

# **Report of the Oregon Sunshine Committee**

**July 1, 2024**

DRAFT

## **Introduction**

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

## **Statutory basis**

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

## **Committee membership**

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

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

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

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

### **Structure of report**

Following this introductory section, this report will describe the Sunshine Committee's work and recommendations over the past two years, as well as its plans. Exemption review work is discussed first, starting with an explanation of exemptions reviewed to date and recommendations of the Sunshine Committee based on that review. An update on the Sunshine Committee's plans to finish its review follows. The final section of the report examines various ways in which the Sunshine Committee can continue to serve Oregonians, and the Public

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

### **Exemption Review**

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

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

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

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

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

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

### Recommendations

The Committee reviewed exemptions related to adoption, child custody, child support and child welfare, collectively referenced as family law exemptions. The exemptions for child support materials is largely driven by federal law and accordingly outside the scope of the Sunshine Committee's reach. It was recommended that exemptions related to child welfare build a dichotomy between alleged victim's access to information held by state agencies while at the same time recognizing victims and their advocates should be able to obtain information while even if the records are not accessible to the general public. The committee recommended the remainder of family law exemptions were rooted in solid policy decisions except they should be converted to conditional exemptions to allow for the narrow instances where the public interest outweighed the privacy interests in the specific record.

Trade secrets exemptions were examined by the committee in the wake of litigation between a media company and an Oregon city related to records possessed by the City but considered a trade secret by a business with facilities within the City. The committee found that

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

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

Criminal investigatory records were considered under the exemption granted under ORS § 192.345(3). The law provides for the exemption of materials compiled by a law enforcement agency for the investigation of a potential crime be exempt, but that a delineated list of

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

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

majority of regulated professions the Committee has recommended they remove such exemptions related to investigations and align themselves more closely to the practice of the Bar Association. Recommendations on the regulation of educators and health care professions continue to be a focus of the Committee and are not including this recommendation.

### **Next Steps**

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

Attachments (approved recommendations)