order granting or denying the petition, in whole or in part, to the petitioner and to the state agency. In the case of records of a health professional regulatory board, the Attorney General must also send a copy of the order by first-class mail to any licensee or applicant who is the subject of any records ordered to be disclosed. ORS 192.450(5).

c. Judicial Review

If the Attorney General orders the agency to disclose the record, the agency must comply with the order in full within seven days,[269] unless within the seven days the agency gives notice of its intention to institute proceedings for injunctive or declaratory relief in circuit court.[270] Copies of this notice must be sent to the Attorney General and by certified mail to the petitioner. The agency then must institute the proceedings within seven days after issuing the notice of intention. ORS 192.450(2). The Attorney General will not represent the agency in such a case, but may authorize it to obtain special counsel. ORS 192.450(3).

If the Attorney General's order is adverse to the person petitioning for review, that person likewise has recourse to circuit court, as does a licensee or applicant who is the subject of records of a health professional regulatory board. ORS 192.450(2)(6). In such cases, the Attorney General would represent the agency in upholding the order. ORS 192.450(3). The

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[268] Public Records Order, November 12, 1981, Newnham (see App F-3).

[269] A health professional licensing board may not disclose any record concerning a licensee or applicant *before* the seventh day. ORS 192.450(5).

[270] The seven-day deadline is unambiguous and strictly applied. *Davis*, 108 Or App at 128, 134 (see App C-12); *Gray*, 139 Or App at 556, 567 (see App C-14).

seven-day time limitation in ORS 192.450(2) does not apply to a suit filed by a petitioner[271] or a health professional licensee or applicant.

If the petition is granted in part and denied in part, either the agency or the petitioner or both (as well as a licensee or applicant who is the subject of health professional regulatory board records) may resort to the court to challenge the portion of the Attorney General's order with which they disagree. The statute is silent as to the procedure in a case in which both an agency and a petitioner (or licensee) challenge the order, but presumably the agency (which unlike the petitioner or licensee has specific time limits with which to comply) would give notice and file suit, and the defendant petitioner (or licensee) would challenge the denial portion of the order in the answer. The Attorney General would not represent the agency in such a case.

All actions for injunctive or declaratory relief must be filed in the Circuit Court for Marion County, except that in the case of records of a health professional regulatory board, an action may be filed in the circuit court for the county where the records are held. ORS 192.450(2), (6).

The court has jurisdiction to enjoin the agency from withholding records and to order production of any records improperly withheld. The court does not review the Attorney General's order, but considers the matter de novo. The burden is on the agency to sustain its action, except that in the case of records of a health professional regulatory board, the person seeking disclosure of the records has the burden of demonstrating by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including but not limited to the public interest in nondisclosure. ORS 192.450(6), 192.490(1). The agency may assert an exemption before the court that it did not raise in the course of the Attorney General's review.[272]

In any case in which a person petitions for judicial review and prevails, the person will be compensated for the cost of the litigation at trial and on appeal, including attorney fees. These costs will be assessed against the agency. ORS 192.490(3). ORS 192.490(3) *requires* the award of a fee so long as a statutory proceeding is brought and the plaintiff's

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[271] *Oregonian Publishing,* 144 Or App at 180, 184 (see App C-17).

[272] *In Defense of Animals*, 199 Or App at 167–170 (see App C-21).

claim prevails.[273] This provision contrasts with the discretionary authority of the court to award attorney fees under the Public Meetings Law. ORS 192.680(3). "Good faith" is immaterial and will not prevent an award of attorney fees if disclosure is delayed beyond seven days after an order to disclose.[274] Furthermore, the agency pays costs even if it offers to furnish the requested information but asserts that it is not required to disclose. In one case, the public body's offer of compromise did not include a concession that the records were public records that plaintiffs or others could review. Therefore, plaintiff was entitled to attorney fees when he prevailed in the action seeking a declaration that the records were public records subject to disclosure.[275]

However, if the person prevails only in part, the award of costs, disbursements and attorney fees is discretionary.[276] ORS 192.490(3).

If an agency fails to comply with an order from the Attorney General and does not issue a notice of intention to institute a suit within seven days after issuance of the order, or does not institute the suit within seven days after the notice is issued, the person will be compensated for the cost of the litigation, including attorney fees, regardless of which party instituted the suit and regardless of which party prevails. ORS 192.490(3). Again, the Attorney General will not represent the agency in these cases, but may authorize it to retain special counsel.

2. Local Governments and Nonelected Officials

In any case in which a person is refused an opportunity to inspect a record by a local government body or official, other than an elected official, a petition for disclosure may be filed with the district attorney. ORS 192.460. The same petition form is used as for a petition to the Attorney General and the procedure is exactly the same as that described above. However, the district attorney performs the functions of the Attorney General. If the district attorney's order is adverse to the local agency or official, that agency or official may give notice and file suit in the circuit court for the particular county. If the order is adverse to the

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[273] *Smith,* 63 Or App at 685 (see App C-6).

[274] *Gray,* 139 Or App at 567 (see App C-14).

[275] *Kotulski v. Mt. Hood Comm. College*, 62 Or App 452, 660 P2d 1083 (1983) (see App C-5).

[276] *Guard Publishing Co.*, 310 Or at 40–41 (see App C-10); *Oregonian Publishing*, 144 Or App at 188–89 (see App C-17).

petitioner or if it is not complied with, the petitioner has the same recourse to the circuit court for the county. Exactly the same procedures, time requirements and provisions for attorney fees apply.

3. Elected Officials

If a state or local elected official, or appointed official holding an elective office,[277] claims a right to withhold disclosure of a public record in his or her custody or in the custody of any other agency under this law, the claim is not subject to administrative review by the Attorney General or a district attorney.[278] The person denied access to the record may immediately seek judicial review of the denial in the Circuit Court for Marion County or the circuit court of the county in which the elected official is located. ORS 192.480. If the petitioner prevails, he or she will be compensated for the cost of litigation, including attorney fees. ORS 192.490(3).

ORS 192.480 applies equally to records in the custody of an elected official and records as to which the official claims the right to deny access.

When a circuit court judge, an elected official, denied disclosure of certain videotapes which recorded the conduct of the proceedings in the circuit court, we were prohibited from considering a petition for the disclosure of the tapes based on ORS 192.480.[279] We reached the same conclusion when circuit court judges denied disclosure of certain exhibits included in the official court records of a bail hearing and a trial.[280] In each of these instances, we concluded that it was unnecessary to determine the custodian of the information requested, since the language of the section says "'as to which an elected official claims the right to withhold disclosure,' regardless of whether that official has custody of the record."[281] Thus, if records in the custody of the Department of Corrections are sought, and the Governor orders nondisclosure, recourse is to the court only. If the elected official orders nondisclosure even after a

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[277] Public Records Order, November 22, 1995, Larson (see App F-34).

[278] Public Records Order, December 3, 2004, Rakha (see App F-56).

[279] Public Records Order, December 22, 1988, Larson (see App F-16); Public Records Order, August 7, 2007, Stotter (see App F-60).

[280] Public Records Order, February 1, 1989, Larson (see App F-17); Public Records Order, November 22, 1995, Larson (see App F-34).

[281] Public Records Order, February 1, 1989, Larson, at 2 (see App F-17); Public Records Order, August 21, 2002, Maimon (see App F-49).

petition for review has been filed with the Attorney General or a district attorney, that reviewing officer is deprived of jurisdiction and the petitioner's recourse is to the court only. ORS 192.480.

Upon request, the Attorney General or district attorney may serve or decline to serve, in the discretion of the Attorney General or district attorney, as counsel in such suit for an elected official for which the Attorney General or district attorney ordinarily serves as counsel. *Id.* ORS 192.480 does not preclude an elected official from requesting advice from the Attorney General or district attorney on whether a public record must be disclosed.

PUBLIC RECORDS LAW APPENDIX A
Answers to Questions Commonly Asked About the Public Records Law

Q. Can a public body be required under the Public Records Law to create a record by collecting information, recording oral statements or otherwise?

A. No. A public body is required to allow inspection (subject to any exemptions) of any public records in its possession. In responding to a public records request, a public body is required to use computer software or programs to retrieve and make available data or information the public body stores in computer or electronic form, if it employs the computer software or programs to retrieve information for its own purposes. However, a public body cannot be required to create any record, including running a computer program to generate new data or information that did not exist in the agency records before the computer program was run, even when it has the means to do so. *See* Letter of Advice dated June 1, 1987, to Jim Kenney (OP-6126); Public Records Order, October 13, 2004, Johansen.

Q. Is a public body required to make available for inspection and/or copying public records on a periodic basis, or as records come into the possession of the public body, based on a "continuing request" for records?

A. No. A public body is required to make available for inspection and copying (subject to any applicable exemptions) only those records that exist at the time of the request. Persons seeking to inspect or to obtain copies of records of a public body on a continuing basis may be required to make a new request for records after the public body has responded to a request for records currently in the public body's possession.

Q. Is a public body required to provide copies of records for which someone else owns the copyright?

A. Under federal law the owner of a copyright has the *exclusive* right to reproduce or distribute copyrighted work, although others may copy a limited amount of the work under the "fair use" doctrine. 17 USC §§

106, 107, 501. The Public Records Law does not authorize public bodies to violate federal copyright law. A public body must permit a requester to inspect copyrighted materials, but should not make copies or allow someone else to make copies of such materials without the copyright owner's consent or on advice of legal counsel.

Q. May a public body establish a single "information officer" for all public records requests?

A. Yes. In fact, it is a good idea to have one person responsible for coordinating public records requests, if possible. Keep in mind, however, that the public records law does not allow any unnecessary delay. The public body must "furnish proper and *reasonable* opportunities * * * during the usual business hours." The public body may make "*reasonable* rules" but only "for the protection of the records and to prevent interference with the regular discharge of * * * duties." Any procedure that has the effect of unnecessarily delaying or discouraging response to public records requests is invalid. See discussion of Protective Rules.

Q. Does the Public Records Law mandate that a public body require a requester to prepay the estimated cost of providing requested records?

A. No. A public body *may* require prepayment of estimated fees, but the law does not mandate that it do so. However, as of January 1, 2006, the law authorizes a public body to charge a fee in excess of $25 only if it first provides a written cost estimate and receives confirmation from the requester to continue processing the request. The public body has the option of requiring prepayment of the estimated fee or waiting to collect its actual costs of responding to the request.

Q. May a public body establish a charge of 50 cents per page for copies of public records?

A. Yes, *if* that reasonably reflects its actual cost *including* the time of the person locating and copying the record, plus administrative overhead. See also next question. A public body may not charge more than its *actual cost* of making the records available for inspection or for furnishing copies. Also, a public body may charge a fee in excess of $25 only if it first provides a written cost estimate and receives confirmation from the requester to continue processing the request.

Q. May a public body charge for time spent in reviewing records to determine which of them are exempt, and for time spent in separating exempt and nonexempt material?

A. Yes. This activity is an essential part of making records available for inspection, and the public body is entitled to recover its actual cost. (If the public body is a state agency, it must adopt a rule establishing the basis for its charges.) Although a public body may not charge for time its attorney spends determining the application of the Public Records Law, it may recover the cost of time the attorney spends reviewing public records and separating exempt and nonexempt material at the public body's request.

Q. Is an indigent person entitled to waiver of the fee for inspection of copies of records?

A. Not automatically. While indigence is a factor that a public body may consider in deciding whether to grant a request for a fee waiver under ORS 192.440, the overriding factor is the public interest. See discussion of Fee Waiver.

Q. May I obtain the addresses, telephone numbers or Social Security numbers of public employees?

A. No, unless the employee is an elected official (in which case his or her address and telephone number are not exempt), or the requester clearly shows that the public interest requires disclosure in a particular instance. Otherwise, that information is exempt from disclosure under ORS 192.502(3). Although a public employee's name is personal information, it generally is not exempt from disclosure under ORS 192.502(2) because disclosure is not an unreasonable invasion of privacy.

Q. May I obtain names, addresses and telephone numbers of individuals doing business with public bodies?

A. Generally, yes. While names, home addresses and personal telephone numbers are personal information, disclosure of the name, address and telephone number of a licensee or individual doing business with a public body generally is not an unreasonable invasion of privacy. This includes names, addresses and telephone numbers of people in databases of public bodies, such as the Department of Fish and Wildlife or the Board of Nursing. However, disclosure of such information could

be an unreasonable invasion of privacy even if not otherwise prohibited, depending upon the circumstances. *See Jordan v. MVD*, 308 Or 433, 781 P2d 1203 (1989); *Guard Publishing Co. v. Lane County School Dist.*, 310 Or 32, 791 P2d 854 (1990); and discussion of ORS 192.502(2), Personal Privacy Exemption. Home addresses and personal telephone numbers also may be exempt under ORS 192.445, the personal safety exemption.

Disclosure of motor vehicle records of the Department of Transportation containing names, addresses and telephone numbers is prohibited, with several exceptions. ORS 802.175 to 802.191. *See also* 18 USC 2721-2725. Disclosure of motor vehicle records containing Social Security numbers is also prohibited. ORS 802.195.

Q. Are an outside consultant's report and recommendations paid for by a public body subject to disclosure?

A. Yes, although various exemptions may apply to all or parts of the report.

Q. Is a calendar, planner or phone message notepad maintained by a public employee subject to the Public Records Law?

A. If a public employee's calendar, planner or phone message notepad contains information relating to the conduct of the public's business, it is a public record subject to the disclosure provisions of the Public Records Law. If a calendar or planner contains both information relating to the conduct of the public's business and personal information about the employee, such as social activities outside of regular working hours or doctor's appointments, that information likely can be redacted from disclosure, under the personal privacy exemption ORS 192.502(2).

Q. Are records maintained by a neighborhood association subject to disclosure?

A. It depends on whether the particular neighborhood association is a "public body." This requires an analysis of a number of factors, including the specific responsibilities and authority of that particular neighborhood association. *See Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994).

Notwithstanding the analysis under the Public Records Law, some cities require, as a condition of their recognition of a neighborhood association, that the association's records be available for inspection by

the public. Contact city offices for information about requirements regarding neighborhood associations.

Q. Can I get a transcript of material that is on tape?[1]

A. You are entitled only to listen to the tape, and to make (or be furnished) a copy of the tape. The public body is not required to make a transcript of the tape, although of course it may. *See* Public Records Order, April 22, 2004, Birhanzl (stenographic tape of judicial hearing); Public Records Order, August 30, 1982, Palaia. If you have a disability that prevents you from listening to a tape, you may be entitled to the record in an alternative format. See discussion of Americans with Disabilities Act.

Q. What if I am an inmate of the state penitentiary and the rules do not permit me to possess a tape recording?

A. In that case, you might make arrangements to have the tape furnished to someone else who can transcribe it for you.

Q. Do I have the right to actually inspect the original records, or can the public body require me to accept copies?

A. You have the right to inspect original records, except for particular documents that contain exempt and nonexempt material which must be separated, or where the public body has justifiably adopted a requirement that copies will be furnished instead because this is necessary to protect the records or to prevent interference with its work. *Davis v. Walker*, 108 Or App 128, 131-33, 814 P2d 547 (1991).

Q. Are records collected for the purpose of a pending contested case administrative proceeding exempt?

A. Not as such. An administrative proceeding is not "litigation," and therefore ORS 192.501(1) (records prepared for litigation) does *not* apply. The fact that the ultimate order may lead to litigation is not a ground for nondisclosure. If however, the public body can show that litigation is reasonably likely to occur, the exemption applies. Some of the records also may be exempt for other reasons.

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[1] This question does not relate to a tape of a public meeting or executive session held pursuant to the Public Meetings Law. That law's requirement for the recording of public meetings and executive sessions is discussed in Part II of this manual.

Q. Must a city release a police report to a victim who is filing a civil lawsuit after the criminal prosecution has been concluded?

A. ORS 192.501(3) exempts criminal investigatory material from disclosure. This exemption does not expire after the close of the prosecution, but it is then more difficult to justify withholding the information. Remember also that the use to which a requester will put the records generally is not a factor in determining whether an exemption applies.

Q. Must police officer notebooks be disclosed? Must access be given to police logs?

A. Notebooks and logs are public records. Specific exemptions, such as those for criminal investigation information, ORS 192.501(3), and information submitted in confidence, ORS 192.502(4), may apply. Any information that is not exempt must be separated from that which is and must be made available. ORS 192.505.

Q. May I inspect a draft of a report in process of preparation?

A. Maybe, maybe not. See discussion of ORS 192.502(1), Internal Advisory Communications Exemption.

Q. May the Director of the Oregon Student Assistance Commission release names and addresses of recipients of State of Oregon need grants?

A. No, not without the student's consent. Because this information may not be disclosed under federal law, the Buckley Amendment, it is exempt from disclosure under the Public Records Law. ORS 192.502(8).

Q. Does a "policy or procedure" of nondisclosure by a federal agency justify nondisclosure under ORS 192.502(8)?

A. No. The ORS 192.502(8) exemption justifies nondisclosure only when disclosure is *prohibited* by federal law or regulation. We have concluded that this prohibition requirement is satisfied by federal laws cutting off federal funding if the state discloses specified information. *See* Public Records Order, April 13, 1987, Bristol.

Q. Are birth and death records public records?

A. Abstracts (summaries) of birth and death records are open to public inspection. With several exceptions, birth records for births occurring within 100 years of the request and death records for deaths

occurring within 50 years of the request (other than abstracts) are exempt from disclosure. ORS 432.121, 192.502(9). A subject of the record or his or her spouse, child, parent, sibling or legal guardian may inspect a birth or death record, as may the authorized representative of any of those persons, or a person who can demonstrate that he or she intends to use the information solely for research purposes. A person also may inspect a death record upon demonstrating that the record is needed to determine or protect a personal or property right.

It is important to note that appeals from decisions of custodians of vital records not to disclose information are conducted under the judicial review provisions of the Administrative Procedures Act (ORS 183.480 to 183.484), not under the review procedures in the Public Records Law. ORS 432.121(10), 432.130. *See* Public Records Order, September 22, 2005, Dansie; Public Records Order, April 7, 1995, Pittman.

Q. Are bids and proposals submitted in response to Invitations to Bid (ITB) and Requests for Proposals (RFP) confidential?

A. Bids are confidential, but only prior to the close of the ITB and the time set for bid opening. *See* ORS 279B.055(5)(a) and 279C.365(2)(a) and (3) (bids shall remain sealed until opened publicly by the contracting agency at the time designated in the advertisement); ORS 192.502(9). Once bids have been opened, they are available for public inspection, except to the extent that the bidder has appropriately designated parts of the bid as trade secrets, which may then be exempt from disclosure under ORS 192.501(2), or as information submitted to a public body in confidence, which may be exempt under ORS 192.502(4). *See* ORS 279B.055(5)(c).

Proposals are confidential until after the notice of intent to award a contract is issued. *See* ORS 279B.060(5)(a) (goods and services contracts) and 279C.410(1) (public improvement contracts). Thereafter a contracting agency may withhold from disclosure those parts of a proposal for a goods or services contract that qualify for exemption under any provision of ORS 192.501 or 192.502. *See* ORS 279B.060(5)(b). The contracting agency may withhold from disclosure those parts of a proposal for a public improvement contract that qualify for exemption either as a trade secret, as defined in ORS 192.501(2), or information submitted to a public body in confidence, as described in ORS 192.502(4). *See* ORS 279C.410(3).

Q. Are the records on juveniles who have been arrested available for inspection?

A. Technically, juveniles are not "arrested" but are taken into custody. ORS 419C.091. See discussion of ORS 192.501(3), Criminal Investigatory Material. Juvenile court records, as well as reports and other materials relating to a juvenile's history and prognosis, generally are exempt from disclosure because they are made confidential or privileged under the Juvenile Code. ORS 419A.255(1)–(2), 192.502(9). See discussion of ORS 192.502(9), Other Oregon Statutes Establishing Exemptions.

However, unless there is a need to delay disclosure in the course of an investigation, the Juvenile Code expressly provides for disclosure of the following information when a youth is taken into custody in circumstances where, if the youth were an adult, the youth could be arrested without a warrant: the youth's name and age, whether the youth is employed or in school, the offense for which the youth was taken into custody, the name and age of the adult complaining party and the adult victim, the identify of the investigating and arresting agency, the time and place the youth was taken into custody and whether there was resistance, pursuit or a weapon used. ORS 419A.255(6). In addition, the Juvenile Code provides for disclosure of the youth's name and birth date, the basis for the juvenile court's jurisdiction, the date, time and place of any juvenile court proceeding in which the youth is involved, the act alleged in the petition if it is one that if committed by an adult would constitute a crime, the portion of the juvenile court order providing for the legal disposition of the youth if the youth is within the juvenile court's jurisdiction for an act that if committed by an adult would constitute a crime, and the names and addresses of the youth's parents or guardians. ORS 419A.255(5).

Q. Are medical records subject to the public records law?

A. Medical records in the custody of public bodies are subject to the Public Records Law. ORS 179.505 addresses the disclosure of medical records maintained by publicly operated institutions and certain other programs. These records are exempt from disclosure to the extent that statute restricts or prohibits their disclosure. ORS 192.502(9). Other state or federal laws may also restrict or prohibit disclosure of records to the

extent they contain health information.[2] ORS 192.502(8) and 192.502(9). Such information is also generally exempt from disclosure under the personal privacy exemption, ORS 192.502(2).

Medical records maintained by private physicians or hospitals are not covered by the public records law because they are not in the possession of public bodies. Some guidance on the disclosure of such records may be found in ORS 192.525 to 192.530. *See also* OAR 847-012-0000 (Board of Medical Examiners); Health Division's Guidelines for Protecting Confidentiality and Assuring Only Authorized Access to Patient's Medical Records.

Q. Should a public body redact an individual's Social Security number from records that otherwise are not exempt from disclosure?

A. Federal courts that have considered the issue to date have held that Social Security numbers (SSNs) are exempt from disclosure under a provision of the federal Freedom of Information Act that is similar to ORS 192.502(2), the personal privacy exemption.[3] Because the only Oregon case concerning SSNs[4] predates the Oregon Supreme Court's interpretation of ORS 192.502(2),[5] as well as the development of the federal case law and the 1990 amendments to the Social Security Act that prohibit disclosure of SSNs in certain instances,[6] public bodies should not disclose any SSNs without advice from their legal counsel. Also, the

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[2] *See, e.g.*, 42 U.S.C. §§ 1301 *et seq.* (Health Insurance Portability and Accountability Act of 1996 and 45 C.F.R. Part 160.

[3] *See, e.g., Sheet Metal Workers Int'l Assoc., Local Union No. 19 v. U.S. Dept. of Veterans Affairs,* 135 F3d 891 (DC Cir 1998); *Painting Industry of Hawaii Market Recovery Fund v. US Department of the Air Force,* 751 F Supp 1410, 1418 (D Hawaii 1990), *rev'd on other grounds* 26 F3d 1479 (9th Cir 1994); *Oliva v. United States,* 756 F Supp 105, 107 (ED NY 1991); *Swisher v. Department of the Air Force,* 495 F Supp 337, 340 (WD Mo 1980), *aff'd* 660 F2d 369 (8th Cir 1981); *United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry v. Department of the Army,* 841 F2d 1459, 1466 (9th Cir 1988).

[4] *AFSCME v. City of Albany*, 81 Or App 231, 233, 725 P2d 381 (1986) (citing predecessor to ORS 192.502(2) without discussion, held that employee Social Security numbers not exempt).

[5] *Jordan v. Motor Vehicles Division*, 308 Or 433, 781 P2d 1203 (1989).

[6] 42 USC § 405(c)(2)(C)(viii).

Public Records Law specifically addresses the disclosure of SSNs of parties to particular court proceedings and of public body employees and volunteers. *See* ORS 192.501(28), and 192.502(3).

Q. Is it a crime to tamper with public records?

A. Yes. Under ORS 162.305(1), a person commits the crime of tampering with public records if, without lawful authority, the person knowingly destroys, mutilates, conceals, removes, makes a false entry in or falsely alters any public record, including records relating to the Oregon State Lottery. Tampering with Oregon State Lottery records is a Class C felony. Tampering with records other than Lottery records is a Class A misdemeanor.

Q. Who do I petition for review of denial of records in the custody of special districts, Tri-Met, the Port of Portland or community colleges?

A. The district attorney of the county in which the public body is located.

Q. May a business sell public database information for profit?

A. Generally, yes.[7] For example, a private business may obtain public database information from a public body, transfer it to CD-ROM (or some other format that makes the information easy to access) and then sell the CD-ROM for a profit. While members of the public could obtain the information directly from the public body, they may be willing to pay for the information if it is in a more easily accessible format. Although public bodies may only recover their actual costs in making records available, a private business may charge whatever the market will bear.

[7] Some statutes may specifically address disclosure of public records to persons who intend to use the information for commercial purposes. *See, e.g.,* ORS 247.955 (prohibits use of voter registration lists for commercial purposes); ORS 190.050 (declaring geographic databases of intergovernmental groups to be exempt under ORS 192.502 and authorizing reasonable fees for such data having commercial value).

PUBLIC RECORDS LAW APPENDIX B
Samples, Forms

Sample Request for Disclosure of Public Records

_____ (Date)

(Requester's Name)
(Requester's Address)
(Other contact information: E.g., requester's telephone no., e-mail address, fax no.)

(Name of public body)
(Address of public body)
Attn: (Officer or employee responsible for processing requests)

I (we), _____ (name(s)), request that (public body) and its employees (make available for inspection) (provide a copy or copies of) the following records:

1. _____
(Name or description of record)
2. _____
(Name or description of record)

__ I wish to arrange an opportunity to personally inspect the requested records.

__ I wish to receive copies of the requested records.

_____
(Requester's Signature)

Sample Written Procedure for Public Records Request

Making a Public Records Request

A request for public records that are in the custody of [public body] may be made by submitting a written request to:

[Name of individual]
[Title or position]
[Address]
[Other pertinent contact information, e.g., fax number, e-mail address]

The request may be submitted in person, by mail, by fax or by e-mail.

- The request must:
  - Include name and address of the person requesting the public record;
  - Include telephone number or other contact information for the person requesting the public record; and
  - Include a sufficiently detailed description of the record(s) requested to allow [public body] to search for and identify responsive records.
- The request should:
  - Be dated;
  - Be signed by the person requesting the public record.

Calculation of Fees

[Public body] calculates fees for responding to public records requests in the following manner:

- $0.xx per page for photocopies.
- The cost of records transmitted by fax is $x.xx for the first page and $x.xx for each additional page, limited to a xx-page maximum, not including the cover page.
- The cost of records transmitted by e-mail is $x.xx per e-mail and is limited to xx MB in size per e-mail.

- Actual cost for use of material and equipment for producing copies of non-standard records.
- Upon request, copies of public records may also be provided on a 3.5-inch computer disk or compact disk (CD) if the document(s) are stored in the [public body's] computer system. Disks will be provided at a cost of $5.00 per disk and may contain as much information as the disk will hold. Due to the threat of computer viruses, the [public body] will not permit requesters to provide disks for electronic reproduction of computer records.
- Labor charges that include researching, locating, compiling, editing or otherwise processing information and records:
    - No charge for the first xx minutes of staff time.
    - Beginning with the xxth minute, the charge per total request is $xx.xx per hour or $xx.xx per quarter-hour. A prorated fee is not available for less than a quarter-hour.
- The actual cost for delivery of records such as postage and courier fees.
- $x.xx for each true copy certification.
- Actual attorney fees charged to the [public body] for the cost of time spent by an attorney in reviewing the public records, redacting material from the public records or segregating the public records into exempt and nonexempt records.
- [Public body] may require pre-payment of estimated fees before taking further action on a request.

Sample Response to Public Records Request

To: [Requester]

In accordance with ORS 192.440(2), this is to acknowledge our receipt on [date] of your request for the following record[s]:

[Describe records requested.]

Having reviewed your request, we are able to inform you that:

__ Copies of all requested public records for which [public body] does not claim an exemption from disclosure under ORS 192.410 to 192.505 are enclosed.

__ [Public body] [does not possess/is not the custodian of] the requested record[s].

__ [Public body] is uncertain whether we possess the requested record[s]. We will search for the record and make an appropriate response as soon as practicable.

__ [Public body] is the custodian of at least some of the requested public records. We estimate that it will require [estimated time] before the public records may be inspected or copies of the records will be provided. We estimate that the fee for making the records available is $_____, which you must pay as a condition of receiving the records.

__ [Public body] is the custodian of at least some of the requested public records. We will provide an estimate of the time and fees for disclosure of the public records within a reasonable time.

__ [State/federal] law prohibits [public body] from acknowledging whether the requested record[s] exist[s]. [Cite to relevant state/federal law.]

__ [Public body] is unable to acknowledge whether the requested record[s] exist[s] because that acknowledgement would result in [the loss of federal benefits/other sanction]. [Cite to relevant state/federal law.]

Certification of True Copy

The following statement may be used on the cover sheet or last sheet of a **hard copy** of a public record in order to certify that it is a true copy:

> I certify that I have compared the [attached/foregoing] [document] consisting of ___ page[s] with the original in this office, that I am the custodian, and that the [attached/foregoing] is a true and correct copy.

_____, Oregon
city

_____
signature

_____, 20___.
date

_____
name/title

[Official Seal]
(if any)

The following statement may be attached to or provided with an **electronic copy** of a public record in order to certify that it is a true copy:

> I certify that I have compared the description of record/data contained on the attached computer disk/tape/whatever with the original in this office, that I am the custodian, and that the attached is a true and correct copy of the original. However, because of the nature of the electronic medium on which the attached record is provided, I cannot ensure that its contents will not be modified after its release from my custody.

_____, Oregon
city

_____
signature

_____, 20___.
date

_____
name/title

[Official Seal]
(if any)

Petition for Attorney General's or District Attorney's Review

A petition to the Attorney General or district attorney requesting him or her to order a public record to be made available for inspection or a copy to be produced shall be in substantially the following form, or in a form containing the same information:

_____ (date)

I (we), _____ (name(s)), the undersigned, request the Attorney General (or District Attorney of _____ County) to order _____ (name of governmental body) and its employees to (make available for inspection) (produce a copy or copies of) the following records:

1. _____
(Name or description of record)

2. _____
(Name or description of record)

I (we) asked to inspect and/or copy these records on _____ (date) at _____ (address). The request was denied by the following person(s):

1. _____
(Name of public officer or employee; title or position, if known)

2. _____
(Name of public officer or employee; title or position, if known)

_____
(Signature(s))

Note: This form should be delivered or mailed to the Attorney General's office in Salem (1162 Court St. N.E., Salem, Oregon 97301-4096); or to the district attorney's office in the county courthouse.

Helpful Hints for Responding to Public Records Requests

- Consider designating one person to coordinate responses to public records requests. This will ensure consistent and, generally, more timely responses.
- Upon receiving a records request, review the request to see if it is ambiguous, overly broad or misdirected. If so, contact the requester for clarification. Also, clarify whether the requester merely wants an opportunity to inspect the records or actually wants copies of the records. A brief conversation with a requester can save considerable time and expense in responding to records requests.
- If the initial review reveals that the request is not ambiguous, overly broad or misdirected, or if the request was clarified after contact with requester, provide the response required by ORS 192.440(2) as soon as practicable and without unreasonable delay. (See App. B-6).
    - Remember that the Public Records Law gives public bodies a reasonable time to make the records requested available to the requester, despite any deadlines that a requester attempts to impose.
    - Notify the requester if the public body intends to charge for the "actual costs" of making the records available. To charge a fee greater than $25.00, the public body must provide written notice of the estimated amount and receive confirmation that the requester wants the public body to process the request. For particularly expensive requests, consider requiring payment *in advance* of working on a request.

      At this stage, the public body may receive a request for a fee waiver. Review this manual's discussion of this subject before responding.
- Consider whether any exemptions apply to the requested records and whether the public body might want to disclose the record despite an exemption. If any "conditional" exemptions apply, remember to consider whether the public interest in disclosure outweighs the interest in nondisclosure.

  The public body may delay release of records to consult with legal counsel about exemptions or other relevant provisions of the law.

- If no exemptions apply to the requested records, coordinate release of the records to the requester in as timely a manner as possible.
- If one or more exemptions apply to a requested record, and the public body plans to claim the exemption(s), review each requested record to determine whether the entire record or only specific portions of the record are exempt. If only portions of a record are exempt, delete or obscure the exempt portions and disclose the remaining portions of the record.
- When denying a public records request, cite the specific exemption(s) on which the public body relies.

PUBLIC RECORDS LAW APPENDIX C

Summaries of Oregon Appellate Court Decisions on Public Records

Note: In 1987, the legislature reorganized and renumbered the Public Records Law exemptions. Or Laws 1987, ch 764. Since then, several provisions of ORS 192.501 and 192.502 were also renumbered. These case summaries refer to the ORS cites in effect at the time of the court decision.

See Table of Cases, pp. xv-xviii, for pages in manual where case is discussed.

***MacEwan v. Holm, et al.*, 225 Or 27, 359 P2d 413 (1961).**

This case, decided 12 years before enactment of the present Public Records Law, is nevertheless perhaps the leading case in terms of the approach the Oregon courts take with respect to the public's "right to know." The court stated:

> Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants.* * *
>
> And the public interest in making such writings accessible extends beyond the concern for the honest and efficient operation of public agencies. The [information] * * * may be sought by persons who propose to use it for their own personal gain. Thus they may wish to obtain names and addresses for use as a mailing list, or the record of transfers of property to conduct a title insurance plant. * * * The data gathered by government are available to its citizens for such private purposes.

226 Or at 38-39.

> In balancing the interests referred to above, the scales must reflect the fundamental right of a citizen to have access to public records as contrasted with the incidental right of the agency to be

> free from unreasonable interference. * * * *[T]he burden is cast upon the agency to explain why the records sought should not be furnished.*

226 Or at 46 (emphasis added).

In the particular case, it was held that records "in a raw or tentative state" preliminary to the making of a final report were subject to disclosure.

***Papadopoulos v. State Board of Higher Education*, 8 Or App 445, 494 P2d 260 (1972). (This case was decided under predecessor public records laws.)**

The Court of Appeals held that a report on the School of Science at the University which was prepared by faculty from out-of-state schools was a public record subject to disclosure despite claim of acting president that there was an understanding with the faculty that the report would be confidential. The evidence indicated that it contained no "confidential personal information."

***Stivahtis v. Juras*, 13 Or App 519, 511 P2d 421 (1973). (This case was decided under predecessor public records laws.)**

Representative suit brought by plaintiff on behalf of all public assistance recipients of Oregon. Plaintiffs sought a declaratory judgment that, pursuant to ORS 192.030, a public assistance recipient may have access to all records maintained by the Public Welfare Division that pertain to the recipient. The court held that despite special confidentiality statutes, disclosure of a recipient's file to the recipient is required by the Public Records Law. The court held the confidentiality statutes, ORS 411.320 and ORS 418.130, were enacted to protect the recipient from embarrassment and harassment. Because disclosure is the rule, the confidentiality statutes cannot be given any broader reading than necessary to carry out their function. This case departs from the general rule that the identity of the requester is irrelevant. (ORS 192.030 was repealed by Or Laws 1973, ch 794, § 34.)

***Turner v. Reed*, 22 Or App 177, 538 P2d 373 (1975).**

Plaintiff sought 48 documents pertaining to his incarceration. The court held that some documents could be exempt by their nature, but defendant, Department of Corrections, must plead and prove each exemption. Reports of psychiatric examinations, expressed in the professional's own words, are exempt because disclosure could adversely affect the future functioning of the division. ORS 192.500(2)(d), relating to the records of the Corrections Division.

Each document, the court said, must be examined to see if some nonexempt material could be excised and disclosed. ORS 192.500(3). The court concluded that the recommendations of the Parole Board were only "advisory" pending agency action and thus exemptible. This exemption encourages frank intra-agency communications. ORS 192.500(2)(a). Documents regarding plaintiff's marriage based on conversations with his wife were of little public interest and the need for confidentiality in order to procure this kind of information in the future was overwhelming. The court exempted this information pursuant to ORS 192.500(2)(d). (Although these records were apparently also exempt under ORS 192.500(2)(c), and other exemptions may have been applicable to other records, defendant asserted only ORS 192.500(2)(a) and (d).)

Reports of plaintiff's activities while on parole were purely factual and thus not exempt from disclosure under ORS 192.500(2)(a). Some parole reports had been disclosed and others retained. The court found the only difference between these documents to be that disclosure of the previously retained reports might embarrass public officials. The reports were ordered disclosed.

***Sadler v. Oregon State Bar*, 275 Or 279, 550 P2d 1218 (1976).**

Plaintiff sought state and county bar records pertaining to an attorney's professional and election-related conduct. A request for an order releasing the data was granted by the Attorney General. The court found the records not exempt under ORS 192.500(2)(c), the exemption for information submitted in confidence.

The court stated that there was no evidence that anyone who had complained to the bar about the attorney did so with the understanding that the information would be held in confidence. A request for and

promise of confidentiality are requirements of the ORS 192.500(2)(c) exemption.

Addressing a separation of powers issue, the court held that the Public Records Law does not unreasonably encroach upon the judicial function of disciplining lawyers.

***Jensen v. Schiffman*, 24 Or App 11, 544 P2d 1048 (1976).**

Plaintiff sought release of a county sheriff's report of an investigation into allegations of misconduct in a city police department. The trial court found the report exempt from disclosure by ORS 192.500(1)(c) because the report was compiled for a criminal investigation. The Court of Appeals reversed. No charges had been filed, nor were any likely to be filed. The criminal investigation exemption does not automatically expire in such a case, but the court then must determine whether the purpose of the exemption has terminated, and to the extent it has not, apply a balancing test between the public interest in disclosure and interference with continuing criminal justice purposes.

***Penrod v. Oregon State Penitentiary*, 35 Or App 319, 581 P2d 124 (1978).**

Prisoners have access to their disciplinary records pursuant to ORS 192.420.

***Morrison v. School District No. 48*, 53 Or App 148, 631 P2d 784 (1981).**

A school district resisted disclosure of its substitute teacher roster. In affirming the trial court, the Court of Appeals ordered disclosure notwithstanding defendant's assertions: (1) that the roster was personal information disclosure of which would constitute an unreasonable invasion of privacy, and (2) that the information was submitted in confidence to the district. The court also rejected an amicus argument that the public employee collective bargaining statute, when read along with ORS 192.500, impliedly prevented disclosure.

The roster, the court said, did not qualify under the personal information exemption, ORS 192.500(2)(b), because one's name and position as a substitute teacher was not the type of information normally kept secret from strangers. Moreover, even though plaintiff probably wanted to use the roster in a collective bargaining context, the identity of the plaintiff is irrelevant. The statute speaks of "public disclosure," and

thus plaintiff's identify and purpose for seeking disclosure were not pertinent.

The court held that defendant must establish that the information was submitted in confidence, and not merely later decided to be confidential, to be exempt under ORS 192.500(2)(c). Lastly, the amicus brief failed to persuade the court because the disclosure statute contains two specific labor relations exemptions and, therefore, no implied exemption could be read into the law.

***Lane County School District v. Parks*, 55 Or App 416, 637 P2d 1383 (1981).**

Plaintiff sought the school district's substitute teacher roster. Defendant school district raised several points addressed in *Morrison v. School District No. 48* (see above) and followed here. Defendant also argued that the roster was information compiled or acquired for litigation, ORS 192.500(1)(a). The court agreed with the trial court's finding that the roster was not created because of any ongoing or expected litigation, and held that the litigation exemption applies only to records "compiled or acquired by the public body for use in" existing or expected litigation.

***Kotulski v. Mt. Hood Community College*, 62 Or App 452, 660 P2d 1083 (1983).**

The college sought to exempt from disclosure, under ORS 192.500(2), the addresses of its part-time faculty. The court found it necessary only to apply the first part of the inquiry set out in *Morrison v. School District No. 48* (see above), and held that the defendant here had not established that the requested information is "information of a personal nature." The court found that one's address is not information that "normally would not be shared with strangers" because addresses are commonly listed in telephone directories, printed on checks and provided to merchants. Furthermore, they appear on driver's licenses and other identification that is routinely shown to strangers. The college also argued that the addresses were exempt as "information submitted to a public body in confidence." The court held that evidence that the addresses were not disclosed to students or insurance companies or booksellers who request them and that the college would honor requests not to disclose telephone numbers did not establish that the addresses of the part-time faculty were given in confidence. The court also held that

plaintiff's judgment was more favorable than defendant's offer of a one-time inspection of the records, which would not have resolved the issue that the records were public records. Therefore, an award of attorney fees and costs was required.

***Smith v. School District No. 45*, 63 Or App 685, 666 P2d 1345 (1983).**

School district provided record of its hearing but resisted disclosure of hearing record of another probationary teacher and minutes of contract renewal meeting. The district finally furnished all records before trial. Court of Appeals reversed in part holding that (1) ORS 192.420 creates a right of access to public records that is not dependent on the requestor's need or motivation; (2) there was no evidence to show that plaintiff's request was unduly burdensome; (3) a public body may not refuse to produce records subject to inspection just because the requestor already possesses them, and the trial court could not properly refuse to declare that the records were public and subject to disclosure; (4) the statutory litigation exemption is limited; (5) ORS 192.490(3) requires the award of attorney fees so long as a statutory proceeding was brought and the plaintiff prevails with respect to his or her claim; and (6) the trial court's refusal to award attorney fees for violation of the Public Meetings Law was discretionary and the court's refusal was not an abuse of discretion.

***Pace Consultants v. Roberts*, 297 Or 590, 687 P2d 779 (1984).**

Names and addresses of employers against whom unlawful employment practice complaints are pending under ORS 659.040, whether on ledger cards or actual complaint forms, are not exempt from disclosure by the "investigatory information exemption," ORS 192.500(1)(h).

***Ogden v. Bureau of Labor*, 68 Or App 235, 682 P2d 802 (1984).**

Nondisclosure under ORS 192.500(l)(h) of investigatory information gathered by bureau in an employment discrimination case is justified as to the public generally but not as to parties directly involved in the dispute.

***Ogden v. Bureau of Labor*, 299 Or 98, 699 P2d 189 (1985).**

Court could not decide question of discovery and public records on appeal.

***State ex rel KOIN-TV, Inc. v. Olsen*, 300 Or 392, 711 P2d 966 (1985).**

Trial judge in defamation action did not abuse his discretion in denying television station's motion that it be permitted to copy videotape of defendant's deposition, after trial in which videotape was played to jury in open court, marked as an exhibit and received in evidence. If Public Records Law applies to the courts, the television station's writ must be dismissed because that law provides a plain, adequate and speedy remedy in the ordinary course of the law. If the law does not apply, the television station cannot prevail on a claim of right to copy based on that law. Court assumes, arguendo, that the law does not apply to courts.

***Bay Area Health District v. Griffin*, 73 Or App 294, 698 P2d 977 (1985).**

Plaintiff, a "public body" within the meaning of the Public Records Law, brought a declaratory judgment action to determine whether it was required to disclose a certain public record, citing the internal advisory communications exemption, ORS 192.500(2)(a). The record was a portion of a consultant's report of a study which included interviews with medical and hospital staff members about operating room functions, and a review of data on operating room utilization and procedures. In determining whether, in this instance, the public interest in encouraging frank communication clearly outweighed the public interest in disclosure, the court held that because there was no evidence that the nonfactual information resulted from "frank communication," the court would affirm the trial court's order to disclose.

***American Federation of State, County and Municipal Employees, Council 75 v. City of Albany*, 81 Or App 231, 725 P2d 381 (1986).**

Plaintiff sought a declaratory judgment that the Social Security numbers of city employees were not exempt from disclosure and an injunction ordering the city to produce them. The trial court found that federal law prohibited disclosure, but that state law did not exempt the Social Security numbers from disclosure as information of a personal nature or as information submitted in confidence. The Court of Appeals

upheld the trial court with respect to personal privacy, ORS 192.500(2)(b), and confidential disclosure by citizens, ORS 192.500(2)(c), but reversed on the federal law question. The court held that Social Security numbers of government employees provided to government as an employer, not as a governmental entity, are not prohibited from disclosure under federal law. Therefore, disclosure is not prohibited under the state law exemption that incorporates federal law exemptions, ORS 192.500(2)(g).

***Portland Adventist Medical Center v. Sheffield*, 303 Or 197, 735 P2d 371 (1987).**

Plaintiff responded to a notice from the Multnomah County Assessor to show cause why some of plaintiff's properties should not be added to tax rolls. Plaintiff requested that the information submitted be kept confidential. When the assessor refused, plaintiff brought a declaratory judgment action in the tax court. The tax court dismissed the complaint. The Supreme Court affirmed, concluding that absent *specific* legislative authorization to keep particular information confidential, the assessor must disclose it, even if the legislature had expressed a policy of keeping this *type* of information confidential. Moreover, that information is exempt from obligatory disclosure does not foreclose its voluntary disclosure.

***Coos County v. Oregon Department of Fish and Wildlife*, 86 Or App 168, 739 P2d 47 (1987).**

Plaintiff requested individual questionnaire responses. The questionnaire had been sent by the Oregon Department of Fish and Wildlife to fish and wildlife biologists, to solicit their ratings of the effectiveness of the Oregon Forest Practices Act. The department contended that the responses were exempt from disclosure as internal advisory communications under ORS 192.500(2)(a). After reviewing the requested documents *in camera*, the trial court ordered disclosure. The Court of Appeals affirmed without opinion, 83 Or App 696, 732 P2d 961 (1987), and then on reconsideration adhered to the same result. It was undisputed that the questionnaire responses were communications within a public body, at least in part advisory and related to other than purely factual matters. The department already had disclosed summaries of the questionnaire responses but refused to disclose the responses themselves. The court concluded that the "public interest in the disclosure of public

records cannot be satisfied by the 'disclosure' of a summarizing document, regardless of whether a summary satisfies the individual need of the requesting party." 86 Or App at 172.

Additionally, the court held that any "chilling effect" that disclosure of the information might have on future intra-agency communications because of embarrassment to the agency and its employees is insufficient, by itself, to justify nondisclosure under the internal advisory communications exemption.

***State ex rel Frohnmayer v. Oregon State Bar*, 307 Or 304, 767 P2d 893, *affirmed* 91 Or App 690, 756 P2d 689 (1989).**

The Oregon State Bar refused to produce materials for the inspection of counsel for a lawyer who was the subject of bar disciplinary proceeding. Counsel petitioned the Attorney General to review those records to determine whether they were exempt, but the bar declined to provide the records to the Attorney General. The court held that the Oregon State Bar is a "state agency" subject to the Public Records Law. The court also held that the Attorney General's role in enforcing the Public Records Law in this context did not violate Article III, section 1, of the Oregon Constitution (separation of powers), and that the application of the Public Records Law here did not unduly interfere with the court's function in regulating the legal profession in violation of Article VII, section 1.

***City of Portland v. Rice*, 308 Or 118, 775 P2d 1371 (1989).**

The defendants had appealed from a declaratory judgment that the public records they sought from the Portland Police Bureau's Internal Investigation Unit (IIU) are exempt from disclosure under ORS 192.501(13), the exemption for documents supporting a "personnel discipline action." The court held that where no discipline was imposed as a result of the IIU's inquiry, the "personnel discipline action" exemption does not apply.

***Guard Publishing Co. v. Lane County School Dist.*, 96 Or App 463, 774 P2d 494 (1989), *reversed on other grounds* 310 Or 32, 791 P2d 854 (1990).**

Defendant school district denied plaintiff publisher access to names and addresses of replacement coaches during a teacher's strike. The court held that the names of those coaches were not exempt from disclosure as

"personal information"; public employees are not anonymous or entitled to be. Coaches, however, treated their home addresses as personal and private outside the context of and before the public records request, and submitted those addresses to the district in confidence. Moreover, the evidence showed that several coaches were subjected to harassment, thus demonstrating that disclosure of their addresses would constitute an unreasonable invasion of privacy. No public interest required the disclosure of their home addresses. Accordingly, the court held that those addresses were exempt under ORS 192.502(2).

***State ex rel Oregon Television, Inc. v. Prophet*, 97 Or App 525, 776 P2d 592 (1989).**

Plaintiff obtained an alternative writ of mandamus compelling defendants either to produce certain public documents that the district attorney had under the Public Records Law or to show cause why they need not do so. After a hearing, defendant produced the documents. The trial court then denied plaintiff's petition for costs, disbursements and attorney fees since the action had not been brought under the Public Records Law.

***Jordan v. Motor Vehicles Division*, 308 Or 433, 781 P2d 1203 (1989).**

Plaintiff sought a citizen's home address on vehicle registration records held by defendant. Defendant argued that the information was exempt under the personal information exemption, ORS 192.502(2). The court agreed with DMV. It held that a person's home address was information relating to a specific individual and, therefore, "information of a personal nature." Under the facts presented, disclosure of the information would allow the plaintiff to harass the citizen to an extent that an ordinary reasonable person would find highly offensive. Disclosure, therefore, would constitute an "unreasonable invasion of privacy." Plaintiff demonstrated no overriding public interest in disclosure. Therefore, the information was exempt under ORS 192.502(2).

***Guard Publishing Co. v. Lane County School District*, 310 Or 32, 791 P2d 854 (1990).**

Publishing company sought declaratory judgment that names and addresses of replacement teachers serving as coaches during teachers' strike were matter of public record subject to disclosure. The court held that the information is not exempt from public disclosure absent an

individualized showing of justification. Here, the district's blanket policy of nondisclosure is contrary to the legislative intent of the Public Records Law, which strongly favors disclosure. The district must consider each request for an exemption from disclosure on its own merits, and give the party requesting inspection of public records a reasonable opportunity to make a showing which would entitle the party to disclosure. Reversed and remanded, with instructions to determine and award appropriate attorney fees to the publishing company.

***AA Ambulance Co., Inc. v. Multnomah County*, 102 Or App 398, 794 P2d 813 (1990).**

Plaintiff sought access to documents in the possession of an out-of-state consultant that was performing a study for the county regarding emergency and medical ambulance services. The documents were allegedly given to the consultant by ambulance providers, "with the understanding that they would be kept confidential." The county argued that the documents were public records only because its contract with the consultant said that the county was entitled to their use, but that the contract also limited the county's access to those documents because of their confidentiality. The court held that, even assuming the documents were public records only because of the terms of the contract, "the contract, in and of itself, can[not] create an exception" to the Public Records Law. The court found that the county had not established that the elements necessary for the exemption for records submitted in confidence, ORS 192.502(3), had been met.

***Morse Bros., Inc. v. ODED*, 103 Or App 619, 798 P2d 719 (1990).**

Plaintiff requested ODED to produce certain records and stated that an immediate response was necessary. Two days later, after being informed that the agency was referring the request to the Attorney General's office, the plaintiff petitioned the Attorney General for an order requiring ODED to produce the records. Two days later, the Assistant Attorney General representing ODED informed plaintiff's attorney that she would not be able to respond for several days because she needed to obtain information and that the petition to the Attorney General was premature since the agency had not denied the records request. That same day plaintiff filed an action in circuit court. The Court of Appeals found that the plaintiff had not allowed the agency the opportunity to review the requested records and to act on that request

before petitioning the Attorney General. Because the plaintiff brought the proceeding in circuit court before the Attorney General had taken any action on the petition, and before the Attorney General was required to act, the court held that the trial court should have dismissed the complaint.

***Davis v. Walker*, 108 Or App 128, 814 P2d 547 (1991).**

Plaintiff appealed an order denying her request for an injunction ordering the Portland Police Bureau to disclose public records, to provide her an opportunity to inspect and copy the original records and to prohibit the bureau from charging fees in excess of its actual cost for copying the records. Plaintiff also sought attorney fees. The court held, under ORS 192.440(3), that the fees charged in accordance with the bureau's fee schedule were not reasonably calculated to reimburse the bureau for its actual costs in furnishing edited copies of the records to plaintiff, because the bureau had failed to show that its fee schedule was based on an evaluation of the bureau's actual costs in making public records available. The court upheld the bureau's regulation permitting inspection of only edited copies of the bureau's records as reasonably necessary for the protection of the records and to prevent interference with the bureau's duties, under ORS 192.430(2). Because plaintiff prevailed in her suit challenging the fees charged by the bureau and other bureau actions in the case, she was entitled to attorney fees under ORS 192.490(3).

***Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994).**

Plaintiffs sought certain records of a fact-finding team that had been appointed by a private nonprofit group at the request of the McKenzie School District to investigate problems at McKenzie High School. The Oregon Supreme Court reversed the Court of Appeals' determination that the fact-finding team was a commission of the school district and set out six factors that are relevant to determine whether an entity is the "functional equivalent" of a public body. Those six factors are: 1) The entity's origin — was it created by government or was it created independently? 2) The nature of the function(s) assigned and performed by the entity — are the functions traditionally performed by government or are they commonly performed by a private entity? 3) The scope of authority granted to and exercised by the entity — does it have authority

to make binding decisions for the government? 4) The nature and level of governmental financial and nonfinancial support. 5) The scope of governmental control over the entity. 6) The status of the entity's officers and employees — are they public employees? The court concluded that only the first two factors weighed in favor of the fact-finding team being the functional equivalent of a public body and, therefore, the fact-finding team was not subject to the Public Records Law.

***Laine v. City of Rockaway*, 134 Or App 655, 896 P2d 1219 (1995).**

Plaintiffs sought certain records from the city relating to the operation of the fire department prior to 1991. The city charter authorized the city council to appoint a fire chief. The city appointed a fire chief and directed him to organize a fire department. The city purchased the equipment of the Rockaway Rural Fire Protection District in 1943, assumed its debts and liabilities and provided services in the area previously served by the district. The city budgeted for the operation of the fire department and had the authority to ratify the election of the fire chief, who was responsible to the mayor and city council. The city owned the fire hall, maintained it, paid the insurance on the trucks and workers' compensation insurance on the voluntary firefighters, paid a nominal salary to the fire chief, his assistant and a secretary-treasurer, and paid a nominal amount to volunteers as "call pay." The city, by ordinance, gave the fire department various powers. The city also contracted with other jurisdictions to provide them with fire protection services. In 1991, the fire department incorporated as a public benefit nonprofit corporation that has contracted with the city to provide fire protection services. The court applied the six factors set out in *Marks v. McKenzie High Schl. Fact-Finding Team* and determined that the first five factors weighed in favor of the fire department being the functional equivalent of an agency or department of the city. Though the plaintiff did not request records from the fire department after 1991, neither the plaintiff nor the court seemed to question that, after that date, the fire department was no longer the functional equivalent of a public body.

***Hunter v. Farmers Insurance Company*, 135 Or App 125, 898 P2d 201 (1995).**

The Oregon Court of Appeals upheld the trial court's exclusion of the testimony of a county community corrections officer who testified on the basis of a presentence report and associated notes. As amended in 1989, ORS 137.077 specifies the conditions under which either a presentence report *or* information contained in such a report may be disclosed by specified persons. Information contained in a presentence report may not be disclosed through trial testimony unless that disclosure falls within one or more of the situations specified in the statute.

***Premier Technology v. State of Oregon*, 136 Or App 124, 901 P2d 883 (1995).**

Plaintiff and the state executed a video lottery terminal lease agreement conditioned upon the completion of a security investigation. After the state gave notice of termination, plaintiff brought a breach of contract action. Plaintiff moved to compel production of documents relating to the security investigation of other terminal manufacturers who were awarded contracts with the state. The trial court denied the motion on two grounds, including exemption from disclosure under the Public Records Law. The Court of Appeals affirmed the ruling, stating that the information was exempt from disclosure under ORS 192.502(3) because 1) it was submitted voluntarily and in confidence, 2) the agency had obligated itself in good faith not to disclose the information 3) the information was of the type that reasonably would be considered confidential, and 4) the public interest would suffer because disclosure would discourage potential contractors, thereby reducing competition. The court declined to decide whether information contained in exempt public records was privileged, and therefore not discoverable under ORCP 36B and OEC 509.

***Gray v. Salem-Keizer School District*, 139 Or App 556, 912 P2d 938, *review denied* 323 Or 265, 918 P2d 846 (1996).**

An unsuccessful applicant for teaching positions with Salem-Keizer School District requested copies of two "negative" employment references in his job application file. The district denied the request, asserting they were exempt from disclosure under the Public Records Law as information submitted in confidence, ORS 192.502(3). The Court of Appeals held that the references were not exempt from disclosure

because their substance could be disclosed without identifying their sources. In reaching its conclusion, the court considered two competing views of the public interest.

