

## **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. 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).

**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’s 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 require a public body, after finding the records requested, to require the requester to prepay the estimated costs of providing those records?**

A. No. However, the law permits that practice, and most public bodies follow it.

**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.

**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 spent consulting with an attorney to educate itself on the public records law, it may recover the costs of any time an attorney spent to segregate the exempt and nonexempt records.

**Q. Is an indigent person entitled to waiver of the fee for inspection or 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 and telephone numbers of public employees?**

A. No, unless the employee is an elected official, or the requestor clearly shows that the public interest requires disclosure in a particular instance. Public body employee and volunteer addresses and telephone numbers are exempt from disclosure under ORS 192.502(3). The names of public body employees are not exempt under the law. Although personal information, disclosure of an employee's name is not an unreasonable invasion of privacy. See discussion of Public Employee Addresses, Birth Dates and Telephone Numbers.

**Q. May I obtain names, addresses and telephone numbers of persons doing business with public bodies?**

A. Generally, yes. Names, addresses and telephone numbers are personal information. Generally, however, disclosure of the name, address and telephone number of a licensee or person doing business with a public body 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 names and addresses 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); Public Records Order, May 31, 1990, Heilman/Boles; and discussion of ORS 192.502(2), Personal Privacy Exemption. Some addresses may also 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 are prohibited, with several exceptions. Or Laws 1997, ch 678.

**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?<sup>1</sup>**

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*, 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 Disability 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?**

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<sup>1</sup> This question does not relate to a tape of a meeting for which minutes are required to be kept pursuant to the Public Meetings Law. That law's requirement for Minutes of public meetings is discussed in Part II of this manual.

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.

**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(3), 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 Oregon State Scholarship 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(7).

**Q. Does a "policy or procedure" of nondisclosure by a federal agency justify nondisclosure under ORS 192.502(7)?**

A. No. The ORS 192.502(7) 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. Birth and death records (other than abstracts) are exempt from disclosure unless the applicant has a direct and tangible interest in the record. ORS 432.120, 192.502(8); OAR 333-11-096(1). Registrants, immediate family members, guardians or legal representatives are considered to have "direct and tangible interest." For death records, other persons may qualify when the information is needed to determine or protect a person 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 432.120(3), 432.130. *See* 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 and proposals are confidential, but only prior to the close of the ITB or RFP and the time set for opening. *See* ORS 279.027 (bids shall remain sealed until opened publicly by the contracting agency at the time designated in the advertisement); ORS 192.502(8). Once bids and proposals have been opened, they are available for public inspection, except to the extent that the bidder or proposer has appropriately designated parts of the bid or proposal as trade secrets, which are exempt from disclosure under ORS 192.501(2).

ORS 279.037(3) provides that information submitted by a bidder in a prequalification statement required by ORS 279.039 "shall be deemed a trade

secret” under the Public Records Law if requested by the person submitting the information.

**Q. Are the records on juveniles who have been arrested available for inspection?**

A. Technically, juveniles are not “arrested” but 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 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, the offense for which the youth was taken into custody, the name and age of the adult complaining party or victim, the identity 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, when a youth is found to be within the jurisdiction of the juvenile court for an act that if committed by an adult would constitute a crime, the Juvenile Code provides for disclosure of the basis for the 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, the portion of the juvenile court order providing for the legal disposition of the youth, 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(8). They are 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 847-12-000 (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.<sup>2</sup> Because the only Oregon case concerning SSNs<sup>3</sup> pre-dates the Oregon Supreme Court's interpretation of ORS 192.502(2),<sup>4</sup> 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,<sup>5</sup> public bodies should not disclose any SSNs without advice from their legal counsel.

**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?**

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<sup>2</sup> *See, e.g., 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); *IBEW v. US Dept. Of Housing and Urban Development*, 852 F2d 87, 92 (3rd Cir 1988); *Swisher v. Department of the Air Force*, 495 F Supp 337, 340 (WD Mo (1980), *aff'd*, 660 F2d 369 (8th Cir 1981); *Local 3, IBEW v. NLRB*, 845 F2d 1177, 1180 (2d Cir 1988); *United Assn of Journeymen and Apprentices of the Plumbing and Pipefitting Industry v. Department of the Army*, 841 F2d 1459, 1466 (9th Cir 1988).

<sup>3</sup> *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).

<sup>4</sup> *Jordan v. Motor Vehicles Division*, 308 Or 433, 781 P2d 1203 (1989).

<sup>5</sup> 42 USC § 405(c)(2)(C)(viii).



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.<sup>6</sup> 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.

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<sup>6</sup> 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).