The district's view of the public interest in nondisclosure was that receiving candid references on applicants is essential, and therefore confidentiality was required. The district also asserted that the public interest in employing suitable teachers and administrators would suffer because of the potential chilling effect of subjecting to disclosure candid information provided by former employers or others about applicants for employment. The applicant argued that without an opportunity to verify and possibly challenge the information contained in the reports, an individual could be denied employment based upon false accusations or discriminatory reasons, thereby harming the public interest in ensuring unbiased and informed hiring decisions by public agencies.

After considering the two views, the court concluded that the public interest in reducing the potential for hiring decisions based on secret, unrebuttable allegations or innuendo would be served by disclosing the references, provided that the source-identifying information was redacted. According to the court, eliminating the source-identifying information would provide sufficient protection of confidentiality for future sources who submitted candid employee evaluations.

The court also held that the applicant was entitled to attorney's fees because the district did not provide the applicant with the other nonexempt documents in his application file within seven days of the order of the Marion County District Attorney, as mandated by ORS 192.490(3).

***Lane Transit District v. Lane County*, 146 Or App 109, 932 P2d 81 (1997), *reversed in part on other grounds* 327 Or 161, 947 P2d 1217 (1998).**

Citizens for Responsible Public Transit (Citizens) filed a proposed initiative measure that would alter the salary of plaintiff's general manager and revise procedures for salary increases. Lane Transit District (district) sought declaratory and injunctive relief, arguing that the measure was administrative in nature and therefore not subject to the initiative power. The trial court entered an order requiring Citizens to pay the district's "labor costs" for responding to Citizens' discovery requests during the litigation. Citizens appealed the order. The district argued to

the Court of Appeals that ORS 192.440 allowed the custodian of public records to establish fees for its "actual cost" in producing records to a requesting party. The Court of Appeals reversed the trial court, finding that Citizens did not make a public record request to the district, but filed a "garden-variety" request for production of documents pursuant to ORCP 43. The court found no authority to apply the fee provisions of the Public Records Law to a discovery request simply because the party is a public body.

***Oregon AFSCME Council 75 v. Oregon Department of Administrative Services*, 150 Or App 87, 945 P2d 102 (1997).**

The Department of Administrative Services (DAS) received a records request from a television reporter for the names, titles and workstations of all state employees who had used 240 hours or more of sick leave in a certain period. AFSCME, the public employees' union, and a public employee sued the state seeking declaratory and injunctive relief to prevent disclosure of the information.

DAS argued that the information to be disclosed, which contained no medical information, is not exempt from disclosure under ORS 192.502(2) (personal privacy). Alternatively, DAS contended that even assuming the information that an individual had used more than 240 hours of sick leave could come within the exemption under certain circumstances, the court erred in applying a blanket exemption absent an individualized showing of justification for exemption. Plaintiffs responded that disclosure of individual sick leave information is always an unreasonable invasion of privacy.

The court did not reach the merits of the arguments. Rather, the court stated that for a court to entertain an action for declaratory relief, the complaint must present a justiciable controversy. In this matter, because plaintiffs asked that the records sought by the television reporter be declared exempt and enjoined from disclosure under ORS chapter 192, the reporter seeking the information had the right to present proof to try to defeat the claimed exemption. Failure of plaintiffs to join the television reporter in the suit therefore deprived the court of jurisdiction.

The court raised, but did not decide, the additional jurisdictional issue of whether public employee unions had representational standing to assert the rights of members.

***Oregonian Publishing Company v. Portland School District No. 1J*, 144 Or App 180, 925 P2d 591 (1996), *modified* 152 Or App 135, 952 P2d 66 (1998), *affirmed on other grounds* 329 Or 393, 987 P2d 480 (1999).**

Plaintiff sought to compel the Portland School District to provide investigation records of alleged misuse and theft of district property. The district first claimed that plaintiff's action was not timely filed, arguing that ORS 192.450 (2) requires a private individual to initiate proceedings within 14 days of the order denying disclosure. The Court of Appeals concluded that the 14-day limit applied only to public bodies.

The district then argued that the records were exempt from disclosure under 192.501(12) (materials supporting disciplinary action). The court concluded that since the records related to alleged misuse and theft of public property by public employees, the public interest in disclosure was significant and the exemption did not apply. Also, while the purpose of the exemption is to protect a public employee from ridicule for having been disciplined, the court noted that the publicity surrounding the situation made it questionable whether disclosure would intrude on employee privacy. The district also argued that the records were exempt under ORS 192.502(2) (personal privacy). The court concluded that the information was not of a "personal nature" as the term is used in the exemption statute, and that disclosure would not constitute an unreasonable invasion of privacy.

Finally, the district argued that the records were exempt from disclosure under ORS 192.502(9) (records confidential under other Oregon law) and ORS 342.850(8) (granting authority to school boards to regulate access to teacher personnel files). On reconsideration, the court held that testimony of the investigating officer at an unemployment hearing, where substantially all information contained in the report was disclosed and available to the public via a written transcript, waived the exemption under ORS 342.850(8) and ORS 192.502(9).

The Oregon Supreme Court affirmed the Court of Appeals' result, but on different grounds. The Supreme Court concluded that ORS 192.502(9) and 342.850(8) simply did not apply to the investigation report because that report did not address any individual employee's terms and conditions of employment or recommend any employment decision regarding any individual employees. The court also observed

that the report was prepared by school police who are not involved in personnel evaluations. Noting that "the district cannot restrict access to public records simply by placing the records in a personnel file or using a label, such as 'Personnel Investigation,'" the court concluded that the investigation report at issue was not the type of document the legislature intended to exempt from disclosure as part of a teacher personnel file.

(Note: The Court of Appeals has confirmed that it will adhere to the analysis of ORS 192.502(2) and 192.501(12) it applied in this case because the Supreme Court's opinion did not call that analysis into question. *City of Portland v. David Anderson and the Oregonian*, 163 Or App 550, 988 P2d 402 (1999).)

***Springfield School District v. Guard Publishing Company*, 156 Or App 176, 967 P2d 510 (1998).**

The school district sought to prevent disclosure of documents contained in personnel files related to the misconduct investigation of a principal and assistant principal. The district claimed the documents were exempt from disclosure under ORS 192.502(9) and ORS 342.850(8) (school district shall adopt rules governing access to personnel files). Referring to *Oregonian Publishing Co. v. Portland School Dist.* (see above), the court held that ORS 342.850(8) comes within the catchall exemption of ORS 192.502(9), and that confidential personnel records held in school district files are exempt from public disclosure.

Plaintiff contended that the district's disclosure of general information about the investigation and subsequent action altered the confidential nature of the documents in the personnel files. The court held that disclosure of some information contained in the personnel files does not convert all documents in the file into public information.

Plaintiff also claimed that the district waived any applicable exemption by publicly releasing the charging letters against the principal and assistant principal, which described in detail the district's investigation and findings. The court held that the district waived its exemption from disclosure for documents that were based on the same factual circumstances as those publicly released by the district, but that the context of other documents in the personnel files was sufficiently different so that the school district did not waive the exemption for those documents.

***City of Portland v. David Anderson and The Oregonian*, 163 Or App 550, 988 P2d 402 (1999).**

Defendants sought to compel the City of Portland to provide documents pertaining to an investigation and disciplinary action against a police captain. The investigation arose from allegations of conducting private business on police time, improper use of police telephones, improper use of a police office, and off-duty use of an escort service allegedly involving prostitution. The captain ultimately received discipline only for his involvement with the escort service.

The Court of Appeals held that the records were not exempt from disclosure under ORS 192.501(12) (materials supporting disciplinary action). With regard to documents relating to the allegation for which the officer actually received discipline, the court concluded that under the circumstances the public interest required disclosure. The court reasoned that the individual was a high-ranking police officer and that the public therefore has a legitimate interest in confirming his integrity and ability to enforce the law evenhandedly. Because information regarding the officer's use of an escort service that may serve as a front for prostitution bears materially on his integrity and on the risk that its compromise could affect the administration of his duties, the public interest compels disclosure.

The court also held that the records were not exempt from disclosure under ORS 192.502(2) (personal privacy). Because the records did not affect the individual exclusively and were not peculiar to his private concerns, the court concluded that they did not constitute information of a personal nature. The court further observed that even if the records did constitute personal information, their disclosure would not unreasonably invade individual privacy because the conduct involved directly bears on the possible compromise of a public official's integrity in the context of his public employment.

***Hood Technology Corporation v. Oregon OSHA*, 168 Or App 293, 7 P3d 564 (2000).**

Plaintiff sought disclosure of the identity of a person who filed a false complaint against plaintiff, alleging a violation of the Oregon Safe Employment Act. The court held that the trial court erred in granting summary judgment to defendant on the basis that the person's identity was exempt from disclosure as a confidential submission under ORS

192.502(4). To satisfy the exemption, the defendant had to show that the complainant, in fact, submitted information in confidence. Because the person made the complaint and gave his or her name, address and telephone number before the defendant asked about confidentiality, the court concluded that competing inferences could be drawn as to the person's subjective understanding as to confidentiality when initially providing the information. Either the complainant provided the information without regard for confidentiality, requesting it due only to the defendant's raising of the issue, or the complainant spoke with the intention and belief that his or her identity would remain confidential, and that belief was confirmed by the defendant's inquiry. This issue needed to be determined by the trial court.

The court also concluded that judging whether disclosure of the complainant's identity would cause harm to the public interest turns not on the truth or falsity of the complaint, but on the complainant's good faith or bad faith in submitting the information. Disclosure of the identity of a person who acted in good faith is contrary to the public interest, even if the submitted information was false, while there is no public interest in protecting the identity of persons who "intentionally and knowingly make false complaints for malicious and vindictive/harassment purposes."

***Kluge v. Oregon State Bar*, 172 Or App 452, 19 P3d 938 (2001).**

Plaintiff, the subject of a formal disciplinary proceeding of the Oregon State Bar (OSB), requested disclosure of records related to that proceeding. The court held that the circuit court erred in relying solely on the bar's description of the records, rather than reviewing the records *in camera* in order to determine whether they were exempt as internal advisory communications under ORS 192.502(1). The court also held that the materials submitted by the OSB were inadequate to demonstrate that the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure because they merely asserted that disclosure of the records "would discourage frank communications within the OSB disciplinary process" and did not weigh the competing public interests in the disclosure of the records. Finally, unlike the type of categorical exemption for psychiatric reports contemplated in *Turner v. Reed*, 22 Or App 177, 538 P2d 378 (1975), the court concluded that there is nothing

about OSB's disciplinary records that would permit a balancing of the public interest in the disclosure based solely on the nature of the records. Instead, a balancing of the public interest "in the particular instance" requires consideration of the content of the records in question.

***Oregonians for Sound Economic Policy v. SAIF*, 187 Or App 621, 69 P3d 742 (2003).**

ORS 656.702(1) provides that "[t]he records of the State Accident Insurance Fund Corporation [SAIF], excepting employer account records and claimant files, shall be open to public inspection." Plaintiff sought SAIF's disclosure of certain documents other than employer account records and claimant files. SAIF withheld some records on the ground that they were exempt from disclosure under provisions of the Public Records Law. Plaintiff brought a declaratory judgment action seeking disclosure of the records, and the trial court entered summary judgment in plaintiff's favor. The Court of Appeals affirmed the trial court's conclusions that the Public Records Law exemptions do not apply to requests filed pursuant to ORS 656.702(1) and that plaintiff was therefore entitled to the requested records. SAIF also contended that the trial court should have dismissed the declaratory judgment action because the judicial review provisions of the Public Records Law constitute the exclusive means of obtaining an order requiring disclosure of a public record. The Court of Appeals rejected that argument, concluding that ORS 656.702 creates an additional, independent mechanism to obtain records from SAIF that is enforceable through a declaratory judgment action.

***In Defense of Animals v. OHSU*, 199 Or App 160, 112 P3d 336 (2005).**

A nonprofit public interest corporation, In Defense of Animals (IDA), filed suit for disclosure of records by OHSU's Oregon Regional Primate Research Center (OHSU) and for a reduction of fees assessed for responding to its disclosure request.

The Oregon Court of Appeals held that names of OHSU staff were exempt from disclosure under ORS 192.501(31). IDA argued that disclosure would further the public interest in protecting animals used in medical research and had identified ways in which it would use the information. OHSU presented testimony that veterinarians had been threatened for their work with animals, that they feared attack, that some

employees had requested that DMV withhold their information and OHSU not disclose their names or identifying information to the public.

The court held that, "even considering the presumption in favor of disclosure," the public interest did not require disclosure of the names of staff members for two reasons. *Id.* at 178. First, the goal of ensuring proper treatment of animals at OHSU did not depend on disclosure of the names of specific staff members. Second, while OHSU had not produced evidence associating IDA with harassing or threatening activities, the general evidence presented with regard to such conduct "was sufficient to demonstrate a significant interest on the part of OHSU in nondisclosure." *Id.* at 179.

The court also held that the names of drug companies for which OHSU conducted research, as well as the names of the experimental drugs being tested, were exempt under ORS 192.502(20), as sensitive business records of OHSU not customarily provided to business competitors. The court concluded that the exemption applies to medical, scientific and other research conducted at OHSU that constitutes a business activity of OHSU, with "business activity" being any activity conducted for commercial purposes or in a commercial manner. The court further interpreted the phrase "business competitors" to include both competitors of OHSU and competitors of companies that contract with OHSU to perform research. In particular, the names of companies that had contracted with OHSU to perform research and the names of the experimental drugs being tested by OHSU both fell under this unconditional exemption. Knowledge as to which research institutions companies utilize to test experimental drugs and the fact that testing is being done on animals is information that ordinarily would not be provided to the companies' competitors. The research contracts between OHSU and the drug companies provided that information about the experimental drugs would be treated as proprietary.

IDA also claimed, in relation to a specific portion of requested records, that OHSU's assessed fees did not meet the standard established by ORS 192.440(3), namely that they were not reasonably calculated to reimburse its actual costs in making the records available for review. The Public Records Law does not expressly provide for review of whether a public body's fees are "reasonable." However, the court held that, at least in the context of an action for declaratory or injunctive relief such as that

filed by IDA, courts have jurisdiction to review the issue. *Id.* at 182-83. The court specifically did not decide whether the Attorney General and district attorneys have similar authority. *Id.* at 183.

In determining that OHSU's fees were not reasonably calculated to reimburse its actual costs, the court found unconvincing the claim that review and redaction of requested records could be done only by professional staff. *Id.* at 185-86. It also considered relevant the fact that OHSU had calculated some personnel costs at overtime rates without showing why it could not have hired additional, perhaps temporary, staff at a regular rate of pay specifically to respond to a voluminous records request. *Id.* at 186.

Finally, the court also interpreted the "public interest test" relevant to the granting of a waiver or reduction of fees. Its conclusions in this regard are addressed in the discussion of Waiver or Reduction of Fees.

***City of Portland v. Oregonian Publishing Company*, 200 Or App 120, 112 P3d 457 (2005).**

The City of Portland filed suit in response to an order from the Multnomah County District Attorney to disclose records relevant to the investigation and discipline of a police officer who killed a civilian during a traffic stop. The Oregon Court of Appeals held that the records were not exempt from disclosure under ORS 192.502(1) as internal advisory communications. (The applicability of ORS 192.501(12) was not at issue.) The court specifically noted that the balancing test required by ORS 192.502(1) is weighted in favor of disclosure, with the public body withholding the records needing to prove that "the public interest in nondisclosure 'clearly' outweighs the interest in disclosure." *Id.* at 124. The court identified several reasons why the city had not met is burden in relation to the records that had been requested by the *Oregonian*.

The city argued that the internal advisory exemption applied because members of the Portland Police Bureau would exercise greater candor and critical self-evaluation if they knew that their assessments would be used only to improve the performance of a particular employee or of the bureau as a whole. Recognizing that people are generally more candid when they know that their statements will remain confidential, the court stated that they "are also more likely to be vindictive, careless, or speculation [*sic*] – and therefore unreliable." *Id.* at 125. The fact that the city had disclosed the description of events, findings, and discipline

imposed prior to the newspaper making its request also contributed to the court's decision that the exemption did not apply, as did the fact that the court found the supervisory assessments contained in the requested records to be "clinical and detached."

The court described the incident underlying the investigation as "highly inflammatory and widely reported." *Id.* at 125. While the city argued that the "high profile" nature of the case increased the need for confidentiality in order to encourage candor, the court gave greater weight to the idea that the case's high profile made "the public's need to have complete confidence that a thorough and unbiased inquiry has occurred * * * most urgent and compelling * * *." *Id.* at 127.

***Jury Service Resource Center v. Carson*, 199 Or App 106, 111 n 2, 110 P3d 594 (2005), *reversed in part on other grounds*, *Jury Service Resource Center v. De Muniz*, 340 Or 423, 429, 134 P3d 948 (2006).**

Plaintiffs requested that court officials from Lincoln County and Marion County disclose to them their jury pool records, consisting of source lists, master lists, and term lists. When the county officials denied the requests, plaintiffs appealed to the Attorney General. The Attorney General denied the petitions, explaining that the requested records were exempt from disclosure. Defendants argued that the Public Records Law did not require disclosure because the ORS 192.502(9) creates an exemption for information that is confidential under other statutes. Under ORS 10.215, jury lists are confidential unless those lists are requested by a litigant pursuant to ORS 10.275, which was not the case here.

The court declined to decide the issue of whether jury lists are "court records" for purposes of ORS 192.410(4). By the terms of ORS 192.410(4), the statute includes only those records in ORS 7.010, and does not include jury lists. However, the court concluded that ORS 10.215(1) prohibited disclosure because, if jury lists were not public records, ORS 10.215(1) directly prohibited disclosure. If jury lists were public records, ORS 192.502(9) prohibits disclosure of records under the Public Records Law that are exempt under other state statutes.

The Oregon Supreme Court agreed with the analysis of the Oregon Court of Appeals by stating that the Court of Appeals "did not err in rejecting plaintiffs' arguments respecting the Public Records Law * * *." p. 429. However, the Oregon Supreme Court reversed the appellate

court's holding that the First Amendment to the United States Constitution required defendants to give plaintiffs full access to jury pool records, including source lists, master lists, and jury term lists.

***Klamath County School Dist. v. Teamey*, 207 Or App 250, 140 P3d 1152 (2006), *review denied* 342 Or 46 (2006).**

The Klamath County School District filed suit in response to an order from the Klamath County District Attorney requiring disclosure of the reports of an investigation into allegations of mismanagement and misconduct by district employees. The circuit court reversed the order on grounds that the reports were exempt from disclosure under ORS 192.502(9) because they represented confidential attorney-client communications. The requesters appealed to the Court of Appeals, which affirmed the trial court.

On receiving the original allegations of wrongdoing, the school district had referred them to its attorney and requested advice about how to respond to them. The attorney informed the district that investigation of the allegations would be necessary before he could provide legal advice. The school board authorized the attorney to engage the services of an auditor and investigator to conduct the investigation. The investigators prepared reports of their factual findings, which the attorney forwarded to the school board. The attorney then met with the board to provide advice based on the reports. The reports were not made public, but the school district issued a press release stating that the allegation were not substantiated and that there was clear evidence of no wrongdoing.

In reaching its decision, the Court of Appeals confirmed that ORS 192.502(9), which exempts from disclosure "records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law," incorporates the attorney-client privilege established by OEC 503 (ORS 40.225). The court concluded that the record did not support the defendant's contention that the attorney was hired primarily to investigate rather than to render legal service.

Partly in response to this decision, the 2007 legislature amended ORS 192.502(9) to narrow the availability of attorney-client privilege as an exemption to disclosure of factual information developed in response to allegations of public body wrongdoing. Or Laws 2007, ch 513.

PUBLIC RECORDS LAW APPENDIX D

Index to Oregon Attorney General's Formal Opinions, Informal Opinions and Public Records Orders

Formal Attorney General Opinions have a volume and page number; Informal Opinions (Letters of Advice) have a number lower than 7000. Public Record Orders are designated PRO. Copies are available from the Department of Justice at reproduction costs. Formal opinions and selected informal opinions are summarized in Appendix E; selected PROs are summarized in Appendix F.

Confidential Submissions		
Accreditation, Portland State	PRO	04/28/88
Addresses & Telephone Numbers		
Lottery Prize Winners	5860	09/23/85
State Employees	5524	07/01/83
Attendance Records, "Sign-Up" Sheets	PRO	06/12/85
Complaint Filed with Licensing Agency	PRO	11/08/04
Driver License Records on Retesting	PRO	04/12/90
Employment Applicants/Candidates		
Chancellor of Higher Education	PRO	08/12/88
References & Background Checks	PRO	07/17/97
.....	PRO	01/15/97
University President	6248	10/13/88
Financial Information About Bidder for Purchase of State Property	PRO	03/04/04
Good Faith Obligation by Agency	PRO	11/08/04
Investigatory Records, ODOT	PRO	11/17/88
Lightening Strike Map	PRO	09/04/98
Loan Info., Economic Development	PRO	08/21/86
Negotiation Notes, Mahonia Hall	PRO	07/01/91
Representation Elections, Checklists	6087	02/26/87
Requests for Proposals (RFPs)	PRO	04/30/81
Settlement Offer	PRO	04/05/02
Stock Market Appraisals, OIC	v42p392	06/09/82
Survey Responses		
Public School Students	PRO	12/11/92
Workers' Compensation	PRO	07/14/89
.....	PRO	09/12/88
Tribal Compact Compliance Info	PRO	03/03/97
Corrections & Parole Board		
Agreement with Denton, Texas	PRO	01/26/96
Medical Tests	PRO	12/16/87
Security & Disciplinary Records	PRO	01/26/93

Mortgage Holders, DVA	PRO	09/01/82
Public Employees	5524	07/01/83
.....	PRO	05/31/90
Payroll Records	6182	11/30/87
.....	PRO	03/27/92
Performance Evaluations	v41p437	04/14/81
.....	PRO	06/26/98
.....	PRO	05/25/94
.....	PRO	07/28/92
Representation Election Records	6087	02/26/87
Retirement Benefit Records	PRO	11/15/02
Security Release Questionnaires	PRO	11/08/88
Survey Responses	PRO	09/12/88
Telephone Numbers	PRO	09/09/96
Telephone Bills, Annotated	PRO	08/31/05
Personal Safety	PRO	11/19/99
Personnel Discipline Actions		
BPSST Instructor	PRO	10/11/96
Corrections Employees	PRO	01/12/90
CSD Employees in Whitehead Case	PRO	04/14/95
Jurisdiction to Discipline	PRO	11/09/00
Motor Vehicles Division Employee	PRO	11/26/90
Reasonable Time to Respond	PRO	04/03/95
State Fire Marshal's Office	PRO	04/29/93
State Police Officers	PRO	07/03/95
.....	PRO	01/27/92
Real Estate Appraisal Information	PRO	12/02/94
Separation of Exempt/Nonexempt Materials **(See this Heading Below)**		
Text & Examination Materials		
Evaluation for Tax Credit Projects	PRO	05/02/97
Interview Questions	PRO	01/12/01
Oral Licensing Examination	PRO	01/24/89
Practical Licensing Examination	PRO	03/17/97
Reviewing Own Examination	4891	02/01/80
State Assessment Tests	PRO	02/28/02
Threatened/Endangered Species Info	PRO	06/22/93

.....	PRO	02/06/95
.....	PRO	05/04/94
.....	PRO	05/19/93
.....	PRO	08/01/91
.....	PRO	07/08/91
Forestry, Department of		
Lightning Strike Map.....	PRO	09/04/98
Marbled Murrelet Survey Forms.....	PRO	06/22/93
Government Ethics Commission		
Financial Statement of State Legislator.....		
.....	PRO	05/15/81
	PRO	02/18/81
Governor		
Authority to Inspect Confidential Records....	v40p96	10/03/79
Higher Education, Oregon State System of		
AACSB Accreditation Letter.....	PRO	04/28/88
Chancellor Nonfinalists, Identity of.....	PRO	08/12/88
Complaint by NCAA Against University.....	PRO	11/12/81
Contract Between OHSU & Blue Cross.....	PRO	12/30/87
Expenditures for 1995 Rose Bowl (UO).....	PRO	02/06/95
Payroll Records of Student Body President...	PRO	04/13/87
Price Lists of Bidders on OHSU RFP.....	PRO	12/07/89
PSU Foundation Records.....	PRO	04/22/88
PSU Security Log.....	PRO	01/20/89
Purchase Orders & Requests.....	PRO	08/13/87
Sign-Up Sheet for OSU Open Forum.....	PRO	06/12/85
Videotape of Rhesus Monkey Behavior.....	PRO	06/19/95

Human Services, Department of
(Formerly Including Divisions of Adult and Family Services, Health, Mental Health, Senior and Disabled Services and Vocational Rehabilitation and State Office of Services to Children and Families)

Adult Foster Home, Complaints	PRO	09/16/82
Advertising Prepared by Private Firm	PRO	08/06/87
Child Abuse Records	v40p96	10/03/79
.....	PRO	06/28/96
Child Support Obligor Addresses	PRO	11/18/88
Children/Juvenile Case Recorders & Court Records	0312	12/22/71
.....	PRO	06/28/96
.....	PRO	08/17/87
Death Records Database	PRO	04/07/95
Deceased Patient Records	3708	09/23/76
.....	PRO	02/07/94
Elderly Abuse Reports	PRO	06/27/84
Employees, Discipline Action	PRO	04/14/95
.....	PRO	04/03/95
Employees, Names/Addresses	PRO	05/31/90
Employees, Names in Whitehead Case	PRO	04/14/95
Medical Info, Vocational Rehabilitation	6124	07/30/87
Patient Abuse Records, Nursing Home	v40p155	12/05/79
Insurance Division		
Advisory Group Minutes & Materials	PRO	07/01/91
Financial Records Insurer in Receivership.	PRO	05/19/82
Trade secrets	PRO	08/08/07
Job Training Partnership Act Records	5626	02/07/84
Jurors, Names & Addresses	PRO	04/02/91
Jury Lists	v45p185	03/16/87
.....	PRO	11/08/88

State Police		
Disciplinary Action Documents	PRO	07/03/95
.....	PRO	01/27/92
Identity of Informant	PRO	04/04/86
Public Safety Plans	PRO	01/27/07
Report on Casino Compliance	PRO	03/03/97
Undercover Law Enforcement Officers	PRO	11/13/01
Taxation		
Homeowner Property Tax Relief Application	5300	02/18/82
Reports & Returns	v41p455	04/28/81
Transportation, Department of		
Accident Investigation Report	0905	11/20/70
Appraisal of Property	PRO	12/02/94
Investigation of Harassment Complaint	PRO	11/17/88
Legal Research and Analysis	PRO	02/23/06
Twenty-Five Year Old Records		
(See Old Records)		
Veterans' Affairs, Department of		
Names/Addresses of Mortgage Holders	PRO	09/01/82
Waiver of Exemption by Disclosure	4068	03/29/88
.....	6217	08/25/77
.....	PRO	09/28/87
Waiver of Fees		
(See Fees for Records Requested, Waiver)		
Workers' Compensation Division		
Audit Records	PRO	06/25/82
Pending Cases	PRO	07/09/98
Supervisor's Appraisal of ALJ	PRO	06/26/98
Survey Responses	PRO	09/12/88

PUBLIC RECORDS LAW APPENDIX E
Summaries of Oregon Attorney General's Formal Opinions and Selected Informal Opinions Concerning Public Records

NOTE: In 1987, the legislature reorganized and renumbered the Public Records Law exemptions. Or Laws 1987, ch 764. Since then, several provisions of ORS 192.501 and 192.502 were also renumbered. Earlier Attorney General opinions refer to the ORS cites in effect at the time the opinion was issued.

37 Op Atty Gen 98, August 30, 1974

Unrecorded copies of deeds, contracts, etc., and other instruments evidencing an interest in land, filed with county tax assessors under ORS 311.280(1) for purposes of segregating and assessing taxes on part of land previously assessed as one parcel, are subject to public inspection.

37 Op Atty Gen 126, September 4, 1974

Discussion of criminal investigatory information exempt from disclosure under ORS 192.500(1)(c), and in particular of "reports of crimes and records of arrest" which are *not* exempt from disclosure. The police agency has an obligation to weigh the public interest in disclosure. "[E]ach inquiry must be judged on the individual facts, considering the nature of the crime, the interest of the public in the efficient operation of the agency and the interest of the inquiror [*sic*]."

NOTE: ORS 192.500(1)(c) was amended in 1981 to amplify the definition of "reports of crime and records of arrest."

38 Op Atty Gen 467, December 29, 1976

(Superseded by action of the legislature in exempting unfair labor practice investigatory material from disclosure. ORS 192.500(1)(i).)

Letter of Advice (OP-3928), June 7, 1977

Records maintained by the University of Oregon Health Sciences Center are public records. Although information of a personal nature is exempt from disclosure if public disclosure would constitute an

unreasonable invasion of privacy, ORS 192.500(2)(b), "[w]e cannot conceive of a circumstance under which an individual's request to review his or her medical file would constitute an invasion of that individual's privacy."

38 Op Atty Gen 945, June 8, 1977

Relates to handling of a name change request, not supported by substantiating court order or other document, in records of state university.

38 Op Atty Gen 1318, October 13, 1977

Election officer may not refuse inspection of poll book solely because inspection may disclose how a particular elector voted.

38 Op Atty Gen 1761, March 7, 1978

Background materials concerning agenda matters given to governing body members in advance of a public hearing are public records, subject to disclosure except to the extent that portions may be exempt under various provisions of ORS 192.500. A public body may voluntarily release such exempt portions of the materials to the press upon a stipulation that they will not be disclosed before the meeting. No such stipulation may be required for any nonexempt material. The only remedy for press violation of a stipulation would be refusal to conditionally release such exempt material in the future.

39 Op Atty Gen 61, July 20, 1978

Motor Vehicles Division is constitutionally required to charge other government agencies and private individuals for record information, since its expense otherwise would be an unlawful diversion of the constitutionally dedicated Highway Fund. It may charge for its expenses in conducting a search even if it does not find the requested information.

39 Op Atty Gen 480, January 12, 1979

A written personnel evaluation of a community college president is exempt from public inspection under ORS 341.290(19)(b), except with the consent of the college president involved. An executive session of the board may be held to consider such evaluation under ORS 192.660(2)(b), "to consider records that are exempt by law from public inspection." (ORS 192.660(2)(b) was amended by Oregon Laws 1979,

chapter 644, section 5, and recodified as ORS 192.660(1)(f). ORS 341.290(19) was amended by Oregon Laws 1983, chapter 182, section 1, and recodified as ORS 341.290(17).)

39 Op Atty Gen 721, May 29, 1979

A county may *not* refuse to allow a person to use the person's own equipment to copy maps which are public records, and may not decline to make available a duplicate copy of a magnetic tape containing public records, subject to reasonable rules and regulations for protection of the records and to prevent interference with county business. A home-rule county may not charge a fee exceeding the actual cost of making a record available.

40 Op Atty Gen 96, October 3, 1979

The Governor may inspect confidential child abuse records, to the extent required to determine that laws relating to child abuse are faithfully carried out. The Attorney General may inspect such records, in conjunction with defense of a suit against CSD arising out of a child abuse case, to the extent required by the legal action.

40 Op Atty Gen 155, December 5, 1979

Discussion of complex confidentiality requirements of Oregon Laws 1979, chapter 770, now ORS 441.630 to 441.685, relating to nursing home patient abuse.

41 Op Atty Gen 435, April 13, 1981

Library circulation records showing use of library materials by named persons are personal, and disclosure ordinarily would be an unreasonable invasion of privacy. The protection afforded by ORS 192.500(2)(c) for personal information is not limited to information in personal and medical files.

However, disclosure of names and addresses of library patrons probably would not be an unreasonable invasion of privacy. (NOTE: Codified by 1981 enactment of ORS 192.500(1)(j) and amendment of 192.500(2)(c).)

41 Op Atty Gen 437, April 14, 1981

Routine job performance evaluation material concerning a local school district superintendent, placed in his personal file, and not relating to his health, family status, personal finances or similar

subjects, is *not* exempt from disclosure under the "personal information" exemption. *Information relating to manner of performance of public duties is not personal.* Placing it in a personal file does not make it personal.

(Answer to the second question, that the file could not be considered in executive session, was superseded by enactment of ORS 192.660(l)(i). *Enactment of that provision did not supersede our answer above to the first question.*)

41 Op Atty Gen 455, April 28, 1981

The Department of Revenue may not divulge the names or other particulars of taxpayers who have paid the 100 percent fraud penalty in connection with income tax returns, except to the Attorney General or a district attorney to enable them to advise and represent the department. ORS 314.835.

42 Op Atty Gen 17, July 13, 1981

In view of *State ex rel Oregonian v. Deiz*, 289 Or 277, 613 P2d 23 (1980), holding that provisions of ORS 419.498(1) requiring juvenile court proceedings to be secret were unconstitutional, other provisions of the statute could not be construed to prohibit police disclosure of a juvenile's name at the time of arrest, and of the grounds for arrest. Police agencies probably would not incur civil liability for release of such information, and news agencies would not incur civil liability for release of such information if lawfully obtained.

42 Op Atty Gen 382, May 26, 1982

The Oregon State Board of Nursing must disclose the names, business addresses and home addresses of its licensees when requested to do so. It may not charge more than its actual costs in making the information available.

42 Op Atty Gen 392, June 9, 1982

The Oregon Investment Council may employ executive sessions to consider records exempt by law from public inspection. Stock and stock market appraisals submitted in confidence by its money managers, written evaluation of its money managers, and technical reports prepared by consultants and money managers may be kept confidential and discussed in executive session if the requirements of ORS 192.500(2)(c) can be met.

Letter of Advice (OP-6087), February 26, 1987

Checklists showing which employees have voted in representation elections conducted by the Employment Relations Board are public records and subject to disclosure. Information about an employee's mere act of voting is not exempt from disclosure as an unreasonable invasion of privacy, under ORS 192.500(2)(b), nor does it meet the tests for exemption as information submitted in confidence under ORS 192.500(2)(c).

45 Op Atty Gen 185, March 16, 1987

ORS 10.215(1) provides a valid exception to the Public Records Law for jury lists. Therefore, jury lists containing names and addresses of potential jurors are exempt from disclosure.

Letter of Advice (OP-6126), June 1, 1987

When a public body uses a computer program to generate appraisal information on real property, the records generated are public records. The Public Records Law requires public bodies to make available nonexempt information and records, but does not require a public body to provide information that does not exist in the public body's records or database. The appraisal information on a particular property does not exist until the program is applied to generate that appraisal, and the Public Records Law does not require the public body to create that information.

Letter of Advice (OP-6049), June 26, 1987

ORS 192.420 gives every "person" the right to inspect nonexempt public records. The definition of "person" in the Public Records Law does not include a "public body," which is a separately defined term. Therefore, the Department of Revenue may not use the remedies created by the Public Records Law to obtain public records from a local government. (The department may always ask the local government for the records, and the local government may supply the information if it chooses.)

Letter of Advice (OP-6217), March 29, 1988

Exemption from disclosure for faculty research in ORS 192.501(15) is intended to protect against "piracy" of research ideas and data collected by faculty members, as well as to protect against the risks associated with the release of incomplete and inaccurate data

pending its verification and correction. Release of raw data or preliminary reports of research conducted by Oregon State University to persons cooperating in the research project does not "waive" the exemption when that partial disclosure furthers the purpose underlying the exemption of permitting the accuracy of the data to be verified.

46 Op Atty Gen 97, July 6, 1988

Records of the Oregon Trade and Marketing Center, Inc. (OTMC) that are in the custody of the Economic Development Department are "public records" under ORS 192.410(4) and would be subject to the Public Records Law.

Note that this opinion also concluded that OTMC was not a "public body" subject to the Public Records Law. We believe that this portion of the opinion is no longer correct in light of *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994).

Letter of Advice (OP-6248), October 13, 1988

Identities of candidates for university president need not be disclosed by search committee. Although a name itself is generally not exempt from disclosure under the personal privacy exemption, ORS 192.502(2), a person's name may be exempt in certain contests, due to a person's desire for confidentiality to avoid stigmatizing or other undesired effect. Because of the potential professional threat to candidates that could arise from release of their names, we conclude that revealing a person's status as a candidate for president would constitute an unreasonable invasion of privacy. Release of the names would be contrary to the public interest since the potential for disclosure of such information may cause many or most qualified candidates to refuse to apply, making it more difficult for the state to recruit talented individuals to fill important offices. The identities may also be exempt from disclosure under ORS 192.502(3) as information submitted in confidence if the potential applicants requested that their identities be kept confidential.

46 Op Atty Gen 155, March 17, 1989

The Oregon Medical Insurance Pool is not a "state agency" or a "public body" subject to the Public Records Law.

49 Op Atty Gen 210, January 26, 2000

If the Treasurer could provide a paper copy of a record maintained by the Treasury in an electronic form by simply pressing a button on a computer, the Treasurer would be obligated to do so when responding to a request for a paper copy made under the Public Records Law.

Letter of Advice (OP-2000-1), July 11, 2000

Public records that refer to a set-aside conviction, but that are not themselves sealed under ORS 137.225(3), are not exempt from disclosure under ORS 192.496(2) or 192.502(9) merely because they refer to the set-aside conviction.

PUBLIC RECORDS LAW APPENDIX F

Summaries of Selected Public Records Orders Issued by the Oregon Attorney General

NOTE: In 1987, the legislature reorganized and renumbered the Public Records Law exemptions. Or Laws 1987, ch 764. Since then, several provisions of ORS 192.501 and 192.502 were also renumbered. The public record orders refer to the ORS cites in effect at the time the order was issued.

February 18, 1981, Leslie Zaitz. Petition for an order requiring Oregon Government Ethics Commission[1] to make available a credit report, an individual financial statement and the credit check worksheet of State Senator Richard Groener. Petition denied because information was personal and disclosure would be an unreasonable invasion of privacy. Petitioner failed to demonstrate an "overriding public interest to support disclosure."

March 6, 1981, Don Bishoff. Petition for an order to the Employment Relations Board requiring it to disclose the *number* of signatures on certain representation petitions. The petition was granted on grounds ORS 192.500(1)(g) exempts only the *names* and *signatures* of petitioners. The agency is not required to compile data, but the information sought had already been compiled. An asserted federal agency practice of nondisclosure is not a prohibition justifying nondisclosure under ORS 192.500(1)(g).

April 30, 1981, Julie Lou Tripp. Petition for order directing Adult and Family Services Division to release information on unsuccessful bidders for the state contract to direct mail food stamps. Petitioner sought names of unsuccessful bidders and amounts bid. Petition granted because bidders' names and amounts bid were not "trade secrets" pursuant to the exemption in ORS 192.500(1)(b). The information was not confidential under federal regulations either.

[1] Oregon Laws 2007, chapter 865, subsection 40b(1) amends ORS 244.250 to change the name of the "Oregon Government Standards and Practices Commission" to the "Oregon Government Ethics Commission."

Finally, requested information could not "reasonably be considered confidential" under ORS 192.500(2)(c).

May 15, 1981, Leslie Zaitz. Petition for an order requiring the State Ethics Commission to release State Senator Richard Groener's financial statement and the transcript of the commission's interview with Groener concerning the statement was granted. The records were perhaps personal, but available for disclosure primarily because Groener had invited interested parties to examine the records during a speech on the floor of the Senate. Thus, requester had shown, by clear and convincing evidence, that no unreasonable invasion of privacy would occur.

June 25, 1981, Lee Wendelbo. Petition for an order requiring the Water Resources Department to disclose an interoffice memo containing recommendations as to a water right transfer. Disclosure denied under ORS 192.500(2)(a), on grounds that the memo was preliminary and incomplete, in process of internal review and consideration before the employee's final recommendation—"'He needs the opportunity to even change his opinion as well as expand it without being bound to the first draft memo.'"

August 13, 1981, Bruce Westfall. Petition for an order requiring the Teacher Standards and Practices Commission to make available for inspection the report on an investigation of a false transcript allegedly found in a school administrator's file. Denied, on grounds that the commission's preliminary investigation and report had not been completed. The particular record named in the petition did not yet exist.

September 16, 1981, Bruce Westfall. Renewal of request for completed Teacher Standards and Practices Commission investigation report. Order granted disclosure despite commission's assertion that report was confidential under ORS 192.500(1)(c), personal information such that disclosure would be an unreasonable invasion of privacy.

October 8, 1981, Stephen Johnson. Petition for an order requiring Employment Division to produce Lumber and Wood Products Layoff-Closure Report(s). The reports were based in part on information secured from employers under ORS chapter 657 and in part from newspaper and other periodicals. ORS 657.665 (listed in ORS

192.500(2)(h)) prohibits disclosure of information received from employers under ORS chapter 657. The petition was denied as to such information in the reports and was granted as to the information derived from other sources. (NOTE: ORS 657.665(3) can be read to permit disclosure of information that is not identifiable as to individual employers or employees. The balance of the statute flatly prohibits disclosure; an ambiguity is created by the more permissive language of subsection (3).)

November 12, 1981, Blaine Newnham. Order granted inspection of NCAA complaint against the University of Oregon, with some deletions. The conditional exemption for interagency advisory communications was not applicable, because the NCAA is not a public body. The exemption for information submitted in confidence was not applicable, despite NCAA demand for confidentiality and university agreement, because the information could not reasonably be considered confidential and the public interest required disclosure of information relating to staff misconduct resulting in substantial adverse consequences to university athletic program. No adverse consequences to continuing investigation were likely. Names and other identification of students involved were deleted as required by federal law. University president had option under ORS 351.065 to delete names of staff members. Names of other persons involved, without official responsibilities, were deleted to protect their privacy except in a case in which wide publicity naming the person had already occurred.

November 19, 1981, Raleigh Lund. Order granted to allow inspection of copyrighted computer program belonging to Employment Division. The program is not exempt from disclosure, but the use after disclosure is limited by federal copyright laws.

March 22, 1982, John Reid. Petition for an order to make available transcript of a parole hearing. Hearing was taped, not transcribed. Obligation to disclose may be met by allowing petitioner to listen to tape, but there is no obligation to transcribe it. Parole Board may if it wishes to furnish a copy of transcript of tape at petitioner's expense.

May 10, 1982, Henry Kane. Petition for an order permitting inspection of "PMH financial records," these being records of a private

insurance company in receivership, with the Insurance Commissioner named as receiver. The order stated:

> Before the Attorney General makes such a determination, he must be fully advised of what records are being sought.*** Even if we are to determine that such records are public records, there very well may be exemptions which apply. Therefore we must be fully advised of the particular financial records * * * which you seek.

May 19, 1982, Henry Kane. Same as May 10, 1982, in more detail. The order stated:

> We express no opinion as to whether these records are public records, other than to note that appointing the Commissioner as receiver of an insolvent insurer may not convert the insurer into a public agency nor convert the insurer's private records into public records. * * * *We conclude that the Attorney General lacks jurisdiction to consider the petition.* * * * The judge appointing the Insurance Commissioner as a receiver is, of course, an elected official, and the receiver acts subject to the direction of the court. Thus, the receiver is an arm of the appointing court and owes a duty only to the court. Simply put, we lack jurisdiction to require the court or any of its agents to release documents.

(Emphasis added.)

June 25, 1982, Leslie Zaitz. Petition for an order to Workers' Compensation Department (WCD) allowing inspection of all WCD documents concerning audit of C. Dennis Williams' companies.

Petition granted in part and denied in part. Denied under ORS 192.500(1)(a) (litigation exemption) with respect to audit material specifically collected, compiled and created for purpose of determining liability of Williams' companies to WCD, in order to enforce payment by litigation or settlement induced by threat of litigation. Exemption not lost although much material was collected from Williams, and other material was discussed with him. Discussion of factors considered in determining that public interest did not weigh in favor of disclosure.

Denied under ORS 192.500(2)(a), preliminary internal memoranda, as to a few memos in file which were unduly frank expressions of opinion. Granted despite ORS 192.500(2)(a) as to many other internal memoranda, in the absence of any particular reasons for nondisclosure, for materials already publicly disclosed, including a 1981 audit, and for preliminary drafts of the 1981 audit.

July 6, 1982, Leslie Zaitz. Petition for an order to Department of Economic Development allowing inspection of an investigation report regarding Warren H. Merrill furnished by the Attorney General. Denied under ORS 192.500(2)(h) and ORS 40.225, the attorney-client privilege. We stated:

> If the purpose is not waived [by the client], the exemption is absolute; neither the preliminary language of ORS 192.500(2) nor paragraph (h) itself contains any language providing for a balancing test. If the lawyer-client privilege is applicable, the Attorney General cannot consider whether or not the information should be disclosed in the public interest, but must deny your petition.

The report was our work product and our legal advice to our client, and the privilege was applicable. Disclosure by the commission of a previous investigation report involving the same person but other subject matter did not waive the privilege as to this report.

July 19, 1982, John Baucom. Petition for an order allowing inspection of Corrections Division files concerning the petitioner's incarceration and parole. The division would not allow inspection, but offered to furnish copies at 50 cents per page. We concluded that the right to inspection is satisfied by the furnishing of copies for which the division has a right to charge. The division would clearly have the right to charge for the supervisory time necessary to allow inspection of the original records and to pull the exempt materials from the file. The division has determined that this would be as expensive and less convenient than simply furnishing copies, and we cannot say that this determination (or the 50 cents per page charge) is unreasonable. Petition denied.

July 23, 1982, Stephen Schell. Petition for an order allowing inspection of Department of Fish and Wildlife records relating to

application for a permit to spray carbaryl on Tillamook Bay oyster beds. Granted in part and denied in part.

Denied as to a State Police report under ORS 192.500(1)(c) (criminal investigatory information). Denied under ORS 192.500(2)(a) (preliminary intra-agency communications) as to a draft report before completion of the final report to the Fish and Wildlife Commission. Denied as to parts of other documents under ORS 192.500(2)(a), on grounds that disclosure would inhibit free and frank communication. Granted as to the major parts of those memos and all of several other memos, all preliminary intra-agency communications, after weighing the public interest in disclosure against the public interest in encouraging free and frank communications. It was concluded that disclosure of this material would not particularly inhibit such communications in the future.

August 30, 1982, John Palaia. Petition for an order requiring the Board of Parole to furnish a transcript of parole hearings. Denied, on grounds the board did not and cannot be required to prepare a transcript. The board will be required (upon request and payment of cost) to furnish a copy of its tape. (A penitentiary inmate cannot himself listen to the tape or be furnished a copy, under Corrections Division rules, but can presumably make arrangements to have a third party receive the tape and transcribe it.)

September 1, 1982, Mark W. Nelson. Petition for an order requiring the Department of Veterans' Affairs to make available: "A listing by name and address of all mortgage holders within the State of Oregon, in label form." We concluded that:

> Names and addresses are personal information, but disclosure cannot be said to be an unreasonable invasion of privacy. The same information is freely available in any telephone book or city directory. * * *
>
> * * * the department cannot be required to furnish the list in label form, but of course it may do so if that is convenient.

September 16, 1982, Lee Sherman-Stadius. Petition for an order requiring the Senior Services Division to disclose number and nature of complaints against foster homes and home care facilities for the elderly in Washington County, addresses of the facilities, names and

addresses of their owners, and actions taken in response to the complaints.

ORS 410.610 to 410.700 provide ambiguously for confidentiality of such complaints, but it was concluded that under ORS 410.690(1) the only information meant to be confidential is the identity of complainants and of the elderly persons involved.

ORS 410.150 does not (as it seems) prohibit disclosure of all Senior Services Division records, but protects

> applicants for and recipients of services. It governs cases in which identifiable persons apply for and receive direct services, and not cases in which the division is carrying out its general regulatory, supervisory, protective and administrative obligations.

January 12, 1984, John Snell. Petition for an order requiring the Oregon Racing Commission to disclose the income tax return of one applicant for a license and a one-page financial statement submitted by another applicant. Petition granted. The overriding public interest in disclosure of the relevant financial records of applicants for racing licenses outweighs the substantial invasion of privacy.

June 27, 1984, Douglas Harrison. Petition for an order requiring the Senior Services Division to disclose abuse report of a particular named victim. Generally, under ORS 410.610 to 410.700, abuse reports are subject to disclosure after deletion of the names of informants and of persons allegedly abused, as well as deletion of any additional information which would be exempt under ORS 192.500. In this case, however, since the report was requested by name, disclosure would reveal identifiable personal information. If such disclosure would result in an unreasonable invasion of privacy, the agency could decline to disclose it. Here, the particular report contained medical and other information of such a nature that public disclosure would be an unreasonable invasion of privacy. But, since the petition was filed on behalf of the person responsible for the elderly person's care, release of the requested information, in this situation, would not constitute an unreasonable invasion of privacy. Therefore, disclosure was ordered.

January 2, 1985, John Snell. Petition for an order requiring the Oregon Racing Commission to disclose personal financial statements submitted with an application for a racing license. Under ORS

192.500(2)(b), such financial information is "of a personal nature" and public disclosure of an individual's detailed financial statement is per se an unreasonable invasion of privacy. However, the public interest in knowing whether an applicant's net worth is adequate to successfully operate the track and in knowing an applicant's financial interests related to racing activities is strong enough to compel disclosure of that information.

May 16, 1985, Oregon State Board of Higher Education. Petition for an order requiring the Psychiatric Security Review Board (PSRB) to disclose names and crime convictions of persons within the jurisdiction of the PSRB and enrolled in state institutions of higher learning. The following information constituted public records: The fact that a person has been found not guilty by reason of mental disease or defect and placed under the jurisdiction of the PSRB, the fact that a person is within the custody of the PSRB, and the nature of the crime committed. Enrollment in a particular school arguably may be personal, but in any case, disclosure to the institution involved is not an invasion of privacy. We ordered the PSRB to furnish the information but stated that the PSRB is not required to allow the Board of Higher Education unrestricted access to the files.

June 12, 1985, Les Ruark. Petition for an order to the OSU Extension Service to disclose a "sign-up sheet" used to record attendance at a public forum on toxic waste disposal. We found that the requested information is clearly a public record and does not meet the necessary tests for exemption from disclosure. In particular, ORS 192.500(2)(c) did not apply. The information was voluntarily submitted, but is not of a type which "should reasonably be considered confidential," nor has the agency "obliged itself in good faith not to disclose the information."

April 4, 1986, Michael J. Martinis. Petition for an order requiring the Oregon State Police to "divulge the identity of the informant" who provided information to the State Police concerning a possible violation of law. Denied because ORS 40.275(2), incorporated into the Public Records Law in ORS 192.500(2)(h), expressly creates a privilege to refuse to disclose the identity of an informant in a criminal investigation, and the State Police invoked the privilege. The name of the informant was also confidential under ORS 192.500(1)(c)

(criminal law investigation information), and ORS 192.500(2)(c) (information submitted in confidence to a public body.)

August 21, 1986, David R. Maier. Petition for an order requiring the Oregon Economic Development Department to disclose records relating to a specific Oregon Business Development Fund loan. Petition was denied in part and allowed in part. The requested documents contained financial information about a particular company and an individual personal financial statement of the president of the company. The individual financial statements were exempt from disclosure under the personal privacy exemption, ORS 192.500(2)(b). The other information was exempt in part, based on a document-by-document review, under the exemption for information submitted to a public body in confidence, ORS 192.500(2)(c), and as a trade secret, ORS 192.500(1)(b). Pursuant to ORS 192.500(3), the exempt material and nonexempt material in a document must be separated, and the nonexempt material disclosed. The legislature has subsequently codified an exemption for such records in ORS 192.502(15).

April 13, 1987, Chris Bristol. Petition for an order requiring the State Board of Higher Education and Portland State University to disclose university payroll records, including time sheets, relating to a particular student's employment as student body president. The petition was denied under ORS 192.496(4), exempting from disclosure "[s]tudent records required by state or federal law to be exempt from disclosure," and ORS 192.500(2)(g), exempting public records "the disclosure of which is prohibited by federal law or regulations." Under the Buckley Amendment to the federal Freedom of Information Act, 20 USC § 1232g, and federal regulations, the availability of federal funds to the university would be jeopardized if the university disclosed employment records relating to a student's employment in a position that can be filled only by a student. This provision sufficiently stated a prohibition on disclosure for purposes of the Public Records Law.

August 6, 1987, Lars Larson. Petition for an order requiring the Department of Human Resources (DHR) to disclose advertising materials and public opinion polls prepared by private advertising firms for use by DHR in the state's AIDS education campaign. The petition was denied because at the time of the request, the materials were compiled and owned by the private agencies, and state officials

had not decided what materials would be used or recommended for use in the campaign. Therefore, at the time of the request, the materials were not public records. After the request, the state officers decided to use certain of the materials in the campaign. These particular materials then became public records subject to disclosure.

August 13, 1987, Bennett Hall and Chris Bristol. Petition for an order to require officials at Portland State University to make available purchase orders and departmental purchase requests relating to the purchase of furniture, appliances and other housewares for the residence of the University President. Petition denied as premature because university officials were in process of responding to initial request. Attorney General is not authorized to act on a public records petition until a state agency has denied a request for disclosure.

August 17, 1987, Leslie Zaitz. Petition for an order requiring the Children's Services Division (CSD) to disclose MacLaren School records and CSD records pertaining to five children. Denied in significant part, but allowed with respect to certain types of materials. The only information disclosed was that related to the administration of justice in the juvenile court system under ORS 419.567(5). *See also State ex rel Oregonian v. Deiz*, 289 Or 277, 613 P2d 23 (1980). The remainder of the information was exempt from disclosure under the Oregon Juvenile Code, ORS 419.567(1) and (2), relating to reports and other material on the history and prognosis of a child within juvenile court jurisdiction; the Public Records Law, ORS 192.496(4) and 192.500(2)(h), relating to school records and personal privacy; and the Education Law, relating to school records. The Juvenile Code exemption in ORS 419.567(2) prohibited direct *and indirect* disclosure of the exempted information. This included a prohibition against disclosing not only reports, but also the information contained in the reports and other information not contained in reports, relating to the child's history or prognosis.

August 17, 1987, Chris Mullman. Petition for an order requiring the Physical Therapy Licensing Board to disclose file material on a particular clinic, including investigatory information. Denied in part, but allowed with regard to some materials. The board maintained two files on the clinic, a licensing file and an investigation file. The licensing file was available for public inspection. The investigation file

contained complaints and supporting documents, witness interview information and communications between the agency and its legal counsel in the Attorney General's office. The complaints were exempt from disclosure under ORS 688.230, even though that exemption was not expressly incorporated into the Public Records Law. The witness statements were exempt from disclosure under ORS 192.500(2)(c) as information submitted to a public body in confidence; and under ORS 192.500(2)(i), under which confidential records compiled by one public agency remain confidential when received by another public agency if considerations giving rise to the confidential nature of the records remain applicable. The communications between the agency and its legal counsel were exempt from disclosure under the attorney-client privilege, ORS 40.225, incorporated into the Public Records Law in ORS 192.500(2)(h). Portions of the investigatory files were not exempt, and pursuant to ORS 192.500(3) were separated and ordered disclosed.

September 28, 1987, Bill Hall, Dean Brickey and Mike Thorpe. Petition for an order requiring the Lincoln County Juvenile Court to disclose legal pleadings in a particular case. Denied because the records are exempt juvenile court records under ORS 419.567, an exemption incorporated into the Public Records Law under ORS 192.500(1)(h). Even though some or all of the requested documents already had been shown to one requester, there was no waiver of confidentiality because ORS 419.567(1) states that "the record of the case *shall* be withheld from public inspection." (Emphasis added.)

December 16, 1987, Steven Boyd. Petition for an order to require the Department of Corrections (department) to provide petitioner with copies of results of his medical test for AIDS antibodies. Petition denied because the department had complied with the Public Records Law by affording petitioner an opportunity to inspect his lab test and because physical possession of the record within the penitentiary would endanger prison security. Neither the Public Records Law nor ORS 179.505 confers upon an inmate an unfettered right to possess confidential medical records within a penal institution.

December 30, 1987, Patrick O'Neill. Petition for an order to require Oregon Health Sciences University (OHSU) to disclose a portion of a contract between OHSU and Blue Cross and Blue Shield

of Oregon (BCBSO). Petition denied because the payment schedule in the OHSU/BCBSO preferred provider contract is within the scope of Oregon statutory definitions of trade secrets, and therefore also is within the trade secret exemption to the Public Records Law.

March 4, 1988, Board of Naturopathic Examiners. Letter of advice reconsidering prior order directing board to disclose license application. We concluded that the board must disclose an applicant's answers to questions whether the applicant has been convicted of a felony or misdemeanor and whether the applicant has been the subject of a complaint to or investigation by any state board that regulates the professional conduct of naturopaths. However, the board may withhold, as personal information, answers to questions pertaining to the applicant's drug or alcohol addiction, treatment for those conditions, psychiatric treatment and treatment for mental illness.

April 22, 1988, Robert Joondeph. Petition for an order compelling Oregon State Hospital to disclose incident or abuse reports or similar reports documenting an investigation of a patient suicide. Petition denied as the records are exempt under ORS 192.502(8), which incorporates two other state laws—ORS 179.505(2), which restricts disclosure of medical history and treatment records of patients at state institutional health care facilities, and ORS 41.675, which makes privileged certain information compiled by a health care facility for internal quality assurance purposes. Petitioner's association with Oregon Advocacy Center, which has special statutory access to certain records, does not equate to a *public* right to access to those records; under the Public Records Law, petitioner stands in the same shoes as any member of the public.

April 22, 1988, Peter Murphy. Petition for inspection of three of Portland State University's (PSU) accounts and the PSU Foundation's annual budgets for 1986-87 and 1987-88. Petition granted (except as to the budget for 1986-87 since none exists). Although the PSU Foundation is not a "public body" under the Public Records Law, its budget was prepared by, used and retained by PSU and was directly related to the activities of two state officials, performing functions in their official capacities. Accordingly, its budget, as well as PSU's accounts, are nonexempt "public records."

April 28, 1988, Paul Koberstein. Petition for an order to require Portland State University (PSU) to disclose a letter from the American Assembly of Collegiate Schools of Business to PSU regarding the accreditation of the PSU School of Business Administration. Petition granted because the letter is a public record and is not included within any exception to the Public Records Law. The letter is a public record since it is retained and used by PSU, a public body. The internal advisory communications, personal privacy and confidential information exemptions do not apply to this letter.

July 22, 1988, Robert Goffredi. Petition for an order directing Health Division to disclose death certificates, medical examiner's reports and autopsies. Petition denied. Right asserted under the Public Records Law is not right to discovery, and the pendency of a criminal prosecution neither adds or subtracts from the records request; a person filing a petition for a public records disclosure order under the Public Records Law stands in the same shoes of other members of the public. Records are exempt under ORS 192.502(8), which incorporates other state laws restricting inspection of medical examiner reports and autopsies, ORS 146.035, and death certificates, ORS 432.120. Those statutes do not include petitioner in the category of persons entitled to inspect or obtain copies of the records at issue.

August 12, 1988, Michael Dean. Petition for an order compelling disclosure of the identity of nonfinalist applicants for the position of Oregon Chancellor of Higher Education from the Oregon State System of Higher Education. Petition denied under the personal privacy and confidential information exemptions (ORS 192.502(2) and (3)).

September 2, 1988, Greg Smith. Petition for an order to require the Board of Nursing to disclose all board records regarding the circumstances of the death of a named patient and all records relating to any board actions regarding a named board licensee. Petition granted in part, denied in part. The information to which access was denied (report of possible violation of statutes regulating the nursing profession; name of the subject of the report; and name of the complainant) is confidential information under ORS 678.126(1) and applies not only to the physical document but to the information itself.

September 12, 1988, Peter O. Hansen. Petition for an order directing the Department of Insurance and Finance (department) to

make available responses provided in a survey of workers' compensation claimants. The survey responses were exempt under ORS 192.502(3) as information submitted in confidence, not otherwise required by law, where such information should reasonably be considered confidential, and the department obliged itself not to disclose information provided in response to the survey except in the form of composite statistics. Disclosure of the requested survey responses would harm the public interest because future respondents would not provide candid responses in subsequent surveys, and the department would not be able to obtain accurate information from which to formulate public policy. The department was not required to identify and provide to petitioner the survey responses belonging to petitioner's clients when the responses did not reference the client's attorney.

October 21, 1988, Charles L. Best. Petition for an order compelling disclosure of records and documents prepared by the Public Utility Commission (PUC) staff for a pending contested case proceeding. We denied the petition as to portions of records containing "frank and uninhibited subject comments" of PUC staff and legal counsel with respect to the utility in the pending case. "Disclosure of the records would deter [PUC] employees from giving frank and uninhibited opinions, evaluations, reports and recommendations to their colleagues, supervisors and the commission. * * * [D]isclosure thus would interfere with the free flow and exchange of information and ideas which the PUC needs for the proper discharge of its regulatory responsibilities." The public interest in encouraging frank communications clearly outweighed the public interest in disclosure. Accordingly, the nonfactual portions of the records were exempt internal advisory communications, ORS 192.502(1). Additionally, some memoranda were confidential communications sent by the PUC staff to its counsel and vice versa, which fell under the attorney-client privilege, ORS 40.225. That privilege is incorporated in the Public Records Law by ORS 192.502(8).

November 8, 1988, F. Douglass Harcleroad. Petition by Lane County District Attorney for an order compelling the State Court Administrator to disclose two types of documents: (1) "page two of the Security Release Questionnaire and Financial Statement" for all Lane County criminal defendants "who execute such a document for the

purpose of reviewing release or requesting a court appointed attorney" and (2) the "jury register" for the Lane County Circuit and District Courts.

We denied the petition for blanket disclosure of the financial statement. The personal financial information in the questionnaire was "information of a personal nature" within the meaning of ORS 192.502(2). To be entitled to disclosure of that information, a requester must clearly and convincingly show that disclosure would not unreasonably invade the privacy of the applicant and that the public interest requires disclosure in the particular instance. The requester sought the information because his office was in a special position to check the accuracy of the financial statement, and thus detect fraud in applications for court-appointed counsel. Because of the particularized inquiry required by ORS 192.502(2), however, blanket disclosure of that information for all defendants was not required. Rather, the requester could satisfy the statute by showing, for instance, that he reasonably suspects that a specific defendant has assets that would make him or her financially ineligible for appointed counsel.

We also noted that the court administrator could voluntarily provide these documents to the district attorney. To the extent the documents are exempt in the court administrator's hands, they would remain exempt while in the district attorney's possession pursuant to ORS 192.502(9), the exemption for transferred records.

We also concluded that the district attorney was entitled to the "jury register," but not to the "term jury list."

November 17, 1988, Max Rae. Petition for an order compelling the Oregon Department of Transportation (ODOT) to disclose notes of all interviews in the investigation file concerning a complaint of sexual harassment and discrimination. We ordered disclosure, concluding that the documents did not fall within the exemption for information submitted in confidence. Specifically, despite the ODOT investigator's assurance of confidentiality at the start of each interview, we could not determine that the employees actually submitted the information in reliance on that assurance. The exemption, therefore, did not apply.

November 18, 1988, Roger F. Dierking. Petition for an order directing the Adult and Family Services Division (AFSD) to disclose

the name and address of obligors in the Oregon Child Support Program. Petition denied. Because redisclosure of obligors' addresses obtained form the Internal Revenue Service (IRS) or the Oregon Department of Revenue (DOR) was prohibited by 26 USC § 6103(p)(4) and ORS 314.835, respectively, this information was exempt from disclosure under ORS 192.502(7) and ORS 192.502(8). Although some of the information may not have been obtained from either the IRS or DOR, the AFSD records do not indicate the source of the information. When nonexempt information cannot be separated from the exempt information, all of the information must be considered exempt.

December 22, 1988, Lars Larson. Petition for an order compelling Multnomah County Circuit Court and its employees to disclose videotapes recording conduct of pretrial proceedings in circuit court. These tapes were made by or on behalf of the Oregon Trial Lawyers' Association pursuant to authorization given by Circuit Court Judge Haas under Canon 3A.(7)(c) of the Code of Judicial Conduct. We concluded that because Judge Haas, an elected official, claimed the right to withhold disclosure of those tapes, ORS 192.480 required the Attorney General to decline to consider the petition. (To the same effect, *see* Public Records Order, February 1, 1989 (Larson).)

December 23, 1988, Aaron N. Eastlund. Petition for an order compelling the Motor Vehicles Division (MVD) to disclose records relating to the function of programs used by MVD on the Oregon Department of Transportation computer. We denied the petition. First, to satisfy the request the agency would have to create a new record by collating and cross-referencing specific pieces of information stored in the computer. The Public Records Law does not require an agency to do so. Second, the information was exempt because disclosure would permit unauthorized access to the computer. *See* ORS 192.501(16). No public interest required disclosure in the particular instance.

January 20, 1989, Greg Needham and Roger Edgington. Petition for an order directing Portland State University (PSU) to disclose records of arrests and reports of crimes occurring on campus and maintained in the PSU daily security log. Petition granted in part, denied in part. State law prohibits a school from releasing information relating to a student, and federal law prohibits a college receiving

federal funds from releasing such information. ORS 192.496(4) exempts from disclosure student records required by state or federal law to be exempt from disclosure. Consequently, PSU's practice of disclosing edited copies of the daily security log only after deleting confidential student information complies with the Public Records Law.

January 24, 1989, Bonnie Wilson and Eleanor J. Parsons. Petition for an order directing the Board of Psychologist Examiners (board) to provide copies of petitioner's answers to an oral examination administered by board. Petition granted. The board allowed petitioner to listen to tape recordings of the examination but refused to provide petitioner with a copy of the portions of the tapes containing her answers. The test questions were conditionally exempt from disclosure under ORS 192.501(4) because the board periodically reuses some of the test questions in later administrations of the test. However, the exemption did not cover petitioner's oral examination answers because the board failed to establish that disclosure of the answers would threaten the integrity of the examination by indirectly revealing the questions.

February 1, 1989, Lars K. Larson. Petition for an order directing the Multnomah County Trial Court Administrator to make available exhibits made a part of the official court record during a bail hearing. The judge claimed the right to withhold disclosure of the requested exhibits to minimize pretrial publicity and to protect the defendants' constitutional right to a fair trial. ORS 192.480 requires the Attorney General to decline to consider a petition to disclose a public record when an elected official claims the right to withhold the record from public disclosure regardless of whether that official has custody of the record.

February 24, 1989, Richard A. Weill. Petition for an order compelling Department of Revenue (DOR) to disclose a copy of a proposed opinion and order in a pending taxpayer appeal. The proposed opinion and order contained a tentative recommendation by the hearing officer on a suggested DOR policy change. We granted the petition. The document satisfied four elements of the internal advisory communications exemption. However, DOR already had disclosed to the requester documents that discuss the proposed order in some detail.

That disclosure undermined the public interest in the confidentiality of the proposed opinion and order, which otherwise might justify routine nondisclosure of proposed orders recommending policy changes. Therefore, the document was not exempt from disclosure.

March 9, 1989, George Smith. Petition to obtain public records "at a reasonable charge." Denied for lack of jurisdiction. When a public body's fees comply with the "actual cost" provisions of ORS 192.440(2), there is no basis for Attorney General to intervene.

March 28, 1989, Dorothy Clark and Anthony M. Chapman. Petition for an order directing Oregon State Hospital (OSH) to disclose diagnostic records, reports of psychiatric treatment and all medical records on petitioner. Petition conditionally granted. ORS 179.505, incorporated into the Public Records Law through ORS 192.502(8), prohibits disclosure of medical and psychiatric records unless the specified conditions for disclosure are met. Thus, OSH must produce a copy of the requested records to the petitioner only after OSH receives a properly signed consent of release form.

March 30, 1989, Thomas C. Howser. Petition for an order compelling the Oregon State Bar (OSB) to disclose documents compiled in the course of OSB's pending disciplinary proceeding concerning David H. Leonard. We granted the petition in part and denied it in part.

We concluded that several documents fell within the internal advisory communications exemption, ORS 192.502(1). These documents contain analysis and recommendations by the Local Professional Responsibility Committee (OPRC), the OSB's Assistant General Counsel and Disciplinary Counsel of the charges against Mr. Leonard. All of those portions satisfied the first three elements of the exemption. The issue was whether "the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure."

We concluded that, in a pending disciplinary proceeding against an attorney,

> the OSB's ability properly to discharge its disciplinary responsibilities would be substantially prejudiced by disclosure of the portions of the requested documents containing analysis of the charges against Mr. Leonard and

> recommendations on the disposition of those charges. The public interest in allowing the LPRC, SPRB, and Disciplinary Counsel to exchange frank comments and recommendations concerning proposed disciplinary action would be significantly undermined if Mr. Leonard could obtain access to these candid analyses, strategies and recommendations during the pendency of the disciplinary proceeding.

We also concluded that the public interest in disclosure was clearly outweighed by the public interest in encouraging frank communication among the various arms of the OSB to effectuate the OSB's accomplishment of its disciplinary responsibilities.

Finally, two of the documents in question were covered by the attorney-client privilege and, therefore, were found exempt from disclosure.

April 3, 1989, Douglas A. Harrison. Petition for an order directing the Motor Vehicles Division to release information on individual involved in automobile accident. Petition denied as to medical information, but granted as to physician reports and driver medical certification forms to extent medical information is deleted. Because disclosure of personal medical records is an unreasonable invasion of privacy, the records are exempt under ORS 192.502(2) unless the public interest requires disclosure, which it does not in this case. The physician-patient privilege under ORS 40.235 does not apply to physician reports and driver certification forms submitted at request of driver pursuant to ORS 807.090 because such reports are intended to be distributed to third parties.

April 7, 1989, Darrell Martin. Petition for an order directing Oregon State University (OSU) officials to disclose OSU School of Education's administrative rules, department procedures and printed job descriptions was denied as premature. An agency's noncompliance with a request that is not sufficiently specific does not constitute a denial to produce public records. An agency may require additional specificity in the request and ask that the requester prepay anticipated costs necessary to fulfill the request.

May 2, 1989, Marvieta Redding and Nickolas Facaros. Petition for an order directing Department of Agriculture (department) to release records on the fungicide Tilt. Petition granted in part and denied in

part. The requested documents contained FDA law enforcement investigation records for which the petition was denied under ORS 192.502(7), which exempts "information the disclosure of which is prohibited by federal law or regulations." 21 CFR § 20.64(d)(1) and 21 CFR § 20.84 prohibit disclosure of FDA law enforcement investigation records contained in department files until the federal case is closed or until the FDA Commissioner authorizes disclosure. Copies of federal district court pleadings are not part of the FDA law enforcement investigation records and must be disclosed.

May 9, 1989, Paul R. Hribernick. Petition for an order compelling the Economic Development Department (EDD) to disclose records related to a proposed Precision Castparts Corporation plant and facility. EDD had not yet refused disclosure, but instead had asked the Attorney General to review the records and advise it whether the records must be disclosed. The agency thereby had acted reasonably and in compliance with the Public Records Law. *See* ORS 192.430 (custodian of public records "shall furnish proper and reasonable opportunities for inspection and examination" of records in its custody). EDD's failure to comply with the deadline that the requester sought to impose did not constitute an actual or constructive denial. Because there was no denial, the petition to the Attorney General was premature and was denied.

July 7, 1989, P. Scott McCleery. Petition for an order directing Oregon State University (OSU) to disclose records prepared under the direction of an OSU instructor and generated from interviews with particular subjects. Petition denied. The interview and data records were prepared as a result of a research project at OSU. Although preliminary results of the project had been released, research was continuing and the instructor planned subsequent publications. The requested records were exempt under ORS 192.501(12) so as to ensure protection of the instructor's research ideas and data until publicly released, copyrighted or patented. The public interest did not require disclosure in this instance.

July 7, 1989, Randall Baker. Petition for an order directing disclosure of records was denied where the requester failed to comply with the agency's administrative rules governing requests for public records. ORS 192.430 provides that the custodian of records may

make reasonable rules and regulations necessary for the protection of records and to prevent interference with the regular discharge of duties of the custodian. Agency rules requiring that requests for public records be in writing and identify specific documents requested were reasonable under ORS 192.430.

July 14, 1989, David A. Rhoten. Petition for an order directing the Department of Insurance and Finance to disclose actual unabridged quotations from employee interviews for the Evaluation Section study. Petition denied. The records were exempt from disclosure under ORS 192.502(3) because the information was voluntarily submitted in confidence, not otherwise required by law, and should reasonably be considered confidential. Disclosure would undermine the integrity of the review process and of management of the personnel who were promised confidentiality. Disclosure could also subject staff members who provided interview responses to possible recriminations, thereby undermining agency morale and the ability of agency employees to work in a cooperative effort. Disclosure of the unabridged responses provided during interviews, even in unattributed form, would not adequately protect the identity of the participants.

December 7, 1989, Steven C. Baldwin. Petition for an order to Oregon Health Sciences University (OHSU) requiring disclosure of fee schedules and price lists provided to OHSU by unsuccessful bidders on OHSU's RFP #17. Petition denied on basis of ORS 192.501(2) (trade secrets exemption) and ORS 646.461(4) (Uniform Trade Secrets Act), which is incorporated into ORS 192.502(8).

The pricing information has commercial value; knowledge of such information would economically benefit competitors; the companies take reasonable efforts to maintain the information's secrecy; and disclosure could put the companies at a competitive disadvantage.

The public interest would be harmed by disclosure. Access to these records would not aid the public in monitoring OHSU's adherence to the RFP process. Disclosure would harm OHSU's ability to attract bidders, thereby increasing costs to the public.

January 12, 1990, Susan G. Bischoff. Petition for an order to Oregon Department of Corrections requiring disclosure of records relating to a complaint of sexual harassment in the workplace.

On November 7, 1989, a notice of tort claim was filed against the state. The filing of notice of tort claim indicates that litigation is reasonably likely to occur. Thus, records compiled or collected and interviews conducted after the date the state received the notice are exempted from public disclosure under ORS 192.501(1)(a) (records pertaining to litigation exemption). The availability of discovery negates any need to use the Public Records Law to gain access to these records.

The personnel discipline action involved is not completed. An agency may postpone action on the public records request until the personnel matter is finally resolved. If there is a disciplinary sanction, the records will be exempt under ORS 192.501(13) (personnel discipline action exemption); if there is no disciplinary sanction, the records will not be exempt.

April 12, 1990, Robin E. Bower and Marcus A. Petterson. Petition for an order to Motor Vehicles Division (MVD) requiring disclosure of records pertaining to the decision by MVD that petitioner retake the driver license examination to determine his ability to operate a motor vehicle. Petition granted.

The information is generally exempt from public disclosure under ORS 192.502(3) as information submitted to a public body in confidence. However, public interest could suffer by nondisclosure in this type of case when the information was submitted to MVD solely with an intent to harass and petitioner was an otherwise competent driver. By disclosure, such vindictive and false reports will be discouraged, the driver is saved the time and expense of retesting, and the agency can better allocate its limited resources to retesting truly unsafe drivers. Because public interest would not suffer by disclosure, ORS 192.502(3) does not exempt these records from public disclosure.

May 31, 1990, John Heilman and J.S. Boles. Petition for an order requiring Adult and Family Services (AFS) to disclose the names and addresses of employees of the Albina Branch of AFS. Granted in part and denied in part.

The release of names of public employees does not constitute an unreasonable invasion of privacy. *See Guard Publishing Co. v. Lane County School District*, 96 Or App 463, 467, 774 P2d 494 (1989),

rev'd on other grounds 310 Or 32, 791 P2d 854 (1990). The names, therefore, must be disclosed.

ORS 192.502(2) exempts the employees' addresses from disclosure as personal information if disclosure would constitute an unreasonable invasion of privacy. Facts show that the party requesting disclosure does so solely for the purpose of harassment, which is plainly an unreasonable invasion of privacy and contrary to public policy. The addresses are, therefore, exempt from disclosure under ORS 192.502(2).

June 8, 1990, Frank A. Madrid. Petition for an order requiring Risk Management Division to disclose report prepared relating to tort claim. Petition denied on basis of ORS 192.501(1) (records pertaining to litigation exemption). On October 18, 1989, petitioner filed a notice of tort claim against the state. The filing of this notice indicates litigation is reasonably likely to occur. The report requested was prepared in response to that notice. Thus, it is a record pertaining to litigation and exempt under ORS 192.501(1). The private interest in the report does not qualify as a public interest weighty enough to override the exemption.

October 2, 1990, Myron B. Katz and Harry Esteve. Petition for an order compelling the Public Utility Commission (PUC) to disclose a copy of the draft report by the PUC and Oregon Department of Energy on the "dollar costs of an early shutdown of the Trojan Nuclear Power Plant." Petition granted. The draft report is plainly a public record, for which the only arguably applicable exemption is ORS 192.502(1), the exemption for internal advisory communications. Under this exemption, a public record is exempt from disclosure if four elements are satisfied. Here, the first three elements are satisfied: the communication is within a public body, it is of an advisory nature preliminary to an agency final action, and it covers other than purely factual materials.

The issue remains as to whether in this particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. In this case, it does not. The final report has already been released to the public. The final report and the draft differ in content, but neither agency has explained how revealing any of these

differences could cause public harm. Also, the report concerns economic effects of a controversial ballot measure, raising public interest in disclosure. Because the public interest in disclosure outweighs the public interest in nondisclosure, the draft is not exempt under ORS 192.502(1).

November 26, 1990, Linda Nealy and Dave Hogan. Petition for an order requiring Motor Vehicles Division (MVD) to disclose records relating to the suspension or termination of a named MVD employee. Petition granted. ORS 192.501(13) exempts records of a personnel discipline action from public disclosure unless the public interest requires disclosure in the particular instance. Here, a public employee was criminally charged with misusing a public office for financial gain and in furtherance of a criminal conspiracy. The public has a strong interest in knowing how MVD handled the matter. Also, the information sought substantially overlaps what has already been made public. Public interest requires disclosure in this particular instance.

April 2, 1991, Jim Adams and Chris Williamson. Petition for an order requiring Josephine County Circuit Court and trial court administrator to disclose names, addresses and telephone numbers of jurors in a particular case. Petition granted. The jurors' names have been spoken in open court, and thus, cannot be considered confidential. ORS 192.502(2) does not exempt the jurors' addresses and telephone numbers from disclosure for two reasons. First, a blanket policy by the court keeping the information confidential is invalid. *Guard Publishing Co. v. Lane County School District*, 310 Or 32, 37, 791 P2d 854 (1990). Second, there are no facts suggesting disclosure would constitute an unreasonable invasion of privacy. In particular instances, the release of this type of information may unreasonably invade the privacy of particular jurors. However, the facts in this case do not justify the blanket denial of access.

July 1, 1991, Kristine M. Juul. Denied under ORS 192.502(3) a petition for an order to disclose portions of minutes and supporting materials of an advisory group to the Department of Insurance and Finance charged with making proposals for reform of the Oregon Workers' Compensation Law. The group was made up primarily of labor and management representatives who were assured by the department that the contents of the meetings would be kept

confidential. We concluded that the public interest would suffer by disclosure because disclosure would discourage similar efforts to bring together persons with competing interests to negotiate sensitive issues of public interest. Our conclusion was reinforced by the fact that most of the working documents of the committee were disclosed as well as the final report and findings of the committee.

July 8, 1991, Jim Marr and Don Rees. Petition for an order compelling Children's Services Division (CSD) to waive all fees for public records requested, on ground that release of records is in the public interest pursuant to ORS 192.440(4). Petition denied. CSD waived part, but not all, of its fee. CSD's denial of a complete waiver was not unreasonable. ORS 192.440(4) permits an agency merely to reduce, rather than entirely waive, its fee. Potential financial hardship on an agency that would arise from granting a fee waiver is pertinent to the reasonableness of the agency's decision. Here, in view of CSD's substantial costs in complying with the requests, its decision not to seek reimbursement for certain of its recoverable costs, and its agreement to further reduce its fee by over 25 percent, the denial of a complete fee waiver was not unreasonable.

August 1, 1991, Lars Larson. Petition for review of the Marion County Trial Court Administrator's denial of request for a complete waiver of fees under the Oregon Public Records Law. A request for public records that will benefit the general public does not necessarily entitle an individual to a complete waiver as a matter of law. ORS 192.440(4) gives the agency discretion to reduce, rather than entirely waive the fee. Since the Oregon fee waiver provision is modeled after the Freedom of Information Act, before the 1986 amendments, guidance is obtained by looking at federal courts which use an arbitrary and capricious standard of review. A reduction of fees to only copying costs rather than a complete fee waiver on a substantial and nonroutine request is neither arbitrary nor capricious.

December 23, 1991, Steve Mayes. Petition for an order directing the Oregon State Treasury (OST) to disclose records relating to loans, loan service reports and documents prepared by Tony Canby briefing senior OST officials on OST's real estate investment activities. Petition denied. A public body does not deny a request for disclosure when it takes time to consult with legal counsel about its legal duty to

disclose requested records. The petition was denied as to OST loan records and loan service reports because OST had not denied the records request and had agreed to disclose nonexempt records upon completion of the file review. The requested reports prepared by Tony Canby were exempt from disclosure under ORS 192.501(3) because such documents were compiled from OST files by the Criminal Justice Division as part of an ongoing criminal investigation into the activities of Mr. Canby.

January 27, 1992, Robert Moody. Petition for an order requiring the Oregon State Police (OSP) to make available disciplinary actions taken by OSP against two law enforcement officers for federal game law violations. Petition granted. ORS 192.501(13) exempts records of a personnel disciplinary action from public disclosure unless the public interest requires disclosure in the particular instance. In this instance, four facts increase the public interest in disclosure and decrease the employees' privacy expectations: the employees are law enforcement officers with supervisory responsibilities; the basis for the discipline resulted in criminal prosecution and sanction; the criminal proceedings are completed; and the criminal allegations and disposition were made public. The public interest in knowing how OSP deals with criminal offenses committed by its supervisory law enforcement officers requires disclosure.

February 25, 1992, Lex Loeb. Petition for an order requiring the Columbia River Gorge Commission (commission) to make available certain records in the commission's custody. Petition denied because the commission, governed by federal law and an interstate compact, was not a "public body" subject to the Public Records Law.

March 27, 1992, Dwight Leighty and Peg Ralston. Petition for an order directing the Public Utility Commission (PUC) to produce copies of records that would reveal the gross pay of PUC employee, years that employee worked for the PUC and whether the employee provided insurance to a minor child through a payroll deduction. Petition granted in part and denied in part. The information sought was of a personal nature. The public has an interest, however, in knowing the amount of compensation provided to public employees and their length of service. Moreover, public employees have a reasonable expectation that personnel information such as salary and term of

employment could be subject to public scrutiny. Consequently, disclosure of such information for a public employee did not constitute an unreasonable invasion of privacy (i.e., highly offensive to an ordinary person). Nevertheless, there is no legitimate public interest in knowing how a public employee spends a paycheck, and petitioner articulated no overriding public interest that required disclosure in this particular instance. Consequently, the insurance information was exempt from disclosure under ORS 192.502(2), the personal privacy exemption.

July 28, 1992, Reba Owen and Joan Fraser. Petition for an order directing the Children's Services Division (CSD) to provide copies of CSD performance evaluations for CSD supervisors and the scoring methodology. Petition granted in part and denied in part. Generally, employee evaluations are information of a personal nature, the disclosure of which would be an invasion of privacy. Because of the type of responsibility that a CSD social service supervisor has involving the care and protection of children, however, the public has a substantial interest in knowing how these individuals as a class are performing their public duties. Weighing that interest against the competing concerns of obtaining candid assessments of employees' strengths and weaknesses, we concluded that the evaluations should be released without the names or other identifying materials. Any personal information not directly related to job performance should also be redacted as exempt under ORS 192.502(2), the personal privacy exemption. The methodology used by CSD in completing its evaluations must be disclosed.

December 11, 1992, Bruce Smith. Petition for an order compelling the Oregon Department of Human Services, Office of Alcohol and Drug Abuse Programs (Department) to make available individual school and class survey results. The Office of Alcohol and Drug Abuse Programs contracts with an independent contractor to conduct a statewide alcohol and drug survey. The individual school results are not prepared, used or retained by the office; however, the office owns the individual school reports since the contract requires the independent contractor to prepare those reports and states that all work products resulting from the contract are the exclusive property of the Department. Although the individual school reports are public records, they are exempt from disclosure under ORS 192.502(3) in that they are

the product of information submitted to a public body in confidence and not otherwise required by law to be submitted, such information should reasonably be considered confidential, the public body obliged itself in good faith not to disclose the information, and the public interest would suffer by the disclosure.

January 26, 1993, Joanna Patten. Denied petition for disclosure of redacted information from a security audit conducted by the Department of Corrections after the escape of a prisoner from the Oregon State Penitentiary. The audit contained information about security practices and procedures in the prison. Knowledge of this information by inmates or their confederates could "substantially prejudice or prevent" the department from operating a secure prison. ORS 192.502(4).

April 19, 1993, Joseph M. Charter. Petition for an order compelling SAIF to disclose documents relating to claims history, experience rating and cost of individual claims of Timberline Products Co. Petition denied based on the exemption for employer account records under ORS 672.702. After reviewing the legislative history of ORS 672.702, we concluded the legislature intended not to require SAIF to disclose employer-related documents that would place SAIF at a competitive disadvantage with other private carriers. Without determining the exact parameters of the term "employer account records," we concluded that employers would hesitate to insure with SAIF if SAIF were required to disclose employer records of this type, and the records are therefore exempt from disclosure. ORS 192.502(8).

April 29, 1993, Mark Haas. Petition for an order compelling the Executive Department to disclose records pertaining to the termination of three high level management officials. Petition denied. ORS 192.501(13) exempts records of a personnel discipline action unless the public interest requires disclosure in the particular instance. Here, public interest does not require disclosure. These employees were not dismissed as a result of a criminal investigation or for reasons that resulted in criminal prosecution and sanction. Further, the reasons for this disciplinary action have not been made public. There is no overriding public interest in depriving these former state employees of their privacy surrounding the reasons for their discipline.

May 19, 1993, Bruce E. Smith. Petition for an order requiring a complete fee waiver or substantial reduction in the fees assessed by the Children's Services Division (CSD) in responding to two record requests. Petition denied. CSD did not unreasonably deny the fee waiver or reduction. There is a public interest in the subject of the request. However, there has been no showing that the fee requirements inhibited the requester's ability to request or use the records sought. Investigative reporters are not automatically entitled to a complete fee waiver or substantial reduction in fees. The public interest, here, was not hindered by CSD's request for prepayment of fees, nor by its denial of waiver or reduction. The public also has an interest in reimbursement of CSD's actual costs. The request involved substantial time and expense for CSD. The requested records were voluminous. It was necessary to segregate exempt from nonexempt materials. The nonexempt portions of the files were made available and requester was allowed to copy them at her own expense. CSD's decision to reduce its fees by $170.13 instead of granting a waiver was not "unreasonable."

June 22, 1993, Mark Lear and Andrew Hyman. Petition for an order directing the Oregon Department of Forestry (ODF) to make available the completed marbled murrelet survey forms for three specific locations. Petition denied. The records are exempt from disclosure by ORS 192.501(14) unless the public interest requires disclosure in the particular instance.

Assurances that the records will not be publicized does not require ODF to disclose the records. ODF does not have any way to enforce such stipulations, nor does it have any way to evaluate the reliability of such promises. The policy behind ORS 192.501(14) is to protect endangered and threatened species. Once the location of such a species is disclosed, it is nearly impossible to protect it from disturbance or harm because ODF cannot control how or to whom the information is disseminated. Murrelets are unusually shy and easily disturbed, and many Oregon residents resent the birds' protected status. Public interest does not require disclosure because of the requester's intention to contribute to the public discussion on this important topic. Nondisclosure is essential to carry out the statutory policy. Thus, the public interest does not require disclosure in this instance.

February 7, 1994, Bruce Smith. Petition for an order requiring Mental Health and Developmental Disability Services Division to disclose medical records of patients who died at Dammasch State Hospital. Petition denied on basis of ORS 192.502(8), which incorporates ORS 40.230 (psychotherapist-patient privilege) and ORS 40.235 (physician-patient privilege). There are three elements for these privileges to apply: (1) the communication must be confidential, i.e., not intended to be disclosed to third persons, (2) the communication must be for purposes of diagnosis or treatment, and (3) the communication must be among the patient, the patient's psychotherapist (or physician) or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist (or physician). The medical records at issue meet each element.

These privileges survive the death of the patient, unless waived by the personal representative. Because there was no waiver in this case, the records are exempt from disclosure under ORS 192.502(8). However, ORS 192.495 provides that records that are more than 25 years old "shall be available for inspection," notwithstanding ORS 192.501 to 192.505. Accordingly, the exemption in ORS 192.502(8) does not apply to medical records of deceased patients that are more than 25 years old. If the records contain any material older than 25 years, that material must be segregated and disclosed.

May 4, 1994, Frank Dixon. Petition for review of denial of fee waiver by Oregon Health Sciences University (OHSU) in responding to a public records request was denied. ORS 192.440(2) authorizes a public agency to establish fees to reimburse it for actual costs in making records available. The decision to waive those fees is discretionary upon a determination by the public agency that the waiver or reduction is in the public interest. ORS 192.440(4). One basis for a fee waiver is a demonstrated ability of the requester to disseminate the requested information to the general public. OHSU's determination that the requester exhibited a diminished involvement in public disclosure and education and appeared to have insufficient funds to broadly disseminate the information sought were reasonable grounds for denial of a complete fee waiver.

May 5, 1994, Connie Wright. Petition for an order directing the Eastern Oregon Correction Institution to produce for inspection

records relating the date, hours and type of leave taken by security staff. The leave information is not exempt from disclosure under ORS 192.502(2). Although the information is of a "personal nature," it is not the type of information that an ordinary reasonable person would deem highly offensive to disclose as, generally, an individual's coworkers are aware of the general reason that an employee is off from work and the length of time that he or she is gone. The petitioner does not seek records documenting the reasons for the particular type of leave taken, such as the reasons why an individual took sick leave. The terms of a contractual agreement entered into by the state cannot override the legislative mandate in the Public Records Law that any person has a right to inspect any public record, except as expressly exempt from disclosure.

May 25, 1994, Pamela A. Mattson and David Laine. Petition for an order directing the Employment Department to make available the job performance evaluation of the manager of its Tillamook office. Petition granted. ORS 192.502(2) exempts information of a personal nature if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure. The job performance evaluation contains information of a personal nature, and disclosure would constitute an unreasonable invasion of privacy. However, the public interest that citizens have in knowing how public employees are performing their duties requires disclosure in this particular instance. The public interest in the proper job performance of the manager of a branch office is over and above any interest the public might have in knowing how well a rank and file employee performs his or her job. Although disclosure of any less than positive comments might be embarrassing to the manager, the Public Records Law does not provide an exemption to avoid embarrassment for public officials except when a disciplinary sanction has been imposed (see ORS 192.502(13)), which is not the case here. The Employment Department must disclose the performance evaluation, except for two items that are not related to job performance, but describe the manager's personal aspirational goals.

December 2, 1994, Timothy M. Parks. Petition for an order directing the Oregon Department of Transportation (ODOT) to make available an appraisal obtained by ODOT relating to property subject to a condemnation proceeding that has been settled. Petition denied.

ORS 192.501(6) exempts from disclosure information "relating to the appraisal of real estate prior to its acquisition." Although one parcel has already been acquired by ODOT, the appraisal analysis and conclusion information contained in the report relate to other parcels of real estate yet to be acquired by ODOT. The agency will segregate and disclose any nonexempt information.

April 3, 1995, Lars Larson. Petition for production of documents relating to a disciplinary matter was denied as premature. ORS 192.501(13) conditionally exempts records of a personnel discipline action. This exemption covers only completed actions. When an individual seeks records concerning a disciplinary action not yet complete, an agency may postpone action on the request until the matter is resolved. The agency's reasonable time to respond to the request also includes the time needed to consult with legal counsel about the disclosure of records that appear to be exempt in whole or in part.

April 14, 1995, Steve Mayes. Petition for an order directing the Children's Services Division (CSD) to produce a list of employees involved in the Whitehead case and disciplinary action records against those employees. Disclosure of the employee names did not constitute an unreasonable invasion of privacy, despite a request by individual employees not to have their identities disclosed to the media, because disclosure would not likely lead to harassment or physical harm of individuals named on the list. ORS 192.501(13) exempts from disclosure records relating to a disciplinary action and materials supporting that action when the employee receives a sanction. Although the Whitehead case was widely publicized, the disciplinary records requested by petitioner were routine discipline matters. CSD's general disclosure of the sanctions imposed against the employees satisfies the public interest in this case while protecting public employees from ridicule. Consequently, the requested materials were exempt from disclosure.

June 19, 1995, Sheri A. Speede. Petition for an order directing Oregon Health Sciences University to make available the videotapes that served as data for an article on rhesus monkey behavior published in Physiology and Behavior. Petition denied. ORS 192.501(15) exempts faculty research from disclosure "until publicly released."

The videotapes are "writings" as that term is defined in the Public Records Law, ORS 192.410(6). Although some preliminary results of the research project have been publicly released, the faculty member plans to analyze the data contained on the videotapes for more research on related issues. Premature disclosure of faculty research would have a chilling effect on faculty publications and permit "piracy" of research data. Because the research project is still in progress, and further research and publication is planned, the videotapes are exempt from disclosure, unless the public interest requires disclosure.

The petitioner asserts a public interest in disclosure because of the public concern over the humane treatment of animals, the controversial conclusion of the researches, and the fact that the research is publicly funded. We do not find these assertions to compel disclosure. Research does not lose its exemption merely because it is scientifically or politically controversial. Nor is the exemption inapplicable because the research is publicly funded. The exemption only has relevance to public institutions, most of the research of which is publicly funded. Moreover, the public interest in the humane treatment of animals is safeguarded by university's Institutional Animal Care and Use Committee and the federal Animal Welfare Act. Thus, we conclude that the public interest does not require disclosure of the videotaped research data in this instance.

July 3, 1995, Daryl S. Garrettson. Petition for an order directing the Oregon State Police (OSP) to make available records pertaining to investigations into alleged misconduct by members of the OSP. Petition denied. Materials created by an assistant attorney general (AAG) in his capacity as attorney for OSP, including reports made by OSP officials at the request of the AAG for the purpose of rendering professional legal services are privileged under the attorney-client privilege, ORS 40.225, and thus exempt from disclosure under ORS 192.502(8). Because disciplinary sanctions were meted out to two officers based on the investigation and the remainder of the information supported that action, those records are exempt from disclosure under ORS 192.501(13). We find no overriding public interest in disclosure. A labor union's request for information of possible relevance to its duties as an exclusive representative is not a "public interest" under the Public Records Law. Portions of the

requested records were also exempt under ORS 192.501(3) because they were compiled for criminal law purposes, the two-year statute of limitations for criminal prosecutions had not expired, and the Baker County District Attorney reserved possible criminal prosecution.

August 30, 1995, Spencer Heinz. Petition for an order directing the State Offices for Services of Children and Families to produce records relating to an investigation of alleged sexual misconduct by a child protective service worker. Petition denied. Because the requested information was compiled by the Baker County District Attorney (DA) for use in a criminal prosecution and the DA requested that the information not be disclosed until completion of the criminal prosecution, the information was exempt from disclosure under ORS 192.501(3). The public's interest in successful operation of the criminal justice system outweighs the public interest in disclosure of information that could jeopardize completion of a pending criminal prosecution.

November 22, 1995, Lars K. Larson. Petition for an order directing circuit court judge to make available for inspection and copying a videotape of a police sting admitted as evidence in a criminal trial. Petition denied. The judge claimed the right to withhold disclosure until completion of the trial. The Attorney General lacked jurisdiction to consider the petition under ORS 192.480 because the judge, although appointed to fill an unexpired term and not elected, still holds an elective office. In applying ORS 192.480, we look to the character of the office rather than the means by which the individual in that office was selected.

January 26, 1996, John E. Gutbezahl. Petition for an order directing the Oregon Department of Corrections (ODOC) to make available an agreement between ODOC and Denton County, Texas, for housing and care of ODOC inmates, including any provisions relating to ODOC's medical screening criteria. Petition denied. The provisions of the agreement described ODOC's medical screening process for transferred inmates was exempt from disclosure under ORS 192.502(4) because disclosure would jeopardize and substantially degrade ODOC's ability to implement an effective inmate transfer program. The provisions detailing the specific procedures employed by ODOC's health services staff to intervene when inmates participate

in hunger strikes was similarly exempt because disclosure would substantially interfere with ODOC's ability to carry out its essential functions including management of inmate hunger strikes.

February 5, 1996, Kristine L. Wright. Petition for an order directing Oregon State Hospital to make available deceased patient's medical records. Petition denied. The requested records were within the scope of the psychotherapist-patient privilege, ORS 40.230, and the physician-patient privilege, ORS 40.235. Those privileges remain in effect after the patient's death unless waived by a personal representative of the patient's estate. Therefore, the records were exempt from disclosure under ORS 192.502(8).

May 10, 1996, John G. Kelley. Petition for an order directing the Driver and Motor Vehicle Services Division (DMV) to provide access to DMV's computer database via a dial-up modem or, in the alternative, a complete electronic copy of the computer database maintained by DMV. Petition denied. The custodian of records has a duty to ensure the security of public records, and DMV had no way to protect the records from modification or destruction should dial-up modem accesses be allowed to the computer records. Because DMV did not have the means to filter out the exempt information from the nonexempt in its electronic database, and thereby permit access only to the nonexempt information, all of the information had to be considered exempt.

September 9, 1996, Richard Coreson and Justice Burns. Petition for an order directing the Oregon Department of Fish and Wildlife (ODFW) to make available telephone numbers of hunting and fishing licensees. Petition granted. Although a person's home telephone number is "personal" information, the determination of whether disclosure of such numbers would constitute an unreasonable invasion of privacy (i.e., highly offensive to an ordinary reasonable person) must be made on a case-by-case under ORS 192.502(2). ODFW may not have a blanket policy of nondisclosure; the requested telephone numbers must be disclosed except for numbers of individuals determined exempt from disclosure under the personal safety exemption provided under ORS 192.445.

September 18, 1996, Larry Tuttle. Petition for review of decisions by the Department of Geology and Mineral Industries (DOGAMI) on

fee waiver and records request. Although DOGAMI found that the "public interest" standard of ORS 192.440(4) was met, the agency concluded, under authority granted by ORS 192.440(4), that its budget and staffing levels did not allow it to grant a complete waiver due to the size and complexity of the records request. As to request for documents relating to other fee waivers granted by DOGAMI, the agency did not maintain such documents, and the Public Records Law does not require agencies to create records.

September 27, 1996, Tony Davis and Dave White. Petition for an order directing the Department of Administrative Services (DAS) to provide the state's report showing the most recent forecast for how many inmates the state is expecting to add to the state prison system under Measure 11. Petition granted. DAS had the requested report and intended to release it to the public in a few days. No statutory basis existed for DAS to withhold the report from immediate public disclosure.

October 10, 1996, Michael V. Reed. Petition for an order directing the Oregon Liquor Control Commission (OLCC) to make available witness statements the agency collected in the course of an investigation for a liquor law license application. Petition denied. While investigating possible liquor law violations, OLCC inspectors conducted interviews and obtained statements, which were shared with law enforcement authorities in conjunction with a criminal investigation. By virtue of the information having been shared with law enforcement authorities, the OLCC investigation records were compiled for criminal law purposes and are exempt from disclosure under ORS 192.501(3).

October 11, 1996, J. Todd Foster and Steve Bennett. Petition for an order directing the Board of Public Safety Standards and Training (BPSST) to produce a copy of all disciplinary findings against a BPSST instructor during his 21 years with BPSST. Petition granted in part and denied in part. ORS 192.501(12) exempts from disclosure completed personnel discipline actions and related records when a sanction is imposed unless the public interest requires disclosure in the particular instance. Ordinarily, disciplinary records are of primary significance to the employer and employee with little relevance to the public interest. BPSST instructors provide instruction to law

enforcement officers on minimum fitness standards, which necessarily include the ability and willingness to enforce the law in the diverse communities of this state without regard to gender, race, religion or ethnicity, while treating all citizens with equal dignity and respect. The instructor was disciplined for making comments offensive to a student's religious beliefs and ethnicity. When a law enforcement officer who is charged with the duty to provide instruction about the minimum standards of moral fitness has engaged in conduct that is contrary to or incompatible with those standards, the public interest in the disciplinary records outweighs the employee's expectation of privacy.

As to any remaining disciplinary records, the discipline was unrelated to the instructor's training responsibilities, nor was he exercising law enforcement functions. Accordingly, we find no overriding public interest in disclosure.

January 15, 1997, Nonalee Burr and Jerry Freshour. Petition for an order directing the Board of Public Safety Standards and Training (BPSST) to make available the background investigation report for petitioner's application for employment. Petition granted in part, denied in part. The information provided by private individuals who previously employed petitioner was exempt under ORS 192.502(3) because it was submitted in confidence, not otherwise required by law, and should reasonably be considered confidential. When the information would, by its very substance, identify the source of the reference, simply deleting source-identifying materials to permit disclosure of the statements would not preserve the requested confidentiality. The public interest would suffer by disclosure; if BPSST was not able to assure its sources that their statements would be kept confidential, the agency would lose its ability to obtain frank appraisals of a candidate's suitability for public employment. The information provided by state agencies previously employing petitioner was exempt under ORS 192.502(1) to the extent it was nonfactual communications of an advisory nature between public bodies. The public interest in encouraging frank and candid exchanges between the public bodies of subjective evaluations of an applicant's prior work outweighs the public interest in disclosure. The remainder of the requested information was not exempt from disclosure either

because it was not submitted in confidence by citizens or because it was provided by a state agency, but was of a purely factual nature.

March 3, 1997, Poo-sa'key and Gregory Willeford. Petition for an order directing the Oregon State Police (OSP) to make available OSP's building inspection report for The Mill Casino building and compliance review report relating to the Tribal-State Compact for Regulation of Class III Gaming between the Coquille Tribe and the State of Oregon (Compact). Petition denied in part and granted in part. As to the inspection report, OSP's delay in responding to the records request to obtain legal advice not a denial.

As to the compliance review report, much of the information was submitted to OSP on the express condition that the information would be kept confidential, and OSP obliged itself in good faith not to disclose the information. The exemption in ORS 192.502(3) applies only when the information was "not otherwise required by law" to be submitted. Except for the Compact, however, under which the tribe agreed to allow the state to review its records and to provide OSP access to all areas of the gaming facility, the tribe was under no legal obligation or otherwise required by law to do so. Information is "required by law" to be submitted when that is required by a governmental enactment such as a statute or rule, not merely when there is a legal obligation under a contract. The information should reasonably be considered confidential because it describes the specific measures undertaken by the tribe to protect the gaming operations and its disclosure could affect the security of the gaming operation and facility. Failure by OSP to maintain confidentiality of the records would likely result in decreased cooperation from tribes in similar reviews. The public interest in maintaining candid and open communications between OSP and the tribe in relation to the tribe's gaming operation and security measures outweighed any harm caused by a denial of disclosure in this instance. Consequently, the portions of information provided by the tribe in confidence were exempt under ORS 192.502(3).

March 17, 1997, Cindy Chastain. Petition for an order directing the Health Division (division) to make available copies of its practical examination for petitioner's electrolysis license and petitioner's exam results. Petition denied. ORS 192.501(4) exempts from disclosure

exam questions, scoring keys and other data used to administer a licensing examination if the examination will be used again. Like written exam questions, disclosure of performance items evaluated on the practical exam could jeopardize the integrity of the practical examination because they would identify the particular attributes being evaluated by the proctor. The sections of the score sheets detailing performance evaluation and the specific comments of the evaluator regarding performance were also exempt from disclosure. As to the remainder of the score sheet, the division agreed to disclose the sections detailing possible points available for each item on the exam and the points awarded to the petitioner.

May 2, 1997, David A. Bledsoe. Petition for an order directing the Oregon Housing and Community Services Department (OHCSD) to produce copies of sound recordings of Finance Committee Meetings, electronic mail messages, phone logs, Finance Committee Policy Manual and all scoring sheets and materials used for evaluating tax credit projects. Petition denied. OHCSD agreed to provide either sound recordings or transcripts of the Finance Committee meetings with the attorney-client privileged communications deleted, and electronic mail, telephone records and the Policy Manual, so long as OHCSD's estimated costs were prepaid by the petitioner. Consequently, the Attorney General lacked authority to order disclosure. ORS 192.450(1). OHCSD also agreed to provide the requested information pertaining to tax credit project files, except for scoring sheets and evaluation materials that were exempt under ORS 192.501(4). The materials were designed by OHCSD to elicit detailed descriptive information on proposed tax credit projects so that those projects could be evaluated in a competitive funding cycle. If the evaluation methodology was disclosed, subsequent responses would become tailored toward that methodology, more uniform in character, less descriptive of defining attributes for each project, and thus less useful in evaluating projects for competitive funding. Consequently, the scoring sheets and evaluations materials were exempt from disclosure because disclosure would jeopardize the integrity of OHCSD's consolidated funding cycle examination process.

July 17, 1997, Steven Wilker. Petition for an order directing Oregon Department of Corrections to release information obtained as part of a preemployment background check was denied. Employment

verification forms completed by employment references in confidence are exempted from disclosure under ORS 192.502(3). Communications between a former public employer and a prospective public employer are exempt from disclosure under the internal advisory exemption, ORS 192.502(1), because of the public interest in encouraging frank communication.

August 6, 1997, Carlton Scott Parrish. Petition for an order directing Oregon State University to make available a compilation of proposed budget cuts was denied. ORS 192.502(1) exempts from disclosure communications within a public body of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to final agency determination if the public interest in frank communication clearly outweighs the public interest in disclosure. Here, the public interest in allowing frank exchanges concerning budget options and potential cuts would be substantially undermined if the preliminary recommendations of managers were disclosed before the university made these difficult program decisions.

September 19, 1997, James Long. Petition for an order directing Oregon Occupational Safety and Health Division to make available records concerning steelwork collapse at Portland International Airport was denied. ORS 192.501(17) exempts investigatory information relating to any complaint or charge alleging possible violation of the Oregon Safe Employment Act unless the public interest requires disclosure in the particular instance. Despite the huge investment of public funds in the airport expansion project and the potential relevance of the records to the Port's oversight of its contractors, the public interest in protecting the integrity of the investigation and ensuring safe working conditions is paramount to the interest in disclosure of these records during the investigative phase. By its terms, the exemption no longer applies when a final administrative determination is made or the employer receives notice of any citation, and the requester will be able to obtain the requested information at that time.

October 17, 1997, Rhonda Fenrich. Petition for an order directing the Board of Public Safety Standards and Training to make available an internal affairs investigation report was denied. Under ORS 192.502(1) (internal advisory communications), a record is exempt if it

is a communication within or between public bodies, it is of an advisory nature preliminary to agency action, it covers other than purely factual materials, and the public interest in encouraging frank communication clearly outweighs the public interest in disclosure in the particular instance. The "Conclusion and Recommendation" section of the report is exempt from disclosure under ORS 192.502(1).

June 26, 1998, Bradley Scheminske and Joan Fraser. Petition for an order requiring the Workers' Compensation Board to produce records related to its investigation of complaints against a former Administrative Law Judge. Information about administrative law judge's job performance is not exempt under ORS 192.502(2) (personal privacy). Notes of the presiding Administrative Law Judge assessing the merits of the complaints are exempt under ORS 192.502(1), which exempts from disclosure communications within a public body of an advisory nature to the extent they cover other than purely factual materials and are preliminary to final agency determination. Public interest in encouraging supervisor's frank appraisal of subordinates that are the subject of complaints outweighs the public's interest in disclosure of the portions of the notes that subjectively evaluate investigation materials and make recommendations for board action.

ORS 192.502(19) exempts from disclosure workers' compensation claims records subject to certain exceptions, including when the disclosure is made in such a manner that the information cannot be used to identify any workers who are the subject of the claim. Records not exempt under ORS 192.502(19) if workers' names and other identifying information can be redacted.

July 9, 1998, Bradley Scheminske. Petition for an order directing Workers' Compensation Board to make available records that identify all active workers' compensation litigation cases pending at the board was denied. The material requested is exempt from disclosure as workers' compensation "claim records" under ORS 192.502(19). The intent of the exemption is to protect the identity of workers who have filed claims in order to protect them from discrimination. There are four exceptions to this exemption, none of which apply. The first, for records necessary for an insurer, self-insured employer or third-party administrator to process a claim, was not met because the requested

records are not limited to cases in which the requester is involved. The second permits disclosure only when necessary for the director or other governmental agency to carry out its duties. The third exception is when records can be disclosed in a manner that protects the identity of the worker who is subject to the claim, and the requester did not accept the board's offer to supply the information with the workers' names redacted. The final exception, when a worker or worker's representative requests review of the claims records, did not apply because requester was neither a worker nor a worker's representative.

September 4, 1998, Dan Spatz. Petition by a newspaper editor for an order directing Oregon Department of Forestry to make available copies of a lightning strike map for Wasco County denied. Lightning strike data was made available to department under a licensing agreement with a private corporation, which defined the data as proprietary and confidential and obliged the department not to disclose it. ORS 192.502(4) exempts from disclosure information submitted in confidence when an agency obliges itself in good faith not to disclose the information if the information is of a nature that reasonably should be kept confidential, is not required by law to be submitted, and the public interest would suffer by disclosure. Each of these conditions was met.

The information was also a trade secret exempt under ORS 192.501(2). The public interest did not require disclosure because the requester's objective (to illustrate fire stories and to inform the community of recent lightning strikes that may warrant investigation) had no bearing on the department's use of the information. Disclosure would therefore not further the public's interest in monitoring what the agency was doing and would likely harm the public interest by hampering the agency's ability to detect and suppress fires. The information was also exempt under ORS 192.502(9), which incorporates the Uniform Trade Secrets Act.

August 2, 1999, Damon L. Vickers. Petition for an order requiring the Oregon Occupational Safety and Health Division of the Department of Consumer and Business Services (OR-OSHA) to disclose an Oregon Department of Justice (DOJ) memorandum to OR-OSHA regarding the proposed revision of OR-OSHA administrative rules and redacted information from records previously disclosed by

the agency. Petition denied. The DOJ memorandum and a portion of the redacted materials were privileged under Oregon Evidence Code Rule 503 as attorney-client communications and therefore exempt from disclosure under ORS 192.502(9). An additional portion of the redacted information consisted of OR-OSHA staff analysis of the draft proposed rules. As such, it was exempt from disclosure as internal advisory communication. ORS 192.502(1).

September 20, 1999, Brian Michael. Petition for an order requiring Oregon State University to disclose a copy of a class grade book with student names and identification numbers deleted. Petition denied because the federal Family Education Rights and Privacy Act (FERPA), 20 USC § 1232g, prohibits the release of personally identifiable information from student records without the student's consent. Federal regulations provide that "personally identifiable information" includes that which "would make the student's identity easily traceable." 34 CFR § 99.3. The requester's possible knowledge regarding students in the class and the small number of students taking the final examination, coupled with disclosure of the requested grade book, would have made student identities easily traceable. Because disclosure was prohibited by federal law, the class grade book was exempt from disclosure under ORS 192.502(8), which exempts information "the disclosure of which is prohibited under federal law or regulations."

November 19, 1999, William Joseph Birhanzl. Petition for the Attorney General to direct the Board of Investigators (board) to make available records pertaining to particular license applicants. Petition granted in part and denied in part. Petition denied in relation to disclosure of the license applicants' personal residence addresses and telephone numbers because the board, following the requirements of the uniform rule, had concluded that disclosure was prohibited under the personal safety exemption, ORS 192.445. The Attorney General would not substitute its judgment for the board's when reviewing the board's decision under ORS 192.450(1).

December 1, 1999, Anne L. Nichol. Petition for an order requiring the State Controller's Division (division) to make available a list of outstanding and uncashed warrants over a certain dollar amount issued by the state during the two years prior to the request. Petition denied

because list was exempt under ORS 192.502(15), exempting reports of unclaimed property filed by the holders of such property to the extent permitted by ORS 98.352.

December 17, 1999, Charles Sheketoff. Petition for an order requiring the Employment Department to make available reports prepared by the Shared Information System (SIS) for the Adult and Family Services Division (AFS). Petition denied because the Employment Department's SIS was not the custodian of the requested reports but acted as AFS's agent in relation to the reports. The Employment Department was required to disclose the reports only if they were not available from the custodian.

February 9, 2000, Andrew Schneiderman. Petition for an order requiring the Oregon Department of State Police (OSP) to make available report to OSP hiring selection committee regarding requester's eligibility for hire. The portions of the report that provided the investigators' subjective assessments of background information regarding the requester and recommendation regarding employment were exempt under internal advisory communication exemption, ORS 192.502(1).

March 10, 2000, Steve Suo/Steve Mayes. Petition for an order to require the Oregon Department of Transportation (ODOT) to waive its fees for providing requested records. Petition denied because ODOT's refusal to waive fees was not unreasonable. ODOT's compliance with the Public Records Law was neither an expenditure for a highway, nor an administrative cost that supports a highway program or purpose that primarily and directly facilitates motorized vehicle travel. Consequently, ODOT could not waive its fees if the costs that the fees represented otherwise would have been paid from constitutionally dedicated highway funds. It was reasonable for ODOT to use its small nondedicated General Fund appropriation to ensure that it could fulfill its statutorily mandated responsibilities for the general public good, for which no other funds were available, rather than to grant a fee waiver for a public records request.

It was not unreasonable for ODOT to request Department of Justice attorneys to perform the necessary segregation of exempt and nonexempt materials within requested records when a large amount of records were requested that raised issues related to, e.g., the attorney-

client privilege, trade secret information and the application of newly-enacted exemption statutes. Therefore, it was proper for ODOT to include attorney fees in its estimate of the actual costs to make the records available.

March 29, 2000, Steve Mayes. Petition for an order to require several Oregon agricultural commissions, e.g., the Oregon Blueberry Commission, either to waive their public records fees or to provide a written explanation and justification of the fees charged. Petition denied because commissions' refusal to waive fees was not unreasonable. With respect to request for written explanation and justification of fees, Public Records Law does not authorize a person to petition the Attorney General to review an agency's establishment of fees, and the Attorney General has no authority to determine if the fees charged represent an agency's actual costs.

July 17, 2000, Pat Forgey. Petition for an order requiring the Sex Offender Registration Unit of the Oregon State Police (OSP) to make available the unit's Sex Offender Database in electronic form. Petition denied because nonexempt information sought was part of larger database containing both exempt and nonexempt information, and software used by OSP did not allow segregated information to be exported electronically.

September 5, 2000, Herbert D. Riley. Petition for an order requiring the Oregon Department of Veterans' Affairs (ODVA) to disclose records of an investigation of a discrimination complaint. Petition denied as to records covered by the attorney-client privilege and exempt under ORS 192.502(9). As to notes of the investigator's interview of an ODVA administrator, basis for the claim of attorney-client privilege was the fact that the investigator, working at the direction of an Assistant Attorney General, was legal counsel's representative, and communications during the interview were solely for the purpose of facilitating the rendition of professional legal services to ODVA and were not intended to be disclosed to third parties.

November 9, 2000, Don S. Simpson. Petition for an order to direct the Building Codes Division (division) to make available a report reviewing the Silverton Building Department. Petition granted. The requested record included factual information about one or more

Silverton employees that might or might not support personnel discipline action. Because the division's purpose in creating the report was to carry out its statutory duty to regulate municipalities' building inspection programs, however, and the division was without jurisdiction to discipline a Silverton employee, there was no basis under the exemption for personnel discipline actions, ORS 192.502(12), to withhold the requested record from disclosure.

January 12, 2001, Harvey Varenhorst. Petition for an order to require the Oregon Department of State Police (OSP) to make available interview questions and other information pertaining to specific hiring decisions made by OSP. Petition was denied under ORS 192.501(4) for those questions requiring an applicant to respond to a specific hypothetical scenario because disclosure would threaten the integrity of the applicant evaluation process.

January 31, 2001, Charles Hinkle. Petition for an order directing the Oregon School Activities Association (OSAA) to disclose certain records in the OSAA's custody. Petition denied because the OSAA was not the functional equivalent of a state agency under the nonexclusive list of factors outlined in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994).

February 1, 2001, Leslie I. Zaitz. Petition for an order to direct the Oregon State Police (OSP) to make available an unredacted copy of an e-mail message between two employees within OSP. Petition denied as to portions of the e-mail that were internal advisory communications under ORS 192.502(1). Contrary to arguments offered by the requester, assessing the extent to which frank communication in the particular instance actually helped to advance the work of the agency was not an appropriate consideration in balancing the public interest in frank communication against the public interest in disclosure under ORS 192.502(1).

June 28, 2001, Leslie L. Zaitz. Petition for an order requiring the Oregon Department of Education (ODE) to disclose copies of correspondence between ODE employees and the Government Ethics Commission (GEC) denied because ODE did not have custody of applicable public records. While one or more individual ODE employees may have been in possession of correspondence with GEC concerning the employee's possible violation of ethical obligations

arising under ORS chapter 244, such correspondence would not be a public record when in the employee's, rather than GEC's, possession. Because a GEC investigation would pertain to the public employee in his or her private capacity, and the employee would be personally liable for any sanctions that GEC may impose, correspondence between the employee and the GEC about whether the employee's conduct violated ORS chapter 244 would be prepared, owned, used or retained by the employee in his or her private capacity. Consequently, such correspondence would not be a public record.

August 15, 2001, Vincent Padgett and Pamela Eller. Petition for an order directing the Oregon Department of State Police (OSP) to disclose polygraph records. Petition denied. The requested polygraph records were part of the criminal investigation that led to criminal charges being brought against the petitioner, Mr. Padgett, on which he was convicted. The convictions were on appeal at the time the records request was made to OSP. While information about polygraph examinations is generally inadmissible in criminal trials, in light of the possibility of the convictions being overturned on appeal and retrial becoming necessary, both the petitioner and the state were entitled to a jury unaffected by the prior polygraph examination. Therefore, the requested records were exempt as "investigatory information compiled for criminal law purposes" under ORS 192.501(3).

October 31, 2001, William Miller. Petition for an order requiring the Oregon Department of Education (ODE) to waive its fees for providing requested records. Petition denied. Because a waiver or reduction of fees for the cost of providing records from the Oregon School for the Deaf about instances of sexual abuse to the Seattle Post-Intelligencer would serve the public interest, ODE had the authority to waive its fees. ODE waived all but $50 of its $1,523 fee for providing the newspaper with records for the 2000-2001 school year, but denied the newspaper's request to waive all but $100 of its fees for responding to a follow-up request for records for five additional years. In light of the reduction of fees assessed for responding to the newspaper's initial request, the time and expense to ODE of responding to the follow-up request, the volume of records ODE would need to review to respond to the follow-up request, and the confidential nature of student records necessitating segregation of

exempt from nonexempt information, ODE's denial of the request for a further waiver of its fees was not unreasonable.

November 13, 2001, Pat Forgey. Petition for an order directing the Oregon Department of State Police (OSP) to disclose any police report or internal investigation report involving an identified individual as a suspect. Petition denied. The order addressed the redaction of names in the report OSP had disclosed. Redacted names of law enforcement officers assigned to undercover investigative duties are exempt as criminal investigatory information under ORS 192.501(3), and are also confidential under ORS 181.852, which specifically addresses information about undercover law enforcement officers and is incorporated into the Public Records Law through ORS 192.502(9).

February 28, 2002, Gregory Perry. Petition for an order directing the Oregon Department of Education to provide copies of the Oregon State Assessment Test in mathematics and reading given to 3rd, 5th, and 8th grade students in the years 1996 through 2001. Petition denied. ORS 192.501(4) exempts from disclosure "[t]est questions, scoring keys, and other data used to administer a licensing examination, employment, academic or other examination or testing procedure before the examination is given and if the examination is being used again." The questions in the requested tests could be reused in future statewide assessments. The public interest in assessing whether the rigor of the tests changed over time did not require disclosure in this instance.

March 27, 2002, Leslie I. Zaitz. Petition for review of Department of Education's (ODE) denial of fee waiver. Petition denied. ODE's agreement to waive $182.50 out of a total $566.50 in copying fees was not unreasonable in light of the volume of records produced and the time spent by ODE personnel to respond to requests.

April 5, 2002, Paul B. Meadowbrook and David Myton. Petition for an order directing the Teacher Standards and Practices Commission (TSPC) to make available all records concerning investigation and suspension of a named teacher. Petition denied in part and granted in part. Certain information of a highly personal nature that was contained in records provided by a former student was not exempt on the basis of personal privacy under ORS 192.502(2) where, before providing the records, the student was informed by

TSPC that they might have to be publicly disclosed in the course of the disciplinary process.

TSPC obtained personnel records from the Corvallis School District that would ordinarily be confidential under ORS 342.850(8). Under ORS 192.502(10), those transferred records would remain confidential if the considerations originally giving rise to confidentiality remained applicable. With regard to information contained in the records that was included in TSPC's order or that duplicated information already disclosed to the requester, those considerations no longer applied. With regard to records that were not disclosed by TSPC, in its order or otherwise, the confidentiality policies continued to apply, and the records were exempt from disclosure.

Finally, the teacher's attorney submitted a settlement offer to TSPC with the caption "For Settlement Purposes Only – Confidential." The record was not exempt from disclosure as a confidential submission under ORS 192.502(4) because there was nothing to suggest that TSPC represented that it would not disclose the information.

July 10, 2002, Randy Tucker. Petition for an order requiring the Department of Administrative Services to disclose redacted sections of the state's "Measure 7 Implementation Plan" (Plan). Petition denied. The two withheld sections of the Plan were internal advisory communications under ORS 192.502(1). The frank and free exchange of ideas for administering and funding Measure 7 claims would be self-censored or "chilled" if the involved state employees had to be concerned about political or other ramifications disclosure would have on themselves or their agencies. Under the circumstances, the clear public interest in encouraging frank communication outweighed the public interest in disclosure.

August 21, 2002, David Isaac Maimon. Petition for an order directing the transcript coordinator for the Marion County Circuit Court to make available a copy of an audiotape of a specific hearing. Petition denied. The Marion County Presiding Judge had issued an order directing that a record of the proceeding be provided only in the form of a written transcript. This order constituted a claim by an elected official of a right to withhold disclosure of the audiotape,

divesting the Attorney General of authority to consider the petition under ORS 192.480.

September 3, 2002, James Long. Petition for an order requiring Oregon Public Broadcasting (OPB) to disclose certain financial records. Petition denied. OPB, a private, not-for-profit corporation, is not the functional equivalent of a public body subject to the Public Records Law under the nonexclusive list of factors set out in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994). Factors supporting this conclusion include the lack of government control over OPB's operations and the private status of its employees.

October 7, 2002, Jeanyse R. Snow. Petition on behalf of the City of Warrenton for an order directing the Division of State Lands to disclose certain records. Petition denied. The City of Warrenton is itself a public body, and as such is not a "person" entitled to invoke the Public Records Law to obtain records from another public body.

November 15, 2002, Melissa Jones and Jim Voykto. Petition for an order requiring the Public Employees Retirement System to disclose retirement benefit information for 32 named retirees. Petition granted in part and denied in part. Retirement benefit amounts received by an individual retired public employee is information of a personal nature, the disclosure of which would be an unreasonable invasion of privacy under ORS 192.502(2), if the disclosure identifies the benefit amounts as pertaining to the individual retiree. However, the benefit amount information in a form that does not permit associating it with a particular individual is not exempt from disclosure.

November 19, 2002, Scott Forrester. Petition for an order requiring the Citizens' Utility Board (CUB) to disclose certain records. Petition denied. CUB is not a public body subject to the Public Records Law under the nonexclusive list of factors set out in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994). Like the entity considered in *Marks*, CUB performs only advocacy or advisory functions, not governmental decision-making functions.

December 18, 2002, Noelle Crombie. Petition for an order requiring the Department of Human Services (DHS) to disclose

records concerning the agency's discharge of its child welfare responsibilities in relation to named individuals. Petition denied. The Clackamas County District Attorney's office served a subpoena on DHS in relation to a pending criminal prosecution, and the subpoena encompassed the requested records. As a result, the requested records constituted investigatory information compiled for criminal law purposes under ORS 192.501(3). A deputy district attorney requested that DHS assert the criminal investigatory exemption for the requested records, and it was permissible for DHS to act on the deputy district attorney's representation that public disclosure of the records would interfere with a pending criminal prosecution.

January 21, 2003, Keli Kubat. Petition for an order requiring the Department of Human Services (DHS) to disclose a copy of a Social Security Administration (SSA) form and records related to the assessment stated on the form. Petition denied. The requested records related to a determination made under the SSA disability program. SSA is responsible for the maintenance of all records of that program and has promulgated regulations governing their disclosure. The relevant federal regulations authorize SSA, but not DHS, to disclose records. On the basis of the applicable federal regulations and underlying statutes, the requested records were exempt from disclosure under ORS 192.502(8).

March 20, 2003, Paul J. Rask. Petition for an order requiring the Department of Transportation, Driver and Motor Vehicle Services (DMV) to disclose records concerning a named individual's driver license. Petition denied. Included among records responsive to the petition were reports from private individuals to DMV about the specified person's driving ability. Some records were exempt from disclosure because they had been submitted to DMV in confidence. ORS 192.502(4). Other records not meeting the criteria of that exemption contained the names, addresses, phone numbers or other information identifying persons who made reports to DMV. From their interactions with DMV, the agency concluded that the persons whose identity would be revealed by disclosure of the records wished to maintain their anonymity. In the particular circumstances, in which disclosure could have the effect of jeopardizing personal and professional relationships with the person whose driving ability was at

issue, the records were exempt on the basis of personal privacy. ORS 192.502(2).

September 25, 2003, D.E. Bridges. Petition for an order directing Oregon State University (OSU) to disclose transportation analysis records. Petition denied. The petitioned records, which had been prepared by or under the direction of OSU faculty, contained or discussed transportation research and analysis for which the Oregon Department of Transportation had contracted with OSU. The research had not yet been publicly released, and was neither copyrighted nor patented. With the research being preliminary and incomplete, and therefore at an increased risk of being misinterpreted, the public interest did not require disclosure in the particular instance, and the records were exempt from disclosure under ORS 192.501(14) (faculty research records). OSU agreed to disclose records responsive to the request, to the extent that they contained nonexempt information.

October 1, 2003, Robin Franzen. Petition for an order directing the Department of Administrative Services, Risk Management Division, to disclose an investigative file and final report. Petition denied. The petitioned records had been developed or compiled in response to the state's receipt of a notice of tort claim, and the time in which court action could be initiated on the claim had not yet run at the time the request was filed. Because disclosure of the records would prejudice the state in litigation, and the time in which litigation remained a possibility was finite, the public interest did not require disclosure in the particular instance, and the records were exempt under ORS 192.501(1) (records pertaining to litigation).

March 4, 2004, Les Zaitz. Petition for an order directing the Department of Administrative Services (DAS) to disclose certain financial information about the sale of Dammasch State Hospital as surplus state property. Petition denied. Petitioned records provided by a developer, addressing the developer's financial status, met the criteria for exemption from disclosure as confidential submissions under ORS 192.502(4). Even though in some instances the developer had not complied with all of the steps created by DAS to maintain confidentiality, its actions had been sufficient to demonstrate that financial information had been submitted on the condition that it would remain confidential. Disclosure would have caused harm to the

public interest by discouraging developers and investors from seeking to do business with the state. Pro formas submitted by the developer, showing the expense and revenue assumptions for the proposed project, constituted trade secrets, and disclosure would not have served the public interest stated by the petitioner, *i.e.*, knowing about the financial viability of the developer. The pro formas were exempt from disclosure under ORS 192.501(2) (trade secrets).

March 29, 2004, Jim Redden. Petition for an order directing the Oregon Historical Society (OHS) to disclose certain records compiled during former Governor Neil Goldschmidt's administration. Petition denied. The petitioned records were being held by OHS. The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations, and requires the public body to provide "proper and reasonable opportunities for inspection and examination" of the records. ORS 192.420, 192.430. Under the analytic framework established by the Oregon Supreme Court in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994), OHS is neither a "public body" nor its functional equivalent. Factors leading to this conclusion included OHS being created by private, not government, interests; its lack of authority to make binding decisions for state government; the nongovernmental status of its staff; and the limited governmental financial support provided to, and control exercised over, OHS.

April 22, 2004, William Joseph Birhanzl. Petition for an order directing the Multnomah County Trial Court Administrator to disclose records of certain judicial hearings. Petition denied. The public body maintained a copy of the records in the form of a stenographic tape, which only the court reporter who recorded it could "read" and transcribe. The Public Records Law requires that a custodian of a public record maintained in a machine readable form provide copies "in the form requested, if available." ORS 192.440(2). If the public record is not available in the form requested, the public body is required to make it available "in the form in which it is maintained." ORS 192.440(2). The public body was willing to provide the requester with a copy of the tape, along with the court reporter's name and contact information. The process by which a party to a court proceeding may request the creation of a transcript is governed by

ORS 8.350, with implementation of that statute being outside the scope of the Attorney General's jurisdiction under the Public Records Law. ORS 192.450.

June 4, 2004, Andrea R. Meyer. Petition for an order directing the Oregon Liquor Control Commission (OLCC) to disclose the redacted portions of an otherwise disclosed draft report related to agency rulemaking. Petition denied. The draft report had been prepared by OLCC staff for circulation among OLCC's executive management and, eventually, its Commissioners, for the purpose of providing staff recommendations regarding a final rulemaking decision to be made by the Commission. The redacted portions were in sections entitled "Summary of Comments" and "Presiding Officer Summary and Recommendation." Rather than "purely factual material," the redacted portions of the report were influenced by the policy positions being recommended, with the redactions in the latter section representing the drafter's subjective weighing and assessment of the information being provided, along with recommendations based on that analysis. Because the Commission had actually made its decision prior to the staff report being finalized, the report had not had any bearing on the decision. While disclosure would not have informed the public about the Commission's decision-making process, it would have deterred OLCC staff from freely providing to the Commission frank evaluation of evidence in future rulemaking proceedings. Therefore, the public interest in encouraging frank communication clearly outweighed the public interest in disclosure, making the redacted portions of the report exempt from disclosure under ORS 192.502(1) (internal advisory communications).

June 16, 2004, Andrea R. Meyer. Petition for review of the Oregon Liquor Control Commission's (OLCC) denial of a waiver or reduction of fees. Petition denied. The 25% fee reduction which the OLCC agreed to grant the petitioner was sufficiently substantial. The agency's decision to grant the reduction rather than a complete waiver was not unreasonable, given that the public benefit of disclosure to the petitioner was narrow in scope.

June 16, 2004, Dennis Wilkinson. Petition for an order directing the Union/Baker Education Service District to disclose records. Petition denied. Education Service Districts were created by statute to

provide "regional educational services to component school districts." ORS 334.003(2). A formal Attorney General Opinion describes them as "popularly elected local government bod[ies]." 42 Op Atty Gen 243, 255 n 9 (1982). The Attorney General does not have jurisdiction to review the denial of a records request issued by a local government body.

July 8, 2004, David P. Meyer. Petition for an order directing the Board of Accountancy to disclose records relating to a named person. Petition denied. The petitioned records had been created and compiled by the agency during its investigation of complaints filed against the named person. The agency had shared a portion of these records with the Portland Police Bureau (PPB), which was conducting a criminal investigation involving the named person. Following the agency's receipt of the petitioner's request for records, the PPB informed it that disclosure of all but one of the shared records could impede or have an adverse effect on the criminal investigation. With no basis to conclude that the public interest required disclosure in the particular instance, the records specified by the PPB were exempt from disclosure under ORS 192.501(3) (criminal investigatory material). Other petitioned records were exempt from disclosure under ORS 192.502(9) due to their being made confidential under other Oregon law, specifically ORS 673.415(2). The agency agreed to disclose all nonexempt records.

August 16, 2004, James Bobbit. Petition for an order directing the Department of Corrections (DOC) to disclose a tort claim investigative report. Petition denied. DOC had prepared the petitioned record in response to a request from the Risk Management Division of the Department of Administrative Services, in connection with the latter's processing of a notice of tort claim filed by the petitioner. The tort claim notice was sufficient evidence that litigation was "reasonably likely to occur," so as to make the record exempt under ORS 192.501(1) (records pertaining to litigation), unless the public interest required disclosure in the particular instance. Because an interest in private litigation does not qualify as a public interest requiring disclosure, and another interest requiring disclosure was not identified, the record was exempt.

October 13, 2004, Gary Johansen. Petition for an order directing the Real Estate Agency to disclose records regarding licensees in machine readable format. Petition denied. Because the agency had told the petitioner how to obtain a CD-ROM containing a portion of the petitioned records, the agency had not denied the request for those records. In order to disclose the remaining petitioned records, the agency would have needed to "prepare extensive custom [computer] programs." Because the Public Records Law does not require public bodies to "develop or acquire new or additional software or programs in order to [electronically] retrieve the requested information," the Attorney General did not have authority to order disclosure of the additional records.

October 14, 2004, Sarah Jeans. Petition for review of the denial of a fee waiver by the Oregon State Police. Petition denied. A public body has authority to waive fees if it determines that waiver "is in the public interest because making the record available primarily benefits the general public." ORS 192.440(4). The petitioner based her waiver request on a financial inability to pay the agency's estimated fees and an interest in using the records to defend herself in court. A personal benefit to the requester alone, including the use of records in defending against criminal prosecution, is insufficient to require a fee waiver. An inability to pay, standing alone, is also insufficient.

November 8, 2004, Norma Anderson. Petition for order directing the Oregon Health Licensing Office (agency) to disclose records concerning a complaint filed against the petitioner. Petition denied in part and granted in part. The agency agreed to disclose all requested records other than the complaint, and the petition was denied as to these records. In relation to the complaint, the agency asserted that the complainant had requested confidentiality. However, it could not be established that the agency had obliged itself in good faith not to disclose the information provided by the complainant. For this reason, the record of the complaint was not exempt under ORS 192.502(4) (confidential submissions).

December 3, 2004, Naseem Rakha. Petition for an order directing Representative Tootie Smith to disclose records. Petition denied. At the time the order was issued, Tootie Smith was a member of the Oregon House of Representatives. The Attorney General does not have

jurisdiction to consider a petition to inspect or to copy public records that are in the custody of an elected official, or in the custody of any other person but as to which an elected official claims the right to withhold disclosure. ORS 192.480. The petitioner asserted that the Attorney General had jurisdiction because the basis of the petition was not a denial of a records request but Representative Smith's failure to respond to the request. The petition was denied because, regardless of the basis of the petition, the Attorney General did not have jurisdiction due to Representative Smith's status as an elected official.

December 9, 2004, Jim Redden. Petition for an order directing the State Archivist to disclose records. Petition denied. The order addressed two issues: the interpretation of the statute making certain records of the Corrections Ombudsman confidential, ORS 423.430, and whether the State Archivist had constructively denied the petitioner's request for records not affected by ORS 423.430 by taking an unreasonable time to respond. With regard to the latter issue, records responsive to the petitioner's request included legal counsel records from the administration of a former Governor. Under the transferred records exemption, ORS 192.502(10), it was appropriate for the State Archivist to consult with the office of the current Governor about whether the records were exempt from disclosure, given that the current Governor is the state officer with authority to decide whether to disclose gubernatorial records covered by the attorney-client privilege and therefore exempt under ORS 192.502(9). The reasonable time in which the State Archivist was required to respond to the petitioner's request included the time needed for the current Governor's staff to review the relevant records and consult with the State Archivist about disclosure.

March 23, 2005, Janie Har. Petition for an order directing Oregon Department of Transportation (ODOT) to disclose subcontracts executed on the state's behalf by an ODOT contractor. Petition denied. ODOT had not prepared or retained the subcontracts. Also, it had not used them, either through reviewing their contents or another activity. Under the terms of its agreement with the contractor, ODOT had a right to access the subcontracts, but did not own them. Because a right of inspection does not amount to ownership, the subcontracts did not constitute "public records" as defined in ORS 192.410(4), i.e., "any writing containing information relating to the conduct of the public's

business * * * prepared, owned, used or retained by a public body regardless of physical form or characteristics." Therefore, the Attorney General lacked authority to order their disclosure.

May 26, 2005, Bryan Andrade. Petition for an order directing the Department of Transportation, Driver and Motor Vehicle Services Division (DMV) to identify and disclose applicable law. Petition denied. The petitioner had referenced a disclosed DMV record and requested that the agency identify and disclose the state law relevant to aspects of the record. Responding to the request would have required DMV to engage in legal research. Under the rubric that the Public Records Law does not require a public body to create a record to disclose the reasoning behind its actions or the knowledge held by their staff nor to explain or answer questions about their public records, the petition was denied.

June 30, 2005, William J. Mills. Petition for an order directing Oregon State University (OSU) to disclose human resource records. Petition denied. OSU had provided a portion of the information requested and had informed the petitioner that it would process the remainder of his request upon receipt of its fee, representing its estimated processing cost of $15. Public bodies have authority to establish fees reasonably calculated to reimburse them for their costs in making records available, and may require prepayment of their estimated costs. The petition was denied because OSU had not denied the petitioner's request.

August 31, 2005, John Canzano. Petition for an order directing University of Oregon (UO) to disclose cellular phone records. Petition denied. A UO cellular telephone bill logged calls made or received on a phone used by one of UO's athletic coaches. The bill listed phone calls chronologically and showed 13 categories of information for each. UO disclosed information in all 13 categories for business calls made or received on the phone at times other than when the coach was on vacation or personal leave, on holidays, or on weekends. For business calls made or received during those specified times, UO disclosed 12 categories of information, withholding the "origination" location which would reveal the coach's location during nonwork hours.

For personal calls made or received on the phone, UO disclosed six categories of information, withholding those categories that revealed the time and duration of a call, the origination location of a call, the phone number of the other party to a call, the destination location of a call, and whether the call was a conference call or forwarded to another number. Some personal calls were made during vacation or other leave days, holidays or weekends. Others were made on work days.

The coach is a salaried employee. For such employees, whose work hours are not limited to specified times of any given weekday, we concluded that personal calls made on work days were made during "personal time." Applying the personal privacy exemption, ORS 192.502(2), we conducted a line-by-line analysis of the records. We determined that information withheld by UO that would reveal the coach's whereabouts during nonwork hours was personal in nature, regardless of whether a particular call was or was not work-related. We also concluded that an ordinary reasonable person would find disclosure highly offensive. We made the same determination for the remainder of the information withheld by UO, which related only to personal, not work-related, calls. In regard to whether the public interest by clear and convincing evidence nonetheless required disclosure in the particular instance, we found that disclosure of the withheld information would have revealed nothing about the coach's performance as a public employee.

February 23, 2006, Henry Kane. Petition for disclosure of Oregon Department of Transportation (ODOT) records pertaining to advice given to ODOT by the Attorney General and all records pertaining to whether Article IX, section 3a, of the Oregon Constitution authorizes fuel and vehicle taxes to be used for purposes not listed in Article IX, section 3a. Petition denied. With regard to the first set of records, ODOT agreed to disclose all responsive records concerning advice received from an Assistant Attorney General. With regard to the second set of records, the Public Records Law does not impose on public bodies an obligation to comply with a request to engage in legal research or analysis of an issue. Because the Attorney General's office had not provided advice about the specific point of law in petitioner's second request, the request effectively invited ODOT to determine if any previous advice pertained to the legal question as framed by petitioner.

January 27, 2007, James W. Laws. Petition for an order directing Oregon State Police (OSP) to disclose The Mobile Response Team Plan or Special Operations Plan (plan) for the multi-agency enforcement action conducted at or in the vicinity of the Cove Palisades State Park. Petition denied. ORS 192.501(18) requires that a public record meet four criteria to qualify for the exemption. The plan met the criteria because, first, it was a specific operational plan for an identified event during particular periods, specifying how and when personnel are deployed around the park. Second, the record was connected to activities that occurred during the 2004 Memorial Day weekend at the state park that threatened the safety of specific individuals and the public generally, and the law enforcement activity provided for in the plan addressed OSP's actions to alleviate an anticipated threat to safety the following year. Third, the plan was prepared and used by OSP. Finally, public disclosure of the plan would allow individuals to learn the tactical procedures and deployment methods of OSP personnel and endanger the physical safety of law enforcement personnel and civilians in around the state park.

February 21, 2007, Lemuel Hentz. Petition for an order directing the Legislative Counsel Committee of the Oregon Legislative Assembly and its employees to make available for inspection or produce the date and time the Legislative Counsel received a copy of the Oregon Department of Corrections adopted rule, "Racketeering," OAR 291-105-0015(4)(k). Petition denied. A "state agency," as defined by ORS 192.410(5), does not include the Legislative Assembly.

February 27, 2007, Les Zaitz. Petition for an order directing the Oregon Department of Corrections (ODOC) to disclose ODOC records concerning Fred Monem, ODOC Food Services Administrator. Petition denied. ORS 192.501(3) exempts from disclosure criminal investigatory information not originally created, but later gathered, for criminal law enforcement purposes. The United States Attorney's Office represented to ODOC that disclosure of Monem's records could interfere with the pending investigation and possible prosecutions to follow. The exemption applied even though federal law enforcement authorities had not yet requested or subpoenaed the records because, while there was a legitimate public interest in disclosure of the requested records, the public interest did not require disclosure at that time.

August 7, 2007, Daniel J. Stotter. Petition for an order directing the Trial Court Administrator for Marion County Circuit Court to disclose the court's audio and video recordings of specified proceedings. Because the circuit court judge claimed the right to withhold disclosure of the recordings, the Attorney General had no authority to consider the petition, pursuant to ORS 192.480, regardless of whether the elected official had actual custody of the record.

August 8, 2007, Karen Kirsch. Petition for an order directing the Insurance Division (Division) to disclose the rate filing submitted to the Division by Regence Blue Cross/Blue Shield. Petition denied. Specific information contained in the rate filing pertaining to claim trends, retention, target-loss ratio, and accidental death benefit rates met the criteria for trade secrets and was exempt under ORS 192.501(2). The insurer informed the Division that the information was proprietary, compiled and known by the insurer's actuaries who had acquired the knowledge necessary to make such projections, used as a core component of rate setting, protected by Regence using extensive measures, and would provide an economic advantage to competitors if the information was disclosed. Furthermore, while other states have provided full disclosure of rate filings, such disclosure does not bind an Oregon agency or necessarily show a significant public interest in disclosure in this instance. Disclosure is reviewed pursuant to Oregon Public Records Law and the Uniform Trade Secrets Act.

October 16, 2007, Susan Davis. Petition for an order directing the University of Oregon to disclose e-mails between specified University personnel relating to reading and reading policy. Petition granted in part and denied in part. The University agreed to provide copies of several pages of material in response to the request and therefore that portion of the petition was denied as moot. Of the remaining e-mail messages subject to the request, the University produced thousands of pages of e-mail messages. The exemptions cited by the University required a highly fact-intensive review. Because the University did not associate any particular record with any particular exemption, the Attorney General was unable to determine which exemption was applied to which record, or whether an exemption was properly applied. The Attorney General granted the petition in part by ordering the University to disclose the records or, in the alternative, identify the particular exemption the University claims applies to a given record.

PUBLIC RECORDS LAW APPENDIX G
Statutes Affecting Disclosure

This appendix lists Oregon statutes incorporated into ORS 192.502(9) that may affect public disclosure, as well as some exemptions stated in other sections of the Public Records Law that are specific to a particular agency. It is *not* an exhaustive list. Also, some of these statutes are applicable only under certain circumstances; some are conditional; and some are merely permissive. Check the language of the statutes to determine the scope of any potential exemption.

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Accountancy, Board of	Criminal offender information	181.534
	Information of Practice Review Committee	673.455
Administrative Services, Dept. of	Criminal offender information	181.534
Advisory Council on Child Abuse Assessment	Assessment videotapes	418.794
Agriculture, Dept. of	Agricultural credit mediation files	192.501(16)
	Commercial feed tests	633.077(2)
	Commodity handlers production records	576.115(5)
	Fertilizer registration information	633.364
	Milk handlers records audit	583.086(1)
	Milk marketing referendum records	583.490(3)
	Nursery license application	571.057(2)
	Pesticide sales or use data	Or Laws 2001, ch 915 § 2
Appraiser Certification & Licensure Board	Criminal offender information	181.534
Assessors, County	Appraisal information received in confidence	308.413
	Industrial plant/value appraisal	308.411(4)
	Personal property tax return	308.290
	Wasteland/farmland application	308.372(3)
Attorney	Client communications	40.225

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Attorney (Cont'd)	Disclosures to criminal defendants	135.815
	Domestic relations conciliation communications	107.600
	Pretrial discovery information	135.855
Attorney Assistance Committees	Information about attorneys	9.545(2)
Attorney General/District Attorney	District attorney disclosures to defendants	135.815
	Oregon No-Call List information	646.567
	Security seal violation notice	618.506(2)
	Trade practice violation notice	646.632(2)
Bar, Oregon State	Lawyers Assistance Committee or Personal & Practice Management Assistance Committee	9.568(3)
	Liability Fund claims	9.080
Blind Commission	Records, papers & files	346.150 346.165 346.167
Child Fatality Review Team	Information & records	418.795
Child Support Division (formerly Support Enforcement Division)	Child support information	25.020 25.260 192.502(33)
	Federal Parent Locater Service information	180.380
	Paternity information	25.020 192.502(33)
Children's Advocate, Office of	Criminal offender information	181.534 181.537 417.815
Chiropractic Examiners, Board of	Criminal offender information	181.534 684.100
	Investigatory information on licensee or applicant conduct	676.165(5) 676.175 684.100(10)

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Chiropractic Examiners, Board of (Cont'd)	Peer review information	684.185(7)
Citizen Review Boards, Local	Information reviewed for actions & recommendations	419A.100
Civil Service Commissions	Examination papers	242.722
Clergy	Penitent communications	40.260
Clerks, County	Commitment hearing transcripts	426.160
	Elections Security Plan	192.502(31)
	Marriage records	106.180
	Voters' Pamphlet material (for limited time)	251.430
Clinical Social Workers	Client communications	40.250 675.580
Clinical Social Workers, Board of	Complaint information	675.585(2)
	Criminal offender information	181.534 675.540(4)
	Investigatory information on licensee or applicant conduct	676.165(5) 676.175
	Violation of professional standards information	675.583(2)
Community Colleges	Student records	341.290(17)
	Workforce investment records	660.318
Consumer and Business Services, Dept. of	Business registration information	190.255
	Credit union records	723.118
	Debt consolidation violations	697.732
	Depositors & amounts	706.730
	Employee safety or health complaints	654.062(4)
	Employee safety inspection scheduling information	654.067
	Employer report of safety & health hazard evaluations	654.120
	Health benefit plan decision review synopsis	743.862(5)
	Insurance agent terminations	744.079(10)

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Consumer and Business Services, Dept. of (Cont'd)	Insurance compliance audit documents	731.762
	Insurer & health care service contractor capital or surplus reports	731.752
	Medical services provider information	656.248(5)
	Order to cure impairment	732.230(3)
	Records, reports & information	192.502(6)
	Regulatory records	705.137
	Reports/investment information/stockholder lists	706.720
	Savings & loan company reports	722.419
	Service contracts, complaint/investigation	646.277
	Workers' compensation claim records	192.502(19)
Contracting Agencies, State and Local	Contract bids	279B.055(5) 279C.365(2)
	Contract proposals	279B.060(5) 279C.410(1)
Corrections, Dept. of	Corrections, parole or probation officers' home address & phone number, e-mail address	192.502(34)
	Information & records	192.502(5)
	Inmate transfer records	421.213
	Medical records	179.495
	Ombudsman complaints, information	423.430
	Ombudsman testimony, privileged	423.440
	Presentence report	137.077
Counselors and Therapists, Board of Licensed Professional	Client communications	40.262
	Client information complaints	675.765 675.580
	Criminal offender information	181.534

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Counselors and Therapists, Board of Licensed Professional (Cont'd)	Investigatory information on licensee or applicant conduct	675.745 676.165(5) 676.175
County Multidisciplinary Child Abuse Team	Information & records	418.795 418.747(5)(7)
County Registrar	Birth & death abstracts (certain information)	432.119
Courts, Generally	Adoption information	109.440
	Adoption petitioners	109.235
	Adoption proceedings	7.211
	Certain judgment reports	18.425(5)
	Child support payment information	25.020(8) 192.502(33)
	Criminal offender information	181.534
	Court security improvement plans	1.180
	Domestic relations conciliation records/proceedings	107.600
	Domestic relations mediation records/proceedings	107.785
	Drug court program records	3.450
	Drug evaluation results	430.475
	Expunged information	419A.262
	Grand jury indictment (before arrest of defendant)	132.410
	Information from intercepted communication	133.729
	Interception of communications application	133.723
	Jury lists, source lists	10.215 10.275
	Juvenile court records	419A.255 419A.257
	Mediation agreements	36.230
	Mental commitment materials	426.160
	Paternity proceedings information	25.020(8) 192.502(33)
	Preliminary hearing statements	135.155

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Courts, Generally (Cont'd)	Presentence report & written information relating to sentencing	137.077
	Professional fiduciary criminal records checks	125.240(2)(a)
	Settlement agreements	17.095
Courts, Juvenile	Records acquired or reviewed by court appointed special advocates	419A.170
	Record of a case	419A.255 419A.257
	Reports of juvenile's history & prognosis	419A.255
Courts, Tax	Industrial plant valuations	305.420
	Subpoenaed industrial plant tax information	305.392
	Trade secret information in litigation	305.430
Dentistry, Board of	Complaint information	679.320
	Criminal offender information	181.534
	Dentist-patient communications	40.235
	Investigatory information on licensee or applicant conduct	676.165(5) 676.175 679.140(10) 679.280(1)
Denture Technology, Board of	Investigatory information on licensee or applicant conduct	676.165(5) 676.175
Developmental Disabilities Protection and Advocacy System	Records of individuals with developmental disabilities	192.517
Dietitians, Board of Examiners of Licensed	Investigatory information on licensee or applicant conduct	676.165(5) 676.175 691.585(1)
Domestic Violence Fatality Review Team	Information	418.714(10)
Economic and Community Development Dept.	Business registration information	190.255
	Certain submitted records	192.502(16)

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Economic and Community Development Dept. (Cont'd)	"Eligible project" application/negotiations	285B.392
	Job Training Partnership Act participant records	285A.446
	Negotiations with persons considering location in Oregon	285A.090
Education, Dept. of	Criminal offender information	181.534
	School employee disciplinary records	339.375(6)-(7)
Emergency Medical Services Providers (Governing Body of)	Program data concerning emergency medical technicians	41.685
	Emergency medical dispatchers' or fire service professionals' home addresses, phone numbers & e-mail addresses	192.502(34)
Employees Benefit Board	Unfair labor practice complaints	192.501(9)
Employment Dept.	Business registration information	190.255
	Criminal offender information	181.534 181.537
	Criminal offender information-Child Care Division	657A.030
	Disclosure of wage information to consumer reporting agency	657.673
	Information other than for SSA & Federal Unemployment Tax purposes	657.665
	Workforce Investment records	657.710(3)
Employment Relations Board	Employee representation cards	192.501(7)
	Unfair labor practice complaints	192.501(9)
Energy, Office of	Certain information on regulation of energy facilities	469.560(2)
	Criminal offender information	181.534

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Energy, Office of (Cont'd)	Energy Facility Siting Council security programs	192.502(11)
	Energy producer records	469.090
Environmental Quality, Dept. of	Annual progress reports of waste reduction plans not reported to DEQ	465.024(5)
	Annual recycling reports	459A.050
	Certain hazardous waste information	466.090
	Certain information regarding underground storage tanks	466.800
	Certain information in waste treatment or disposal permit application	466.060(2)
	Criminal offender information	181.534
	Financial assistance request records for cleanup costs	465.300
	Hazardous waste trade secrets	465.250(5)
	Pollution control information	468.095(2)
	Solid waste reduction account information	465.024(5)
	Toxics use & waste reduction plans	465.018
	Trade secrets in annual reports as classified by director	465.031
Export Trading Corporations	Commercial or financial information	777.793
	Commercial/financial records, trade secrets	777.795
Fair and Exposition Center, Oregon State	Criminal offender information	181.534
Financial Institutions	Private financial records	192.555
Fire Fighter Civil Service Commissions	Examination papers	242.722
Fire Marshal	Criminal offender information	181.534
	Hazardous substance information	453.327
	Investigation testimony	476.090

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Fish and Wildlife, Dept. of	Criminal offender information	181.534
Forestry, Dept. of	Criminal offender information	181.534
Geology and Mineral Industries, Dept. of	Geothermal well reports Information in mineral exploration drilling permits Oil/gas drilling records	522.365 517.720 520.095
Governing Bodies	Executive sessions, minutes of	192.650
Governor	Budget estimates Energy resource information compiled for emergencies	291.223 176.765
Health Licensing Office	Midwife conduct information Criminal offender information	687.490 181.534
Higher Education, Board of	Contracts for financial services Personal staff records in higher education institutions Student records	352.017 351.065 351.070(4) 352.017
Hospitals	Committee materials on training, supervision & staff discipline	41.675
Housing and Community Services Dept.	Certain landlord-tenant information	90.770
Human Services, Dept. of (Including former Adult and Family Services Division, State Office for Services to Children and Families, Health Division, Mental Health and Developmental Disabilities Services Division, Senior and Disabled Services Division, and Vocational Rehabilitation Division)	Abortion & fetal death reports Adoption registry Adoption reports & information, sealed Aid & services recipient/applicant information Cancer registry system information Child abuse reports/records Child support cases Child support information	432.337 109.440 109.445 432.420 410.150 418.130 432.530 432.540 419B.035 418.135 25.020 25.260 192.502(33)

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Human Services, Dept. of (Cont'd)	Communicable/reportable disease, identity of persons with	433.008
	Criminal history information related to placement of child	418.747(5)
	Criminal offender information	181.534 181.537
	Custodial facilities, information held by	426.155
	Denturist conduct investigatory information	676.165(5) 676.175 680.542
	Diabetes in children	444.330
	Domestic violence fatality review team information	418.714(10)
	Elderly abuse records/reports	124.085
	EMT conduct investigatory information	124.090 676.165(5) 676.175 682.175(6)
	Family violence shelters	108.620(3)
	Foster homes, complaint information about	443.765
	Genetic tests (DNA) information	192.535 192.537 192.547 659.715 659.720
	HIV (AIDS) test results	433.075
	HIV test subject, identity results	433.045(3)
	HIV tests of certain convicted persons and crime victims	135.139
	Home health services recipient information	410.480
	Infectious disease, identity of persons affected with or exposed to	433.423(2)

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Human Services, Dept. of (Cont'd)	Juvenile court records	419A.255 419A.257
	Long-term care client information	410.535
	Long-term care patient abuse investigation photos	441.660
	Long-term care patient abuse records	441.671 441.650(7)
	Medical records	179.505
	Mentally ill or developmentally disabled abuse reports	430.763
	Morbidity & mortality information	432.060
	Nursing staff plan violations	441.170
	Paternity information	25.020(8) 192.502(33)
	Personnel information	409.160(2)
	Primary caregivers registry	475.331
	Project Independence, client/recipient information	410.480
	Public assistance records	411.320
	Quarantine/other public health proceeding, record of	433.019(21)
	Vital records	432.121
	Vocational rehabilitation information & records	344.530
	Vocational rehabilitation reports	344.600
Informers	Elderly abuse reporter	124.075
	Health care facility care	441.057
	Health/safety law complainant	654.062(4)
	Identity of informers	40.275
	Whistleblower law (identities)	659.535
Institutions, State	Patient records	179.505
Insurance Division	Agent compensation agreements	744.245
	Certain reports & documents of insurer	731.750 731.752

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Insurance Division (Cont'd)	Complaints & investigation data	731.264
	Confidential documents	705.137
	Examination documents from Surplus Lines Association	735.430(1)
	Impaired insurers	734.650 734.830
	Insurance examination records	731.312
	Life settlement provider, policyholder identification	744.346
	Negligence lawsuits against health care providers	742.400(3)
	Surplus lines affidavits	735.425
Interagency Investigative Teams	Child fatality review team information, records	418.795
	County multidisciplinary child abuse team information, records	418.795 418.747(5), (7)
	Domestic violence fatality review team information	418.714(10)
Interagency Shared Information System Participating Agencies	Information in, submitted to or received from Interagency Shared Information System	ORS ch 657
Intergovernmental Groups	Geographic information	190.050
Interpreters	Hearing impaired & non-English speaker privilege	40.272 40.273
Judicial Department	Criminal offender information	181.534
Judicial Fitness and Disability Commission	Disability information	1.303(6) 1.425(2)
	Records, files, papers & communications	1.440
Justice, Dept. of	Antitrust information	646.836
	Business registration information	190.255
	Child Abuse Multidisciplinary Intervention Program	418.747(7)
	Criminal offender information	181.534

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Justice, Dept. of (Cont'd)	Crime victim compensation records	147.115
Labor and Industries, Bureau of Commissioner	Employment discrimination material & reports	192.501(8)
	Wage rate determination	279.359
	Wage rate inspection	279.355
Lands, Dept. of State	Criminal offender information	181.534
Landscape Contractors, Board of	Landscape contractor investigation records	671.550(2)
Law Enforcement Agencies	Child abuse records	419B.035
	Information about employees with undercover investigative duties	181.852
Legislative Assembly	Information made confidential by rule or resolution	171.430
Legislative Counsel Committee	Matters submitted in confidence	173.230
Legislative Fiscal Office	Confidential draft measures	173.455
Legislative Revenue Office	Confidential draft measures	173.855
	Individually identifiable information from Dept. of Revenue records	173.850
Libraries, Public	Circulation records & patron information	192.502(22)
Liquor Control Commission	Criminal offender information	181.534
Local Citizen Review Boards	Information reviewed for actions & recommendations	419A.102
Long-Term Care Ombudsman	Long-term care residents & complaints	441.113
Marine Board	Marine accident reports	830.490
Mass Transit Districts	Criminal offender information	267.237 181.534
Massage Technicians Board	Investigatory information on licensee or applicant conduct	676.165(5) 676.175 687.081(9)

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Massage Therapists, Board of	Criminal offender information	181.534
Mediation	Child custody communications Mediation materials	107.179(4) 36.220
Medical Examiner	Deadly weapon injury reports	146.780
Medical Examiners, Board of	Criminal offender information Investigatory information on licensee or applicant conduct Peer review information Records of Diversion Supervisory Council	181.534 676.165(5) 676.175 677.425 441.055 677.655
Mental Health Program, Community	Commitment investigation information	426.370
Mental Illness Protection and Advocacy System	Records of individuals with mental illness	192.517
Metropolitan Service District	Software product programming source codes, object codes, and geographic databases or systems	268.357
Midwifery, Board of Direct Entry	Midwife conduct information	687.485
Military Department	Criminal offender information	181.534
Mortuary and Cemetery Board	Investigatory information on licensee or applicant conduct	676.165(5) 676.175 692.180(5) 692.230(4)
Naturopathic Examiners, Board of	Criminal offender information Investigatory information on licensee or applicant conduct Peer review information	181.534 676.165(5) 676.175 685.115 685.205(6)
Notaries Public	Notarial journal activities	194.152(4)
Nurses	Patient communications	40.240
Nursing, Board of	Criminal offender information	181.534

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Nursing, Board of (Cont'd)	Investigatory information on licensee or applicant conduct or applicant conduct	676.165(5) 676.175 678.126(1)
Nursing Home Administrators, Board of	Complaints Investigatory information on licensee or applicant conduct	678.725(2) 676.165(5) 676.175 678.780(4)
Occupational Therapy Licensing Board	Investigatory information on licensee or applicant conduct	675.300 676.165(5) 676.175
Optometry, Board of	Investigatory information on licensee or applicant conduct	676.165(5) 676.175 683.165(1) 683.335(2)
Oregon Health and Science University	Names, home or professional addresses or locations of persons involved in animal research Personal information about donors or potential donors of money or property	192.501(30) 192.501(24)
Oregon Resource and Technology Development Corporation	Client proprietary information	284.650(19) 284.670(3)(c)
Oregon University System	Criminal offender information Personal information about donors or potential donors of money or property	181.534 192.501(24)(25)
Parks and Recreation, Dept. of	Criminal offender information	181.534
Parole Board	Information & records	192.502(5)
Pesticide Analytical and Response Center	Medical information	634.550
Pharmacist Diversion Program Supervisory Council	Records	689.352
Pharmacy Board	Criminal offender information	181.534

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Pharmacy Board (Cont'd)	Investigatory information on licensee or applicant conduct	676.165(5) 676.175 689.455(3)
	Pharmacy technician information	689.495
Physical Therapist Licensing Board	Investigatory information on licensee or applicant conduct	676.165(5) 676.175 688.230
Physicians	Patient communications	40.235
Police, Dept. of State	Blood samples, autoradiographs, physical evidence, information in DNA database	181.085
	Criminal records compiled for authorized agencies doing background checks	181.534
	Fingerprints, photos, records & reports	181.548
	Firearm information	166.412(7)
	Information about employees with undercover investigative duties	181.852
	Medical information on missing persons	146.535
	Police officer's home address, phone number & e-mail address	192.502(34)
	Personnel investigation information	181.854
	Phone numbers produced by pen register or trap & trace device	165.673
	Sex offender registration information	181.592
Psychiatric Security Review Board	Reports, medical, social & criminal histories	161.336

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Psychologist Examiners, Board of	Criminal offender information Investigatory information on licensee or applicant conduct	181.534 675.075 676.165(5) 676.175
Psychotherapists	Patient communications	40.230
Public Defense Services, Office of	Client communications	40.225
Public Employees' Retirement System	Criminal offender information	181.534
Public Officers	Exempt public records	40.270
Public Safety Officers	Home address, phone number & e-mail address Peer support counseling information Personnel investigation information Photographs	192.502(34) 181.860 181.854 181.675 181.854
Public Safety Standards and Training, Dept. of	Criminal offender information Investigation information Investigator client files & personal information Photograph of public safety officer	181.534 181.880 703.480 703.473 181.675
Public Utility Commission(er)	Automatic phone number identification, unlisted phone numbers, unpublished phone Criminal offender information Utility rate schedules Utility & carrier investigation records	401.765(2) 181.534 759.175 759.215 756.075(4)
Qualified Tuition Savings Board	Individual account information	348.867
Racing Commission	Criminal offender information	181.534

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Radiologic Technology Board	Investigatory information on licensee or applicant conduct	676.165(5) 676.175 688.525(3) 688.605
Real Estate Agency or Commissioner	Criminal offender information Membership campgrounds	181.534 94.974
Registrars	Foundling reports Vital statistics	432.430 432.121
Regulated Entities	Environmental audit report	468.963
Revenue, Dept. of	Appraisal information received in confidence Authorized release of tax information Books/papers by owner for appraisal of industrial plants Business registration information Criminal offender information Hotel/motel tax information Income tax reports Inheritance tax returns Personal property tax returns State transient lodging tax records Timber & log sale or purchase records	308.413 305.193 305.192 190.255 181.534 192.502(17) 314.835(1) 314.840 118.525 308.290 320.340 321.381
School Districts	School employee disciplinary records Student medical records including student educational plans Teacher personnel files	339.375(6)-(7) 332.061(2) 342.850
School Employees	Student communications	40.245
Schools and Education Institutions	Blind/deaf student records Eligibility for donated books	346.169 337.288

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Schools and Education Institutions (Cont'd)	Student records	326.565 336.187(1) 326.580
	Teacher personnel files	342.850
Search Organizations	Private adoption agency records	109.507
Secretary of State	Business registration information	190.255
	Criminal offender information	181.534
	EDP programs & media used to store Business Registry information	56.100
	Fees, copies of records	128.600
	Government Waste Hotline, informant's identity	177.180
	Tax information for audits	297.060
	Voter registration identifying documents	247.973(4)
	Voters' Pamphlet material (for limited time)	251.145
Speech-Language Pathology and Audiology, Board of Examiners for	Investigatory information on licensee or applicant conduct	676.165(5) 676.175 681.440(4)
State Accident Insurance Fund	Employer account records, dividend schedules & formulas	656.702
State Court Administrator	Information from person requesting counsel, information to verify indigency	151.495
	Jury lists, source lists	10.215 10.275
Stenographers	Employer communications	40.265
	Support information	180.320
Student Assistance Commission	Criminal offender information	181.534
Tax Practitioners, Board of	Investigation information	673.730
	Names & addresses of tax preparers	673.710

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Teacher Standards and Practices Commission	Criminal offender information	181.534
	Investigation information	342.176
Transit Districts	Criminal offender information	181.534
		267.237
	Short-term obligations	267.400(7)
Transportation, Dept. of	Criminal offender information	181.534
	Hazardous material transport	824.082(2)
	Hazardous waste reports	824.092
	Medical impairments & health care provider reports	807.710
	Motor vehicle records:	802.220
	Accident report	802.220(5)
	Anatomical donation information	97.952
		802.179
		802.181
	Driving Record Abstracts: convictions, accidents, diversions > 3 years, terminated suspensions	802.220(4)
	Duplicate images of DMV photographs	807.115
	Name, address, telephone number, driver license, permit & identification card number	802.177 802.179 802.181
	Social security numbers	802.195
	Undercover vehicle registration	802.220(1)
	Oregon Innovative Partnerships Program records	367.804(5)(6)
	Private-public transportation project study	383.025
	Transportation project proposals	367.804(5)(6)
	Vehicle fuel dealer reports	319.190(2)
Treasurer, State or Local	Records received from banks regarding collateral requirements	295.018(6)

AGENCY-PERSON	MATERIAL AFFECTED	STATUTE
Treasurer, State or Local (Cont'd)	Registered bond owners	288.590
Veterans' Affairs, Dept. of (Director)	Federal records	406.050
Veterinary Medical Examining Board	Investigatory information on licensee or applicant conduct	676.165(5) 676.175 686.135(3)
Water Resources Commission	Well reports	537.762(4)
Wife-Husband	Spouse communication	40.255
Workers' Compensation Board	Medical panel records	656.327(4)
Youth Authority	Child abuse information/records, interagency teams	418.747(5)(7) 418.795
	Criminal offender information	181.534
	Information on released youth offenders	420A.122
	Juvenile court records	419A.255 419A.257
	School employee disciplinary records	339.375(6)-(7) 181.854
	Youth corrections officers' home addresses, phone numbers & e-mail addresses	192.502(34)

PUBLIC RECORDS LAW APPENDIX H
Attorney General's Uniform Rule for Personal Safety Exemption

As Amended Effective January 1, 2008

Public Records Personal Safety Exemption

137-004-0800 (1) An individual may request that a public body not disclose the information in a specified public record that indicates the home address, personal telephone number or personal electronic mail address of the individual. If the individual demonstrates to the satisfaction of the public body that the personal safety of the individual or the personal safety of a family member residing with the individual is in danger if the home address, personal telephone number or personal electronic mail address remains available for public inspection, the public body may not disclose that information from the specified public record, except in compliance with a court order, to a law enforcement agency at the request of the law enforcement agency, or with the consent of the individual.

(2) A request under subsection (1) of this rule shall be submitted to the custodian of public records for the public record that is the subject of the request. The request shall be in writing, signed by the requestor, and shall include:

(a) The name or a description of the public record sufficient to identify the record;

(b) A mailing address for the requestor.

(c) Evidence sufficient to establish to the satisfaction of the public body that disclosure of the requestor's home address, personal telephone number or personal electronic mail address would constitute a danger to the personal safety of the requestor or of a family member residing with the requestor. Such evidence may include copies of the following documents:

(A) Documentary evidence, including a written statement, that establishes to the satisfaction of the public body that disclosure of the requestor's home address, personal telephone number or personal electronic mail address would constitute a danger to the personal safety of the requestor or of a family member residing with the requestor.

(B) A citation or an order issued under ORS 133.055 for the protection of the requestor or a family member residing with the requestor;

(C) An affidavit or police reports showing that a law enforcement officer has been contacted concerning domestic violence, other physical

abuse or threatening or harassing letters or telephone calls directed at the requestor or a family member residing with the requestor;

(D) A temporary restraining order or other no-contact order to protect the requestor or a family member residing with the requestor from future physical abuse;

(E) Court records showing that criminal or civil legal proceedings have been filed regarding physical protection for the requestor or a family member residing with the requestor;

(F) A citation or a court's stalking protective order pursuant to ORS 163.735 or 163.738, issued or obtained for the protection of the requestor or a family member residing with the requestor;

(G) An affidavit or police reports showing that the requestor or a family member residing with the requestor has been a victim of a person convicted of the crime of stalking or of violating a court's stalking protective order;

(H) A conditional release agreement issued under ORS 135.250-260 providing protection for the requestor or a family member residing with the requestor;

(I) A protective order issued pursuant to ORS 135.873 or 135.970 protecting the identity or place of residence of the requestor or a family member residing with the requestor;

(J) An affidavit from a district attorney or deputy district attorney stating that the requestor or a family member residing with the requestor is scheduled to testify or has testified as a witness at a criminal trial, grand jury hearing or preliminary hearing and that such testimony places the personal safety of the witness in danger;

(K) A court order stating that the requestor or a family member residing with the requestor is or has been a party, juror, judge, attorney or involved in some other capacity in a trial, grand jury proceeding or other court proceeding and that such involvement places the personal safety of that individual in danger; or

(L) An affidavit, medical records, police reports or court records showing that the requestor or a family member residing with the requestor has been a victim of domestic violence.

(3) A public body receiving a request under this rule promptly shall review the request and notify the requestor, in writing, whether the evidence submitted is sufficient to demonstrate to the satisfaction of the public body that the personal safety of the requestor or of a family member residing with the requestor would be in danger if the home address,

personal telephone number or personal electronic mail address remains available for public inspection. The public body may request that the requestor submit additional information concerning the request.

(4) If a public body grants the request for exemption with respect to records other than a voter registration record, the public body shall include a statement in its notice to the requestor that:

(a) The exemption remains effective for five years from the date the public body received the request, unless the requestor submits a written request for termination of the exemption before the end of five years; and

(b) The requestor may make a new request for exemption at the end of the five years. If a public body grants the request for exemption with respect to a voter registration record, the public body shall include a statement in its notice to the requestor that:

(A) The exemption remains effective until the requestor must update the individual's voter registration, unless the requestor submits a written request for termination of the exemption before that time; and

(B) The requestor may make a new request for exemption from disclosure at that time.

(5) A person who has requested that a public body not disclose his or her home address, personal telephone number or personal electronic mail address may revoke the request by notifying, in writing, the public body to which the request was made that disclosure no longer constitutes a danger to personal safety. The notification shall be signed by the person who submitted the original request for nondisclosure of the home address, personal telephone number or personal electronic mail address.

(6) This rule does not apply to county property and lien records.

(7) As used in this rule

(a) "Custodian" has the meaning given that term in ORS 192.410(1);

(b) "Public body" has the same meaning given that phrase in ORS 192.410(3).

Stat. Authority: ORS 192.445

Stats. Implemented: ORS 192.445

PUBLIC RECORDS LAW APPENDIX I

Oregon Revised Statutes

INSPECTION OF PUBLIC RECORDS

192.410 Definitions for ORS 192.410 to 192.505. As used in ORS 192.410 to 192.505:

(1) "Custodian" means:

(a) The person described in ORS 7.110 for purposes of court records; or

(b) A public body mandated, directly or indirectly, to create, maintain, care for or control a public record. "Custodian" does not include a public body that has custody of a public record as an agent of another public body that is the custodian unless the public record is not otherwise available.

(2) "Person" includes any natural person, corporation, partnership, firm, association or member or committee of the Legislative Assembly.

(3) "Public body" includes every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.

(4)(a) "Public record" includes any writing that contains information relating to the conduct of the public's business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.

(b) "Public record" does not include any writing that does not relate to the conduct of the public's business and that is contained on a privately owned computer.

(5) "State agency" means any state officer, department, board, commission or court created by the Constitution or statutes of this state but does not include the Legislative Assembly or its members, committees, officers or employees insofar as they are exempt under section 9, Article IV of the Oregon Constitution.

(6) "Writing" means handwriting, typewriting, printing, photographing and every means of recording, including letters, words, pictures, sounds, or sym-

bols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings. [1973 c.794 §2; 1989 c.377 §1; 1993 c.787 §4; 2001 c.237 §1; 2005 c.659 §4]

192.420 Right to inspect public records; notice to public body attorney. (1) Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505.

(2)(a) If a person who is a party to a civil judicial proceeding to which a public body is a party, or who has filed a notice under ORS 30.275 (5)(a), asks to inspect or to receive a copy of a public record that the person knows relates to the proceeding or notice, the person must submit the request in writing to the custodian and, at the same time, to the attorney for the public body.

(b) For purposes of this subsection:

(A) The attorney for a state agency is the Attorney General in Salem.

(B) "Person" includes a representative or agent of the person. [1973 c.794 §3; 1999 c.574 §1; 2003 c.403 §1]

192.423 Condensation of public record subject to disclosure; petition to review denial of right to inspect public record; adequacy of condensation. (1) When a public record is subject to disclosure under ORS 192.502 (9)(b), in lieu of making the public record available for inspection by providing a copy of the record, the public body may prepare and release a condensation from the record of the significant facts that are not otherwise exempt from disclosure under ORS 192.410 to 192.505. The release of the condensation does not waive any privilege under ORS 40.225 to 40.295.

(2) The person seeking to inspect or receive a copy of any public record for which a condensation of facts has been provided under this section may petition for review of the denial to inspect or receive a copy of the records under ORS 192.410 to 192.505. In such a review, the Attorney General, district attorney or court shall, in addition to reviewing the records to which access was denied, compare those records to the condensation to determine whether the condensation adequately describes the significant facts contained in the records. [2007 c.513 §2]

Note: Section 6, chapter 513, Oregon Laws 2007, provides:

Sec. 6. Section 2 of this 2007 Act [192.423] and the amendments to ORS 40.225, 192.460 and 192.502 by sections 3 to 5 of this 2007 Act apply to public records created on or after the effective date of this 2007 Act [June 20, 2007]. [2007 c.513 §6]

Note: 192.423 was added to and made a part of 192.410 to 192.505 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

192.430 Functions of custodian of public records; rules. (1) The custodian of any public records, including public records maintained in machine readable or electronic form, unless otherwise expressly provided by statute, shall furnish proper and reasonable opportunities for inspection and examination of the records in the office of the custodian and reasonable facilities for making memoranda or abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them. If the public record is maintained in machine readable or electronic form, the custodian shall furnish proper and reasonable opportunity to assure access.

(2) The custodian of the records may adopt reasonable rules necessary for the protection of the records and to prevent interference with the regular discharge of duties of the custodian. [1973 c.794 §4; 1989 c.546 §1]

192.440 Copies or inspection of public records; written response by public body; fees; waiver or reduction; procedure for records requests. (1) The custodian of any public record that a person has a right to inspect shall give the person, upon request:

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

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

(2) If a person makes a written request to inspect a public record or to receive a copy of a public record, the public body receiving the request shall respond as soon as practicable and without unreasonable delay. The public body may request additional information or clarification from the requester for the purpose of expediting the public body's response to the request. The response of the public body must acknowledge receipt of the request and must include one of the following:

(a) A statement that the public body does not possess, or is

not the custodian of, the public record.

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

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

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

(e) A statement that the public body is uncertain whether the public body possesses the public record and that the public body will search for the record and make an appropriate response as soon as practicable.

(f) A statement that state or federal law prohibits the public body from acknowledging whether the record exists or that acknowledging whether the record exists would result in the loss of federal benefits or other sanction. A statement under this paragraph must include a citation to the state or federal law relied upon by the public body.

(3) If the public record is maintained in a machine readable or electronic form, the custodian shall provide a copy of the public record in the form requested, if available. If the public record is not available in the form requested, the custodian shall make the public record available in the form in which the custodian maintains the public record.

(4)(a) The public body may establish fees reasonably calculated to reimburse the public body for the public body's actual cost of making public records available, including costs for summarizing, compiling or tailoring the public records, either in organization or media, to meet the person's request.

(b) The public body may include in a fee established under paragraph (a) of this subsection the cost of time spent by an attorney for the public body in reviewing the public records, redacting material from the public records or segregating the public

records into exempt and nonexempt records. The public body may not include in a fee established under paragraph (a) of this subsection the cost of time spent by an attorney for the public body in determining the application of the provisions of ORS 192.410 to 192.505.

(c) The public body may not establish a fee greater than $25 under this section unless the public body first provides the requestor with a written notification of the estimated amount of the fee and the requestor confirms that the requestor wants the public body to proceed with making the public record available.

(d) Notwithstanding paragraphs (a) to (c) of this subsection, when the public records are those filed with the Secretary of State under ORS chapter 79 or ORS 80.100 to 80.130, the fees for furnishing copies, summaries or compilations of the public records are those established by the Secretary of State by rule, under ORS chapter 79 or ORS 80.100 to 80.130.

(5) The custodian of any public record may furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public.

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

(7) A public body shall make available to the public a written procedure for making public record requests that includes:

(a) The name of one or more persons to whom public record requests may be sent, with addresses; and

(b) The amounts of and the manner of calculating fees that the public body charges for responding to requests for public records.

(8) This section does not apply to signatures of individuals submitted under ORS chapter 247 for purposes of registering to vote as provided in ORS 247.973. [1973 c.794 §5; 1979

c.548 §4; 1989 c.111 §12; 1989 c.377 §2; 1989 c.546 §2; 1999 c.824 §5; 2001 c.445 §168; 2005 c.272 §1; 2007 c.467 §1]

192.445 Nondisclosure on request of home address, home telephone number and electronic mail address; rules of procedure; duration of effect of request; liability; when not applicable. (1) An individual may submit a written request to a public body not to disclose a specified public record indicating the home address, personal telephone number or electronic mail address of the individual. A public body may not disclose the specified public record if the individual demonstrates to the satisfaction of the public body that the personal safety of the individual or the personal safety of a family member residing with the individual is in danger if the home address, personal telephone number or electronic mail address remains available for public inspection.

(2) The Attorney General shall adopt rules describing:

(a) The procedures for submitting the written request described in subsection (1) of this section.

(b) The evidence an individual shall provide to the public body to establish that disclosure of the home address, telephone number or electronic mail address of the individual would constitute a danger to personal safety. The evidence may include but is not limited to evidence that the individual or a family member residing with the individual has:

(A) Been a victim of domestic violence;

(B) Obtained an order issued under ORS 133.055;

(C) Contacted a law enforcement officer involving domestic violence or other physical abuse;

(D) Obtained a temporary restraining order or other no contact order to protect the individual from future physical abuse; or

(E) Filed other criminal or civil legal proceedings regarding physical protection.

(c) The procedures for submitting the written notification from the individual that disclosure of the home address, personal telephone number or electronic mail address of the individual no longer constitutes a danger to personal safety.

(3) A request described in subsection (1) of this section remains effective:

(a) Until the public body receives a written request for termination but no later than five years after the date that a public body receives the request; or

(b) In the case of a voter registration record, until the individual must update the individual's voter registration, at which time the individual may apply for another exemption from disclosure.

(4) A public body may disclose a home address, personal telephone number or electronic mail address of an individual exempt from disclosure under subsection (1) of this section upon court order, on request from any law enforcement agency or with the consent of the individual.

(5) A public body may not be held liable for granting or denying an exemption from disclosure under this section or any other unauthorized release of a home address, personal telephone number or electronic mail address granted an exemption from disclosure under this section.

(6) This section does not apply to county property and lien records. [1993 c.787 §5; 1995 c.742 §12; 2003 c.807 §1]

Note: 192.445 was added to and made a part of 192.410 to 192.505 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

192.447 Nondisclosure of public employee identification badge or card. (1) As used in this section, "public body" has the meaning given that term in ORS 174.109.

(2) A public body may not disclose the identification badge or card of an employee of the public body without the written consent of the employee if:

(a) The badge or card contains the photograph of the employee; and

(b) The badge or card was prepared solely for internal use by the public body to identify employees of the public body.

(3) The public body may not disclose a duplicate of the photograph used on the badge or card. [2003 c.282 §1]

Note: 192.447 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 192 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

192.450 Petition to review denial of right to inspect state public record; appeal from decision of Attorney General denying inspection; records of health professional regulatory

boards. (1) Subject to ORS 192.480 and subsection (4) of this section, any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection. Except as provided in subsection (5) of this section, the burden is on the agency to sustain its action. Except as provided in subsection (5) of this section, the Attorney General shall issue an order denying or granting the petition, or denying it in part and granting it in part, within seven days from the day the Attorney General receives the petition.

(2) If the Attorney General grants the petition and orders the state agency to disclose the record, or if the Attorney General grants the petition in part and orders the state agency to disclose a portion of the record, the state agency shall comply with the order in full within seven days after issuance of the order, unless within the seven-day period it issues a notice of its intention to institute proceedings for injunctive or declaratory relief in the Circuit Court for Marion County or, as provided in subsection (6) of this section, in the circuit court of the county where the record is held. Copies of the notice shall be sent to the Attorney General and by certified mail to the petitioner at the address shown on the petition. The state agency shall institute the proceedings within seven days after it issues its notice of intention to do so. If the Attorney General denies the petition in whole or in part, or if the state agency continues to withhold the record or a part of it notwithstanding an order to disclose by the Attorney General, the person seeking disclosure may institute such proceedings.

(3) The Attorney General shall serve as counsel for the state agency in a suit filed under subsection (2) of this section if the suit arises out of a determination by the Attorney General that the public record should not be disclosed, or that a part of the public record should not be disclosed if the state agency has fully complied with the order of the Attorney General requiring disclosure of another part or parts of the public record, and in no other case. In any case in which the Attorney General is prohibited from serving as counsel for the state agency, the agency may retain special counsel.

(4) A person denied the right to inspect or to receive a copy of

any public record of a health professional regulatory board, as defined in ORS 676.160, that contains information concerning a licensee or applicant, and petitioning the Attorney General to review the public record shall, on or before the date of filing the petition with the Attorney General, send a copy of the petition by first class mail to the health professional regulatory board. Not more than 48 hours after the board receives a copy of the petition, the board shall send a copy of the petition by first class mail to the licensee or applicant who is the subject of any record for which disclosure is sought. When sending a copy of the petition to the licensee or applicant, the board shall include a notice informing the licensee or applicant that a written response by the licensee or applicant may be filed with the Attorney General not later than seven days after the date that the notice was sent by the board. Immediately upon receipt of any written response from the licensee or applicant, the Attorney General shall send a copy of the response to the petitioner by first class mail.

(5) The person seeking disclosure of a public record of a health professional regulatory board, as defined in ORS 676.160, that is confidential or exempt from disclosure under ORS 676.165 or 676.175, shall have the burden of demonstrating to the Attorney General by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including but not limited to the public interest in nondisclosure. The Attorney General shall issue an order denying or granting the petition, or denying or granting it in part, not later than the 15th day following the day that the Attorney General receives the petition. A copy of the Attorney General's order granting a petition or part of a petition shall be served by first class mail on the health professional regulatory board, the petitioner and the licensee or applicant who is the subject of any record ordered to be disclosed. The health professional regulatory board shall not disclose any record prior to the seventh day following the service of the Attorney General's order on a licensee or applicant entitled to receive notice under this subsection.

(6) If the Attorney General grants or denies the petition for a record of a health professional regulatory board, as defined in ORS 676.160, that contains in-

formation concerning a licensee or applicant, the board, a person denied the right to inspect or receive a copy of the record or the licensee or applicant who is the subject of the record may institute proceedings for injunctive or declaratory relief in the circuit court for the county where the public record is held. The party seeking disclosure of the record shall have the burden of demonstrating by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including but not limited to the public interest in nondisclosure.

(7) The Attorney General may comply with a request of a health professional regulatory board to be represented by independent counsel in any proceeding under subsection (6) of this section. [1973 c.794 §6; 1975 c.308 §2; 1997 c.791 §8; 1999 c.751 §4]

192.460 Procedure to review denial of right to inspect other public records; effect of disclosure. (1) ORS 192.450 applies to the case of a person denied the right to inspect or to receive a copy of any public record of a public body other than a state agency, except that:

(a) The district attorney of the county in which the public body is located, or if it is located in more than one county the district attorney of the county in which the administrative offices of the public body are located, shall carry out the functions of the Attorney General;

(b) Any suit filed must be filed in the circuit court for the county described in paragraph (a) of this subsection; and

(c) The district attorney may not serve as counsel for the public body, in the cases permitted under ORS 192.450 (3), unless the district attorney ordinarily serves as counsel for the public body.

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

(3) Disclosure of a record or part of a record as ordered by the district attorney is a compelled disclosure for purposes of ORS 40.285. [1973 c.794 §7; 2007 c.513 §4]

Note: See first note under 192.423.

192.465 Effect of failure of Attorney General, district attorney or public official to take timely action on inspection petition. (1) The failure of the Attorney General or district attor-

ney to issue an order under ORS 192.450 or 192.460 denying, granting, or denying in part and granting in part a petition to require disclosure within seven days from the day of receipt of the petition shall be treated as an order denying the petition for the purpose of determining whether a person may institute proceedings for injunctive or declaratory relief under ORS 192.450 or 192.460.

(2) The failure of an elected official to deny, grant, or deny in part and grant in part a request to inspect or receive a copy of a public record within seven days from the day of receipt of the request shall be treated as a denial of the request for the purpose of determining whether a person may institute proceedings for injunctive or declaratory relief under ORS 192.450 or 192.460. [1975 c.308 §5]

192.470 Petition form; procedure when petition received. (1) A petition to the Attorney General or district attorney requesting the Attorney General or district attorney to order a public record to be made available for inspection or to be produced shall be in substantially the following form, or in a form containing the same information:

_____

_____

_____

(date) _____

I (we), _____ (name(s)), the undersigned, request the Attorney General (or District Attorney of _____ County) to order _____ (name of governmental body) and its employees to (make available for inspection) (produce a copy or copies of) the following records:

1._____

(Name or description of record)

2._____

(Name or description of record)

I (we) asked to inspect and/or copy these records on _____ (date) at _____ (address). The request was denied by the following person(s):

1._____

(Name of public officer or employee; title or position, if known)

2._____

(Name of public officer or employee; title or position, if known)

_____

(Signature(s))

_____

_____

_____

This form should be delivered or mailed to the Attorney General's office in Salem, or the district attorney's office in the county courthouse.

(2) Promptly upon receipt of such a petition, the Attorney General or district attorney shall notify the public body involved. The public body shall thereupon transmit the public record disclosure of which is sought, or a copy, to the Attorney General, together with a statement of its reasons for believing that the public record should not be disclosed. In an appropriate case, with the consent of the Attorney General, the public body may instead disclose the nature or substance of the public record to the Attorney General. [1973 c.794 §10]

192.480 Procedure to review denial by elected official of right to inspect public records. In any case in which a person is denied the right to inspect or to receive a copy of a public record in the custody of an elected official, or in the custody of any other person but as to which an elected official claims the right to withhold disclosure, no petition to require disclosure may be filed with the Attorney General or district attorney, or if a petition is filed it shall not be considered by the Attorney General or district attorney after a claim of right to withhold disclosure by an elected official. In such case a person denied the right to inspect or to receive a copy of a public record may institute proceedings for injunctive or declaratory relief in the appropriate circuit court, as specified in ORS 192.450 or 192.460, and the Attorney General or district attorney may upon request serve or decline to serve, in the discretion of the Attorney General or district attorney, as counsel in such suit for an elected official for which the Attorney General or district attorney ordinarily serves as counsel. Nothing in this section shall preclude an elected official from requesting advice from the Attorney General or a district attorney as to whether a public record should be disclosed. [1973 c.794 §8]

192.490 Court authority in reviewing action denying right to inspect public records; docketing; costs and attorney fees. (1) In any suit filed under ORS 192.450, 192.460, 192.470 or 192.480, the court has jurisdic-

tion to enjoin the public body from withholding records and to order the production of any records improperly withheld from the person seeking disclosure. The court shall determine the matter de novo and the burden is on the public body to sustain its action. The court, on its own motion, may view the documents in controversy in camera before reaching a decision. Any noncompliance with the order of the court may be punished as contempt of court.

(2) Except as to causes the court considers of greater importance, proceedings arising under ORS 192.450, 192.460, 192.470 or 192.480 take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(3) If a person seeking the right to inspect or to receive a copy of a public record prevails in the suit, the person shall be awarded costs and disbursements and reasonable attorney fees at trial and on appeal. If the person prevails in part, the court may in its discretion award the person costs and disbursements and reasonable attorney fees at trial and on appeal, or an appropriate portion thereof. If the state agency failed to comply with the Attorney General's order in full and did not issue a notice of intention to institute proceedings pursuant to ORS 192.450 (2) within seven days after issuance of the order, or did not institute the proceedings within seven days after issuance of the notice, the petitioner shall be awarded costs of suit at the trial level and reasonable attorney fees regardless of which party instituted the suit and regardless of which party prevailed therein. [1973 c.794 §9; 1975 c.308 §3; 1981 c.897 §40]

192.493 Health services costs. A record of an agency of the executive department as defined in ORS 174.112 that contains the following information is a public record subject to inspection under ORS 192.420 and is not exempt from disclosure under ORS 192.501 or 192.502 except to the extent that the record discloses information about an individual's health or is proprietary to a person:

(1) The amounts determined by an independent actuary retained by the agency to cover the costs of providing each of the following health services under ORS 414.705 to 414.750 for the six months preceding the report:

(a) Inpatient hospital services;

(b) Outpatient hospital services;

(c) Laboratory and X-ray services;

(d) Physician and other licensed practitioner services;

(e) Prescription drugs;

(f) Dental services;

(g) Vision services;

(h) Mental health services;

(i) Chemical dependency services;

(j) Durable medical equipment and supplies; and

(k) Other health services provided under a prepaid managed care health services contract under ORS 414.725;

(2) The amounts the agency and each contractor have paid under each prepaid managed care health services contract under ORS 414.725 for administrative costs and the provision of each of the health services described in subsection (1) of this section for the six months preceding the report;

(3) Any adjustments made to the amounts reported under this section to account for geographic or other differences in providing the health services; and

(4) The numbers of individuals served under each prepaid managed care health services contract, listed by category of individual. [2003 c.803 §27]

Note: 192.493 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 192 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

192.495 Inspection of records more than 25 years old. Notwithstanding ORS 192.501 to 192.505 and except as otherwise provided in ORS 192.496, public records that are more than 25 years old shall be available for inspection. [1979 c.301 §2]

192.496 Medical records; sealed records; records of individual in custody or under supervision; student records. The following public records are exempt from disclosure:

(1) Records less than 75 years old which contain information about the physical or mental health or psychiatric care or treatment of a living individual, if the public disclosure thereof would constitute an unreasonable invasion of privacy. The party seeking disclosure shall have the burden of showing by clear and convincing evidence that the public interest requires disclosure in the particular instance and that public disclosure would not con-

stitute an unreasonable invasion of privacy.

(2) Records less than 75 years old which were sealed in compliance with statute or by court order. Such records may be disclosed upon order of a court of competent jurisdiction or as otherwise provided by law.

(3) Records of a person who is or has been in the custody or under the lawful supervision of a state agency, a court or a unit of local government, are exempt from disclosure for a period of 25 years after termination of such custody or supervision to the extent that disclosure thereof would interfere with the rehabilitation of the person if the public interest in confidentiality clearly outweighs the public interest in disclosure. Nothing in this subsection, however, shall be construed as prohibiting disclosure of the fact that a person is in custody.

(4) Student records required by state or federal law to be exempt from disclosure. [1979 c.301 §3]

192.500 [1973 c.794 §11; 1975 c.308 §1; 1975 c.582 §150; 1975 c.606 §41a; 1977 c.107 §1; 1977 c.587 §1; 1977 c.793 §5a; 1979 c.190 §400; 1981 c.107 §1; 1981 c.139 §8; 1981 c.187 §1; 1981 c.892 §92; 1981 c.905 §7; 1983 c.17 §29; 1983 c.198 §1; 1983 c.338 §902; 1983 c.617 §3; 1983 c.620 §12; 1983 c.703 §8; 1983 c.709 §42; 1983 c.717 §30; 1983 c.740 §46; 1983 c.830 §9; 1985 c.413 §1; 1985 c.602 §13; 1985 c.657 §1; 1985 c.762 §179a; 1985 c.813 §1; 1987 c.94 §100; 1987 c.109 §3; 1987 c.320 §145; 1987 c.373 §23; 1987 c.520 §12; 1987 c.610 §24; 1987 c.731 §2; 1987 c.839 §1; 1987 c.898 §26; repealed by 1987 c.764 §1 (192.501, 192.502 and 192.505 enacted in lieu of 192.500)]

192.501 Public records conditionally exempt from disclosure. The following public records are exempt from disclosure under ORS 192.410 to 192.505 unless the public interest requires disclosure in the particular instance:

(1) Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation;

(2) Trade secrets. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern,

process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it;

(3) Investigatory information compiled for criminal law purposes. 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. Nothing in this subsection shall limit any right constitutionally guaranteed, or granted by statute, to disclosure or discovery in criminal cases. For purposes of this subsection, the record of an arrest or the report of a crime includes, but is not limited to:

(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;

(4) Test questions, scoring keys, and other data used to administer a licensing examination, employment, academic or other examination or testing procedure before the examination is given and if the examination is to be used again. Records establishing procedures for and instructing persons administering, grading or evaluating an examination or testing procedure are included in this exemption, to the extent that disclosure would create a risk that the result might be affected;

(5) Information consisting of production records, sale or purchase records or catch records, or similar business records of a pri-

vate concern or enterprise, required by law to be submitted to or inspected by a governmental body to allow it to determine fees or assessments payable or to establish production quotas, and the amounts of such fees or assessments payable or paid, to the extent that such information is in a form which would permit identification of the individual concern or enterprise. This exemption does not include records submitted by long term care facilities as defined in ORS 442.015 to the state for purposes of reimbursement of expenses or determining fees for patient care. Nothing in this subsection shall limit the use which can be made of such information for regulatory purposes or its admissibility in any enforcement proceeding;

(6) Information relating to the appraisal of real estate prior to its acquisition;

(7) The names and signatures of employees who sign authorization cards or petitions for the purpose of requesting representation or decertification elections;

(8) Investigatory information relating to any complaint filed under ORS 659A.820 or 659A.825, until such time as the complaint is resolved under ORS 659A.835, or a final order is issued under ORS 659A.850;

(9) Investigatory information relating to any complaint or charge filed under ORS 243.676 and 663.180;

(10) Records, reports and other information received or compiled by the Director of the Department of Consumer and Business Services under ORS 697.732;

(11) Information concerning the location of archaeological sites or objects as those terms are defined in ORS 358.905, except if the governing body of an Indian tribe requests the information and the need for the information is related to that Indian tribe's cultural or religious activities. This exemption does not include information relating to a site that is all or part of an existing, commonly known and publicized tourist facility or attraction;

(12) A personnel discipline action, or materials or documents supporting that action;

(13) Information developed pursuant to ORS 496.004, 496.172 and 498.026 or ORS 496.192 and 564.100, regarding the habitat, location or population of any threatened species or endangered species;

(14) Writings prepared by or under the direction of faculty of public educational institutions, in connection with research, until publicly released, copyrighted or patented;

(15) Computer programs developed or purchased by or for any public body for its own use. As used in this subsection, "computer program" means a series of instructions or statements which permit the functioning of a computer system in a manner designed to provide storage, retrieval and manipulation of data from such computer system, and any associated documentation and source material that explain how to operate the computer program. "Computer program" does not include:

(a) The original data, including but not limited to numbers, text, voice, graphics and images;

(b) Analyses, compilations and other manipulated forms of the original data produced by use of the program; or

(c) The mathematical and statistical formulas which would be used if the manipulated forms of the original data were to be produced manually;

(16) Data and information provided by participants to mediation under ORS 36.256;

(17) Investigatory information relating to any complaint or charge filed under ORS chapter 654, until a final administrative determination is made or, if a citation is issued, until an employer receives notice of any citation;

(18) Specific operational plans in connection with an anticipated threat to individual or public safety for deployment and use of personnel and equipment, prepared or used by a public body, if public disclosure of the plans would endanger an individual's life or physical safety or jeopardize a law enforcement activity;

(19)(a) Audits or audit reports required of a telecommunications carrier. As used in this paragraph, "audit or audit report" means any external or internal audit or audit report pertaining to a telecommunications carrier, as defined in ORS 133.721, or pertaining to a corporation having an affiliated interest, as defined in ORS 759.390, with a telecommunications carrier that is intended to make the operations of the entity more efficient, accurate or compliant with applicable rules, procedures or standards, that may include self-criticism and that has been filed by the telecommunications carrier or

affiliate under compulsion of state law. "Audit or audit report" does not mean an audit of a cost study that would be discoverable in a contested case proceeding and that is not subject to a protective order; and

(b) Financial statements. As used in this paragraph, "financial statement" means a financial statement of a nonregulated corporation having an affiliated interest, as defined in ORS 759.390, with a telecommunications carrier, as defined in ORS 133.721;

(20) The residence address of an elector if authorized under ORS 247.965 and subject to ORS 247.967;

(21) The following records, communications and information submitted to a housing authority as defined in ORS 456.005, or to an urban renewal agency as defined in ORS 457.010, by applicants for and recipients of loans, grants and tax credits:

(a) Personal and corporate financial statements and information, including tax returns;

(b) Credit reports;

(c) Project appraisals;

(d) Market studies and analyses;

(e) Articles of incorporation, partnership agreements and operating agreements;

(f) Commitment letters;

(g) Project pro forma statements;

(h) Project cost certifications and cost data;

(i) Audits;

(j) Project tenant correspondence requested to be confidential;

(k) Tenant files relating to certification; and

(L) Housing assistance payment requests;

(22) Records or information that, if disclosed, would allow a person to:

(a) Gain unauthorized access to buildings or other property;

(b) Identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, services; or

(c) Disrupt, interfere with or gain unauthorized access to public funds or to information processing, communication or telecommunication systems, including the information contained in the systems, that are used or operated by a public body;

(23) Records or information that would reveal or otherwise identify security measures, or weaknesses or potential weaknesses in security measures, taken or recommended to be taken to protect:

(a) An individual;

(b) Buildings or other property;

(c) Information processing, communication or telecommunication systems, including the information contained in the systems; or

(d) Those operations of the Oregon State Lottery the security of which are subject to study and evaluation under ORS 461.180 (6);

(24) Personal information held by or under the direction of officials of the Oregon Health and Science University or the Oregon University System about a person who has or who is interested in donating money or property to the university, the system or a state institution of higher education, if the information is related to the family of the person, personal assets of the person or is incidental information not related to the donation;

(25) The home address, professional address and telephone number of a person who has or who is interested in donating money or property to the Oregon University System;

(26) Records of the name and address of a person who files a report with or pays an assessment to a commodity commission established under ORS 576.051 to 576.455, the Oregon Beef Council created under ORS 577.210 or the Oregon Wheat Commission created under ORS 578.030;

(27) Information provided to, obtained by or used by a public body to authorize, originate, receive or authenticate a transfer of funds, including but not limited to a credit card number, payment card expiration date, password, financial institution account number and financial institution routing number;

(28) Social Security numbers as provided in ORS 107.840;

(29) The electronic mail address of a student who attends a state institution of higher education listed in ORS 352.002 or Oregon Health and Science University;

(30) The name, home address, professional address or location of a person that is engaged in, or that provides goods or services for, medical research at Oregon Health and Science

University that is conducted using animals other than rodents. This subsection does not apply to Oregon Health and Science University press releases, websites or other publications circulated to the general public;

(31) If requested by a public safety officer as defined in ORS 181.610, by a district attorney or deputy district attorney or by an assistant attorney general designated by the Attorney General, the home address and home telephone number of the public safety officer or attorney contained in the voter registration records for the public safety officer or attorney;

(32) If requested by a public safety officer as defined in ORS 181.610, by a district attorney or deputy district attorney or by an assistant attorney general designated by the Attorney General, the name of the public safety officer or attorney contained in county real property assessment or taxation records. This exemption:

(a) Applies only to the name of the public safety officer or attorney and any other owner of the property in connection with a specific property identified by the officer or attorney in a request for exemption from disclosure;

(b) Applies only to records that may be made immediately available to the public upon request in person, by telephone or using the Internet;

(c) Applies until the public safety officer or attorney requests termination of the exemption;

(d) Does not apply to disclosure of records among public bodies as defined in ORS 174.109 for governmental purposes; and

(e) May not result in liability for a county if the name of a public safety officer or attorney is disclosed after a request for exemption from disclosure is made under this subsection; and

(33) Land management plans required for voluntary stewardship agreements entered into under ORS 541.423. [1987 c.373 §§23c,23d; 1987 c.764 §2 (enacted in lieu of 192.500); 1989 c.70 §1; 1989 c.171 §26; 1989 c.967 §§11,13; 1989 c.1083 §10; 1991 c.636 §§1,2; 1991 c.678 §§1,2; 1993 c.616 §§4,5; 1993 c.787 §§1,2; 1995 c.604 §§2,3; 1999 c.155 §3; 1999 c.169 §§1,2; 1999 c.234 §§1,2; 1999 c.291 §§21,22; 1999 c.380 §§1,2; 1999 c.1093 §§3,4; 2001 c.104 §66; 2001 c.621 §85; 2001 c.915 §1; 2003 c.217 §1; 2003 c.380 §2; 2003 c.524 §1; 2003 c.604 §98; 2003 c.674 §26; 2003 c.803 §12; 2003 c.807 §§2,3; 2005 c.203 §§1,2; 2005

c.232 §§33,34; 2005 c.455 §1; 2007 c.608 §6; 2007 c.687 §1]

Note: The amendments to 192.501 by section 3, chapter 455, Oregon Laws 2005, become operative January 2, 2010. See section 4, chapter 455, Oregon Laws 2005. The text that is operative on and after January 2, 2010, including amendments by section 7, chapter 608, Oregon Laws 2007, and section 2, chapter 687, Oregon Laws 2007, is set forth for the user's convenience.

192.501. The following public records are exempt from disclosure under ORS 192.410 to 192.505 unless the public interest requires disclosure in the particular instance:

(1) Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation;

(2) Trade secrets. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it;

(3) Investigatory information compiled for criminal law purposes. 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. Nothing in this subsection shall limit any right constitutionally guaranteed, or granted by statute, to disclosure or discovery in criminal cases. For purposes of this subsection, the record of an arrest or the report of a crime includes, but is not limited to:

(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;

(4) Test questions, scoring keys, and other data used to administer a licensing examination, employment, academic or other examination or testing procedure before the examination is given and if the examination is to be used again. Records establishing procedures for and instructing persons administering, grading or evaluating an examination or testing procedure are included in this exemption, to the extent that disclosure would create a risk that the result might be affected;

(5) Information consisting of production records, sale or purchase records or catch records, or similar business records of a private concern or enterprise, required by law to be submitted to or inspected by a governmental body to allow it to determine fees or assessments payable or to establish production quotas, and the amounts of such fees or assessments payable or paid, to the extent that such information is in a form which would permit identification of the individual concern or enterprise. This exemption does not include records submitted by long term care facilities as defined in ORS 442.015 to the state for purposes of reimbursement of expenses or determining fees for patient care. Nothing in this subsection shall limit the use which can be made of such information for regulatory purposes or its admissibility in any enforcement proceeding;

(6) Information relating to the appraisal of real estate prior to its acquisition;

(7) The names and signatures of employees who sign authorization cards or petitions for the purpose of requesting representation or decertification elections;

(8) Investigatory information relating to any complaint filed under ORS 659A.820 or 659A.825, until such time as the complaint is resolved under ORS

659A.835, or a final order is issued under ORS 659A.850;

(9) Investigatory information relating to any complaint or charge filed under ORS 243.676 and 663.180;

(10) Records, reports and other information received or compiled by the Director of the Department of Consumer and Business Services under ORS 697.732;

(11) Information concerning the location of archaeological sites or objects as those terms are defined in ORS 358.905, except if the governing body of an Indian tribe requests the information and the need for the information is related to that Indian tribe's cultural or religious activities. This exemption does not include information relating to a site that is all or part of an existing, commonly known and publicized tourist facility or attraction;

(12) A personnel discipline action, or materials or documents supporting that action;

(13) Information developed pursuant to ORS 496.004, 496.172 and 498.026 or ORS 496.192 and 564.100, regarding the habitat, location or population of any threatened species or endangered species;

(14) Writings prepared by or under the direction of faculty of public educational institutions, in connection with research, until publicly released, copyrighted or patented;

(15) Computer programs developed or purchased by or for any public body for its own use. As used in this subsection, "computer program" means a series of instructions or statements which permit the functioning of a computer system in a manner designed to provide storage, retrieval and manipulation of data from such computer system, and any associated documentation and source material that explain how to operate the computer program. "Computer program" does not include:

(a) The original data, including but not limited to numbers, text, voice, graphics and images;

(b) Analyses, compilations and other manipulated forms of the original data produced by use of the program; or

(c) The mathematical and statistical formulas which would be used if the manipulated forms of the original data were to be produced manually;

(16) Data and information provided by participants to mediation under ORS 36.256;

(17) Investigatory information relating to any complaint or charge filed under ORS chapter 654, until a final administrative determination is made or, if a citation is issued, until an employer receives notice of any citation;

(18) Specific operational plans in connection with an anticipated threat to individual or public safety for deployment and use of personnel and equipment, prepared or used by a public body, if public disclosure of the plans would endanger an individual's life or physical safety or jeopardize a law enforcement activity;

(19)(a) Audits or audit reports required of a telecommunications carrier. As used in this paragraph, "audit or audit report" means any external or internal audit or audit report pertaining to a telecommunications carrier, as defined in ORS 133.721, or pertaining to a corporation having an affiliated interest, as defined in ORS 759.390, with a telecommunications carrier that is intended to make the operations of the entity more efficient, accurate or compliant with applicable rules, procedures or standards, that may include self-criticism and that has been filed by the telecommunications carrier or affiliate under compulsion of state law. "Audit or audit report" does not mean an audit of a cost study that would be discoverable in a contested case proceeding and that is not subject to a protective order; and

(b) Financial statements. As used in this paragraph, "financial statement" means a financial statement of a nonregulated corporation having an affiliated interest, as defined in ORS 759.390, with a telecommunications carrier, as defined in ORS 133.721;

(20) The residence address of an elector if authorized under ORS 247.965 and subject to ORS 247.967;

(21) The following records, communications and information submitted to a housing authority as defined in ORS 456.005, or to an urban renewal agency as defined in ORS 457.010, by applicants for and recipients of loans, grants and tax credits:

(a) Personal and corporate financial statements and information, including tax returns;

(b) Credit reports;

(c) Project appraisals;

(d) Market studies and analyses;

(e) Articles of incorporation, partnership agreements and operating agreements;

(f) Commitment letters;

(g) Project pro forma statements;

(h) Project cost certifications and cost data;

(i) Audits;

(j) Project tenant correspondence requested to be confidential;

(k) Tenant files relating to certification; and

(L) Housing assistance payment requests;

(22) Records or information that, if disclosed, would allow a person to:

(a) Gain unauthorized access to buildings or other property;

(b) Identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, services; or

(c) Disrupt, interfere with or gain unauthorized access to public funds or to information processing, communication or telecommunication systems, including the information contained in the systems, that are used or operated by a public body;

(23) Records or information that would reveal or otherwise identify security measures, or weaknesses or potential weaknesses in security measures, taken or recommended to be taken to protect:

(a) An individual;

(b) Buildings or other property;

(c) Information processing, communication or telecommunication systems, including the information contained in the systems; or

(d) Those operations of the Oregon State Lottery the security of which are subject to study and evaluation under ORS 461.180 (6);

(24) Personal information held by or under the direction of officials of the Oregon Health and Science University or the Oregon University System about a person who has or who is interested in donating money or property to the university, the system or a state institution of higher education, if the information is related to the family of the person, personal assets of the person or is incidental information not related to the donation;

(25) The home address, professional address and telephone number of a person who has or

who is interested in donating money or property to the Oregon University System;

(26) Records of the name and address of a person who files a report with or pays an assessment to a commodity commission established under ORS 576.051 to 576.455, the Oregon Beef Council created under ORS 577.210 or the Oregon Wheat Commission created under ORS 578.030;

(27) Information provided to, obtained by or used by a public body to authorize, originate, receive or authenticate a transfer of funds, including but not limited to a credit card number, payment card expiration date, password, financial institution account number and financial institution routing number;

(28) Social Security numbers as provided in ORS 107.840;

(29) The electronic mail address of a student who attends a state institution of higher education listed in ORS 352.002 or Oregon Health and Science University;

(30) If requested by a public safety officer as defined in ORS 181.610, by a district attorney or deputy district attorney or by an assistant attorney general designated by the Attorney General, the home address and home telephone number of the public safety officer or attorney contained in the voter registration records for the public safety officer or attorney;

(31) If requested by a public safety officer as defined in ORS 181.610, by a district attorney or deputy district attorney or by an assistant attorney general designated by the Attorney General, the name of the public safety officer or attorney contained in county real property assessment or taxation records. This exemption:

(a) Applies only to the name of the public safety officer or attorney and any other owner of the property in connection with a specific property identified by the officer or attorney in a request for exemption from disclosure;

(b) Applies only to records that may be made immediately available to the public upon request in person, by telephone or using the Internet;

(c) Applies until the public safety officer or attorney requests termination of the exemption;

(d) Does not apply to disclosure of records among public bodies as defined in ORS 174.109 for governmental purposes; and

(e) May not result in liability for a county if the name of a public safety officer or attorney is disclosed after a request for exemption from disclosure is made under this subsection; and

(32) Land management plans required for voluntary stewardship agreements entered into under ORS 541.423.

192.502 Other public records exempt from disclosure. The following public records are exempt from disclosure under ORS 192.410 to 192.505:

(1) Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

(2) Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

(3) Public body employee or volunteer addresses, Social Security numbers, dates of birth and telephone numbers contained in personnel records maintained by the public body that is the employer or the recipient of volunteer services. This exemption:

(a) Does not apply to the addresses, dates of birth and telephone numbers of employees or volunteers who are elected officials, except that a judge or district attorney subject to election may seek to exempt the judge's or district attorney's address or telephone number, or both, under the terms of ORS 192.445;

(b) Does not apply to employees or volunteers to the extent that the party seeking disclosure shows by clear and convincing evidence that the public interest requires disclosure in a particular instance;

(c) Does not apply to a substitute teacher as defined in ORS 342.815 when requested by a professional education associa-

tion of which the substitute teacher may be a member; and

(d) Does not relieve a public employer of any duty under ORS 243.650 to 243.782.

(4) Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

(5) Information or records of the Department of Corrections, including the State Board of Parole and Post-Prison Supervision, to the extent that disclosure would interfere with the rehabilitation of a person in custody of the department or substantially prejudice or prevent the carrying out of the functions of the department, if the public interest in confidentiality clearly outweighs the public interest in disclosure.

(6) Records, reports and other information received or compiled by the Director of the Department of Consumer and Business Services in the administration of ORS chapters 723 and 725 not otherwise required by law to be made public, to the extent that the interests of lending institutions, their officers, employees and customers in preserving the confidentiality of such information outweighs the public interest in disclosure.

(7) Reports made to or filed with the court under ORS 137.077 or 137.530.

(8) Any public records or information the disclosure of which is prohibited by federal law or regulations.

(9)(a) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

(b) Subject to ORS 192.423, paragraph (a) of this subsection does not apply to factual information compiled in a public record when:

(A) The basis for the claim of exemption is ORS 40.225;

(B) The factual information is not prohibited from disclosure under any applicable state or federal law, regulation or court order and is not otherwise exempt from disclosure under ORS 192.410 to 192.505;

(C) The factual information was compiled by or at the direction of an attorney as part of an investigation on behalf of the

public body in response to information of possible wrongdoing by the public body;

(D) The factual information was not compiled in preparation for litigation, arbitration or an administrative proceeding that was reasonably likely to be initiated or that has been initiated by or against the public body; and

(E) The holder of the privilege under ORS 40.225 has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction.

(10) Public records or information described in this section, furnished by the public body originally compiling, preparing or receiving them to any other public officer or public body in connection with performance of the duties of the recipient, if the considerations originally giving rise to the confidential or exempt nature of the public records or information remain applicable.

(11) Records of the Energy Facility Siting Council concerning the review or approval of security programs pursuant to ORS 469.530.

(12) Employee and retiree address, telephone number and other nonfinancial membership records and employee financial records maintained by the Public Employees Retirement System pursuant to ORS chapters 238 and 238A.

(13) Records of or submitted to the State Treasurer, the Oregon Investment Council or the agents of the treasurer or the council relating to active or proposed publicly traded investments under ORS chapter 293, including but not limited to records regarding the acquisition, exchange or liquidation of the investments. For the purposes of this subsection:

(a) The exemption does not apply to:

(A) Information in investment records solely related to the amount paid directly into an investment by, or returned from the investment directly to, the treasurer or council; or

(B) The identity of the entity to which the amount was paid directly or from which the amount was received directly.

(b) An investment in a publicly traded investment is no longer active when acquisition, exchange or liquidation of the investment has been concluded.

(14)(a) Records of or submitted to the State Treasurer, the Oregon Investment Council, the

Oregon Growth Account Board or the agents of the treasurer, council or board relating to actual or proposed investments under ORS chapter 293 or 348 in a privately placed investment fund or a private asset including but not limited to records regarding the solicitation, acquisition, deployment, exchange or liquidation of the investments including but not limited to:

(A) Due diligence materials that are proprietary to an investment fund, to an asset ownership or to their respective investment vehicles.

(B) Financial statements of an investment fund, an asset ownership or their respective investment vehicles.

(C) Meeting materials of an investment fund, an asset ownership or their respective investment vehicles.

(D) Records containing information regarding the portfolio positions in which an investment fund, an asset ownership or their respective investment vehicles invest.

(E) Capital call and distribution notices of an investment fund, an asset ownership or their respective investment vehicles.

(F) Investment agreements and related documents.

(b) The exemption under this subsection does not apply to:

(A) The name, address and vintage year of each privately placed investment fund.

(B) The dollar amount of the commitment made to each privately placed investment fund since inception of the fund.

(C) The dollar amount of cash contributions made to each privately placed investment fund since inception of the fund.

(D) The dollar amount, on a fiscal year-end basis, of cash distributions received by the State Treasurer, the Oregon Investment Council, the Oregon Growth Account Board or the agents of the treasurer, council or board from each privately placed investment fund.

(E) The dollar amount, on a fiscal year-end basis, of the remaining value of assets in a privately placed investment fund attributable to an investment by the State Treasurer, the Oregon Investment Council, the Oregon Growth Account Board or the agents of the treasurer, council or board.

(F) The net internal rate of return of each privately placed investment fund since inception of the fund.

(G) The investment multiple of each privately placed investment fund since inception of the fund.

(H) The dollar amount of the total management fees and costs paid on an annual fiscal year-end basis to each privately placed investment fund.

(I) The dollar amount of cash profit received from each privately placed investment fund on a fiscal year-end basis.

(15) The monthly reports prepared and submitted under ORS 293.761 and 293.766 concerning the Public Employees Retirement Fund and the Industrial Accident Fund may be uniformly treated as exempt from disclosure for a period of up to 90 days after the end of the calendar quarter.

(16) Reports of unclaimed property filed by the holders of such property to the extent permitted by ORS 98.352.

(17) The following records, communications and information submitted to the Oregon Economic and Community Development Commission, the Economic and Community Development Department, the State Department of Agriculture, the Oregon Growth Account Board, the Port of Portland or other ports, as defined in ORS 777.005, by applicants for investment funds, loans or services including, but not limited to, those described in ORS 285A.224:

(a) Personal financial statements.

(b) Financial statements of applicants.

(c) Customer lists.

(d) Information of an applicant pertaining to litigation to which the applicant is a party if the complaint has been filed, or if the complaint has not been filed, if the applicant shows that such litigation is reasonably likely to occur; this exemption does not apply to litigation which has been concluded, and nothing in this paragraph shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation.

(e) Production, sales and cost data.

(f) Marketing strategy information that relates to applicant's plan to address specific markets and applicant's strategy regarding specific competitors.

(18) Records, reports or returns submitted by private concerns or enterprises required by law to be submitted to or in-

spected by a governmental body to allow it to determine the amount of any transient lodging tax payable and the amounts of such tax payable or paid, to the extent that such information is in a form which would permit identification of the individual concern or enterprise. Nothing in this subsection shall limit the use which can be made of such information for regulatory purposes or its admissibility in any enforcement proceedings. The public body shall notify the taxpayer of the delinquency immediately by certified mail. However, in the event that the payment or delivery of transient lodging taxes otherwise due to a public body is delinquent by over 60 days, the public body shall disclose, upon the request of any person, the following information:

(a) The identity of the individual concern or enterprise that is delinquent over 60 days in the payment or delivery of the taxes.

(b) The period for which the taxes are delinquent.

(c) The actual, or estimated, amount of the delinquency.

(19) All information supplied by a person under ORS 151.485 for the purpose of requesting appointed counsel, and all information supplied to the court from whatever source for the purpose of verifying the financial eligibility of a person pursuant to ORS 151.485.

(20) Workers' compensation claim records of the Department of Consumer and Business Services, except in accordance with rules adopted by the Director of the Department of Consumer and Business Services, in any of the following circumstances:

(a) When necessary for insurers, self-insured employers and third party claim administrators to process workers' compensation claims.

(b) When necessary for the director, other governmental agencies of this state or the United States to carry out their duties, functions or powers.

(c) When the disclosure is made in such a manner that the disclosed information cannot be used to identify any worker who is the subject of a claim.

(d) When a worker or the worker's representative requests review of the worker's claim record.

(21) Sensitive business records or financial or commercial information of the Oregon Health and Science University that is not customarily provided to business competitors.

(22) Records of Oregon Health and Science University regarding candidates for the position of president of the university.

(23) The records of a library, including:

(a) Circulation records, showing use of specific library material by a named person;

(b) The name of a library patron together with the address or telephone number of the patron; and

(c) The electronic mail address of a patron.

(24) The following records, communications and information obtained by the Housing and Community Services Department in connection with the department's monitoring or administration of financial assistance or of housing or other developments:

(a) Personal and corporate financial statements and information, including tax returns.

(b) Credit reports.

(c) Project appraisals.

(d) Market studies and analyses.

(e) Articles of incorporation, partnership agreements and operating agreements.

(f) Commitment letters.

(g) Project pro forma statements.

(h) Project cost certifications and cost data.

(i) Audits.

(j) Project tenant correspondence.

(k) Personal information about a tenant.

(L) Housing assistance payments.

(25) Raster geographic information system (GIS) digital databases, provided by private forestland owners or their representatives, voluntarily and in confidence to the State Forestry Department, that is not otherwise required by law to be submitted.

(26) Sensitive business, commercial or financial information furnished to or developed by a public body engaged in the business of providing electricity or electricity services, if the information is directly related to a transaction described in ORS 261.348, or if the information is directly related to a bid, proposal or negotiations for the sale or purchase of electricity or electricity services, and disclosure of the information would cause a competitive disadvantage for the public body or its retail electricity customers. This subsection does

not apply to cost-of-service studies used in the development or review of generally applicable rate schedules.

(27) Sensitive business, commercial or financial information furnished to or developed by the City of Klamath Falls, acting solely in connection with the ownership and operation of the Klamath Cogeneration Project, if the information is directly related to a transaction described in ORS 225.085 and disclosure of the information would cause a competitive disadvantage for the Klamath Cogeneration Project. This subsection does not apply to cost-of-service studies used in the development or review of generally applicable rate schedules.

(28) Personally identifiable information about customers of a municipal electric utility or a people's utility district or the names, dates of birth, driver license numbers, telephone numbers, electronic mail addresses or Social Security numbers of customers who receive water, sewer or storm drain services from a public body as defined in ORS 174.109. The utility or district may release personally identifiable information about a customer, and a public body providing water, sewer or storm drain services may release the name, date of birth, driver license number, telephone number, electronic mail address or Social Security number of a customer, if the customer consents in writing or electronically, if the disclosure is necessary for the utility, district or other public body to render services to the customer, if the disclosure is required pursuant to a court order or if the disclosure is otherwise required by federal or state law. The utility, district or other public body may charge as appropriate for the costs of providing such information. The utility, district or other public body may make customer records available to third party credit agencies on a regular basis in connection with the establishment and management of customer accounts or in the event such accounts are delinquent.

(29) A record of the street and number of an employee's address submitted to a special district to obtain assistance in promoting an alternative to single occupant motor vehicle transportation.

(30) Sensitive business records, capital development plans or financial or commercial information of Oregon Corrections Enterprises that is not customarily provided to business competitors.

(31) Documents, materials or other information submitted to the Director of the Department of Consumer and Business Services in confidence by a state, federal, foreign or international regulatory or law enforcement agency or by the National Association of Insurance Commissioners, its affiliates or subsidiaries under ORS 646A.250 to 646A.270, 697.005 to 697.095, 697.602 to 697.842, 705.137, 717.200 to 717.320, 717.900 or 717.905, ORS chapter 59, 722, 723, 725 or 726, the Bank Act or the Insurance Code when:

(a) The document, material or other information is received upon notice or with an understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or other information; and

(b) The director has obligated the Department of Consumer and Business Services not to disclose the document, material or other information.

(32) A county elections security plan developed and filed under ORS 254.074.

(33) Information about review or approval of programs relating to the security of:

(a) Generation, storage or conveyance of:

(A) Electricity;

(B) Gas in liquefied or gaseous form;

(C) Hazardous substances as defined in ORS 453.005 (7)(a), (b) and (d);

(D) Petroleum products;

(E) Sewage; or

(F) Water.

(b) Telecommunication systems, including cellular, wireless or radio systems.

(c) Data transmissions by whatever means provided.

(34) The information specified in ORS 25.020 (8) if the Chief Justice of the Supreme Court designates the information as confidential by rule under ORS 1.002. [1987 c.373 §23e; 1987 c.764 §3; 1987 c.898 §27 (enacted in lieu of 192.500); 1989 c.6 §17; 1989 c.925 §1; 1991 c.825 §7; 1993 c.694 §27; 1993 c.817 §1; 1995 c.79 §70; 1995 c.162 §62a; 1995 c.604 §1; 1997 c.44 §1; 1997 c.559 §1; 1997 c.825 §1; 1999 c.274 §17; 1999 c.291 §24; 1999 c.379 §1; 1999 c.666 §1; 1999 c.683 §3; 1999 c.811 §2; 1999 c.855 §4; 1999 c.955 §23; 1999 c.1059 §§12,16; 2001 c.377 §§17,18; 2001 c.915 §3; 2001 c.922 §§12,13; 2001 c.962 §§80,81; 2001 c.965 §§62,63; 2003 c.14 §§90,91; 2003 c.524 §§2,3; 2003

c.733 §§49,50; 2003 c.803 §§5,6; 2005 c.397 §1; 2005 c.561 §3; 2005 c.659 §1; 2007 c.152 §1; 2007 c.181 §1; 2007 c.513 §5; 2007 c.687 §7]

Note: See first note under 192.423.

192.503 [1993 c.224 §3; repealed by 1997 c.678 §15]

192.505 Exempt and nonexempt public record to be separated. If any public record contains material which is not exempt under ORS 192.501 and 192.502, as well as material which is exempt from disclosure, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination. [1987 c.764 §4 (enacted in lieu of 192.500)]

PUBLIC RECORDS LAW

Table of Cases

PUBLIC RECORDS LAW

Table of Cases

PUBLIC RECORDS LAW

Table of Cases

PUBLIC MEETINGS

TABLE OF CONTENTS
II. PUBLIC MEETINGS

TABLE OF CONTENTS — Continued

II

PUBLIC MEETINGS

Special Note: Role of the Attorney General

At the outset of this discussion of the Public Meetings Law, we note an important distinction between the Public Meetings Law and the Public Records Law. The Attorney General and district attorneys have a special statutory role to enforce the Public Records Law's requirements, except when an elected official claims the right to withhold disclosure. In contrast, neither the Attorney General nor district attorneys have such a role under the Public Meetings Law.

The Attorney General's only role under the Public Meetings Law is to provide legal advice to state agencies, boards and commissions that are subject to the law and to the Oregon Government Ethics Commission[1] in its role under ORS 244.260. Most district attorneys do not have a role in interpreting the Public Meetings Law. The exception is where a district attorney also serves as legal advisor to a county governing body. If a citizen wishes to compel compliance with the meetings law, or believes that a governing body has violated the law, the citizen may file a private civil lawsuit against the governing body. A citizen who believes that a governing body has violated the provisions permitting an executive session may file a complaint with the Oregon Government Ethics Commission. See section F, below. Neither the Attorney General nor any district attorney may assist a citizen in such a suit or complaint.

Nevertheless, as a public service, the Attorney General's office frequently responds to questions from citizens or the news media about the Public Meetings Law. *These responses do not constitute formal or informal legal opinions of the Attorney General.* This office may issue legal opinions or give legal advice only to state agencies and officers, including members of the legislature. ORS 180.060. We *can* point out what the law says, and inform interested persons of the construction of the law adopted in the many opinions we have written on the subject. We are committed to

[1] Oregon Laws 2007, chapter 865, subsection 40b(1) amends ORS 244.250 to change the name of the "Oregon Government Standards and Practices Commission" to the "Oregon Government Ethics Commission."

providing this informational assistance to promote better public understanding of the Public Meetings Law.

A. Policy of the Public Meetings Law

ORS 192.620 establishes Oregon's policy of open decision-making by governing bodies:

> The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of ORS 192.610 to 192.690 that decisions of governing bodies be arrived at openly.

This open decision-making policy is given effect by the law's substantive provisions. These provisions are intended to ensure, among other things, that the meetings of governing bodies, at which decisions about the public's business are made or discussed, are open to the public, ORS 192.630(1), (2); that the public has notice of the time and place of meetings, ORS 192.640; and that the meetings are accessible to persons wishing to attend, ORS 192.630(4), (5).

We have acknowledged that strict compliance with the substantive requirements of the Public Meetings Law frequently may "sacrifice[] speed and spontaneity for more process and formality."[2] Nonetheless, we believe that the law's requirements generally will not interfere with a public body's administration.

All substantive provisions of the Public Meetings Law should be read in light of the policy declaration in ORS 192.620. In case of questions about the application of the Public Meetings Law to particular circumstances, the policy section of the law ordinarily will require a decision favoring openness.[3]

The key requirements of the Public Meetings Law are to hold meetings that are open to the public unless an executive session is authorized, to give notice of meetings and to take minutes or otherwise record the meeting. In

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[2] Letter of Advice dated September 12, 1988, to Public Utility Commission (OP-6292) at 7 (see App F-5).

[3] *See Oregonian Publishing Co. v. Board of Parole*, 95 Or App 501, 769 P2d 795 (1989) (policy stated in ORS 192.620 requires court to analyze coverage of law broadly and its exemptions narrowly) (see App D-4).

addition, there are requirements regarding location, voting and accessibility for disabled persons. All of these requirements are discussed below.

B. Bodies Subject to the Law

The Public Meetings Law applies to all meetings of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. ORS 192.610(5), 192.630(1). See p. B-2 for a simplified guide to when the meetings law applies. Each of these elements, which must be met for the Public Meetings Law to apply, is discussed in detail below. The meetings law binds not only the state, but also cities, counties and other public bodies despite any contrary provisions of their charters, ordinances, rules or bylaws. ORS 192.610(4). Of course, cities, counties and other public bodies may subject themselves to provisions stricter than those of the Public Meetings Law.

1. Governing Bodies of Public Bodies

The Public Meetings Law applies to meetings of the "governing body of a public body." ORS 192.630(1). A "public body" is the state, any regional council, county, city or district, or any municipal or public corporation. A "public body" is also a board, department, commission, council, bureau, committee, subcommittee or advisory group of any of the entities in the previous sentence. ORS 192.610(4). We interpret the definition of a "public body" to require that the body be created by or pursuant to the state constitution, a statute, administrative rule, order, intergovernmental agreement, bylaw or other official act.[4] If two or more members of any public body have "the authority to make decisions for or recommendations to a public body on policy or administration," they are a "governing body" for purposes of the meetings law. ORS 192.610(3).[5]

For example, a five-member city council and a seven-member licensing board are both governing bodies. But a three-member committee of a seven-member board is itself a "governing body" if it is authorized to make decisions for or to advise the full board or another public body.

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[4] Letter of Advice dated May 28, 1986, to Representative Larry Hill and William L. Miles, Director, Audits Division (OP-5885, OP-5986).

[5] *Oregonian Publishing Co.*, 95 Or App 501 (see App D-4).

a. Authority to Make Decisions for a Public Body

A body that has authority to make decisions for a public body on "policy or administration" is a governing body. ORS 192.610(3). A body possesses such authority, and is therefore subject to the meetings law, if its decision-making authority is equivalent to the authority to exercise governmental power, *i.e.*, is integral to the movement of the government in an area where it has the power and authority to act. Thus, a three-member subcommittee that has authority only to gather information for the full committee is not a governing body.[6] Even though the subcommittee decides when to meet and determines what procedures it will use to gather and report information, it is not vested with the authority to decide the direction in which the government will move on an issue of policy or administration. In contrast, if the subcommittee possesses the authority to make policy or hiring decisions for a public body, then it is a governing body.

A body that is a governing body because of its authority to make decisions for a public body (including itself) is subject to the Public Meetings Law whenever it holds a "meeting" as defined in ORS 192.610(5). See discussion below of Meetings Subject to the Law.

b. Authority to Make Recommendations to a Public Body

A body that has authority to make recommendations to a public body on policy or administration is a governing body. ORS 192.610(3).

An advisory body may be appointed by a state or local government agency or official. If that advisory body does not exercise other governmental powers, it is a governing body only if its recommendations are made to a "public body." We do not construe "public body" to include an individual official.[7] For example, an advisory committee appointed by an individual official, such as the Governor, the individual head of a department or a school principal, is *not* ordinarily a governing body subject to the Public Meetings Law if the advisory committee reports only to the individual appointing official.[8] If, however, that single official lacks

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[6] 42 Op Atty Gen 187, 188 (1981) (see App F-4).

[7] *Id.* at 189; 44 Op Atty Gen 69 (1984) (see App F-5).

[8] Meetings of an advisory committee addressing administration and policy issues related to the Oregon Health Plan must comply with the Public Meetings Law when two or more committee members in attendance are not employed by a public body. ORS 414.227. This requirement applies even if the committee

authority to act on the advisory group's recommendations, and must pass those recommendations on unchanged to a public body, the Public Meetings Law applies to the advisory group's meetings.[9]

As long as the advisory body is itself a "governing body" of a "public body," the fact that its members may all be private citizens is irrelevant. Thus, the scope of the Public Meetings Law extends even to private citizens, employees and others without any decision-making authority, when they serve on a group that is authorized to furnish advice to a public body. For example, appointment by a school board of a local school advisory committee consisting of private citizens, who meet with and make recommendations to the school board on school matters, creates a "governing body." In light of the power possessed by student governments at Oregon State System of Higher Education schools to recommend incidental fee assessments and allocations to the Board of Higher Education, the student government committees that prepare and make the recommendations to the board are governing bodies subject to the Public Meetings Law.[10]

2. Private Bodies

Private bodies are not covered by the Public Meetings Law.[11] Whether a private body becomes subject to the meetings law by virtue of assuming public functions is an unsettled area of the law. A private body does not become subject to the meetings law merely because it receives public funds, contracts with governmental bodies or performs public services.

State agencies periodically contract with privately established bodies, such as nonprofit corporations, to carry out public purposes. For example, the Mental Health Division and counties specifically are encouraged by

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makes recommendations only to an individual official, e.g., the Administrator of the Office for Oregon Health Plan Policy and Research.

[9] Letter of Advice dated October 13, 1988, to W.T. Lemman, Chancellor (OP-6248) at 3-5 (examining Chancellor's limited role in reviewing presidential search committee's list of finalists, and concluding that Board of Higher Education, not Chancellor, is principal recipient of committee's recommendations) (see App F-6).

[10] 44 Op Atty Gen 69 (184) (see App F-5).

[11] *See* 46 Op Atty Gen 155, 166-67 (1989) (Oregon Medical Insurance Pool is essentially a private entity and, therefore, not a "public body" subject to the Public Meetings Law) (see App F-6).

statute to contract with private bodies to furnish community mental health services.[12] Typically, the private body's entire budget consists of public money. Other groups, such as the Oregon Parks Foundation, may have public officers on their boards, receive public funds and carry out public purposes to such an extent that their records are subject to state audit.[13] Such bodies are not subject to the Public Meetings Law.

As discussed in Part I of this manual, the Oregon Supreme Court has developed a test for determining whether an entity is the "functional equivalent" of a public body for purposes of the Public *Records* Law.[14] Although the definition of "public body" in the Public Meetings Law is similar to the definition in the Public Records Law, they are sufficiently different that the applicability of that test to the Public Meetings Law is questionable. Nevertheless, the court decision may have implications for the meetings of private entities that contract with, or perform services at the request of, public bodies if the private entity has been given authority to make decisions for or recommendations to a public body. A public body or private entity in this situation may wish to consult its legal counsel concerning possible application of the Public Meetings Law to the private entity and the relevance of the six factors identified by the Supreme Court.

One example where a private body's assumption of public functions results in its being subject to the Public Meetings Law is in the context of county alcohol treatment and rehabilitation programs. Under ORS 430.342, an "already existing body" may be designated by a county governing body as the "local alcoholism planning committee" and given statutory functions. Typically, the designee would be a private nonprofit corporation that has

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[12] ORS 430.610 *et seq.*

[13] *Cf.* 38 Op Atty Gen 2105 (1978).

[14] *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994). The six factors are: 1) The entity's origin—Was it created by government or was it created independently? 2) The nature of the function(s) assigned and performed by the entity—Are the functions traditionally performed by government or are they commonly performed by a private entity? 3) The scope of authority granted to and exercised by the entity—Does it have authority to make binding decisions for the government? 4) The nature and level of governmental financial and nonfinancial support. 5) The scope of governmental control over the entity. 6) The status of the entity's officers and employees—Are they public employees? *See also Laine v. City of Rockaway Beach*, 134 Or App 655, 896 P2d 1219 (1995).

contracted with the county to provide alcoholism-related services. Such a private body performing advisory functions for a governing body would be subject to the Public Meetings Law. See discussion above of Governing Bodies. In addition, a public agency may have power by rule or contract to require private bodies that contract with government to open their pertinent meetings to the public.

3. Federal and Multi-Jurisdictional Bodies

Federal agencies are not subject to the Oregon Public Meetings Law. By its terms, the law covers only Oregon state and local governing bodies.

Multi-jurisdictional commissions, whose members are appointed by several different governments (such as federal agencies, the governors of Oregon and Washington and county governing bodies) and whose Oregon members do not constitute a majority, are not subject to the Oregon Public Meetings Law. However, if such a multi-jurisdictional commission has committees consisting of solely, or a majority of, Oregon appointees that are authorized to make decisions for the commission, or that are authorized to deliberate and make recommendations to the state or any other public body within the state, the meetings of those committees may be subject to the Oregon Public Meetings Law. In some cases, the federal enabling legislation may provide that the multi-jurisdictional commission and its committees must comply with state public records and meetings laws.

C. Meetings Subject to the Law

1. Public Meetings

The Public Meetings Law defines a meeting as the convening of any of the "governing bodies" described above "for which a quorum is required in order to make a decision or to deliberate toward a decision *on any matter*." ORS 192.610(5) (emphasis added).

a. Quorum Requirements

"Quorum" is not defined in the Public Meetings Law. Special statutes often define "quorum" for state governing bodies. Local city and county governing bodies may have "quorum" defined by charter, bylaws or rules of order. ORS 174.130 defines "quorum" as a majority:

> Any authority conferred by law upon three or more persons may be exercised by a majority of them unless expressly otherwise provided by law.

For purposes of the Public Meetings Law, we believe this general definition applies in the absence of a special definition of "quorum." See Appendix C for further discussion of quorum.

A gathering of less than a quorum of a committee, subcommittee, advisory group or other governing body is not a "meeting" under the Public Meetings Law. Moreover, if the members of a committee, subcommittee or advisory group are charged to form their recommendations individually rather than collegially through a quorum requirement, the Public Meetings Law does not apply. We have previously stated:[15]

> The test of whether an advisory group is covered * * * is whether the group is deliberative in the sense that votes are taken and there is normally a quorum requirement.

In other words, the application of the Public Meetings Law to meetings of a committee, subcommittee or advisory group depends on whether the appointing body directs the committee members to make their findings and recommendations individually or as a recommendation of the group. If the decision or recommendation is to be made by the group, whether by consensus or majority vote, the Public Meetings Law applies. However, if committee members are instructed to make individual rather than group decisions or recommendations, the "meetings" of the committee are outside the scope of the meetings law. This unquestionably is a difficult area of interpretation, and governing bodies are cautioned not to misuse the committee appointment process or decision-making process to subvert the policy of the Public Meetings Law.

Ordinarily, staff meetings are not covered by the Public Meetings Law because no quorum is required. A staff meeting called by a single official is not covered by the Public Meetings Law because the staff do not make decisions for or recommendations to a "public body." If, however, a quorum of a governing body, such as a three-member commission, meets with the body's staff to deliberate on matters of "policy or administration," ORS 192.610(3), or to clarify collegially a decision for staff, the meeting is within the scope of the law. Thus, we have stated:[16]

> [G]overning body meetings with administrative staff are subject to the requirement of the Public Meetings Law if a quorum of the

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[15] 37 Op Atty Gen 1087, 1089 (1976).

[16] OP-6292 at 6 (see App F-5).

> members of the governing body convenes to receive information from staff on topics related to particular substantive or administrative matters that a quorum of the governing body will or may be called upon to decide.

We also have observed that some agencies may have latitude to conduct business outside of the Public Meetings Law's requirements by not convening a quorum of the governing body. We stated:[17]

> [M]any boards and commissions have authority to conduct official business through means other than the quorum decision-making that triggers the requirements of the Public Meetings Law. Specifically, the [Public Utility] [C]ommission has authority to delegate numerous duties to one commissioner or to staff under ORS 756.055, with specified limitations. Thus, a process of decision-making on day-to-day matters of agency administration legally may be conducted in private by a single commissioner or agency staffer to whom the commission properly has delegated administrative responsibility. However, delegating authority to one commissioner should not be interpreted as nullifying public meetings law requirements if one or more commissioners meet with the delegated commissioner to discuss the subject matter delegated. Arguably, such a maneuver might skirt the requirements of the Public Meetings Law. However, the appearance of impropriety would be substantial and open to charges of subterfuge. In our opinion the risks of such a strategy outweigh its benefits, and the legality of such an interpretation is not free from doubt.

b. Subject of Meetings and Social Gatherings

The Public Meetings Law applies to all meetings of a quorum of a governing body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. Even if a meeting is for the sole purpose of gathering information to serve as the basis for a subsequent decision or recommendation by the governing body, the meetings law will apply.[18] This requirement serves the policy expressed at ORS 192.620 that

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[17] *Id.* at 7-8.

[18] 38 Op Atty Gen 1471, 1474 (1977) (see App F-1); *Oregonian Publishing Co.*, 95 Or App at 505-06 (see App D-4); OP-6292 (see App F-5).

an informed public must be aware not only of the decisions of government, but also of "the information upon which such decisions were made." Hence, except for on-site inspections, discussed below under Statutorily Exempt Public Meetings, information gathering and investigative activities of a governing body are subject to the law. If the requirements of the law would unduly hamper an investigation, the body could direct members to make individual reports to the governing body as discussed above under Quorum Requirements.

If a quorum of a governing body gathers to discuss matters outside its jurisdiction, it is not "meeting" within the purview of the Public Meetings Law.[19] In making this determination, the focus typically will be on the authority granted to the particular governing body and any written policies or directives governing that authority.

Purely social gatherings of the members of a governing body are not covered by the law. The Court of Appeals held that social gatherings of a school board, at which members sometimes discussed "what's going on at the schools," did not violate the Public Meetings Law.[20] The *purpose* of the meeting triggers the requirements of the law. However, a purpose to deliberate on any matter of official policy or administration may arise *during* a social gathering and lead to a violation. Members constituting a quorum must avoid any discussions of official business during such a gathering.[21] And, they should be aware that some citizens may perceive social gatherings as merely a subterfuge for avoiding the Public Meetings Law.

Governing bodies sometimes want to have retreats or goal-setting sessions. These types of meetings are nearly always subject to the Public Meetings Law because the governing body is deliberating toward a decision on official business or gathering information for making a decision. For example, members of a commission may wish to have an informal, long-range planning session to help guide (in general terms) the future priorities of the commission. Because the discussion at such a session is very likely to lay the foundation for subsequent decisions, whether a decision on which general issues to pursue over the next year or a decision on how to approach a particular issue, it would be subject to the meetings law. Even an informal

[19] 38 Op Atty Gen at 1474 (see App F-1).
[20] *Harris v. Nordquist*, 96 Or App 19, 771 P2d 637 (1989) (see App D-4).
[21] OP-6292 (see App F-5).

"get together" between a state commission and state legislators or the Governor would be subject to all of the requirements of the meetings law (notice, minutes, etc.), if a quorum of the commission discusses matters that are within the authority granted to that body. It does not matter that the discussion is "informal" or that no decisions are made; it is still a "meeting" for purposes of the Public Meetings Law.

Whether a governing body's training sessions are subject to the Public Meetings Law will depend on whether any substantive issues are discussed. For example, a governing body may have a training on improving personal interaction among its members. If that training is carefully structured to avoid any discussion of official business, and no such discussion occurs, the training would not be subject to the meetings law. This is a very sensitive area, however, and public bodies should contact their legal counsel for advice.

c. Electronic Communication

The Public Meetings Law expressly recognizes that meetings may be conducted by telephonic conference calls or "other electronic communication." Such meetings are subject to the Public Meetings Law. ORS 192.670(1).

Notice and opportunity for public access must be provided when meetings are conducted by electronic means. For nonexecutive session meetings held by telephone or other electronic means of communication, the public must be provided at least one place where its members may "listen" to the meeting by speakers or other devices. ORS 192.670(2). Special accommodations may be necessary to ensure accessibility for persons with disabilities. See discussion below of Accessibility to Persons with Disabilities. The media must be provided access to such facilities when executive sessions are conducted electronically, unless the executive sessions are held under ORS 192.660(2)(d) (to deliberate with persons designated by the governing body to carry on labor negotiations) or ORS 332.061 (hearing concerning expulsion of minor student from public elementary or secondary school, or pertaining to examination of student's confidential medical records).

State and local governing bodies generally recognize that the Public Meetings Law imposes public access requirements on official telephonic meetings. Governing bodies also must comply with those requirements when their members use more sophisticated means of electronic

communication in lieu of face-to-face official meetings. For example, communications between and among a quorum of members of a governing body convening on electronically-linked personal computers are subject to the Public Meetings Law if the communications constitute a decision or deliberation toward a decision for which a quorum is required, or the gathering of information on which to deliberate.

At least one local government in Oregon has provided home computers to its city councilors to be used as an electronic message system. To avoid inadvertent electronic "meetings," the Gresham City Council has adopted a policy barring a quorum of its members from using the system at any one time. The computer system also is programmed to prevent that occurrence.

2. Statutorily Exempt Public Meetings

The definition of "meeting" under ORS 192.610(5) expressly excludes an on-site inspection of any project or program or a gathering of any national, regional or state association to which the public body or its members belong.

ORS 192.690(1) and (2) exempt the following proceedings from the Public Meetings Law requirements:

- meetings of the state lawyers assistance committee or personal and practice management assistance committees operating under ORS 9.568;
- meetings of medical peer review committees under ORS 441.055;
- meetings of county multidisciplinary child abuse teams that review child abuse cases under ORS 418.747;
- meetings of child fatality review teams that review child fatality cases under ORS 418.785;
- any judicial proceedings;[22]
- deliberations of the Board of Parole or the Psychiatric Security Review Board;

[22] For purposes of this exemption from the requirements of the Public Meetings Law, judicial proceedings including meetings of the State Professional Review Board of the Oregon State Bar. Letter of Advice dated August 13, 1997, to Patrick Hearn, Executive Director, Government Ethics Commission (OP-1997-4) (see App F-6).

- deliberations of state agencies in contested case hearings under ORS chapter 183;
- review by the Workers' Compensation Board or Employment Appeals Board of similar hearings on contested cases;
- meetings of the Energy Facility Siting Council to review security programs;
- meetings of the Oregon Health and Science University Board of Directors or subcommittee regarding:

  —candidates for president of the university, or

  —sensitive business, financial or commercial matters of the university not customarily provided to competitors related to financings, mergers, acquisitions or joint ventures or related to the sale or other disposition of, or substantial change in use of, significant real or personal property, or related to health system strategies;
- meetings of Oregon Health and Science University faculty or staff committees; and
- mediation conducted pursuant to the agricultural mediation service program.

The exemption of "deliberations" of specified agencies does not remove the entire meeting from the law's coverage. For instance, when the Board of Parole gathers information in order to deliberate and then deliberates at the same meeting, the information-gathering portion of the meeting is subject to the law's requirements.[23] Therefore, although state board or commission "deliberations" in contested case hearings under the Administrative Procedures Act are exempt from the meetings law, the information-gathering portions of those hearings and the final decision of the body must be conducted in compliance with the meetings law. However, the information-gathering portion of contested case hearings may be otherwise exempted by statute.[24]

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[23] *Oregonian Publishing Co.*, 95 Or App at 505-06 (see App D-4).

[24] *See, e.g.*, ORS 342.177(1) (discipline proceedings for Teachers Standards and Practices Commission).

Note that a state agency contested case proceeding conducted by a single hearings officer is *not* subject to the Public Meetings Law, because a single hearings officer is not a "governing body." The right of the public to attend such contested case proceedings depends on provisions of law outside the Public Meetings Law.

Local government officials should note, however, that the Public Meetings Law exemption provided in ORS 192.690(1) for *state* agency contested case hearings does *not* apply to hearings conducted by local governing bodies, even though those local government hearings may be remarkably similar to state agency contested case proceedings.[25]

D. Requirements of the Law

1. Notice

The Public Meetings Law requires that public notice be given of the time and place of meetings. This requirement applies to regular, special and emergency meetings as those terms are used in ORS 192.640. The public notice requirements apply to *any* "meeting" of a "governing body" subject to the law, including committees, subcommittees and advisory groups. See discussion above of Governing Bodies and of Meetings. A governing body's notice must be reasonably calculated to provide actual notice to the persons and the media that have stated in writing that they wish to be notified of every meeting.[26]

If a meeting will consist only of an executive session, notice still must be given to the members of the governing body, to the general public and to news media that have requested notice. The notice also must state the specific legal provision authorizing the executive session. ORS 192.640(2).

Notices for meetings that will include both an executive session and a nonexecutive session should give notice of both and state the statutory authority for the executive session.

To assist the public body in satisfying the accessibility requirements of ORS 192.630(5) and the Americans with Disabilities Act, the notice should provide the name of a person and telephone number (including TTY number) at the public body to contact to make a request for an interpreter

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[25] 40 Op Atty Gen 388, 389-90 (1980) (see App F-2).

[26] Members of the governing body, of course, also should receive actual notice. *Cf.* ORS 182.020(1).

for the hearing impaired or for other communication aids. See p. B-5 for a sample meeting notice that includes such information. As an alternative, public bodies that know their audience is likely to require a sign language interpreter or other communication aids and services should simply make those services available and so state in their notice.

The Public Meetings Law requires that the notice of any meeting "include a list of the principal subjects anticipated to be considered at the meeting." ORS 192.640(1). This list should be specific enough to permit members of the public to recognize the matters in which they are interested. This requirement ordinarily would be met by dissemination of an agenda. The agenda need not go into detail about subjects scheduled for discussion or action, but it should be sufficiently descriptive so that interested persons will get an accurate picture of the agenda topics. For example, "public works contract" probably is not a sufficient description when the governing body intends to let a contract for demolition of a landmark building.

The Public Meetings Law does not require that every proposed item of business be described in the notice. The law requires a reasonable effort to inform the public and interested persons, including news media, of the nature of the more important issues ("principal subjects") coming before the body. And the governing body may take up additional "principal subjects" arising too late to be mentioned in the notice. *See* ORS 192.640(1) (listing of principal subjects "shall not limit the ability of a governing body to consider additional subjects"). But, if an executive session is being held, the discussion must be limited to the topic(s) listed in the statutory provision(s) identified as authority for the executive session, ORS 192.640(2). Of course, if the subject matter is governed by the rulemaking requirements of the Administrative Procedures Act (ORS chapter 183), the notice requirements of that statute must be met.

The goal of notice for any meeting is two-fold: to provide general notice to the public at large and to provide *actual* notice to specifically interested persons. The following are suggested methods of meeting the notice requirements for the three types of meetings addressed in the Public Meetings Law:

a. Regularly Scheduled Meetings

The notice for a regular meeting must be *reasonably calculated* to give actual notice of the time and place for the meeting "to interested persons including news media which have requested notice." ORS 192.640(1).

Press Releases — Press releases should be given to the appropriate publications and news services. The following list of publications and news services is commonly used.

- Wire Service — Associated Press. Notices directed to this service at its main offices at the Press Room, State Capitol Bldg., Salem, Oregon 97301 (Phone (503) 363-5358; Fax (503) 363-9502) or 121 S.W. Salmon Street, Suite 1450, Portland, Oregon 97204-2924 (Phone (503) 228-2169; Fax (503) 228-5514), will reach the service. In other areas of the state, notices directed to subscribing news media should reach the service.
- Local Media Representatives — If a meeting involves matters that affect a particular geographic area, press releases should be sent to the local media.
- Trade Papers, Special Interest Publications and Professional Journals — Agencies regulating matters affecting trades, occupations, professions and special interest groups that have regularly scheduled publications directed to affected persons should provide these publications with notices of the agencies' public meetings.

Paid display advertising is not required. A governing body is not required to ensure that the release is published. News media requesting notice of meetings *must* be given notice.

Mailing Lists — Agencies maintaining mailing lists of licensees or other persons or groups for notice purposes, either as a regular practice or under the requirements of ORS 183.335(8), should mail or fax notices of regular meetings to persons on those lists.

Interested Persons — If a governing body is aware of persons having a special interest in a particular action, those persons generally should be notified, unless doing so would be unduly burdensome or expensive.

Notice Boards — Some smaller communities have a designated area or bulletin board for posting notices. Governing bodies may want to post notices of meetings in such areas.

b. Special Meetings

Special meetings require at least 24 hours' notice. ORS 192.640(3). As with regular meetings, press releases should be issued or phone calls made to the wire services and other media. In addition, subject to a rule of

reasonableness, governing bodies should notify interested persons either by mail, facsimile or telephone. News media requesting notice must be notified.

c. Emergency Meetings

An "emergency meeting" is a special meeting called on less than 24 hours' notice. The governing body must be able to point to some reason why the meeting could not be delayed to allow at least 24 hours' notice. An "actual emergency" must exist, and the minutes of the meeting must describe the emergency justifying less than 24 hours' notice. ORS 192.640(3). The law requires that "such notice as is appropriate to the circumstances" be given for emergency meetings. The governing body must attempt to contact the media and other interested persons to inform them of the meeting. Generally, such contacts would be by telephone or facsimile.

The Oregon Court of Appeals has indicated that it will scrutinize closely any claim of an "actual emergency." Any claimed "actual emergency" must relate to the matter to be discussed at the emergency meeting. An actual emergency on one matter does not "justify a public body's emergency treatment of all business coming before it at approximately the same time."[27] Nor do the work schedules of board members provide justification for an emergency meeting. The court noted:[28]

> An actual emergency, within the contemplation of the statute, must be dictated by events and cannot be predicated solely on the convenience or inconvenience of members of the governing body.

Sample meeting notices are found in the appendix to this part of the manual at p. B-5.

2. Space and Location

For any meeting, the governing body should consider the probable public attendance and should meet where there is sufficient room for that expected attendance. If the regular meeting room is adequate for the usual attendance, a governing body probably is not required to seek larger

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[27] *Oreg. Assoc. of Classified Emp. v. Salem-Keizer*, 95 Or App 28, 32, 767 P2d 1365, *rev den* 307 Or 719 (1989) (see App D-4).

[28] *Id.* at 34.

quarters for a meeting that unexpectedly attracts an overflow crowd, but the governing body may take reasonable steps to accommodate the unexpected attendance.

a. Geographic Location

Meetings of the governing body of a public body must be held within the geographic boundaries of the area over which the public body has jurisdiction, at its administrative headquarters or at "the other nearest practical location." *Id.* These requirements are alternatives, which were added to deal with some small districts that maintain administrative offices, sometimes without meeting facilities, outside the boundaries of the district. If the meeting is held within the geographic boundaries over which the body has jurisdiction, the meeting need not be held at, or conveniently near, administrative headquarters. For example, a school board is free to rotate the location of its meetings among schools in its district. A joint meeting of two or more governing bodies must be held within the geographic boundaries of the area over which one of those bodies has jurisdiction, or at the nearest practical location. *Id.* If one or more governing bodies are meeting with the elected officials of one or more federally recognized Oregon Indian tribes, the meeting must be held within the geographic boundaries over which one of the bodies or one of the tribes has jurisdiction, or at the nearest practical location. *Id.*

These rules do not apply in the case of an actual emergency requiring immediate action. Additionally, the law allows governing bodies to hold "training sessions" outside their jurisdiction, as long as no deliberations toward a decision are involved. ORS 192.630(4).

b. Nondiscriminatory Site

A governing body may not hold a meeting at any place where discrimination on the basis of race, color, creed, sex, sexual orientation, national origin, age or disability is practiced. However, the fact that organizations with restricted membership hold meetings at the place does not restrict its use by a public body if use of the place by a restricted membership organization is not the primary purpose of the place or its predominate use. ORS 192.630(3).[29]

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[29] *See also* Americans with Disabilities Act, 42 USC § 12131 *et seq.* (prohibiting discrimination against persons with disabilities by public entities

3. Accessibility to Persons with Disabilities

ORS 192.630(5)(a) provides:

> It is discrimination on the basis of disability for a governing body of a public body to meet in a place inaccessible to persons with disabilities, or, upon request of a person who is deaf or hard of hearing, to fail to make a good faith effort to have an interpreter for persons who are deaf or hard of hearing provided at a regularly scheduled meeting. The sole remedy for discrimination on the basis of disability shall be as provided in ORS 192.680.

This statute imposes two requirements. First, meetings subject to the Public Meetings Law must be held in places accessible to individuals with mobility and other impairments.

Second, there must be a good faith effort to provide an interpreter for deaf or hard-of-hearing persons. A deaf or hard-of-hearing person requesting an interpreter must give the governing body at least 48 hours' notice of the request, and provide the name of the requester, sign language preference and provide any other relevant information the governing body may request. ORS 192.630(5)(b). If a governing body holds a meeting on less than 48 hours' notice, it shall make a reasonable effort to have an interpreter present, but the requirement for an interpreter does not apply to emergency meetings under this law. ORS 192.630(5)(c). "Good faith effort" to obtain the services of an interpreter includes, but is not limited to, contacting the Oregon Department of Human Services or another state or local agency that maintains a list of qualified interpreters and arranging for the referral of one or more such persons to provide interpreter services. ORS 192.630(5)(e).

The sole remedy for violation of ORS 192.630(5)(a) is found in ORS 192.680. See discussion below on Enforcement.

The Americans with Disabilities Act may impose requirements beyond state law. The ADA requires public bodies to ensure that their communications with persons with disabilities are as effective as communications with others.[30] For deaf or hard-of-hearing individuals who

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and by places of public accommodation, applicable to meeting sites owned by private entities).

[30] 42 USC §§ 12131(2), 12132; 28 CFR § 35.160.

do not use sign language, other means of communication, such as assistive listening devices, may be necessary. If the meeting is held by electronic means, the needs of persons with vision or hearing impairments may need to be considered. Also, if written materials will be used during the public meeting, the governing body must make the material available, when requested by individuals with vision impairments, in a form usable to them, such as large print, Braille or audiotapes. A public body cannot charge a person with a disability to cover the cost of providing such additional aids and services. Remedies for violation of the ADA are not limited to the state law provisions of ORS 192.680.[31]

4. Public Attendance

The Public Meetings Law is a public attendance law, not a public participation law. Under the Public Meetings Law, governing body meetings are open to the public except as otherwise provided by law. ORS 192.630(1). *The right of public attendance guaranteed by the Public Meetings Law does not include the right to participate by public testimony or comment.* In fact, the Public Meetings Law expressly mentions public participation in only two situations: an opportunity for "public comment" on the employment of a public officer, ORS 192.660(7)(d)(C), and an opportunity for "public comment" on standards to be used in hiring a chief executive officer, ORS 192.660(7)(d)(D).

Other statutes, rules, charters, ordinances, and bylaws outside the Public Meetings Law may require governing bodies to hear public testimony or comment on certain matters.[32] But in the absence of such a requirement, a governing body may conduct a meeting without any public participation. Governing bodies voluntarily may allow limited public participation at their meetings.

5. Control of Meetings

The presiding officer has inherent authority to keep order and to impose any reasonable restrictions necessary for the efficient and orderly conduct of a meeting. If public participation is to be a part of the meeting, the presiding officer may regulate the order and length of appearances and limit appearances to presentations of relevant points. Any person who fails to

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[31] 42 USC § 12133.

[32] *See, e.g.*, ORS 215.060 (hearings on actions regarding county comprehensive plan).

comply with reasonable rules of conduct or who causes a disturbance may be asked or required to leave and upon failure to do so becomes a trespasser.[33]

This authority extends to control over equipment such as cameras, tape recorders and microphones, but only to the extent of reasonable regulation. We have concluded that members of the public cannot be prohibited from unobtrusively recording the proceedings of a public meeting.[34] We believe the logic supporting the public's right to make an audio record of a meeting also extends to video recording, subject to reasonable regulation to the extent necessary to prevent disruption of the meeting. Some concern has been expressed that criminal law might prohibit the recording of public meetings. But the criminal law prohibition against electronically recording conversations without the consent of participants in the conversation expressly does not apply to recording "[p]ublic or semipublic meetings such as hearings before governmental or quasi-governmental bodies."[35]

It is questionable whether a governing body may exclude a member of the public because the person engaged in misconduct at a *previous* public meeting. It is possible to obtain an injunction against a person who habitually has been disruptive, but an arrest and prosecution for trespass or disorderly conduct on the occasion of the subsequent disruption would be a simpler and probably more effective procedure. In case of an announced threat to disrupt a controversial meeting, it would be permissible to hold the meeting in one room from which the public is excluded, and to allow the public to view and hear the meeting by television in another room.

Smoking is banned at public meetings. ORS 192.710. Although ORS 192.710 was not enacted as part of the Public Meetings Law, that statute provides that no person shall smoke or carry any lighted cigar, cigarette, pipe or other lighted smoking instrument in a room where a public meeting is being held or is to continue after a recess. The meeting is deemed to have started at the time the agenda or meeting notice indicates it is to commence, regardless of the time the meeting actually begins. Violation of this statute

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[33] *State v. Marbet*, 32 Or App 67, 573 P2d 736 (1978); Attorney General Model Rule 137-004-0010; Letter of Advice dated July 13, 1983, to The Honorable Margie Hendriksen (OP-5468) (see App F-5).

[34] 38 Op Atty Gen 50 (1976) (see App F-1).

[35] ORS 165.540(7)(a).

is punishable by a $10 fine. ORS 192.990. Presumably, enforcement would require a peace officer to issue a citation.

The smoking ban applies to any regular or special meeting or hearing of a public body "to exercise or advise in the exercise of any power of government," in a building or room rented, leased or owned by the state or by a county, city or other political subdivision. There is no quorum requirement. It is not clear whether an executive session is a public meeting for purposes of this statute. However, if the governing body is to reconvene after leaving the meeting room for an executive session, the governing body is probably in a "recess" during which smoking is prohibited in the meeting room.

When a public meeting is held at a location that is not "rented, leased or owned" by the state or a political subdivision, such as a hotel meeting room where no separate charge is made for the room, the smoking ban of ORS 192.710 does not apply. However, other laws prohibiting smoking except in designated areas may apply.[36]

The person presiding will avoid embarrassment to members of the public and the governing body by reminding them of the no-smoking rule at the beginning of the meeting.

6. Voting

All official actions by governing bodies must be taken by public vote.[37] The vote of each member must be recorded unless the body has 26 or more members. Even then, any member of the governing body may require that the votes of each member be recorded. ORS 192.650(1)(c). Written ballots are not prohibited, but each ballot must identify the member voting and the vote must be announced. *Secret ballots are prohibited.* The state law supersedes and nullifies any local government charter authorization or requirement for a secret ballot.[38] See Appendix C for a discussion of voting and secret ballots.

A governing body's failure to record a vote is not, in and of itself, grounds for reversing a decision. Without a showing that the failure to

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[36] ORS 433.845.

[37] 37 Op Atty Gen 183 (1974) (see App F-1).

[38] 39 Op Atty Gen 525 (1979) (see App F-2); 37 Op Atty Gen 183 (1974) (see App F-1).

record a vote was related to a manipulation of the vote, a court will presume that public officials lawfully have performed their duties.[39]

7. Minutes and Recordkeeping

The Public Meetings Law requires that the governing body of a public body provide for sound, video or digital recording or written minutes of its meetings.[40] ORS 192.650(1). The record of a meeting, whether preserved in written minutes or a sound, video or digital recording, shall include at least the following information:

- members present;
- motions, proposals, resolutions, orders, ordinances and measures proposed and their disposition;
- results of all votes and, except for public bodies consisting of more than 25 members unless requested by a member of that body, the vote of each member by name;
- the substance of any discussion on any matter; and
- subject to the Public Records Law, ORS 192.410 to 192.505, a reference to any document discussed at the meeting. (Such reference does not change the status of the document under the Public Records Law. ORS 192.650(3).)

Written minutes need not be a verbatim transcript and a sound, video or digital recording is not required to contain a full recording of the meeting, except as otherwise provided by law. Whatever means of recording used must give a "a true reflection of the matters discussed at the meeting and the views of the participants." ORS 192.650(1). See p. B-10 for sample minutes.

The Public Meetings Law requires that written minutes or a sound, video or digital recording of a meeting be made available to the public "within a reasonable time after the meeting." ORS 192.650(1). If written minutes are prepared, they cannot be withheld from the public merely because they will not be approved until the next meeting of the governing

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[39] *Gilmore v. Board of Psychologist Examiners*, 81 Or App 321, 324, 725 P2d 400, *rev den* 302 Or 460 (1986) (see App D-2).

[40] Apart from the requirements imposed by the Public Meetings Law, the Oregon Investment Council must make "full sound records" of its meetings and maintain a written log of each recording. Or Laws 2005, ch. 180.

body. If minutes have not been approved, they may be so identified. In any event, any completed minutes or sound, video or digital recordings are public records subject to disclosure under the Public Records Law. Consistent with the Public Records Law fee provision, discussed in Part I of this manual, a public body may charge a person a fee for preparing a transcript from a sound, video or digital recording. ORS 192.650(4).

These recordkeeping requirements apply to executive sessions, including the option of keeping a record in the form of either written minutes or a sound, videotape or digital recording. ORS 192.650(2). A governing body is not required to transcribe a sound, videotape or digital recording of an executive session unless otherwise provided by law, and if disclosure of material in the minutes or other recording of an executive session would be inconsistent with the purpose for which the executive session was held under ORS 192.660, the material may be withheld from disclosure. ORS 192.650(2).[41] Also, the written minutes of an executive session held under ORS 332.061 (expulsion of a minor student from public school or consideration of a student's confidential medical records) shall contain only the information not excluded under ORS 332.061(2). The news media have no statutory right of access to minutes or other recordings of executive sessions beyond that of the general public.

We assume that a governing body generally should be able to make a sound, video or digital recording of a meeting available to the public within a few days following the meeting. However, we are told that a requirement that written minutes be available within a few days following a meeting is impractical even for a governing body with substantial staff, because such a body may meet in longer sessions and more often than other bodies, and consequently the preparation of minutes takes up to three weeks in the usual course of business. This practice arguably is within the "reasonable time" allowed by the statute, but a reviewing court may reach a different conclusion.

The Oregon Court of Appeals has construed ORS 192.650 to require minutes to be preserved for a reasonable time. The court concluded that, in the absence of evidence that a longer time is required, one year is a

[41] The Public Records Law recognizes an exemption from disclosure for executive session minutes or other recordings that are protected by ORS 192.650(2). *See* ORS 192.502(9), Other Oregon Statutes Creating Exemptions, discussed in Part I of this manual.

reasonable time to preserve minutes.[42] Accordingly, we recommend that, to safely comply with the law, public bodies preserve minutes or audio, video or digital records for at least one year, and longer if there is evidence that a longer period is necessary. Minutes and audio, video or digital recordings also are "public records" under ORS 192.005(5), the definition for purposes of the public records retention law. Therefore, public bodies also should determine whether the records retention schedule established by the State Archivist pursuant to ORS 192.105 requires them to preserve minutes or other recordings for longer than one year.[43]

Minutes and records available to the public must be made available to persons with disabilities in a form usable by them, such as large print, Braille or audiotape. However, the public body is entitled to consider the resources available for use in the funding and operation of the program from which the records are sought in responding to a request for alternative format, and may conclude that compliance with the request would result in a fundamental alteration of the nature of the program or in undue financial or administrative burdens.[44] Public bodies should consult with legal counsel if they are uncertain of their obligation to honor the requester's choice.

A public body may not charge a person with a disability to cover the costs of providing records in an alternative print form, although the public body may charge a fee for all other "actual costs" that may be recovered under the Public Records Law just as it would for any other requester.[45]

E. Executive (Closed) Sessions

The Public Meetings Law authorizes governing bodies to meet in executive session in certain limited situations. ORS 192.660. An "executive session" is defined as "any meeting or part of a meeting of a governing body which is *closed* to certain persons for deliberation on certain matters." ORS 192.610(2) (emphasis added). See discussion below of Enforcement, Civil Penalties, for violation of the executive session provisions.

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[42] *Harris v. Nordquist*, 96 Or App 19 (see App D-4).

[43] *See* discussion of Destruction of Records in Part I of this manual.

[44] 28 CFR § 35.164; *Nelson v. Thornburgh*, 567 F Supp 369 (ED Pa 1983), *aff'd* 732 F2d 146 (3rd Cir 1984), *cert den* 469 US 1188 (1985).

[45] *See* discussion of Fees in Part I of this manual under "How Can a Person Inspect or Obtain Public Records."

Executive sessions should not be confused with meetings that are exempt from the Public Meetings Law altogether. An executive session is a type of public meeting and must conform to all applicable provisions of the Public Meetings Law. Conversely, exempt meetings need not. See discussion under Statutorily Exempt Public Meetings, above.

The authority to go into executive session does not relieve a governing body of its duty to comply with other requirements of the Public Meetings Law. A checklist of items for a governing body to consider when planning to meet in executive session is set out at p. B-6.

1. Permissible Purposes of Executive Sessions

A governing body may hold an open session even when the law permits it to hold an executive session. However, the governing body has the authority to hold closed sessions regarding the following (discussed in the order set forth in ORS 192.660):

a. Employment of Public Officers, Employees and Agents

A governing body may hold an executive session to consider the employment of a public officer, employee, staff member or individual agent, if the body has satisfied certain prerequisites. ORS 192.660(2)(a).

This provision applies to employment of the chief executive officer, other public officers, employees, and staff members of any public body only if the vacancy for the position has been advertised, regular procedures for hiring have been adopted, and, for a public officer, the public has had opportunity to comment on the employment. ORS 192.660(7)(d)(A)-(C). The standards, criteria and policy directives to be used in hiring the chief executive officer must be adopted at a meeting open to the public at which the public has had an opportunity to comment. ORS 192.660(7)(d)(D).

ORS 192.660(2)(a) does not apply to consideration of general employment policies, but relates only to the initial hiring of specific individuals.[46] We have concluded that this provision does not allow discussion of an officer's salary to be conducted in executive session in connection with the hiring of that officer.[47] This provision also does not apply to filling a vacancy in an elective office, or on any public committee, commission or other advisory group. ORS 192.660(7)(a), (b).

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[46] ORS 192.660(7)(c); 41 Op Atty Gen 262 (1980) (see App F-3).

[47] 42 Op Atty Gen 362 (1982) (see App F-4).

b. Discipline of Public Officers and Employees

A governing body may hold an executive session to consider the dismissal or disciplining of a public officer, employee, staff member or individual agent, or hear complaints or charges brought against such a person, if that person does not request an open hearing. ORS 192.660(2)(b).

In order to permit the affected person to request an open hearing, that person must have sufficient advance notice of the purpose of the meeting and the right to choose whether he or she wants the meeting to be in executive session or in an open session. Although the provision requires an "open hearing" if the person involved so requests, we do not construe this provision to require an adversarial "hearing," but only an open session. The affected person need not be present and has no right to postpone the "hearing" to permit an attorney to attend or to have a formal "hearing" unless another law, a contract or a collective bargaining agreement provides those rights.

Regarding discipline of public officers and employees, we note the partial symmetry between the Public Meetings Law and the Public Records Law. Under the Public Meetings Law, a governing body may discuss discipline of an employee in executive session. Under the Public Records Law, records of a personnel discipline action and supporting materials and documents are conditionally exempt from disclosure once a disciplinary sanction has been imposed. ORS 192.501(12).[48]

c. Public Hospital Medical Staff

Executive sessions are authorized for considering matters pertaining to the function of the medical staff of a public hospital licensed under ORS chapter 441. This authorization includes consideration of all matters relating to medical competency in the hospital. ORS 192.660(2)(c).

Meetings of medical peer review committees held under ORS 441.055 are also exempt from the requirements of the Public Meetings Law. ORS 192.690(1). See discussion of Statutorily Exempt Meetings above. Thus, two facially inconsistent sections coexist in the Public Meetings Law: ORS 192.660(2)(c), which permits peer review committees to meet in executive session (and thus necessarily leaves those committees subject to the Public Meetings Law); and ORS 192.690(1), exempting peer review committees from the law's coverage. We conclude that the later-enacted exemption in

[48] *City of Portland v. Rice*, 308 Or 118, 775 P2d 1371 (1989).

ORS 192.690(1) impliedly repealed that portion of ORS 192.660(2)(c) concerning peer review committees, and that such committees are entirely exempt from the Public Meetings Law.

d. Labor Negotiator Consultations

A governing body may hold an executive session "[t]o conduct deliberations with persons designated by the governing body to carry on labor negotiations." ORS 192.660(2)(d). This subsection allows a governing body to confer in executive session with its labor negotiator.[49] The media may be excluded from such a session. ORS 192.660(4). However, ORS 192.660(2)(d) does not authorize a governing body to meet in executive session with the employees' negotiator. The authority of a governing body to conduct labor negotiations with the employees' negotiator in executive session is found in another subsection of ORS 192.660. See discussion of ORS 192.660(3) (Labor Negotiations) below.

e. Real Property Transactions

A governing body may go into executive session to deliberate with persons designated by the governing body to negotiate real property transactions. ORS 192.660(2)(e). Real property transactions are not limited to the purchase or sale of real property. For example, negotiations for a long-term lease transaction undoubtedly would be included within this provision.

The executive session must be limited to discussions of negotiations regarding specific real property and may not include discussion of a public body's long-term space needs or general policies concerning lease sites.[50]

f. Exempt Public Records

A governing body may go into executive session to consider "information or records that are exempt by law from public inspection." ORS 192.660(2)(f). The "law" that exempts records from public inspection is the Public Records Law, specifically ORS 192.445, 192.447, 192.496, 192.501 and 192.502, discussed above in Part I of this manual. Unless a record is exempt from disclosure under these statutes, a governing body may not consider the record in executive session under ORS 192.660(2)(f).

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[49] 42 Op Atty Gen 362, 363-64 (1982) (see App F-4).

[50] Letter of Advice dated May 18, 1990, to Representative Carl Hosticka (OP-6376) (see App F-6).

The 2003 Legislative Assembly amended ORS 192.660(2)(f) by adding "information" to "records" in the basis for going into executive session. Or Laws 2003, ch 524, § 4. It is unclear whether this addition substantively changed the provision, but it appears that "information" existing outside of a "record," i.e., information that is orally conveyed, would rarely be "exempt by law from public inspection."

The authority granted governing bodies in ORS 192.660(2)(f) to use executive sessions to consider records exempt from public inspection is coextensive with the Public Records Law exemptions. Note that several of the other Public Meetings Law provisions authorizing executive sessions already correspond with specific exemptions of the Public Records Law. For example, as noted above in our discussion of ORS 192.660(2)(b) (Employee Discipline), the Public Meetings Law authorizes governing bodies to consider employee disciplinary matters in closed session, and the Public Records Law conditionally exempts public records of completed personnel disciplinary actions from public inspection in ORS 192.501(12).

Whether a particular record is exempt from public disclosure, and may therefore be considered in execution session, may depend on statutes outside but incorporated within the records law through two "catchall" exemptions — ORS 192.502(8) and (9).[51] For example, if a record of a public body's communication with its lawyer is privileged under ORS 40.225, the record would be exempt from disclosure under the Public Records Law, pursuant to ORS 192.502(9). Consequently, a governing body could consider the record in executive session under the authority of ORS 192.660(2)(f). See further discussion below of executive sessions involving legal matters, under the heading "Legal Counsel."

However, a governing body has the cart before the horse if it attempts to withhold disclosure of a public record merely because the record was discussed, or might be discussed, in an executive session. The body's authority to refuse to disclose a record depends on provisions of the Public Records Law, not of the Public Meetings Law. The only part of the meetings law that addresses a public records disclosure issue is ORS 192.650(2), which provides that material in the minutes or other record of an executive session may be "excluded from disclosure" to the extent disclosure would be inconsistent with the purpose for which the executive

[51] *See* discussion of Federal Law Exemption and Other Oregon Statutes Establishing Specific Exemptions in Part I of this manual.

session was initially authorized to be held. See discussion of Minutes and Recordkeeping above. This restriction in the Public Meetings Law is incorporated into the Public Records Law by ORS 192.502(9).

g. Trade Negotiations

Preliminary negotiations involving matters of trade or commerce in which the governing body is competing with governing bodies in other states or nations may be conducted in executive session. ORS 192.660(2)(g). Use of this provision is permissible when the governing body knows or has good reason to believe it is in competition with other governing bodies or nations regarding the matter to be discussed.[52]

h. Legal Counsel

Executive sessions are appropriate for consultation with counsel concerning legal rights and duties regarding current litigation or litigation likely to be filed. ORS 192.660(2)(h). This authorization parallels the Public Records Law exemption for records pertaining to litigation, ORS 192.501(1). Other discussions with counsel generally must be held in open session.

We believe that ORS 192.660(2)(h) is intended to put public bodies on an equal footing with private litigants. This means that the governing body should be able to engage in a private and candid discussion with counsel about the legal issues raised by the litigation. Such discussion may include not only procedural options, but also substantive analysis of the legal merits, risks and ramifications of the litigation.

Our interpretation is consistent with the language of ORS 192.660(2)(h), which uses the fairly broad phrase "legal rights and duties." It is also bolstered by sensible public policies that we believe were part of the legislature's intent in enacting the subsection. First, if a governing body and its counsel were compelled to discuss their litigation position in public, it could result in denying the public body its fair day in court. Any weaknesses in the public body's position would undoubtedly be brought to the court's attention and could affect the court's objectivity. Second, our experience suggests that private and candid consultation with a governing body promotes quick resolution of inadvisable litigation. In executive session, counsel is in a better position to provide the frank advice that the

[52] 42 Op Atty Gen 392, 397 (1982) (see App F-4).

governing body's case is weak and that the litigation should be dismissed or settled.

Furthermore, under ORS 192.660(2)(h), the discussion in executive session may proceed even to the point at which the governing body has reached an informal consensus as to its course of action. As discussed below under Final Decision Prohibition, ORS 192.660(6) guarantees that the results of any consensus will be made public by the requirement that any final decision be made in open session.

We noted earlier that ORS 192.660(2)(f) (consideration of information or records exempt from public inspection) may provide authority for an executive session with legal counsel in cases when ORS 192.660(2)(h) would not apply. As noted above, written legal advice from counsel is privileged information under ORS 40.225. Consequently, it is exempt from disclosure under ORS 192.502(9) and a proper subject of an executive session under ORS 192.660(2)(f).[53] Accordingly, if a governing body takes appropriate steps, it may use an executive session to discuss any legal matter of a confidential nature absent the existence or likelihood of litigation.

Some might argue that this interpretation is an open invitation to evade the purposes of the Public Meetings Law, but we do not intend it as such. When a need for confidential discussion of legal issues arises, even in the absence of an immediate threat of litigation, we see no reason why a governing body should not take advantage of the attorney-client privilege for this purpose. Because it is unclear whether the addition of "information" to ORS 192.660(2)(f) broadens the scope of the provision to cover oral attorney-client communication, a governing body should not cite ORS 192.660(2)(f) as a basis for going into executive session to discuss legal issues that are not presented in a written record of an attorney-client communication without first seeking advice from its legal counsel. The governing body should return to public session for any discussion of policy.

When a governing body holds an executive session under ORS 192.660(2)(h), the governing body must exclude any member of the news

[53] *But see* discussion of SB671, § 5 (2007), page 82 above, amending ORS 192.502(9) to add a new paragraph (b) describing a specific set of circumstances in which the attorney-client privilege does not exempt a document from disclosure.

media if the member of the news media is a party to the litigation to be discussed or is an employee, agent or contractor of a news media organization that is a party to the litigation. ORS 192.660(5).

i. Performance Evaluations of Public Officers and Employees

A governing body may hold an executive session "[t]o review and evaluate" the job performance of a chief executive officer, other officers, employees, and staff, if the person whose performance is being reviewed and evaluated does not request an "open hearing." ORS 192.660(2)(i). We have concluded that ORS 192.660(2)(i) does not allow discussion of an officer's salary to be conducted in executive session in connection with the job performance evaluation of that officer.[54]

We interpret the term "open hearing," as used in ORS 192.660(2)(i), in the same way we construe that term as used in ORS 192.660(2)(b) (open hearing of employee discipline matters on employee's request). In order to permit the affected person to request an "open hearing," the governing body must give sufficient advance notice to the person of his or her right to decide whether to require that the performance evaluation be conducted in open session.

"Open hearing" in this context means "open session." The affected person need not be present and has no right to postpone the "hearing" in order to attend or to permit an attorney to attend. Nor does the affected person have a right, under the Public Meetings Law, to have an attorney present evidence or to have a formal adversarial hearing. Other law, a contract or a collective bargaining agreement, however, may provide such rights.

Disclosure of a record of a public officer's or employee's performance evaluation generally is not an unreasonable invasion of privacy for purposes of exemption from the Public Records Law.[55] This is in contrast to a record of the disciplining of a public officer or employee, which is conditionally exempt from disclosure under another provision of the records law, ORS 192.501(12).[56] Notwithstanding Public Records Law requirements, under the Public Meetings Law a governing body may go

[54] 42 Op Atty Gen 362 (1982) (see App F-4).

[55] *See* discussion in Part I of this manual under Personal Privacy Exemption.

[56] *See* discussion in Part I of this manual under Personnel Discipline Actions.

into executive session to discuss an officer's or employee's performance. Also, the minutes of such an executive session may be withheld from disclosure under the Public Meetings Law, ORS 192.650(2), discussed above under Minutes and Recordkeeping, even though some of the underlying personnel records may not be exempt from disclosure.

ORS 192.660(8) provides that a governing body may not use an executive session held for purposes of evaluating a chief executive officer or other officer, employee or staff member "to conduct a general evaluation of an agency goal, objective or operation or any directive to personnel concerning agency goals, objectives, operations or programs."

j. Public Investments

An executive session may be called "[t]o carry on negotiations under ORS chapter 293 with private persons or businesses regarding proposed acquisition, exchange or liquidation of public investments." ORS 192.660(2)(j). This is the counterpart to the exemption from disclosure of public records relating to proposed investments of state funds. ORS 192.502(13). However, the authority to negotiate with private parties in executive session does not permit the governing body to take final action or to make a final decision in executive session. ORS 192.660(6).

k. Health Professional Licensee Investigation

A health professional regulatory board may go into executive session to consider information obtained as part of an investigation of licensee or applicant conduct. ORS 192.660(2)(k). Under ORS 676.175, the board must keep confidential and not disclose any part of its executive session meeting minutes or other recording that contains confidential information, except as permitted under the terms of ORS 676.175.[57] Confidential information must be protected even when the board convenes in public session for purposes of deciding whether or not to issue a notice of intent to impose a disciplinary sanction on a licensee or to deny or to approve an application for licensure. As a matter of general practice, boards should refer to the case by number and not disclose the name of the licensee or applicant or any other information that would permit the licensee or applicant to be identified. If the board votes not to issue a notice of intent to impose a disciplinary sanction against a licensee or applicant, the board is required to disclose investigatory information it obtained if the person

[57] 49 Op Atty Gen 32 (1998) (see App F-7).

requesting it demonstrates by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure. ORS 676.175(2). If the board votes to issue a notice of intent to impose a disciplinary sanction against a licensee or applicant, upon written request of the licensee or applicant, the board is required to disclose all investigatory information it obtained, except as otherwise specified in ORS 676.175(3).

l. Landscape Architect Registrant Investigation

The State Landscape Architect Board, or an advisory committee to the board, may go into executive session to consider information obtained as part of an investigation of registrant or applicant conduct. ORS 192.660(2)(L). The confidentiality of executive session minutes, transcripts and recordings related to the substance and disposition of the matter investigated is controlled by the terms of ORS 671.338. The board or advisory committee may permit public officials and members of the press to attend the executive session. Those public officials and members of the press are prohibited from disclosing information discussed in the session until the information ceases to be confidential under ORS 671.338. In open session, the board may discuss matters that are being reviewed by an advisory committee, but may not disclose information considered confidential under ORS 671.338.

m. Security Programs

A governing body may go into executive session to "discuss information about review or approval of programs relating to the security" of a number of specified structures, activities, and materials relevant to the operation of the state's infrastructure. The structures, activities and materials about which an executive session may be held to discuss review or approval of security programs are as follows:

- A nuclear-powered thermal power plant or nuclear installation;
- Transportation of radioactive material derived from or destined for a nuclear-fueled thermal power plant or nuclear installation;
- Generation, storage or conveyance of: electricity; gas in liquefied or gaseous form; hazardous substances as defined in ORS 453.005(7)(a), (b) and (d); petroleum products; sewage; or water;
- Telecommunications systems, including cellular, wireless or radio systems; or

- Data transmissions by whatever means provided.

n. Labor Negotiations

ORS 192.660(3) requires labor negotiations to be conducted in open meetings unless the negotiators for both sides request that the negotiations be conducted in executive session. Such executive sessions, if held, are not subject to the notification requirements of ORS 192.640.

As noted above, this subsection, rather than ORS 192.660(2)(d), authorizes governing bodies to engage in labor negotiations with employees' representatives in executive session. Note also that a public body's labor negotiations with employees' representatives are not subject to the Public Meetings Law at all if the negotiations are conducted for the governing body by an *individual* retained by the governing body. This is because the individual labor negotiator is neither a public body nor a governing body. In these circumstances, the public and the media cannot invoke the Public Meetings Law as a basis for attending negotiation sessions.[58]

Labor negotiations take place only between employee representatives, such as labor organizations, and employers.[59] Normally, designated representatives of both parties meet at the bargaining table, in which circumstance, the meeting is not being held by the governing body, and the Public Meetings Law does not apply, as discussed above.

o. Other Executive Session Statutes

The Public Meetings Law list of matters appropriate for executive session is not exclusive. Statutes outside the meetings law authorize governing bodies to hold executive or closed sessions, sometimes without cross-referencing the Public Meetings Law. For example, ORS 332.061 authorizes school boards to consider student expulsion and confidential medical records of students in executive session, notwithstanding the Public Meetings Law. ORS 342.176 authorizes the Teacher Standards and Practices Commission to receive staff reports and to make findings on preliminary investigations of alleged teacher misconduct while in executive session. And ORS 1.425(2) authorizes the Commission on Judicial Fitness

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[58] *SW Ore. Pub. Co. v. SW Ore. Comm. Coll.*, 28 Or App 383, 559 P2d 1289 (1977) (see App D-1).

[59] ORS 243.650 to 243.782.

and Disability to hold closed hearings on allegations of judicial disability, without reference to the Public Meetings Law.

2. Final Decision Prohibition

ORS 192.660(6) provides: "No executive session may be held for the purpose of taking any final action or making any final decision."[60] It is quite likely that the governing body may reach a consensus in executive session, and its members of course will know of that consensus. The purpose of the "final decision" requirement is to allow the public to know the *result* of the discussions. Taking a formal vote in open session satisfies that requirement, even if the public vote merely confirms a tentative decision reach in an executive session.

The statute does not define "final action" or "final decision." Many governmental matters require that a series of official decisions be made or that a series of actions be taken prior to ultimate resolution of an issue of policy or administration. But a need to make further decisions or to take further action does not necessarily make any particular decision or action less final. Whether a governing body has reached a stage when it must make a final decision in public often is a question that must be resolved on a case-by-case basis, but the governing body should choose a public decision unless a final public decision clearly is not required.

A governing body attempting to determine in executive session whether it has reached a point of "final" decision or action should consider two criteria: the nature of the proposed decision or action, and the purpose of the statutory authorization for the particular executive session.

Unless it is reasonably likely that the type of decision or action proposed can be made in executive session, the governing body should return to open session. For example, it is highly unlikely that any decision authorizing expenditure of funds could be made in executive session. But if examination of the nature of the proposed decision or action does not resolve the "finality" question, the governing body should consider whether public announcement of the proposed decision or action actually would frustrate the policy underlying the particular statutory authorization for the

[60] At least one public body has a specific statute requiring a final decision to be made in executive session. The Government Ethics Commission must make its decision at the conclusion of the Preliminary Review Phase in executive session. ORS 244.260.

executive session. Unless the governing body reasonably can conclude that public announcement of a proposed decision seriously will compromise further actions that must be taken, the body should return to open session to announce the decision.

For example, the process of hiring a chief executive officer usually involves a series of governing body decisions and actions. If specific statutory prerequisites have been met, the governing body may conduct much of the hiring process in executive session under the authority of ORS 192.660(2)(a). See discussion above of Employment of Public Officers and Employees. This statute manifests legislative policy to allow governing bodies to conduct uninhibited discussions in the personnel hiring process and to enable governing bodies to attract and recruit qualified persons who would not apply for a chief executive officer position if their candidacy immediately would become known. In this context, it is clear that a decision to reduce a slate of 30 candidates to 10, or to three "finalists" for further consideration, is not a "final action" or "final decision." However, a decision to spend $2,500 to bring the finalists in for interviews would be a final decision. A decision to *negotiate* with a "first choice" candidate, with salary and other conditions of employment remaining unsettled, is not a final decision. A decision to formally *offer* the position to one candidate is a final decision, even before acceptance.

A governing body cannot evade the "final action" requirement by using coded terms. For example, a formal public vote to extend an offer of appointment to "Ms. A" would be a clear violation of the law's requirements, unless a statute outside of the Public Meetings Law *prohibits* disclosure of the individual's name. ORS 676.175(1).

A governing body meeting in executive session must return to *public* session before taking final action. ORS 192.660(6). This requirement cannot be circumvented by simply announcing, in executive session, that the meeting is now open, and then proceeding without affording interested persons a chance to attend. If a public meeting will be held again after the executive session, the desirable practice would be to announce, before the executive session, a specific time for returning to open session. Otherwise, reasonable means must be used to give actual notice to interested persons that the meeting is again a public meeting. If the executive session has been short, it may be sufficient to open the door and announce to persons in the hall that the meeting is open to the public. But clearly, returning to an

unscheduled and unannounced "open session," for which those attending the previous session have no notice and no opportunity to attend, does not comply with the law.

The formal decision, of course, can be postponed to the next regular or duly announced public meeting. In fact, this procedure is necessary for any executive session that is not held in conjunction with a public session, unless the notice of executive session also informs the public and interested persons of the time and place at which the session will be opened to make the formal decision.

Finally, statutes outside the Public Meetings Law effectively may modify the requirement that no final action be taken in executive session. In labor negotiations covered by the Public Employees Collective Bargaining Act,[61] an offer made by the governing body's negotiator, if accepted by the employees' bargaining representative, is binding and effective, and an agreement must be signed even if the governing body has not formally approved the offer in open session. The governing body then appropriately may ratify the agreement at a subsequent public meeting.[62]

3. Method of Convening Executive Session

A governing body may hold a meeting consisting of only an executive session. The notice requirements are the same as those for any other meeting. ORS 192.640. See discussion of Notice above. In addition, the notice must cite to the statutory authority for the executive session. ORS 192.640(2). An example of this type of notice is found at p. B-5.

An executive session may also be called during a regular, special or emergency meeting for which notice has already been given in accordance with ORS 192.640. The person presiding over the meeting must announce the statutory authority for the executive session before going into executive session. ORS 192.660(1). A sample script for use in calling an executive session during a public meeting is found at p. B-9.

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[61] ORS 243.650 to 243.782.

[62] *South Benton Ed. Assn. v. Monroe Union High*, 83 Or App 425, 732 P2d 58, *rev den* 303 Or 331, 736 P2d 565 (1987) (see App D-3). *Compare South Benton Ed. Assn. with Crowfoot Elem. Sch. Dist. v. P.E.R.B.*, 19 Or App 638, 529 P2d 405 (1974) (harmonizing Public Meetings Law with the Public Employees Collective Bargaining Act, court concluded public employee labor organization did not commit unfair labor practiced by attending a school board meeting, open to the public, during period of negotiations).

4. Media Representation at Executive Session

For many years, the common practice of many public bodies was to permit members of the media to attend executive sessions, subject to the understanding that the media representatives would not report certain sensitive matters. The principal purpose of this practice was to provide news representatives the opportunity to obtain, from their attendance at executive sessions, background information that would improve their understanding of final decisions, and consequently, their ability to keep the public better informed.

The Public Meetings Law now expressly provides that representatives of the news media *shall be allowed* to attend all executive sessions except in two situations: executive sessions involving deliberations with persons designated to carry on labor negotiations,[63] and closed sessions held under ORS 332.061(2) to consider expulsion of an elementary or secondary school student or matters pertaining to a student's confidential medical records. ORS 192.660(4).

When an executive session is held for the purpose of conferring with counsel about current litigation or litigation likely to be filed, the governing body must exclude any member of the news media from attending the executive session if the member of the news media is a party to the litigation to be discussed or is an employee, agent or contractor of a news media organization that is a party to the litigation. ORS 192.660(5).

The governing body may require that specified information *not* be disclosed. ORS 192.660(4). See Sample Script at p. B-9. The presiding officer should make the specification, or the governing body could do so (or overrule the presiding officer) by motion. *Absent any such specification, the entire proceeding may be reported and the purpose for having an executive session may be frustrated.* Except in the rarest instances, the governing body at least should allow the general subject of the discussion to be disclosed, and it cannot prevent discussion of the statutory grounds justifying the session. The nondisclosure requirement should be no broader than the public interest requires.

Although we explain above that members of the public may tape record or video record public meetings, we do not believe this is the case with

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[63] *Barker v. City of Portland*, 67 Or App 23, 676 P2d 1391 (1984) (see App D-2).

respect to members of the media who attend executive sessions. We believe the presiding officer may require that members of the media not tape record executive session proceedings, in order to decrease the likelihood that information discussed in the executive session will be inadvertently disclosed.

The term "representatives of the news media" is not defined. We have interpreted that term to include *news-gathering* representatives (i.e., reporters) of news media that ordinarily report activities of the body.[64] This interpretation should be expanded to include representatives of media that ordinarily report matters of the nature under consideration by the body.

The advertising manager of a newspaper is not a representative of the newspaper for purposes of this statute, and a periodical containing only hunting and fishing news is not a medium of news about a meeting of a school board. The hunting and fishing periodical presumably would be a news medium, under the statute, for purposes of a meeting of the Fish and Wildlife Commission.

In recent years, computer programs have made it much easier for individuals to produce and distribute, often electronically, newsletters and other similar periodicals. With increasing frequency, these individuals are claiming to be a "news media" and asking to attend executive sessions. Decisions on whether or not an individual should be permitted to attend an executive session under these circumstances must be made on a case-by-case basis as no clear definition of "news media" exists. Public bodies should consult with their legal counsel when faced with this type of request.

The Public Meetings Law provides no sanction to enforce the requirement that specified information not be disclosed by a news representative. Any penalty for publication would raise freedom of press and speech questions.[65] The experience of more than two decades has been that the media, by and large, honor the nondisclosure requirement. Ultimately, "enforcement" of the nondisclosure requirement depends upon cooperation between public officials and the media. This cooperation advances the purposes of both government and the news media.

A news reporter has no obligation to refrain from disclosing information gathered at an executive session if the governing body fails to

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[64] 39 Op Atty Gen 600 (1979) (see App F-2).

[65] 38 Op Atty Gen 2122 (1989) (see App F-1).

specify that certain information is not for publication.[66] Media representatives may wish, in a spirit of cooperation, to inquire whether a governing body's failure to specify was an oversight. A reporter is under no obligation to keep confidential any information the reporter independently gathers as the result of leads obtained in an executive session. A news reporter has a clear right to disclose any matter covered in an executive session that is not properly within the scope of the announced statutory authorization of the executive session. Indeed, the presence of news media representatives at executive sessions probably encourages compliance with statutory restrictions on the holding of closed sessions.

It is questionable whether a news media representative can be barred from future executive sessions for improperly revealing information obtained at a prior closed session. In a case called to our attention, a reporter and all other representatives of the employing newspaper were threatened with exclusion from future executive sessions for reporting deliberations on a matter that was probably not a proper subject of an executive session. Exclusion or the threat of exclusion in such a case is clearly impermissible.

It is certainly reasonable for a governing body to request a news medium not to assign a particular representative to cover meetings of the body if the representative has irresponsibly violated a clearly valid nondisclosure requirement. An outright ban on a particular individual may be enforceable in such a case, because the statutory purposes will be met by allowing another representative (and representatives of other news media) to attend. However, we can say no more than it is possible that a ban would be enforced in these circumstances. We see no other basis for a governing body to dictate the assignments of a news medium representative. A particular representative certainly could not be banned from meetings simply because the governing body disliked the reports made by the representative.

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[66] But a public body does not waive any evidentiary privilege conferred under ORS 40.225 to 40.295, such as the attorney-client privilege, when "representatives of the news media are allowed to attend execution sessions *** as provided in ORS 192.660(4), or when representatives of the news media disclose information after the governing body has prohibited disclosure of the information under ORS 192.660(4)." ORS 40.280.

5. Other Persons Permitted to Attend Executive Sessions

An executive session is by definition a meeting "which is closed to *certain* persons." ORS 192.610(2) (emphasis added). It follows that the governing body may permit other persons to attend. Generally, an executive session is closed to all except members of the governing body, persons reporting to it on the subject of the executive session or otherwise involved, and news media representatives. However, nothing prohibits the governing body from permitting other specified persons to attend.[67] Statutes outside of the Public Meetings Law specifically allow health professional regulatory boards to permit public officials[68] and members of the press to attend executive sessions in which the board considers information it has obtained in the course of an investigation of a licensee or applicant. The attending individuals should be reminded, however, that they may not disclose such information to any other members of the public. The fact that certain persons have been allowed to attend is not grounds for the general public to attend the executive session.

F. Enforcement of the Law

As noted above, the Attorney General and district attorneys have no enforcement role under the Public Meetings Law. Education and persuasion are by far the best tools available to obtain compliance. Most violations of the Public Meetings Law occur because the governing body is not familiar with the requirements of the law. Quoting the provisions of the law to the governing body often results in future compliance. Most governing bodies that are aware of the law make a good faith effort to comply.

There are, however, cases in which governing bodies continue to violate the law and can be neither persuaded nor educated. Even in such a case, quoting the legal provisions that create potential personal liability of governing body members for attorneys' fees, ORS 192.680(3) and (4), or that authorize the imposition of civil penalties for violation of the executive session provisions of the law, ORS 192.685, is worth trying before suit is filed. But in some cases only litigation will suffice.

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[67] *Barker*, 67 Or App 23 (see App D-2).

[68] In this context, "public official" means a member, member-elect, staff member or employee of a state agency or board, a district attorney's office, the Department of Justice, a state or local public body that licenses, franchises or provides emergency medical services or a law enforcement agency. ORS 676.175, 676.177.

1. Injunctive or Declaratory Actions

Anyone affected by a decision of a governing body of a public body may file a lawsuit to require compliance with, or prevent violations of, the Public Meetings Law by members of the governing body. ORS 192.680(2). An action may be brought even before any decision affecting the plaintiff has been made.[69] Among those with standing to sue are "representatives of the press,"[70] and "any person who might be affected by a decision that might be made."[71]

A suit also may be filed to determine whether the Public Meetings Law applies to meetings or decisions of the governing body. ORS 192.680(2). A suit filed for either purpose must be brought in the circuit court of the county in which the governing body ordinarily meets. *Id.*[72] It is necessary to engage a private attorney, or to appear *pro se* (for oneself).

An action under the Public Meetings Law is not moot solely because a governing body has ceased its improper meeting practices. The governing body's past illegal actions remain in violation of the law.[73] Under ORS 192.680(5), any suit brought under the Public Meetings Law must be commenced within 60 days following the date that the decision becomes public record.

In the case of unintentional or nonwillful violations of the Public Meetings Law, voiding a decision is a permissible but not mandatory remedy. ORS 192.680(1). However, ORS 192.680(1) permits a governing body that makes a decision in violation of the Public Meetings Law to reinstate the decision while in compliance with the law. This rule is consistent with court decisions in other states holding that a later meeting in compliance with an open meetings law can cure earlier open meetings law

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[69] *Harris*, 96 Or App 19 (see App D-4).

[70] *Barker v. City of Portland*, 94 Or App 762, 765-66, 767 P2d 460 (1989) (see App D-3).

[71] *Harris*, 96 Or App 19. *See also Students for Ethical Treatment v. Inst. Animal Care*, 113 Or App 523, 833 P2d 337 (1992) (plaintiffs whose goals are to educate public about animal exploitation have standing because decisions by university committee charged with ensuring standards for animal research, and information on which committee decisions are made, have potential impact on plaintiffs' ability to perform education role) (see App D-5).

[72] *Barker*, 94 Or App at 766 (see App D-3).

[73] *Id.* at 765.

violations.[74] If the governing body reinstates an earlier decision in that manner, the decision shall not be voided. A decision that is reinstated is effective from the date of its initial adoption. ORS 192.680(1). We construe the reinstatement provision to require the governing body not merely to conduct a perfunctory rerun, but to substantially reconsider the issues.

If a subcommittee holds a meeting in violation of the Public Meetings Law at which it decides on a recommendation to a public body, that violation by itself does not render the public body's subsequent decision on the recommendation void. By making its decision in full compliance with the Public Meetings Law, the public body would cure the subcommittee's prior meetings law violation (although the body's rules or bylaws might preclude such action).

However, reinstatement will not prevent a court from voiding a governing body's decision "if the court finds that the violation was the result of intentional disregard of the law or willful misconduct by a quorum of the members of the governing body." ORS 192.680(3). In those circumstances, a court shall void the decision "unless other equitable relief is available." *Id.* In any case, "[t]he court may order such equitable relief as it deems appropriate in the circumstances." ORS 192.680(3).

Before 1989, ORS 192.680(1) provided, "A decision shall not be voided if other equitable relief is available." That language has been deleted. Nonetheless, we construe ORS 192.680 as a whole to retain that principle for unintentional or nonwillful violations. A contrary conclusion would create an anomaly in the law, by which the availability of other equitable relief would bar a court from voiding a decision resulting from an intentional or willful violation of the Public Meetings Law, but not from a merely careless violation. We do not believe that the language of the Public Meetings Law compels that result, or that the legislature intended so to provide. Voiding a governing body's decision thus remains a remedy of last resort under the Public Meetings Law, even after the 1989 amendments.

By so providing, the legislature appears to have balanced the policy of openness in governmental decision-making against other important public policies. For instance, voiding a governing body's decision often may be

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[74] *Board of Educ. School District No. 67 v. Sikorski,* 574 NE2d 736 (III App Ct 1991); *Kleinberg v. Albuquerque Public Schools,* 751 P2d 722 (NM Ct App 1987) (*citing Board of Educ. Santa Fe Public Schools v. Sullivan,* 740 P2d 119 (NM 1987)).

viewed as contrary to the public interest in that the remedy may undermine the stability of governmental decision-making, as well as harm innocent persons who have acted in reliance on that decision. Consequently, courts likely will tend only infrequently to invoke that remedy.

If, however, the violation involves an aggravating factor, such as a conflict of interest violation, that factor, plus the violation of the Public Meetings Law, may lead to judicial voiding of the action. In any case in which a violation is found, the court may enjoin future violations or it may simply declare what the law requires. Future violations after the injunction may lead to contempt of court penalties for violating a court order.

In formulating a remedy under the Public Meetings Law, a court will be guided only by the purposes of the Public Meetings Law rather than the effect of a violation on an unrelated proceeding. Thus, for instance, when a school district's decision in violation of the Public Meetings Law potentially affected the status of a union's representation petition, the court in the Public Meetings Law proceeding held that any remedy must not be directed at the status of that petition.[75]

In the discretion of the court, a successful plaintiff may be awarded reasonable attorney fees. ORS 192.680(3).[76]

If the court finds a violation of the Public Meetings Law and determines that the violation was the result of willful misconduct by any member of the governing body, *that member is personally liable to the governing body or public for the amount of attorney fees paid by the body to a successful applicant.* ORS 192.680(4).

Except for the imposition of civil penalties for violation of the executive session provisions (see discussion below), a lawsuit under ORS 192.680 is the exclusive remedy for a violation of the Public Meetings Law. ORS 192.680(6).[77] Because of this exclusivity, the proof requirements in any action are established by the Public Meetings Law, not any other law.[78]

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[75] *Oreg. Assoc. of Classified Emp. v. Salem-Keizer*, 95 Or App 28, 767 P2d 1365, *rev den* 307 Or 719 (1989) (see App D-4).

[76] *Smith v. School Dist. No. 45*, 63 Or App 685, 666 P2d 1345, *rev den* 295 Or 773, 670 P2d 1036 (1983) (see App D-1).

[77] *Oreg. Assoc. of Classified Emp.*, 95 Or App at 34 (see App D-4).

[78] *Id.*

A person who files a legal action under ORS 192.680(1) is required to establish, by sufficient evidence, that a governing body violated the Public Meetings Law. The governing body then has the burden to prove "that its acts in deliberating toward a decision complied with the law." ORS 192.695.[79]

2. Civil Penalties

Notwithstanding the exclusive remedy provisions of ORS 192.680, complaints that public officials have violated the executive session provisions of the law may be made to the Oregon Government Ethics Commission for review and investigation as provided by ORS 244.260. ORS 192.685(1). The commission may interview witnesses, review minutes and other records and may obtain other information pertaining to executive sessions of the governing body of a public body for purposes of determining whether a violation occurred. ORS 192.685(2).

The commission may impose civil penalties not to exceed $1,000 for violating any provision of ORS 192.660, the executive session provisions.[80] However, if the violation occurred as a result of the governing body of a public body acting upon the advice of the public body's legal counsel, a civil penalty may not be imposed.[81]

If the commission chooses not to pursue a complaint at any time before conclusion of a contested case hearing, the public official against whom the complaint was brought may be entitled to reimbursement of reasonable costs and attorney fees. They would be paid by the public body to which the official's governing body has authority to make recommendations or for which the official's governing body has authority to make decisions. ORS 192.685(3). A public official who prevails following a contested case hearing shall, upon petition to the Circuit Court for Marion County, be awarded reasonable attorney fees at the conclusion of the contested case or on appeal to be paid from the General Fund.[82]

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[79] *Harris*, 96 Or App 19 (see App D-4).
[80] ORS 244.350(2).
[81] *Id.*
[82] ORS 244.400.

PUBLIC MEETINGS LAW APPENDIX A

Answers to Questions Commonly Asked About the Public Meetings Law

Q. May a three-member governing body meet with staff in carrying out its administrative functions, without complying with all the notice and other requirements of the Public Meetings Law?

A. If the governing body is meeting in order to obtain information on which it later will deliberate, or to deliberate or decide on substantive matters, it must comply with the notice, public attendance and recordkeeping requirements of the Public Meetings Law.

Q. As a member of a three-member governing body, must I notify the press and public and arrange for their attendance every time I drop into a colleague's office or make a telephone call to another member?

A. Yes, if you discuss the business of the governing body. The law requires that the public have access to any meeting of a quorum of a governing body of a public body when the governing body meets to gather information on which it will later deliberate, or to deliberate or make a decision on any matter of policy or administration.

Q. Is a "retreat" of a governing body subject to the Public Meetings Law?

A. The answer depends on the matters discussed at the retreat. If the retreat is confined, for instance, to general principles of decision-making or personal interaction, the Public Meetings Law would not apply. However, if at the retreat the governing body deliberates toward or makes a decision on official business, or gathers information on which it later will deliberate, the meetings law applies. In addition, any retreat or training session that includes deliberations must be held inside the governing body's jurisdiction.

Q. What about a "retreat" for other employees and administrators of the public body attended by members of the governing body?

A. Such a "retreat" can be organized to avoid the meeting of a quorum of the governing body for the purpose of gathering information

or deliberating toward decisions on matters within their responsibility, in which case the meetings law would not apply. However, it also is very easy for information gathering or policy deliberations by members of the governing body to occur, in violation of the Public Meetings Law.

Q. May a quorum of members of a governing body participate in a "community retreat" sponsored by a chamber of commerce?

A. Yes, so long as they avoid getting together as a group for any deliberations.

Q. What is a quorum?

A. The Public Meetings Law does not define quorum. It may be defined by city charter, rules of order or some other source. For public bodies, absent other controlling authority, a quorum is a majority. ORS 174.130. Even if a group decides to operate by consensus, the meetings law will apply if a quorum of the group's members are required to make a decision or recommendation. See also discussion of Quorum in Appendix C.

Q. Is an on-site inspection subject to the Public Meetings Law?

A. No. On-site inspections are not "meetings" subject to the meetings law.

Q. Does the Public Meetings Law apply to a chamber of commerce?

A. No.

Q. Is a people's utility district board subject to the Public Meetings Law?

A. Yes.

Q. How about an electric cooperative?

A. No. That is a private body.

Q. How about a nonprofit corporation that receives all of its funds from the state or local government?

A. No, unless it is formally acting as an advisory body to a public body or is required by contract to open its meetings. If the corporation is the "functional equivalent" of a public body, it may also be subject to the Public Meetings Law. See discussion of Private Bodies.

Q. Are homeowners associations and rental associations subject to the Public Meetings Law?

A. No.

Q. Are neighborhood associations subject to the Public Meetings Law?

A. It depends on whether the particular neighborhood association is a "governing body of a public body." Determining whether a neighborhood association is subject to the Public Meetings Law requires an analysis of several factors, including the specific responsibilities and authority of that particular neighborhood association.

Notwithstanding the analysis under the Public Meetings Law, some cities require, as a condition of their recognition of a neighborhood association, that neighborhood association meetings be open to the public.

Q. Is an administrative hearing subject to the Public Meetings Law?

A. The deliberations of state agencies conducting contested cases in accordance with the Administrative Procedures Act, and of several specifically named agencies, are exempt from the meetings law. However, the information-gathering portions of the contested cases are subject to the meetings law if conducted by a governing body. Proceedings in the nature of contested cases conducted by local governing bodies are subject to the meetings law. Contested cases conducted by an individual hearings officer are not subject to the law, because a hearings officer is not a governing body. See discussion of Statutorily Exempt Meetings.

Q. Does the Public Meetings Law apply to the Oregon legislature?

A. The application of the Public Meetings Law to the Legislative Assembly has not been directly addressed in an opinion by the courts or the Attorney General. However, the Oregon Constitution and rules of both chambers require that deliberations of floor sessions and committee meetings, but not caucus sessions, be open to the public and members of the media. *See* Letter of Advice, dated June 19, 1981, to Edward Fadeley, State Senator (OP-5206).

Q. How far in advance must a public body give notice of its regular meetings?

A. Far enough in advance reasonably to give interested persons actual notice and an opportunity to attend. Because the notice must specify the principal subjects to be covered, it must be given separately for each meeting even though the public and news media know that the body meets every Wednesday evening.

Q. Is a notice posted solely on a bulletin board sufficient?

A. It is not. However, such a notice may be used with news releases and mailing lists to meet the notice requirements. See discussion of Notice.

Q. Must meeting notices be published as legal notices?

A. No.

Q. Does the Public Meetings Law notice requirement require the purchase of advertising?

A. No, it requires only appropriate notice.

Q. May a governing body issue a single notice for a "continuous session" that may last for several days?

A. Probably yes, if the body can identify the approximate times that principal subjects will be discussed.

Q. Must a notice be provided for a meeting that is exclusively an executive session?

A. Yes. The notice requirements are the same and must include statutory authority for the executive session.

Q. Is a media request to receive notice of any meetings sufficient to require notice of special and emergency meetings?

A. Yes.

Q. If a news medium requests notice of meetings, is it sufficient for that notice to be mailed "general delivery" to that news medium?

A. Probably yes, if mailed far enough in advance. It is up to the news medium to establish procedures to ensure that the proper person receives the notice. For a special or emergency meeting, a telephone call or a fax to a responsible person is advisable.

Q. Is a meeting without proper notice an illegal meeting?

A. A meeting without notice violates the Public Meetings Law. See discussion of Enforcement of the Law.

Q. Must a governing body notify the public when a meeting has been cancelled, for example, when bad weather requires a last-minute cancellation?

A. The Public Meetings Law does not require a governing body to notify the public when a meeting has been cancelled. Although not required, it is certainly appropriate for a governing body to notify the public that a meeting has been cancelled when it is feasible to do so.

Q. May governing bodies hold public meetings at a location outside of the geographic boundaries of their jurisdiction if there is no appropriate meeting site within their geographic boundaries?

A. The Public Meetings Law requires, with two exceptions, public bodies to hold meetings within their geographic boundaries, at their administrative headquarters or "at the nearest practical location." The two exceptions are when a public body is meeting with another public body or with the elected officials of a federally recognized Oregon Indian tribe and the meeting is within the jurisdiction of that other body or tribe.

If, for example, there was no available meeting place within a public body's geographic boundaries or administrative headquarters, and the only alternative was to hold the meeting at someone's home (which most likely would not meet the requirements of the Americans with Disabilities Act), it probably would be acceptable for the body to hold the meeting outside of its boundaries — provided the meeting is held at the "nearest practical location."

Q. If during an executive session, the members of the governing body discuss matters outside its proper scope, what is the proper role of media representatives present? May they begin taking notes?

A. The Public Meetings Law does not prohibit media representatives from taking notes of executive sessions they attend, whether or not the discussion includes matters outside the lawful scope of the executive session. The law merely permits the governing body to require that specified information discussed during executive session not be disclosed. If the discussion exceeds the lawful scope of the executive

session, media representatives freely may disclose matters outside the session's proper scope. Nonetheless, it always is proper for those representatives politely to call the governing body's attention to the fact that it has strayed from the specified subject or subjects to be discussed in executive session.

Q. May a governing body restrict the number of media representatives attending an executive session?

A. Perhaps. A governing body probably would be able to limit attendance to one representative of each medium wishing to be represented. The body should be able reasonably to limit total attendance to a number that would not interfere with its deliberations.

Q. May a reporter who has a personal stake in a matter, or who has a close relationship to someone who is personally interested, be excluded from an executive session?

A. With one exception, the law does not so provide. If the attendance of a reporter with *direct* personal interest would frustrate the purpose of the executive session, a governing body could justify barring the individual. A reporter's mere relationship to someone with a personal stake in the matter is probably not sufficient justification, but the employer news medium reasonably should comply with a request to assign a reporter other than, for example, a close relative of a property owner whose selling price is the subject of an executive session of a governing body that proposes to buy the property.

The exception is for executive sessions held to confer with legal counsel about current litigation or litigation likely to be filed. The governing body must exclude any member of the news media if the member if a party to the litigation or is an employee, agent or a contractor of a news media organization that is a party to the litigation.

Q. May a governing body reviewing or evaluating a public employee's performance in executive session exclude the employee from attending?

A. If the public employee requests a public session, the meeting must be held in public, and the employee may not be excluded. If the employee makes no such request, then the employee may be excluded. Sufficient advance notice must be given to the employee to allow the employee to choose whether to request a public meeting.

Q. Must reporters be permitted access to executive sessions conducted by electronic conference?

A. Yes.

Q. May a governing body reach a decision in an executive session?

A. It may not reach a final decision, but it may informally decide or reach consensus. This is proper so long as the body goes into public session to act formally on the matter. See discussion of Executive Sessions, Final Decision Prohibition.

Q. What if the decision is to take no action? For example, a complaint with respect to a public official, informally concluded to be without sufficient merit to warrant discipline?

A. It is appropriate, but probably not required, to announce in public session that the matter was not resolved, that no decision was reached or that in the absence of a motion for action, no action will be taken. If, however, a final "no action" decision is made by vote of a quorum of a governing body, the decision must be made and announced in public session.

Q. If a city council meets in executive session to discuss litigation, must the council meet in public session to vote to file a lawsuit or appeal?

A. Yes. Final decisions must be made in public.

Q. Does the meetings law's smoking prohibition apply to executive sessions?

A. The prohibition applies if the executive session is held in the same room in which the public meeting later will continue. However, the executive session itself probably is not a public meeting and, if held in a separate room, is not covered by the prohibition.

Q. May I tape record a public meeting?

A. Yes. 38 Op Atty Gen 50 (1976). You may also videotape a meeting, subject to reasonable rules of the public body to avoid disruption.

Q. Must I inform the governing body before I tape record?

A. No. Although ORS 165.540(1)(c) prohibits the tape recording of conversations unless all the participants are specifically informed that the conversation is being recorded, subsection 6(a) of the statute specifically states that the prohibition does not apply to public or semipublic meetings.

Q. May a public body refuse to use a microphone during its public meetings?

A. The meetings law does not specifically address what steps public bodies must take to ensure that the general public can sufficiently monitor public meetings. However, ORS 192.630(5)(a) and the Americans with Disabilities Act imposes certain requirements on public bodies to ensure that their communications at public meetings with persons with disabilities are as effective as communications with others. See the discussion on Accessibility to Persons with Disabilities.

Q. Does the Public Meetings Law grant me the right to testify before a public body?

A. No, the Public Meetings Law only guarantees the public a right to monitor the meetings of public bodies; it does not grant members of the public the right to interact with public bodies during those meetings.

Q. May a person who has disrupted prior meetings, assaulted board members, etc., be excluded from a public meeting?

A. It is doubtful that a person may be excluded for prior conduct. The person who causes the disruption may be arrested for trespass.

Q. Are written minutes required?

A. Written minutes or a sound, video or digital recording is required for any meeting, including an executive session.

Q. What do I do when a public body's minutes are inconsistent with the notes I took during a meeting?

A. You should work directly with the public body to correct discrepancies that you believe exist in the minutes. In so doing, it may be useful to speak with other attendees to determine if your recollection is accurate. In addition, other attendees may be able to lend support if you have difficulty convincing the public body that the minutes are inaccurate.

Q. How can a suit be filed for a meetings violation?

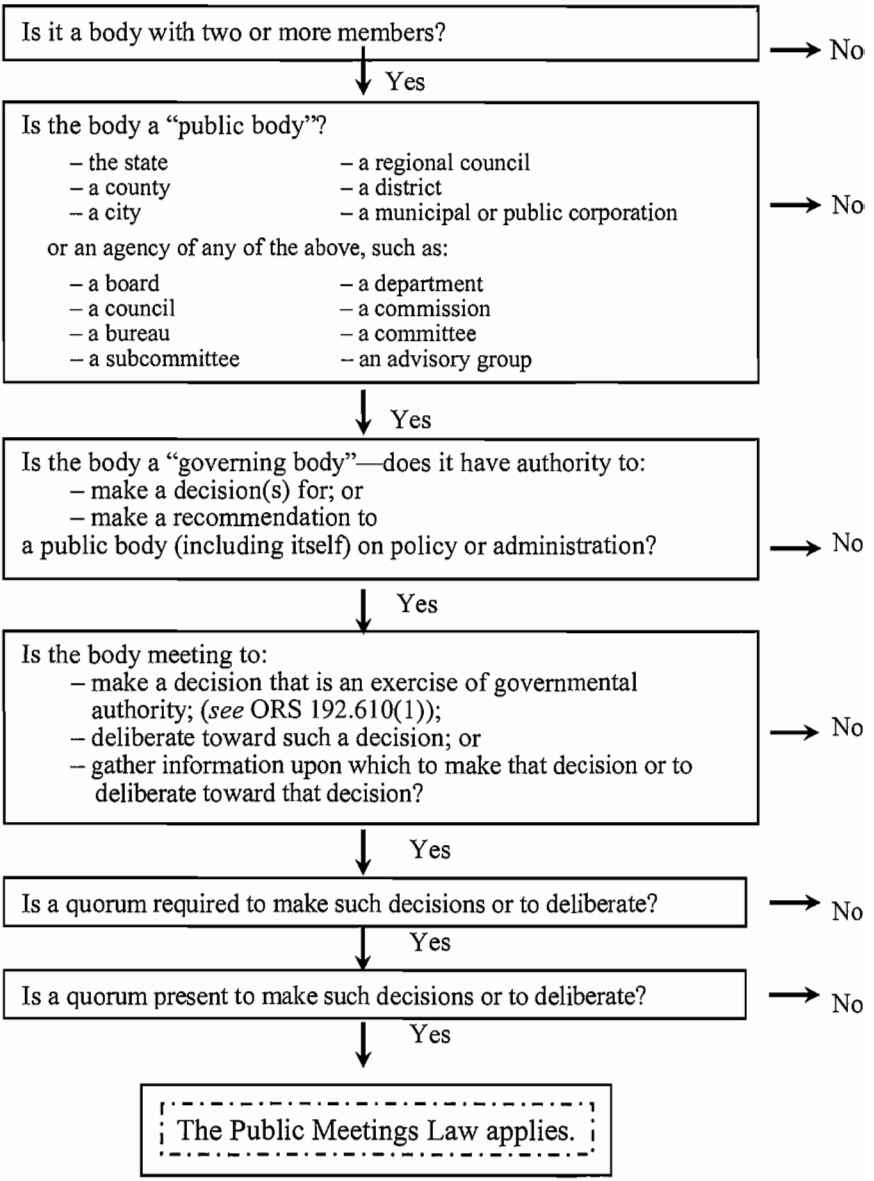
A. A suit should be filed in circuit court. The timing of the suit depends on the relief sought, but no action under the meetings law may be commenced more than 60 days after the decision challenged became public record. A complaint for violation of the executive session provisions of the Public Meetings Law may be filed with the Oregon Government Ethics Commission.

PUBLIC MEETINGS LAW

APPENDIX B
Samples, Forms

Guide to Bodies Subject to Public Meetings Law

This is a simplified guide to understanding when the meetings of a particular body are subject to the Public Meetings Law. For a discussion of the various elements, refer to the text of this manual.



Public Meetings Checklist

The Public Meetings Law applies to all meetings of a quorum of a governing body of a public body for which a quorum is required to make a decision or to deliberate toward a decision on any matter. This checklist is intended to assist governing bodies in complying with the provisions of this law; however, you should consult the appropriate section(s) of this manual for a complete description of the law's requirements.

- ☐ OPEN TO THE PUBLIC. Unless an executive session is authorized by statute, the meeting must be open to the public.
- ☐ NOTICE. The governing body must notify the public of the time and place of the meeting, as well as the principal subject to be discussed. Notice should be sent to:
  - ☐ News media;
  - ☐ Mailing lists; and
  - ☐ Other interested persons.

  The notice for a regular meeting must be reasonably calculated to give "actual" notice of the meeting's time and place. Special meetings require at least 24-hours' notice. Emergency meetings may be called on less than 24-hours' notice, but the minutes must describe the emergency justifying less than 24-hours' notice.
- ☐ SPACE AND LOCATION
  - ☐ Space. The governing body should consider the probable public attendance and should meet where there is sufficient room for that expected attendance.
  - ☐ Geographic location. Meetings must be held within the geographic boundaries over which the public body has jurisdiction, at its administrative headquarters or at "the other nearest practical location."
  - ☐ Nondiscriminatory site. The governing body may not meet at a place where discrimination on the basis of race, color, creed, sex, sexual orientation, national origin, age or disability is practiced.
  - ☐ Smoking is prohibited.
- ☐ ACCESSIBILITY TO PERSONS WITH DISABILITIES

- ☐ Accessibility. Meetings must be held in places accessible to individuals with mobility and other impairments.
- ☐ Interpreters. The governing body must make a good faith effort to provide an interpreter for hearing-impaired persons.
- ☐ Americans with Disabilities Act (ADA). The governing body should familiarize itself with the ADA, which may impose requirements beyond state law.

☐ VOTING. All official actions by governing bodies must be taken by public vote. Secret ballots are prohibited.

☐ MINUTES and RECORDKEEPING. Written minutes or a sound, video or digital recording must be taken at all meetings, including executive sessions. Minutes or another recording must include at least the following:

- ☐ Members present;
- ☐ Motions, proposals, resolutions, orders, ordinances and measures proposed and their disposition;
- ☐ Results of all votes and, except for bodies with more than 25 members unless requested by a member, the vote of each member by name;
- ☐ The substance of any discussion on any matter; and
- ☐ A reference to any document discussed at the meeting. (Reference to a document exempt from disclosure under the Public Records Law does not affect its exempt status.)

The minutes or alternative recording must be available to the public within a "reasonable time after the meeting."

For executive sessions, see separate checklist on p. B-6.

Sample Meeting Notices

Notice of [Regular, Special or Emergency] Meeting

The Oregon Dungeness Crab Commission will hold a (regular/special/emergency) ___ meeting at 9:00 a.m. at the Netarts Community Hall, 10 Ocean Avenue, Netarts, Oregon, on October 4, 1987.

[A copy of the agenda of the meeting is attached.]

— or —

[The meeting will cover extension of commercial takes of Dungeness crabs, and a proposed limitation on sports crabbing in Neahkahnie Bay.]

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours before the meeting to (name and telephone/TTY number) .

Notice of Executive Session

The Oregon Dungeness Crab Commission will hold an executive session at 9:00 a.m. at the Netarts Community Hall, 10 Ocean Avenue, Netarts, Oregon, on October 4, 1987. The session will consider an applicant for the position of Assistant Marine Biologist. The executive session is being held pursuant to ORS 192.660(2)(a).

NOTE: Meeting notices are not required to be signed by an officer or employee. A notice mailed or delivered will be sufficient. It must be mailed or delivered to any news medium that has requested notice and, so far as possible, to any other persons who have requested notice or who are known to be interested. Notification of the general public is also necessary, and a notice merely posted on a bulletin board is ordinarily not sufficient. Such posting and notification to appropriate newspapers, radio stations and wire services is appropriate. It is not necessary to use paid notices. Notice by telephone or fax is advisable for emergency meetings.

Checklist for Executive Session

This checklist is intended to assist governing bodies in complying with the executive session provisions of the Public Meetings Law; however, you

should consult the appropriate section(s) of this manual for a complete description of the requirements.

☐ Provide notice of an executive session in the same manner you give notice of a public meeting. The notice must cite to the specific statutory provision(s) authorizing the executive session.

Permissible grounds for going into executive session are:

(a) To consider the employment of an officer, employee, staff member or agent if: (i) the job has been publicly advertised, (ii) regularized procedures for hiring have been adopted, and (iii) in relation to employment of a public officer, there has been an opportunity for public comment. For hiring a chief executive officer, the standards, criteria and policy to be used must be adopted in an open meeting in which the public had an opportunity to comment. This reason for executive session may *not* be used to fill vacancies in an elective office or on any public committee, commission or other advisory group, or to consider general employment policies. ORS 192.660(2)(a) and 192.660(7).

(b) To consider dismissal or discipline of, or to hear charges or complaints against an officer, employee, staff member or agent, if the individual does not request an open meeting. ORS 192.660(2)(b).

(c) To consider matters pertaining to the function of the medical staff of a public hospital licensed pursuant to ORS 441.015 to 441.063, 441.085, 441.087 and 441.990(3). ORS 192.660(2)(c).

(d) To conduct deliberations with persons you have designated to carry on labor negotiations. ORS 192.660(2)(d).

(e) To conduct deliberations with persons you have designated to negotiate real property transactions. ORS 192.660(2)(e).

(f) To consider information or records that are exempt from disclosure by law, including written advice from your attorney. ORS 192.660(2)(f).

(g) To consider preliminary negotiations regarding trade or commerce in which you are in competition with other states or nations. ORS 192.660(2)(g).

(h) To consult with your attorney regarding your legal rights and duties in regard to current litigation or litigation that is more likely than not to be filed. ORS 192.660(2)(h).

(i) To review and evaluate the performance of an officer, employee or staff member if the person does not request an open meeting. This reason for execution session may *not* be used to do a general evaluation of an agency goal, objective or operation or any directive to personnel concerning those subjects. ORS 192.660(2)(i) and 192.660(8).

(j) To carry on negotiations under ORS chapter 293 with private persons or businesses regarding proposed acquisition, exchange or liquidation of public investments. ORS 192.660(2)(j).

(k) For a health professional regulatory board to consider information obtained as part of an investigation of licensee or applicant conduct. ORS 192.660(2)(k).

(l) For the State Landscape Architect Board or its advisory committee to consider information obtained as part of an investigation of registrant or applicant conduct. ORS 192.660(2)(L).

(m) To discuss information about review or approval of programs relating to the security of any of the following: (A) a nuclear-powered thermal power plant or nuclear installation; (B) transportation of radioactive material derived from or destined for a nuclear-fueled thermal power plant or nuclear installation; (C) generation, storage or conveyance of (i) electricity, (ii) gas in liquefied or gaseous form, (iii) hazardous substances as defined in ORS 453.005(7)(a), (b) and (d), (iv) petroleum products, (v) sewage, or (vi) water; (D) telecommunications systems, including cellular, wireless or radio systems; or (E) data transmissions by whatever means provided. ORS 192.660(2)(m).

(n) To conduct labor negotiations, if requested by negotiators for both sides. ORS 192.660(3).

☐ Announce that you are going into executive session pursuant to ORS 192.660 and cite the specific reason(s) and statute(s) that authorize the executive session for *each* subject to be discussed. See sample script on p. B-9. (You may hold a public session even if an executive session is authorized.)

☐ If you intend to come out of executive session to take final action, announce when the open session will begin again.

- ☐ Specify if any individuals other than the news media may remain.
- ☐ Tell the media what may *not* be disclosed from the executive session. If you fail to do this, the media may report everything. If you discuss matters other than what you announce you are going to discuss in the executive session, the media may report those additional matters.
- ☐ A member of the news media must be excluded from executive sessions held to discuss litigation with legal counsel if he or she is a party to the litigation or is an employee, agent or contractor of a news media organization that is a party.
- ☐ Come back into open session to take final action. If you did not specify at the time you went into executive session when you would return to open session, and the executive session has been very short, you may open the door and announce that you are back in open session. If you unexpectedly come back into open session after previously announcing you would not be doing so, you must use reasonable measures to give actual notice to interested persons that you are back in open session. This may require postponing final action until another meeting.
- ☐ Keep minutes or a sound, video or digital recording of executive sessions.

NOTE: If a governing body violates any provision applicable to the executive session provisions in the Public Meetings Law, a complaint against individual members of the governing body can be filed with the Oregon Government Ethics Commission (OGEC). The OGEC may impose a $1,000 civil penalty, unless the governing body went into executive session on the advice of its attorney.

[1]

[1] Oregon Laws 2007, chapter 865, subsection 40b(1) amends ORS 244.250 to change the name of the "Oregon Government Standards and Practices Commission" to the "Oregon Government Ethics Commission."

Sample Script to Announce Start of Executive Session

The [governing body] will now meet in executive session for the purpose of [limited to enumerated purposes in ORS 192.660] _____.

The executive session is held pursuant to ORS 192.660(__) [choose appropriate section(s) for *this* session], which allows the Commission to meet in executive session to [list activity(ies)] _____.

Representatives of the news media and designated staff shall be allowed to attend the executive session.* All other members of the audience are asked to leave the room. Representatives of the news media are specifically directed not to report on any of the deliberations during the executive session, except to state the general subject of the session as previously announced. No decision may be made in executive session. At the end of the executive session, we will return to open session and welcome the audience back into the room.

*The governing body may choose to allow other specified persons to attend the executive session. *See Barker v. City of Portland*, 67 Or App 23, 676 P2d 1391 (1984).

Sample Public Meetings Minutes

Oregon State Dungeness Crab Commission

Minutes

Regular (Special or Emergency) Meeting — October 4, 1987
Netarts, Oregon

Pursuant to notice made by press release to newspapers of general and local circulation throughout the state and mailed to persons on the mailing list of the Commission and the members of the Commission, a __(regular /special/emergency)__ meeting of the Dungeness Crab Commission was held at the community hall in Netarts, Oregon.

Present were Chairman Abel Adams, and Commissioners Bertha Bales, Charles Carter and Donald David, the entire membership of the Commission. The executive secretary of the Commission, Elmer Eaton, presented the Commission's agenda as follows:

(1) Request to amend commercial limits of daily take of Dungeness crab from the estuaries and ocean waters of the State of Oregon.

(2) Report of marine biologist Franklin on the effect of recent micro-organic growths in Siletz Bay on crab population.

(3) Request to consider portions of Neahkahnie Bay off limits for sports crabbing.

Testimony on the commercial limits was received from George Grant representing commercial crabbing industry for an increase and Howard Hawes representing sportsmen.

After discussion, Commissioner David moved that the Commission give notice that it intended to amend the commercial daily limits by a 10 percent increase and that a public hearing be held to receive information, data, and views of interested persons. Voting for the motion: Commissioners Bales, David and Chairman Adams; against: Commissioner Carter. The motion having carried, the executive secretary was directed to prepare a notice of intention to amend a rule and have it published in the Secretary of State's Administrative Bulletin and to notify the press and the Commission's mailing list.

Marine Biologist Franklin reported that micro-organic growths have caused a 20 percent decrease in the crab population of Siletz Bay. Research

at the Oregon State University Marine Biology Center indicates that it may be possible to develop an ecologically sound strain of micro-organism to combat the harmful growth. Commissioner Bales questioned Franklin as to the effects on the balance of life in the Siletz estuary. Franklin indicated that no sure prediction could be given at this time. Commissioner Bales moved that Franklin consult with the Department of Environmental Quality and report back at the next regular meeting of the Commission. The motion was carried unanimously.

A request to declare portions of Neahkahnie Bay off limits for sports crabbing was presented to the Commission. Supporting the request was George Grant representing the commercial crabbing industry. Mr. Grant testified that the extended take of sportsmen was decreasing the potential take of the commercial take. He indicated that the area was an excellent breeding ground and sportsmen were disturbing the young crabs, thereby endangering the population.

Opposing the request were Irving Instant, a marina operator on Neahkahnie Bay, and a representative of the Tillamook Chamber of Commerce, John Jackson, who disputed Mr. Grant's testimony. The Commission considered a written report prepared by the Department of Environmental Quality titled "The Effect of Sports Crabbing on Crab Populations," and dated June 15, 1987. Commissioner David moved that Mr. Franklin investigate the claim and report back to the Commission at its next regular session. The motion was carried unanimously.

The agenda matters having been dealt with, the Chairman stated that an application for the available position of Assistant Marine Biologist to the Commission had been received. The Chairman then directed that the Commission go into executive session to consider the employment application. The Chairman identified ORS 192.660(2)(a) as authority for the executive session. Kenneth King, reporter for the Associated Press, requested to be present at the executive session.

At the conclusion of the executive session, there being no further business, the meeting was adjourned.

/s/ Elmer Eaton
Executive Secretary
Oregon Dungeness Crab Commission

October 4, 1987

PUBLIC MEETINGS LAW APPENDIX C

Parliamentary Procedure, Quorums and Voting

A. PARLIAMENTARY PROCEDURE GENERALLY

Rules of parliamentary procedure provide the means for orderly and expeditious disposition of matters before a board, commission or council. They govern the way members of a multi-member body interact with each other. As a general proposition, those procedural guides only affect substantive policy development or third-party interests indirectly and do not have the force of law. They may be waived, modified or disregarded without affecting the validity of the agency's decisions.

Public bodies, therefore, have great flexibility to determine their own rules of parliamentary procedure without fear that irregularities or errors will lead to judicial invalidation of their actions. When making or applying rules of parliamentary procedure, a board, commission or council is limited only by (i) any constitutional or statutory requirements, (ii) rights of third parties which may be affected, and (iii) judicial interpretations of constitutional and statutory rights.

Parliamentary procedure for a multi-member body guides all agency decision-making processes, including deliberations following a contested case or rulemaking hearing and deliberation leading to an advisory recommendation on a matter of public policy to another public body.

To facilitate decision-making, a simplified and flexible approach to parliamentary procedure is helpful. The author of one text on parliamentary procedures believes that "stressing a more straightforward and open procedure for meetings eliminates the parliamentary impasses that appear to follow when too much attention is given to parliamentary intrigue and manipulation."[1] He has, for example, eliminated the "seconding" of motions because it is "largely a waste of time."[2] This warning against blind adherence to parliamentary rules is echoed by the author of another text who admonishes that "[t]echnical rules should be

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[1] R. KEESEY, MODERN PARLIAMENTARY PROCEDURE XV-XVI (Preface) (1994).

[2] *Id.* at 21.

used only to the extent necessary to observe the law, to expedite business, to avoid confusion, and to protect the rights of members."[3]

H. ROBERT, ROBERT'S RULES OF ORDER Newly Revised is perhaps the most commonly known and used parliamentary authority. However, A. STURGIS, STURGIS STANDARD CODE OF PARLIAMENTARY PROCEDURE (2d ed 1966) is more easily read and less technical. The Oregon House and Senate rely on P. MASON, MANUAL OF LEGISLATIVE PROCEDURE (1989). Any of these texts could be adopted by reference to guide board, commission or council deliberations. A simple motion such as the following is sufficient for this purpose:

> Except as otherwise provided by law and except where the (insert title of board or commission) directs or acts to the contrary, (insert title and edition of a parliamentary reference book) shall govern parliamentary processes of this public body.

Alternatively, a board, commission or council might adapt some of the rules to suit its particular needs and convenience, and adopt a standard text as a "back-up" resource.

B. QUORUMS AND VOTES

Statutes, not parliamentary procedure, specify quorums and voting requirements. The quorums and voting requirements of Oregon state boards, commissions or councils are governed by general law, ORS 174.130, or by special statutes. General authority to adopt rules to govern their proceedings is not sufficient authority for boards, commissions or councils to write a rule contrary to ORS 174.130 or special statutes of similar import. However, a state agency with authority to create a board, commission or council, establish its duties, its structure, and, in short, determine its very existence, may provide by administrative rule what constitutes a quorum and thus release its board, commission or council from the rigors of ORS 174.130.[4]

1. General Law

ORS 174.130 provides:

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[3] A. STURGIS, STURGIS STANDARD CODE OF PARLIAMENTARY PROCEDURE 8 (2d ed 1966).

[4] Letter of Advice dated January 16, 1985, to Jeffrey Milligan, Executive Director, Juvenile Services Commission (OP-5763).

> Any authority conferred by law upon three or more persons may be exercised by a majority of them unless expressly otherwise provided by law.

Attorneys General have consistently advised that this statute requires a majority of all members of a board, commission or council to concur in order to make a decision.[5] When ORS 174.130 applies, a majority of those present and voting in favor of a particular action is not sufficient to authorize that action unless that majority is more than one-half of the total members of the board, commission or council. For example, in the case of a 13-member board, if only 11 persons were present, six votes for a proposition would be insufficient to authorize any action because six votes would not constitute a majority of the members of that board even though it would constitute a majority of those present.

The language used in ORS 174.130 does not clarify whether the legislative intent was merely to establish a quorum requirement or to require concurrence of a majority of all the members of a body to make a decision. Attorneys General consistently, however, have made the latter interpretation. Further, in 1983, the Attorney General directed the legislature's attention to the Attorney General opinions interpreting the statute and advised that ORS 174.130 might be amended if a more "efficient" decision-making process were desired. ORS 174.130 has not been amended, however. This suggests that the legislature is satisfied with those Attorney General interpretations, making them even more persuasive. Thus, when ORS 174.130 applies, a majority of all members of a board must concur in order to make a decision. There is no specific statutory provision to serve as "other law" to exclude a number of state boards and commissions from the rigors of ORS 174.130.

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[5] *See* 36 Op Atty Gen 960 (1974) (application to city and county land use hearings bodies where no local law provides otherwise); 38 Op Atty Gen 1935 (1978) (application to local budget committee); *see also* 38 Op Atty Gen 1995 (1978); Letter of Advice dated April 9, 1986, to William H. Young, Director, Water Resources Department (OP-5969) (not applicable to rulemaking hearing, but applicable to later rule adoption by Water Resources Commission); Letter of Advice dated January 16, 1985, to Jeffrey Milligan, Executive Director, Juvenile Services Commission (OP-5763) (application to juvenile services organizations) and Letter of Advice dated August 13, 1979, to Melvin Cleveland, Chairman, Employment Relations Board (OP-4743) (application to Employment Relations Board).

2. When Other Statute Designates Quorum

Many boards and commissions have statutes designating the number of members that form a quorum. Such a statute releases a body from the stringent requirements of ORS 174.130. Most of these statutes, but not all, fix the quorum at a majority of the members of the body.[6]

Some of the statutes regarding particular bodies also fix the number of votes required for different types of decisions by the body. For example, the statute concerning the Oregon Government Ethics Commission provides that "[a] quorum consists of four members but no final decision may be made without an affirmative vote of the majority of the members appointed to the commission."[7]

When the statute does not specify the number of votes necessary for a decision, a decision may be made by a majority of the quorum. This was the common law rule, and is also the rule derived from the application of ORS 174.130 to the quorum that is given authority by the special statute. Different jurisdictions interpret the meaning of "majority of the quorum" differently. The interpretation most consistent with Oregon case law and with ORS 174.130 is that a "majority of the quorum" means at least a majority of the minimum number required for a quorum.

When a quorum is present, and all members present cast votes, the "majority of the quorum" is the same as a majority of those voting. A tie, of course, does not constitute a decision.

C. VACANCIES

The fact that one or more vacancies exist on a board, commission or council has no bearing on the quorum requirements. Since the law

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[6] *See, e.g.*, ORS 670.300(2) concerning professional licensing and advisory boards.

[7] ORS 244.250(5). Oregon Laws 2007, chapter 865, subsection 40b(1) amends ORS 244.250 to change the name of the "Oregon Government Standards and Practices Commission" to the "Oregon Government Ethics Commission."

establishes the number of members required for a quorum, the fact that a position is unfilled does not alter this requirement.[8]

D. ABSTENTIONS

When one or more members present do not vote, the abstention does not count as a vote in favor of the majority position, at least when action requires the concurrence of a majority of the board.[9] No case has yet been decided directly concerning the effect of an abstention when a majority of a quorum may take action. However, based on analogous Oregon precedents and cases from other states, we believe that an abstention does not count as either an affirmative or a negative vote. A member who is present but abstains may, however, be counted toward making up a quorum. An abstention therefore cannot be used to make up the minimum number of votes required to pass or reject a motion.

An example may make this clearer. Board "X" is a seven-member board. A statute provides that four members constitute a quorum. The statute does not specify the number of votes required for action. Therefore, at least three concurring votes are needed (majority of the four required for a quorum) to take action. At a meeting, six of the seven members are present. On a motion, three vote in favor, two vote against, and one abstains. The chairman declares the motion passed. One member objects on the basis that the motion did not gain the support of a majority of those present. Another responds that it did, because the abstention "counts as" concurrence. Both members are wrong. The motion gained only three concurring votes—the abstention does not count as an affirmative vote. But the motion only needed three votes; this is both a majority of those voting and a majority of the minimum number required for a quorum. To say that the motion was tied would be to count the abstention as a negative vote, which it is not. If, in the hypothesis, only three of the six present had voted, two for and one against, there would have been no action on the motion because there was no concurrence of a majority of a quorum.

Members of boards, commissions or councils are obviously appointed to make decisions. To abstain is to fail to perform a most

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[8] Letter of Advice dated June 8, 1989, to John F. Hoppe, Acting Executive Director, Board of Police Standards and Training (Op-6322).

[9] *State ex rel Roberts v. Gruber*, 231 Or 494, 373 P2d 657 (1962).

important function given to a board member. Absent compelling circumstances, for example, pecuniary conflict of interest problems, board members should not abstain from voting.[10]

E. PROXY VOTE, ABSENTEE VOTE, VOTES BY MAIL AND SECRET BALLOTS PROHIBITED

A vote by proxy is a vote cast by a substitute on behalf of a member who is not present at the meeting. Absent a specific statutory provision authorizing a proxy, proxy voting is not authorized and is improper since no member of a board, commission or council is empowered to delegate his or her vote to others.[11]

An absentee vote is a vote purportedly cast by a member who is not present at the meeting. This procedure is not authorized by Oregon Law and is also improper since the absent member may not be counted toward making up a quorum and may not vote. This is not to suggest, however, that personal presence at the meeting is required. A member may, for example, be present, participate and vote by telephone.

A vote by mail is a vote purportedly cast by a member without the necessity of a meeting of the board, commission or council. Absent specific statutory authorization, this procedure could not be used. It would also be improper because a decision by the board, commission or council may only be made at a meeting at which a quorum is present.

A secret ballot is a vote of the members in private after which only the result is announced to the public. Absent specific statutory authorization, such a procedure would violate the Oregon Public Meetings Law.[12]

If improper procedures in voting such as the use of a proxy, an absentee ballot, a vote by mail or a secret ballot are used, it will cast grave doubts on the validity of any decision arrived at as a result of using these procedures. If such procedures are used, an agency should consult its assigned attorney about the possibility of ratifying its prior invalid action.

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[10] *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 588 P2d 640 (1978).

[11] 16 Op Atty Gen 77 (1932); Letter of Advice dated February 21, 1975, to Fred Segrest, Administrator, Children's Services Division (OP-3206).

[12] 37 Op Atty Gen 183 (1974); *accord* 39 Op Atty Gen 525 (1979).

F. VOTE TABLES

Two tables follow which show the minimum number of concurring votes necessary to pass or reject a motion. Table I illustrates the application of ORS 174.130, i.e., when no quorum is otherwise specified for a board or commission. By intersecting the number of members on a board with the number of members voting on an issue, the table shows how many concurring votes are needed to pass or reject a motion.

Table II applies to boards and commissions with special statutes that designate a quorum but do not specify the number of votes required for action. It assumes that the quorum is set at majority of the members. It may, however, be used for boards with a different number required for a quorum: simply ignore the far left-hand column and find the number that the applicable statute designates for a quorum in the column named "Minimum Number Present to Form Quorum."

TABLE I

Boards and Commissions Covered by ORS 174.130

Number of Members on Board	NUMBER OF MEMBERS VOTING																			
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
3	X	2	2																	
4	X	X	3	3																
5	X	X	3	3	3															
6	X	X	X	4	4	4														
7	X	X	X	4	4	4	4													
8	X	X	X	X	5	5	5	5												
9	X	X	X	X	5	5	5	5	5											
10	X	X	X	X	X	6	6	6	6	6										
11	X	X	X	X	X	6	6	6	6	6	6									
12	X	X	X	X	X	X	7	7	7	7	7	7								
13	X	X	X	X	X	X	7	7	7	7	7	7	7							
14	X	X	X	X	X	X	X	8	8	8	8	8	8	8						
15	X	X	X	X	X	X	X	8	8	8	8	8	8	8	8					
16	X	X	X	X	X	X	X	X	9	9	9	9	9	9	9	9				
17	X	X	X	X	X	X	X	X	9	9	9	9	9	9	9	9	9			
18	X	X	X	X	X	X	X	X	X	10	10	10	10	10	10	10	10	10		
19	X	X	X	X	X	X	X	X	X	10	10	10	10	10	10	10	10	10	10	
20	X	X	X	X	X	X	X	X	X	X	11	11	11	11	11	11	11	11	11	11

Key to Table I

1. The column on the left shows the number of members on the board or commission.

2. The numbers across the top indicate the number of members voting at a meeting. These include affirmative and negatives votes but do not include abstentions.

3. The number found by intersecting 1 and 2 is the *minimum* number of concurring votes (affirmative *or* negative) that must be cast in order to pass or reject a motion.

4. An abstention is *not* counted as an affirmative or negative vote to make up the minimum number of concurring votes required to pass or reject a motion. If a member abstains, but is present, he or she is still counted for quorum purposes.

5. An "X" indicates that no action should be taken because the number voting is below the minimum number of concurring votes required to pass or reject a motion.

TABLE II

Boards and Commissions Covered by Statutes Specifying Quorum Requirements

Number of Members on Board	Minimum Number Present to Form Quorum	NUMBER OF MEMBERS VOTING (With a Quorum Present)																			
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
3	2	X	2	2																	
4	3	X	2	2	3																
5	3	X	2	2	3	3															
6	4	X	X	3	3	3	4														
7	4	X	X	3	3	3	4	4													
8	5	X	X	3	3	3	4	4	5												
9	5	X	X	3	3	3	4	4	5	5											
10	6	X	X	X	4	4	4	4	5	5	6										
11	6	X	X	X	4	4	4	4	5	5	6	6									
12	7	X	X	X	4	4	4	4	5	5	6	6	7								
13	7	X	X	X	4	4	4	4	5	5	6	6	7	7							
14	8	X	X	X	X	5	5	5	5	5	6	6	7	7	8						
15	8	X	X	X	X	5	5	5	5	5	6	6	7	7	8	8					
16	9	X	X	X	X	5	5	5	5	5	6	6	7	7	8	8	9				
17	9	X	X	X	X	5	5	5	5	5	6	6	7	7	8	8	9	9			
18	10	X	X	X	X	X	6	6	6	6	6	6	7	7	8	8	9	9	10		
19	10	X	X	X	X	X	6	6	6	6	6	6	7	7	8	8	9	9	10	10	
20	11	X	X	X	X	X	6	6	6	6	6	6	7	7	8	8	9	9	10	10	11

Key to Table II

1. The far left column shows the number of members on the board or commission.

2. The second column from the left shows the minimum number of members required to be present to form a quorum, assuming a statute fixes a quorum as a majority of the members of the board.

3. The numbers across the top represent the number of members voting at a meeting. These include affirmative and negative votes but do not include abstentions.

4. The number found by intersecting 1 and 2 with 3 is the minimum number of concurring votes (affirmative or negative) that must be cast in order to pass or reject a motion.

5. An abstention is not counted as an affirmative or negative vote to make up the minimum number of concurring votes required to pass or reject a motion. If a member abstains, but is present, he or she is still counted for quorum purposes.

6. An "X" indicates that no action may be taken because the number voting represents less than the minimum number of concurring votes required to effect action.

7. Assuming a quorum is present, the minimum number of concurring votes required to pass or reject a motion varies according to the number of members voting.

PUBLIC MEETINGS LAW APPENDIX D

Summaries of Oregon Appellate Court Decisions Involving Public Meetings Law

***Crowfoot Elem. Sch. Dist. v. P.E.R.B.*, 19 Or App 638, 529 P2d 405 (1974).**

Unfair labor practice charge against teachers' union dismissed. Employer contended that ORS 243.672(2)(f), which precludes communications between public officials and union members during the period of contract negotiation, forbade teachers from appearing at school board budget meetings. The court read ORS 243.672(2)(f) in harmony with the Public Meetings Law, and held that teachers may attend school board meetings during the negotiation period because the meetings are open to all.

***Egge v. Lane County*, 21 Or App 520, 535 P2d 773 (1975).**

Plaintiff alleged board of commissioners had violated the Public Meetings Law when it met and denied plaintiff's request for a zoning variance. Plaintiff sought reversal of the board's action. The court refused to reverse the board's action because ORS 192.680 then provided that "[n]o decision shall be voided" solely for noncompliance with Public Meetings Law.

***SW Ore. Pub. Co. v. SW Ore. Comm. Coll.*, 28 Or App 383, 559 P2d 1289 (1977).**

Community college district appealed from injunction barring it from conducting collective bargaining sessions closed to the news media. The court held that a retained negotiator is neither a public body nor a governing body. Therefore, the negotiations were not subject to the Public Meetings Law and the media could be excluded. ORS 192.660(3), (4).

***Smith v. School Dist. No. 45*, 63 Or App 685, 666 P2d 1345, *rev den* 295 Or 773, 670 P2d 1036 (1983).**

School district provided record of this hearing but resisted disclosure of hearing record of another probationary teacher and minutes of contract renewal meeting. The district finally furnished all records before trial. Court of Appeals reversed in part holding that (1) ORS 192.420 creates a right of access to public records that is not dependent on the requestor's need or motivation; (2) there was no evidence to show that plaintiff's request was

unduly burdensome; (3) a public body may not refuse to produce records subject to inspection just because the requestor already possesses them, and the trial court could not properly refuse to declare that the records were public and subject to disclosure; (4) the statutory litigation exemption is limited; (5) ORS 192.490(3) requires the award of attorneys fees so long as a statutory proceeding was brought and the plaintiff prevails with respect to his or her claim; and (6) the trial court's refusal to award attorney fees for violation of the Public Meetings Law was discretionary and the court's refusal was not an abuse of discretion.

***Barker v. City of Portland*, 67 Or App 23, 676 P2d 1391 (1984).**

Portland City Council convened in executive session to conduct deliberations with persons designated by the council to negotiate with city unions, including the Portland Police Association. Plaintiff, editor of a newspaper published on behalf of the Association of the Oregon Council of Police Associations, was excluded from the meeting while the other representatives of news media were allowed to attend. Plaintiff argued that a public body is not authorized to selectively exclude representatives of the news media from executive sessions held to discuss labor relations matters. Court held that members of news media are statutorily denied right to attend executive sessions held for the purpose of discussing labor negotiations (ORS 192.660(1)(d). Therefore, the council's decision to exclude plaintiff and not other representatives of the news media was "purely a matter of discretion and is not governed by the [Public Meetings] act."

***Gilmore v. Board of Psychologist Examiners*, 81 Or App 321, 725 P2d 400, *rev den* 302 Or 460, 730 P2d 1250 (1986).**

Psychologist petitioned for review of revocation of her license. She alleged that the revocation was invalid because the board's public meetings minutes, kept in accordance with the Public Meetings Law, ORS 192.650(1), showed no record that a vote was taken on the revocation. Petitioner did not contend that the failure to record a vote resulted in or was caused by any "manipulation of the rule of the members against petitioner." The court upheld the revocation, finding that absent "a showing of prejudice, petitioner has not rebutted the presumption that public officers perform their duties lawfully. ORS 40.135(1)(j). The absence of a recorded vote alone is not reversible error."

***South Benton Ed. Assn. v. Monroe Union High*, 83 Or App 425, 732 P2d 58, *rev den* 303 Or 331, 736 P2d 565 (1987).**

The school district sought review of an unfair labor practice order, issued because the district had refused to sign an agreement reached through collective bargaining with the association. The court had to consider the Public Meetings Law in conjunction with the Public Employes Collective Bargaining Act, ORS 243.650 to 243.782, and other statutes governing school district contracting. The Public Meetings Law allowed the district to conduct in executive session, "deliberations with persons designated by the governing body to carry on labor negotiations," ORS 192.660(1)(d), but prohibited the district from holding an executive session "for the purpose of taking any final action or making any final decision," ORS 192.660(4). The collective bargaining statutes relating to school districts, ORS 332.057 and 332.255, appeared to require school board approval of a collective bargaining agreement before it could be enforced. Finally, ORS 243.672(1)(h) defined as an unfair labor practice a refusal to sign an agreement previously reached by collective bargaining. Reading these statutes together, the court affirmed the unfair labor practice order, and held that "offers made by a negotiator as a result of executive sessions [are] binding * * *. * * * District can still comply with * * * ORS 192.630 by ratifying the agreement at a public meeting after proper notice." ORS 192.630 does not prevent a collective bargaining agreement previously reached through negotiations from being enforceable against the district, where the negotiations were conducted at an executive session meeting.

***Barker v. City of Portland*, 94 Or App 762, 767 P2d 460 (1989).**

Action by monthly newspaper and its editor seeking ruling that the city acted in violation of the Public Meetings Law, and an order that the city comply with ORS 192.630 in the future. The Court of Appeals held that ORS 192.680(1) provides for such relief, even if a public body has ceased its previous unlawful practices. A public body's cessation of improper meetings practices does not render an action under the Public Meetings Law moot, because any illegal action that may have been taken previously is not legalized by the cessation, but remains illegal.

The court also held that the plaintiffs, as representatives of the press and as legal entities, alleged sufficient facts to accord them standing under the Public Meetings Law.

Finally, the court held that the circuit court is the appropriate forum to hear actions under the Public Meetings Law, ORS 192.680.

***Oreg. Assoc. of Classified Emp. v. Salem-Keizer*, 95 Or App 28, 767 P2d 1365, *rev den* 307 Or 719 (1989).**

Plaintiff labor association alleged that defendant school district violated Public Meetings Law by making decision during unauthorized emergency meeting. The Court of Appeals held that no "actual emergency," ORS 192.640(3), existed as to the matter that was the subject of the decision; existence of actual emergency as to a different matter did not justify making decision on other non-emergency matters without complying with statutory notice requirements.

The court also held that inconvenience of the members of a governing body does not constitute an "actual emergency."

Finally, the court held that any remedy granted under the Public Meetings Law must focus on the purposes and policies of the meetings law.

***Oregonian Publishing Co. v. Board of Parole*, 95 Or App 501, 769 P2d 795 (1989).**

ORS 192.690, which exempts the Board of Parole's "deliberations" from the Public Meetings Law, does not exempt from the application of the meetings law the portions of a board meeting when the board is gathering information upon which it will deliberate and decide.

***Harris v. Nordquist*, 96 Or App 19, 771 P2d 637 (1989).**

Plaintiffs, who alleged that they are residents, employes and taxpayers of defendant school district who are vitally interested in the district's decisions and the information leading to those decisions, alleged sufficient facts to demonstrate standing to challenge the district's alleged Public Meetings Law violations.

Where the evidence showed that the defendant board members did not meet in secret for the purpose of deciding on or deliberating toward a decision on any matter, and never discussed board business at any of their private gatherings, defendants did not violate ORS 192.630(2).

The court also held that, under ORS 192.695, the burden of proof shifts to defendants only after a plaintiff makes a prima facie case that a quorum of a governing body has met in private for the purpose of deciding on or deliberating toward a decision on any matter.

In addition, the court held that ORS 192.650 does not require minutes of prohibited meetings.

Finally, the court held that ORS 192.650 requires minutes to be preserved for a reasonable time after a meeting, and that in this instance, one year was a reasonable time.

***Students for Ethical Treatment v. Inst. Animal Care*, 113 Or App 523, 833 P2d 337 (1992).**

Plaintiffs whose goals are to educate the public about animal exploitation have standing under ORS 192.680(2) to seek declaration that university committee charged with ensuring that animal research meets applicable standards violated Public Meetings Law because committee decisions, and information on which those decisions are made, have potential impact on plaintiffs' ability to perform that educational role.

***Indep. Contractors Research Inst. v. DAS*, 207 Or App 78, 139 P3d 995 (2006).**

Petitioners challenged the validity of a rule promulgated by the Department of Administrative Services (DAS) that exempted from the Public Meetings Law the meetings of an advisory council that made recommendations to DAS's Chief Procurement Officer about a program to make purchases from qualified rehabilitation facilities. The court held that the rule was valid. It reasoned that, to be subject to the Public Meetings Law, an entity must (1) make decisions for or recommendations to (2) an entity that meets the definition of a "public body" under the Public Meetings Law. An individual, even one who is an officer of a named group, is not a "public body," therefore; the rule properly exempted the advisory council from the Public Meetings Law.

PUBLIC MEETINGS LAW APPENDIX E

Index to Oregon Attorney General's Formal Opinions and Informal Opinions

Formal Attorney General Opinions have a volume and page number; Informal Opinions (Letters of Advice) either have a number such as 1995-1 or a number lower than 7000. Copies are available from the Department of Justice at reproduction costs. Formal and selected information opinions are summarized in Appendix F.

PUBLIC MEETINGS LAW APPENDIX F
Summaries of Oregon Attorney General's Formal Opinions and Selected Informal Opinions Concerning Public Meetings Law

37 Op Atty Gen 183, October 11, 1974

The Public Meetings Law prohibits the use of secret ballots by a governing body.

38 Op Atty Gen 50, August 10, 1976

A governing body may not ban the tape recording of its official public proceedings by individual citizens, and it may restrict such taping *only* to the extent necessary to protect the orderly conduct of the proceedings.

38 Op Atty Gen 1471, November 4, 1977

Information-gathering sessions of a public body (except on-site inspections) are "meetings" under the Public Meetings Law.

38 Op Atty Gen 1584, December 2, 1977

The Management Board and the Advisory Committee of the Tri Agency Dog Control Authority (two cities and a county) are both governing bodies subject to the Public Meetings Law.

38 Op Atty Gen 2122, May 31, 1978

It is constitutional for the Public Meetings Law to provide that information obtained by newspersons during an executive session shall not be disclosed. ORS 192.660(4) does not restrict rights of the news media, but instead grants a limited right of access which otherwise would not exist. "[I]n each case where an executive session is authorized by the Public Meetings Law, the operation and interests of an Oregon governing body could be jeopardized if the meeting were made public." No sanction is provided for a reporter's violation of a directive not to disclose specified information. "The legislature apparently chose to rely upon the good faith of reporters in complying with the requirement." (ORS 192.660(4) is now codified as ORS 192.660(3).)

39 Op Atty Gen 480, January 12, 1979

A written personnel evaluation of a community college president is exempt from public inspection under ORS 341.290(19)(b), except with the consent of the college president involved. (ORS 341.290 is listed in ORS 192.500(2)(h).) An executive session of the board may be held under ORS 192.660(2)(b) "to consider records that are exempt by law from public inspection." (ORS 192.660(2)(b) was recodified as ORS 192.660(1)(f). Or Laws 1979, ch 664. ORS 341.290(19) as ORS 341.290(17). Or Laws 1983, ch 182.)

39 Op Atty Gen 525, February 20, 1979

The Public Meetings Law requires that all votes of governing bodies and the vote of each member be recorded and made public. Under *LaGrande/Astoria v. PERB*, 281 Or 137, 576 P2d 1204, *adhered to* 284 Or 173, 586 P2d 765 (1978), any charter provision to the contrary is superseded by the state law.

39 Op Atty Gen 600, March 16, 1979

A high school newspaper reporter is a "representative of the news media" and may attend a school board executive session if the newspaper ordinarily covers news germane to the subject of the executive session. The reporter may be excluded if district or school policy bars coverage of matters of the nature discussed. If the reporter is admitted, the "good faith" of the reporter in complying with any nondisclosure requirement may be reinforced by school and district control of the content of the paper.

39 Op Atty Gen 703, May 22, 1979

It is not an unconstitutional violation of equal protection for the Public Meetings Law to allow access by news media representatives to executive sessions, while denying it to the public. (The Oregon news media "Shield Law," ORS 44.520, does not violate the Equal Protection Clause of the Fourteenth Amendment.)

40 Op Atty Gen 388, April 11, 1980

Deliberations of a county court (board of commissioners) after a public hearing under ORS 215.422, involving an appeal from the granting of a subdivision permit, are subject to the Public Meetings Law and must be held in public. The exemption for equivalent deliberations of a state agency governing body after a contested case hearing (ORS

192.690(1)) does not apply to local government bodies. The exemption for judicial proceedings does not apply to quasi-judicial proceedings.

40 Op Atty Gen 458, May 12, 1980

A workshop session of the board of a special district is subject to the Public Meetings Law. Notice requirements discussed. Unless the statute authorizes an executive session, any meeting of a quorum of a board to hear arguments of non-board members, in any setting, must be held in public.

41 Op Atty Gen 28, July 14, 1980

Home-rule cities and counties are subject to the Public Meetings and Records Laws. Regular or special meetings between members of administrative staff and a county governing body are "public meetings." Notation of regular and special meeting dates on a master calendar in the board's office is *not* sufficient notice of meetings. Notice is not specifically required to contain an agenda but other statutes governing specific subject matter may require an agenda. (NOTE: ORS 192.640(1) has since been amended to require "a list of the principal subjects anticipated to be considered at the meeting.") *Any* meeting of two or more members of a three-member governing body is a "public meeting" if the purpose is to decide or deliberate toward a decision on matters within the jurisdiction of the board, regardless of who may or may not be present.

41 Op Atty Gen 218, November 5, 1980

Deliberations of LUBA *after* formal hearings are not subject to the Public Meetings Law. Final order of the board are public records subject to disclosure when issued. Recommendations to LCDC are subject to disclosure when submitted to the commission.

41 Op Atty Gen 262, December 5, 1980

Provision for executive session to "consider the employment of a public officer" pertains only to *hiring* of officer, not the manner of carrying out duties of existing employment. (Remainder of opinion superseded by action of the legislature in authorizing executive sessions "[t]o review and evaluate * * * the employment-related performance of the chief executive officer" or other officers, staff members or employees, unless the person requests a public hearing. Standards, criteria and policy relating to chief executive officers only must be

adopted in public with opportunity for public comment. ORS 192.660(1)(i).)

41 Op Atty Gen 437, April 14, 1981

Routine job performance evaluation material concerning a local school district superintendent, not relating to health, family status, personal finances or similar subjects, is *not* exempt from disclosure under the "personal information" exemption under the Public Records Law. *Information relating to manner of performance of public duties is not personal.*

(Answer to the second question, that the file could not be considered in executive session, was superseded by enactment of ORS 192.660(1)(i). *Enactment of that provision did not supersede our answer above to the first question.*)

42 Op Atty Gen 187, December 23, 1981

A three-member body with investigatory and reporting functions, of which one member was appointed by the Governor of Oregon and two by the Governor of Washington, is not subject to the Public Meetings Law (1) because it was not delegated authority to decide policy, to administer or to make recommendations; (2) because the Governor (to whom it reported) as an individual officer is not a "public body," as the term is defined in ORS 192.610(3); and (3) the body was not an Oregon body.

42 Op Atty Gen 362, May 18, 1982

A public body may not discuss its chief executive officer's salary in executive session as part of the process of setting it, despite ORS 192.660(1)(a), or the 1981 enactment of ORS 192.660(1)(i). It may not discuss salary negotiations for non-union employees in executive session.

42 Op Atty Gen 392, June 9, 1982

The Oregon Investment Council may employ executive sessions to consider records exempt by law from public inspection, if it knows or has good reason to believe other governmental bodies are in competition for the kind of investment opportunity it is considering; and to deliberate with any person designated by it to negotiate a real property transaction. It has no means of enforcing its confidentiality requirements upon news media attending.

Stock and stock market appraisals submitted in confidence by its money managers, written evaluation of its money managers, and technical reports prepared by consultants and money managers may be kept confidential and discussed in executive session if the requirements of ORS 192.500(2)(c) can be met. Oral evaluation of a money manager may be discussed in executive session if dismissal of the money manager is being considered.

Letter of Advice (OP-5468), July 13, 1983

Free expression of opinion may not be exercised in an untrammeled fashion wherever and whenever and in whatever manner a person chooses, even on public property. Rules that relate to the order and decorum of public bodies, limitations on time allowed for persons to make presentations, requirements that no one may have the floor without securing permission from a presiding officer, and specific prohibitions against disturbing or disrupting a meeting are not uncommon. Conduct violating such rules provides grounds for ejecting persons from meetings or premises of public bodies.

44 Op Atty Gen 69, June 27, 1984

The power possessed by student governments under ORS 351.070(1)(d) and (e) to recommend incidental fee assessments and allocations to the Board of Higher Education makes the student government committees that prepare and make the recommendations governing bodies subject to the Public Meetings Law.

46 Op Atty Gen 97, July 6, 1988

We believe this opinion may no longer be correct in light of *Marks v. McKenzie High Schl. Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994). Although *Marks* concerned the Public Records Law, we believe the same factors may apply to determine whether a private body is the "functional equivalent" of a public body for purposes of the Public Meetings Law.

Letter of Advice (OP-6292), September 12, 1988

The Public Utility Commission must comply with the Public Meetings Law when a quorum of the commission meets with staff to receive informational briefings on general topics of public utility regulation and agency administration. Even if information conveyed at a briefing did not relate to a matter requiring immediate action, the

information could have some bearing on future decisions, the responsibility for which is placed upon a quorum of the commission.

Letter of Advice (OP-6248), October 13, 1988

Whether the meetings of the presidential search committee are subject to the Public Meetings Law depends upon whether that committee is properly viewed as providing recommendations to the Chancellor or to the Board of Higher Education. Although the committee gives its recommendations for finalists to the Chancellor, the Chancellor appears to lack authority to screen out any of the finalists, nor may the Chancellor rank his or her recommendations. In light of this limited role of the Chancellor, we conclude that the board is the principal recipient of the search committee's recommendations. Accordingly, the committee is an advisory group to the board, and hence it is a "governing body" subject to the Meetings Law.

46 Op Atty Gen 155, March 17, 1989

The board of directors of the Oregon Medical Insurance Pool is not a governing body of a public body, and therefore is not subject to the Public Meetings Law.

Letter of Advice (OP-6376), May 18, 1990

A governing body may meet in executive session to "conduct deliberations with persons designated by the governing body to negotiate real property transactions." ORS 192.660(1)(e). The apparent policy underlying this provision is to permit public bodies to protect their negotiating position in real property transactions by keeping certain information confidential. This provision does not permit a governing body to discuss long-term space needs or general lease site selection policies in executive session.

Letter of Advice (OP-1997-4), August 13, 1997

The State Professional Responsibility Board (SPRB) is part of the attorney disciplinary process of the Oregon State Board. The SPRB does not hear formal charges against attorneys, but determines whether particular complaints should be pursued. Because the SPRB is a state board with authority to make decisions on attorney disciplinary complaints, its meetings are subject to the Public Meetings Law unless exempt under ORS 192.690 as a "judicial proceeding." We find that the most persuasive interpretation of "judicial proceedings" encompasses

those proceedings initiated within the judicial branch that are adjudicatory in nature and that are part of a process that ultimately may result in a judicial decision. The SPRB meetings meet those criteria and are therefore exempt from the Public Meetings Law.

49 Op Atty Gen 32, April 29, 1998

Information obtained by a health professional regulatory board as part of an investigation of a licensee is confidential and may not be disclosed, except in limited circumstances. ORS 676.175. Therefore, when a health professional regulatory board holds a contested case hearing on a notice of intent to impose a disciplinary sanction on a licensee, the hearing must be held in executive session. ORS 192.660(1)(k). Representatives of the news media may attend such hearings. ORS 192.660(3). Because a board's deliberations following a contested case hearing are not subject to the Public Meetings Law, the board is not required to provide notice of such meetings, take minutes or permit attendance by representatives of the news media. ORS 192.690. The board may not take a final action or make final decisions on such disciplinary cases in executive session, but should ensure that any discussion in public session does not disclose information that is confidential under ORS 676.175.

PUBLIC MEETINGS LAW APPENDIX G

Oregon Revised Statutes

PUBLIC MEETINGS

192.610 Definitions for ORS 192.610 to 192.690. As used in ORS 192.610 to 192.690:

(1) "Decision" means any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present.

(2) "Executive session" means any meeting or part of a meeting of a governing body which is closed to certain persons for deliberation on certain matters.

(3) "Governing body" means the members of any public body which consists of two or more members, with the authority to make decisions for or recommendations to a public body on policy or administration.

(4) "Public body" means the state, any regional council, county, city or district, or any municipal or public corporation, or any board, department, commission, council, bureau, committee or subcommittee or advisory group or any other agency thereof.

(5) "Meeting" means the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. "Meeting" does not include any on-site inspection of any project or program. "Meeting" also does not include the attendance of members of a governing body at any national, regional or state association to which the public body or the members belong. [1973 c.172 §2; 1979 c.644 §1]

192.620 Policy. The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of ORS 192.610 to 192.690 that decisions of governing bodies be arrived at openly. [1973 c.172 §1]

192.630 Meetings of governing body to be open to public; location of meetings; accommodation for person with disability; interpreters. (1) All meetings of the governing body of a public body shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by ORS 192.610 to 192.690.

(2) A quorum of a governing body may not meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as otherwise provided by ORS 192.610 to 192.690.

(3) A governing body may not hold a meeting at any place where discrimination on the basis of race, creed, color, sex, age, national origin or disability is practiced. However, the fact that organizations with restricted membership hold meetings at the place does not restrict its use by a public body if use of the place by a restricted membership organization is not the primary purpose of the place or its predominate use.

(4) Meetings of the governing body of a public body shall be held within the geographic boundaries over which the public body has jurisdiction, or at the administrative headquarters of the public body or at the other nearest practical location. Training sessions may be held outside the jurisdiction as long as no deliberations toward a decision are involved. A joint meeting of two or more governing bodies or of one or more governing bodies and the elected officials of one or more federally recognized Oregon Indian tribes shall be held within the geographic boundaries over which one of the participating public bodies or one of the Oregon Indian tribes has jurisdiction or at the nearest practical location. Meetings may be held in locations other than those described in this subsection in the event of an actual emergency necessitating immediate action.

(5)(a) It is discrimination on the basis of disability for a governing body of a public body to meet in a place inaccessible to persons with disabilities, or, upon request of a person who is deaf or hard of hearing, to fail to make a good faith effort to have an interpreter for persons who are deaf or hard of hearing provided at a regularly scheduled meeting. The sole remedy for discrimination on the basis of

disability shall be as provided in ORS 192.680.

(b) The person requesting the interpreter shall give the governing body at least 48 hours' notice of the request for an interpreter, shall provide the name of the requester, sign language preference and any other relevant information the governing body may request.

(c) If a meeting is held upon less than 48 hours' notice, reasonable effort shall be made to have an interpreter present, but the requirement for an interpreter does not apply to emergency meetings.

(d) If certification of interpreters occurs under state or federal law, the Department of Human Services or other state or local agency shall try to refer only certified interpreters to governing bodies for purposes of this subsection.

(e) As used in this subsection, "good faith effort" includes, but is not limited to, contacting the department or other state or local agency that maintains a list of qualified interpreters and arranging for the referral of one or more such persons to provide interpreter services. [1973 c.172 §3; 1979 c.644 §2; 1989 c.1019 §1; 1995 c.626 §1; 2003 c.14 §95; 2005 c.663 §12; 2007 c.70 §52]

Note: The amendments to 192.630 by section 21, chapter 100, Oregon Laws 2007, are the subject of a referendum petition that may be filed with the Secretary of State not later than September 26, 2007. If the referendum petition is filed with the required number of signatures of electors, chapter 100, Oregon Laws 2007, will be submitted to the people for their approval or rejection at the regular general election held on November 4, 2008. If approved by the people at the general election, chapter 100, Oregon Laws 2007, takes effect December 4, 2008. If the referendum petition is not filed with the Secretary of State or does not contain the required number of signatures of electors, the amendments to 192.630 by section 21, chapter 100, Oregon Laws 2007, take effect January 1, 2008. 192.630, as amended by section 21, chapter 100, Oregon Laws 2007, and including amendments by section 52, chapter 70, Oregon Laws 2007, is set forth for the user's convenience.

192.630. (1) All meetings of the governing body of a public body shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by ORS 192.610 to 192.690.

(2) A quorum of a governing body may not meet in pri-

vate for the purpose of deciding on or deliberating toward a decision on any matter except as otherwise provided by ORS 192.610 to 192.690.

(3) A governing body may not hold a meeting at any place where discrimination on the basis of race, color, creed, sex, sexual orientation, national origin, age or disability is practiced. However, the fact that organizations with restricted membership hold meetings at the place does not restrict its use by a public body if use of the place by a restricted membership organization is not the primary purpose of the place or its predominate use.

(4) Meetings of the governing body of a public body shall be held within the geographic boundaries over which the public body has jurisdiction, or at the administrative headquarters of the public body or at the other nearest practical location. Training sessions may be held outside the jurisdiction as long as no deliberations toward a decision are involved. A joint meeting of two or more governing bodies or of one or more governing bodies and the elected officials of one or more federally recognized Oregon Indian tribes shall be held within the geographic boundaries over which one of the participating public bodies or one of the Oregon Indian tribes has jurisdiction or at the nearest practical location. Meetings may be held in locations other than those described in this subsection in the event of an actual emergency necessitating immediate action.

(5)(a) It is discrimination on the basis of disability for a governing body of a public body to meet in a place inaccessible to persons with disabilities, or, upon request of a person who is deaf or hard of hearing, to fail to make a good faith effort to have an interpreter for persons who are deaf or hard of hearing provided at a regularly scheduled meeting. The sole remedy for discrimination on the basis of disability shall be as provided in ORS 192.680.

(b) The person requesting the interpreter shall give the governing body at least 48 hours' notice of the request for an interpreter, shall provide the name of the requester, sign language preference and any other relevant information the governing body may request.

(c) If a meeting is held upon less than 48 hours' notice, rea-

sonable effort shall be made to have an interpreter present, but the requirement for an interpreter does not apply to emergency meetings.

(d) If certification of interpreters occurs under state or federal law, the Department of Human Services or other state or local agency shall try to refer only certified interpreters to governing bodies for purposes of this subsection.

(e) As used in this subsection, "good faith effort" includes, but is not limited to, contacting the department or other state or local agency that maintains a list of qualified interpreters and arranging for the referral of one or more qualified interpreters to provide interpreter services.

192.640 Public notice required; special notice for executive sessions, special or emergency meetings. (1) The governing body of a public body shall provide for and give public notice, reasonably calculated to give actual notice to interested persons including news media which have requested notice, of the time and place for holding regular meetings. The notice shall also include a list of the principal subjects anticipated to be considered at the meeting, but this requirement shall not limit the ability of a governing body to consider additional subjects.

(2) If an executive session only will be held, the notice shall be given to the members of the governing body, to the general public and to news media which have requested notice, stating the specific provision of law authorizing the executive session.

(3) No special meeting shall be held without at least 24 hours' notice to the members of the governing body, the news media which have requested notice and the general public. In case of an actual emergency, a meeting may be held upon such notice as is appropriate to the circumstances, but the minutes for such a meeting shall describe the emergency justifying less than 24 hours' notice. [1973 c.172 §4; 1979 c.644 §3; 1981 c.182 §1]

192.650 Recording or written minutes required; content; fees. (1) The governing body of a public body shall provide for the sound, video or digital recording or the taking of written minutes of all its meetings. Neither a full transcript nor a full recording of the meet-

ing is required, except as otherwise provided by law, but the written minutes or recording must give a true reflection of the matters discussed at the meeting and the views of the participants. All minutes or recordings shall be available to the public within a reasonable time after the meeting, and shall include at least the following information:

(a) All members of the governing body present;

(b) All motions, proposals, resolutions, orders, ordinances and measures proposed and their disposition;

(c) The results of all votes and, except for public bodies consisting of more than 25 members unless requested by a member of that body, the vote of each member by name;

(d) The substance of any discussion on any matter; and

(e) Subject to ORS 192.410 to 192.505 relating to public records, a reference to any document discussed at the meeting.

(2) Minutes of executive sessions shall be kept in accordance with subsection (1) of this section. However, the minutes of a hearing held under ORS 332.061 shall contain only the material not excluded under ORS 332.061 (2). Instead of written minutes, a record of any executive session may be kept in the form of a sound or video tape or digital recording, which need not be transcribed unless otherwise provided by law. If the disclosure of certain material is inconsistent with the purpose for which a meeting under ORS 192.660 is authorized to be held, that material may be excluded from disclosure. However, excluded materials are authorized to be examined privately by a court in any legal action and the court shall determine their admissibility.

(3) A reference in minutes or a recording to a document discussed at a meeting of a governing body of a public body does not affect the status of the document under ORS 192.410 to 192.505.

(4) A public body may charge a person a fee under ORS 192.440 for the preparation of a transcript from a recording. [1973 c.172 §5; 1975 c.664 §1; 1979 c.644 §4; 1999 c.59 §44; 2003 c.803 §14]

192.660 Executive sessions permitted on certain matters; procedures; news media representatives' attendance; limits. (1) ORS 192.610 to 192.690

do not prevent the governing body of a public body from holding executive session during a regular, special or emergency meeting, after the presiding officer has identified the authorization under ORS 192.610 to 192.690 for holding the executive session.

(2) The governing body of a public body may hold an executive session:

(a) To consider the employment of a public officer, employee, staff member or individual agent.

(b) To consider the dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent who does not request an open hearing.

(c) To consider matters pertaining to the function of the medical staff of a public hospital licensed pursuant to ORS 441.015 to 441.063, 441.085, 441.087 and 441.990 (3) including, but not limited to, all clinical committees, executive, credentials, utilization review, peer review committees and all other matters relating to medical competency in the hospital.

(d) To conduct deliberations with persons designated by the governing body to carry on labor negotiations.

(e) To conduct deliberations with persons designated by the governing body to negotiate real property transactions.

(f) To consider information or records that are exempt by law from public inspection.

(g) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations.

(h) To consult with counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed.

(i) To review and evaluate the employment-related performance of the chief executive officer of any public body, a public officer, employee or staff member who does not request an open hearing.

(j) To carry on negotiations under ORS chapter 293 with private persons or businesses regarding proposed acquisition, exchange or liquidation of public investments.

(k) If the governing body is a health professional regulatory board, to consider information

obtained as part of an investigation of licensee or applicant conduct.

(L) If the governing body is the State Landscape Architect Board, or an advisory committee to the board, to consider information obtained as part of an investigation of registrant or applicant conduct.

(m) To discuss information about review or approval of programs relating to the security of any of the following:

(A) A nuclear-powered thermal power plant or nuclear installation.

(B) Transportation of radioactive material derived from or destined for a nuclear-fueled thermal power plant or nuclear installation.

(C) Generation, storage or conveyance of:

(i) Electricity;

(ii) Gas in liquefied or gaseous form;

(iii) Hazardous substances as defined in ORS 453.005 (7)(a), (b) and (d);

(iv) Petroleum products;

(v) Sewage; or

(vi) Water.

(D) Telecommunication systems, including cellular, wireless or radio systems.

(E) Data transmissions by whatever means provided.

(3) Labor negotiations shall be conducted in open meetings unless negotiators for both sides request that negotiations be conducted in executive session. Labor negotiations conducted in executive session are not subject to the notification requirements of ORS 192.640.

(4) Representatives of the news media shall be allowed to attend executive sessions other than those held under subsection (2)(d) of this section relating to labor negotiations or executive session held pursuant to ORS 332.061 (2) but the governing body may require that specified information be undisclosed.

(5) When a governing body convenes an executive session under subsection (2)(h) of this section relating to conferring with counsel on current litigation or litigation likely to be filed, the governing body shall bar any member of the news media from attending the executive session if the member of the news media is a party to the litigation or is an employee, agent or contractor of a news media

organization that is a party to the litigation.

(6) No executive session may be held for the purpose of taking any final action or making any final decision.

(7) The exception granted by subsection (2)(a) of this section does not apply to:

(a) The filling of a vacancy in an elective office.

(b) The filling of a vacancy on any public committee, commission or other advisory group.

(c) The consideration of general employment policies.

(d) The employment of the chief executive officer, other public officers, employees and staff members of a public body unless:

(A) The public body has advertised the vacancy;

(B) The public body has adopted regular hiring procedures;

(C) In the case of an officer, the public has had the opportunity to comment on the employment of the officer; and

(D) In the case of a chief executive officer, the governing body has adopted hiring standards, criteria and policy directives in meetings open to the public in which the public has had the opportunity to comment on the standards, criteria and policy directives.

(8) A governing body may not use an executive session for purposes of evaluating a chief executive officer or other officer, employee or staff member to conduct a general evaluation of an agency goal, objective or operation or any directive to personnel concerning agency goals, objectives, operations or programs.

(9) Notwithstanding subsections (2) and (6) of this section and ORS 192.650:

(a) ORS 676.175 governs the public disclosure of minutes, transcripts or recordings relating to the substance and disposition of licensee or applicant conduct investigated by a health professional regulatory board.

(b) ORS 671.338 governs the public disclosure of minutes, transcripts or recordings relating to the substance and disposition of registrant or applicant conduct investigated by the State Landscape Architect Board or an advisory committee to the board. [1973 c.172 §6; 1975 c.664 §2; 1979 c.644 §5; 1981 c.302 §1; 1983 c.453 §1; 1985 c.657 §2; 1995 c.779 §1; 1997 c.173 §1; 1997 c.594 §1; 1997 c.791 §9;

2001 c.950 §10; 2003 c.524 §4; 2005 c.22 §134]

Note: The amendments to 192.660 by section 11, chapter 602, Oregon Laws 2007, take effect January 1, 2009. See section 13, chapter 602, Oregon Laws 2007. The text that is effective on and after January 1, 2009, is set forth for the user's convenience.

192.660. (1) ORS 192.610 to 192.690 do not prevent the governing body of a public body from holding executive session during a regular, special or emergency meeting, after the presiding officer has identified the authorization under ORS 192.610 to 192.690 for holding the executive session.

(2) The governing body of a public body may hold an executive session:

(a) To consider the employment of a public officer, employee, staff member or individual agent.

(b) To consider the dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent who does not request an open hearing.

(c) To consider matters pertaining to the function of the medical staff of a public hospital licensed pursuant to ORS 441.015 to 441.063, 441.085, 441.087 and 441.990 (2) including, but not limited to, all clinical committees, executive, credentials, utilization review, peer review committees and all other matters relating to medical competency in the hospital.

(d) To conduct deliberations with persons designated by the governing body to carry on labor negotiations.

(e) To conduct deliberations with persons designated by the governing body to negotiate real property transactions.

(f) To consider information or records that are exempt by law from public inspection.

(g) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations.

(h) To consult with counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed.

(i) To review and evaluate the employment-related performance of the chief executive officer of any public body, a public officer, employee or staff

member who does not request an open hearing.

(j) To carry on negotiations under ORS chapter 293 with private persons or businesses regarding proposed acquisition, exchange or liquidation of public investments.

(k) If the governing body is a health professional regulatory board, to consider information obtained as part of an investigation of licensee or applicant conduct.

(L) If the governing body is the State Landscape Architect Board, or an advisory committee to the board, to consider information obtained as part of an investigation of registrant or applicant conduct.

(m) To discuss information about review or approval of programs relating to the security of any of the following:

(A) A nuclear-powered thermal power plant or nuclear installation.

(B) Transportation of radioactive material derived from or destined for a nuclear-fueled thermal power plant or nuclear installation.

(C) Generation, storage or conveyance of:

(i) Electricity;

(ii) Gas in liquefied or gaseous form;

(iii) Hazardous substances as defined in ORS 453.005 (7)(a), (b) and (d);

(iv) Petroleum products;

(v) Sewage; or

(vi) Water.

(D) Telecommunication systems, including cellular, wireless or radio systems.

(E) Data transmissions by whatever means provided.

(3) Labor negotiations shall be conducted in open meetings unless negotiators for both sides request that negotiations be conducted in executive session. Labor negotiations conducted in executive session are not subject to the notification requirements of ORS 192.640.

(4) Representatives of the news media shall be allowed to attend executive sessions other than those held under subsection (2)(d) of this section relating to labor negotiations or executive session held pursuant to ORS 332.061 (2) but the governing body may require that specified information be undisclosed.

(5) When a governing body convenes an executive session under subsection (2)(h) of this section relating to conferring

with counsel on current litigation or litigation likely to be filed, the governing body shall bar any member of the news media from attending the executive session if the member of the news media is a party to the litigation or is an employee, agent or contractor of a news media organization that is a party to the litigation.

(6) No executive session may be held for the purpose of taking any final action or making any final decision.

(7) The exception granted by subsection (2)(a) of this section does not apply to:

(a) The filling of a vacancy in an elective office.

(b) The filling of a vacancy on any public committee, commission or other advisory group.

(c) The consideration of general employment policies.

(d) The employment of the chief executive officer, other public officers, employees and staff members of a public body unless:

(A) The public body has advertised the vacancy;

(B) The public body has adopted regular hiring procedures;

(C) In the case of an officer, the public has had the opportunity to comment on the employment of the officer; and

(D) In the case of a chief executive officer, the governing body has adopted hiring standards, criteria and policy directives in meetings open to the public in which the public has had the opportunity to comment on the standards, criteria and policy directives.

(8) A governing body may not use an executive session for purposes of evaluating a chief executive officer or other officer, employee or staff member to conduct a general evaluation of an agency goal, objective or operation or any directive to personnel concerning agency goals, objectives, operations or programs.

(9) Notwithstanding subsections (2) and (6) of this section and ORS 192.650:

(a) ORS 676.175 governs the public disclosure of minutes, transcripts or recordings relating to the substance and disposition of licensee or applicant conduct investigated by a health professional regulatory board.

(b) ORS 671.338 governs the public disclosure of minutes, transcripts or recordings relating

to the substance and disposition of registrant or applicant conduct investigated by the State Landscape Architect Board or an advisory committee to the board.

192.670 Meetings by means of telephonic or electronic communication. (1) Any meeting, including an executive session, of a governing body of a public body which is held through the use of telephone or other electronic communication shall be conducted in accordance with ORS 192.610 to 192.690.

(2) When telephone or other electronic means of communication is used and the meeting is not an executive session, the governing body of the public body shall make available to the public at least one place where the public can listen to the communication at the time it occurs by means of speakers or other devices. The place provided may be a place where no member of the governing body of the public body is present. [1973 c.172 §7; 1979 c.361 §1]

192.680 Enforcement of ORS 192.610 to 192.690; effect of violation on validity of decision of governing body; liability of members. (1) A decision made by a governing body of a public body in violation of ORS 192.610 to 192.690 shall be voidable. The decision shall not be voided if the governing body of the public body reinstates the decision while in compliance with ORS 192.610 to 192.690. A decision that is reinstated is effective from the date of its initial adoption.

(2) Any person affected by a decision of a governing body of a public body may commence a suit in the circuit court for the county in which the governing body ordinarily meets, for the purpose of requiring compliance with, or the prevention of violations of ORS 192.610 to 192.690, by members of the governing body, or to determine the applicability of ORS 192.610 to 192.690 to matters or decisions of the governing body.

(3) Notwithstanding subsection (1) of this section, if the court finds that the public body made a decision while in violation of ORS 192.610 to 192.690, the court shall void the decision of the governing body if the court finds that the violation was the result of intentional disregard of the law or willful misconduct by a quorum of the members of the governing body, unless other equitable relief is available. The court may order

such equitable relief as it deems appropriate in the circumstances. The court may order payment to a successful plaintiff in a suit brought under this section of reasonable attorney fees at trial and on appeal, by the governing body, or public body of which it is a part or to which it reports.

(4) If the court makes a finding that a violation of ORS 192.610 to 192.690 has occurred under subsection (2) of this section and that the violation is the result of willful misconduct by any member or members of the governing body, that member or members shall be jointly and severally liable to the governing body or the public body of which it is a part for the amount paid by the body under subsection (3) of this section.

(5) Any suit brought under subsection (2) of this section must be commenced within 60 days following the date that the decision becomes public record.

(6) The provisions of this section shall be the exclusive remedy for an alleged violation of ORS 192.610 to 192.690. [1973 c.172 §8; 1975 c.664 §3; 1979 c.644 §6; 1981 c.897 §42; 1983 c.453 §2; 1989 c.544 §1]

192.685 Additional enforcement of alleged violations of ORS 192.660. (1) Notwithstanding ORS 192.680, complaints of violations of ORS 192.660 alleged to have been committed by public officials may be made to the Oregon Government Ethics Commission for review and investigation as provided by ORS 244.260 and for possible imposition of civil penalties as provided by ORS 244.350.

(2) The commission may interview witnesses, review minutes and other records and may obtain and consider any other information pertaining to executive sessions of the governing body of a public body for purposes of determining whether a violation of ORS 192.660 occurred. Information related to an executive session conducted for a purpose authorized by ORS 192.660 shall be made available to the Oregon Government Ethics Commission for its investigation but shall be excluded from public disclosure.

(3) If the commission chooses not to pursue a complaint of a violation brought under subsection (1) of this section at any time before conclusion of a contested case hearing,

the public official against whom the complaint was brought may be entitled to reimbursement of reasonable costs and attorney fees by the public body to which the official's governing body has authority to make recommendations or for which the official's governing body has authority to make decisions. [1993 c.743 §28]

192.690 Exceptions to ORS 192.610 to 192.690. (1) ORS 192.610 to 192.690 do not apply to the deliberations of the State Board of Parole and Post-Prison Supervision, the Psychiatric Security Review Board, state agencies conducting hearings on contested cases in accordance with the provisions of ORS chapter 183, the review by the Workers' Compensation Board or the Employment Appeals Board of similar hearings on contested cases, meetings of the state lawyers assistance committee operating under the provisions of ORS 9.568, meetings of the personal and practice management assistance committees operating under the provisions of ORS 9.568, the county multidisciplinary child abuse teams required to review child abuse cases in accordance with the provisions of ORS 418.747, the child fatality review teams required to review child fatalities in accordance with the provisions of ORS 418.785, the peer review committees in accordance with the provisions of ORS 441.055, mediation conducted under ORS 36.250 to 36.270, any judicial proceeding, meetings of the Oregon Health and Science University Board of Directors or its designated committee regarding candidates for the position of president of the university or regarding sensitive business, financial or commercial matters of the university not customarily provided to competitors related to financings, mergers, acquisitions or joint ventures or related to the sale or other disposition of, or substantial change in use of, significant real or personal property, or related to health system strategies, or to Oregon Health and Science University faculty or staff committee meetings.

(2) Because of the grave risk to public health and safety that would be posed by misappropriation or misapplication of information considered during such review and approval, ORS 192.610 to 192.690 shall not apply to review and approval of security programs by the Energy Facility Siting Council pursuant

to ORS 469.530. [1973 c.172 §9; 1975 c.606 §41b; 1977 c.380 §19; 1981 c.354 §3; 1983 c.617 §4; 1987 c.850 §3; 1989 c.6 §18; 1989 c.967 §§12,14; 1991 c.451 §3; 1993 c.18 §33; 1993 c.318 §§3,4; 1995 c.36 §§1,2; 1995 c.162 §§62b,62c; 1999 c.59 §§45a,46a; 1999 c.155 §4; 1999 c.171 §§4,5; 1999 c.291 §§25,26; 2005 c.347 §5; 2005 c.562 §23]

Note: The amendments to 192.690 by section 8, chapter 796, Oregon Laws 2007, take effect January 1, 2009. See section 9, chapter 796, Oregon Laws 2007. The text that is effective on and after January 1, 2009, is set forth for the user's convenience.

192.690. (1) ORS 192.610 to 192.690 do not apply to the deliberations of the State Board of Parole and Post-Prison Supervision, the Psychiatric Security Review Board, state agencies conducting hearings on contested cases in accordance with the provisions of ORS chapter 183, the review by the Workers' Compensation Board or the Employment Appeals Board of similar hearings on contested cases, meetings of the state lawyers assistance committee operating under the provisions of ORS 9.568, meetings of the Health Professionals Program Supervisory Council established under ORS 677.615, meetings of the personal and practice management assistance committees operating under the provisions of ORS 9.568, the county multidisciplinary child abuse teams required to review child abuse cases in accordance with the provisions of ORS 418.747, the child fatality review teams required to review child fatalities in accordance with the provisions of ORS 418.785, the peer review committees in accordance with the provisions of ORS 441.055, mediation conducted under ORS 36.250 to 36.270, any judicial proceeding, meetings of the Oregon Health and Science University Board of Directors or its designated committee regarding candidates for the position of president of the university or regarding sensitive business, financial or commercial matters of the university not customarily provided to competitors related to financings, mergers, acquisitions or joint ventures or related to the sale or other disposition of, or substantial change in use of, significant real or personal property, or related to health system strategies, or to Oregon Health and Science University faculty or staff committee meetings.

(2) Because of the grave risk to public health and safety that would be posed by misappropriation or misapplication of information considered during such review and approval, ORS 192.610 to 192.690 shall not apply to review and approval of security programs by the Energy Facility Siting Council pursuant to ORS 469.530.

192.695 Prima facie evidence of violation required of plaintiff. In any suit commenced under ORS 192.680 (2), the plaintiff shall be required to present prima facie evidence of a violation of ORS 192.610 to 192.690 before the governing body shall be required to prove that its acts, in deliberating toward a decision complied with the law. When a plaintiff presents prima facie evidence of a violation of the open meetings law, the burden to prove that the provisions of ORS 192.610 to 192.690 were complied with shall be on the governing body. [1981 c.892 §97d; 1989 c.544 §3]

Note: 192.695 was added to and made a part of ORS chapter 192 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

192.710 Smoking in public meetings prohibited. (1) No person shall smoke or carry any lighted smoking instrument in a room where a public meeting is being held or is to continue after a recess. For purposes of this subsection, a public meeting is being held from the time the agenda or meeting notice indicates the meeting is to commence regardless of the time it actually commences.

(2) As used in this section:

(a) "Public meeting" means any regular or special public meeting or hearing of a public body to exercise or advise in the exercise of any power of government in buildings or rooms rented, leased or owned by the State of Oregon or by any county, city or other political subdivision in the state regardless of whether a quorum is present or is required.

(b) "Public body" means the state or any department, agency, board or commission of the state or any county, city or other political subdivision in the state.

(c) "Smoking instrument" means any cigar, cigarette, pipe or other smoking equipment. [1973 c.168 §1; 1979 c.262 §1]

PENALTIES

192.990 Penalties. Violation of ORS 192.710 (1) is a violation punishable by a fine of $10. [1973 c.168 §2]

PUBLIC MEETINGS LAW

Index