The Legislation Review Subcommittee of the Sunshine Committee presents the following recommendations to the legislature for consideration and approval by the full Sunshine Committee.

Overview

The Subcommittee on Personally Identifiable Information (PII) of the Oregon Sunshine Committee has presented Legislative Recommendations on PII for consideration (see attached document). **Based on those proposed recommendations, we make the following recommendations to the legislature:**

1. In general, the legislature should refrain from adding additional exemptions to public records until the Sunshine Committee can formally review current exemptions and provide recommendations on how to improve public records law.
2. In relation to specific bills currently introduced and moving through the legislative process during the 2019 session:
    a. HB 2016: The legislature should refrain from any change to disclosure of public records, as contained in Section 11.
    b. HB 2331: The legislature should maintain the public interest balancing test for access to public records pertaining to information received through a tip line.

Discussion:

1. In general, the legislature should refrain from adding additional exemptions to public records until the Sunshine Committee can formally review current exemptions and provide recommendations on how to improve public records law.

The legislature established the Sunshine Committee in 2017 with direction to review the more than 500 exemptions to public records law. Creating more exemptions to disclosure of public records while this project is ongoing would impede the mission of the Sunshine Committee and contradict its intent. We recommend the legislature refrain from adding additional exemptions until the Sunshine Committee can finish its work.

2. In relation to specific bills currently introduced and moving through the legislative process during the 2019 session:
    a. HB 2016: The legislature should refrain from any change to disclosure of public records, as contained in Section 11.

Punitive Action: We recommend the legislature refrain from creating a punitive punishment for release of public records released in good faith by public agencies. In an effort to increase access to public records, SB 481 of 2017 explicitly holds public agencies harmless for releasing public records in good faith.

Creating punitive penalties for release of public records would directly contradict the intent of SB 481 of 2017. First, the administrative burden put upon agencies that would be required to follow two conflicting statutes would make response to public records requests more difficult. Second, in the face of potential punitive action, public agencies would likely be much more reticent to respond to any public records requests, even ones not explicitly captured in HB 2016, for fear of the information they released later being deemed personal information.

Expansion of personal information definition: The definition of personal information included in HB 2016 is broad enough to potentially include more information than is even explicitly included. Coupled with above concern, this has the potential to substantially reduce access to public records.

Contradicts recommendations of Sunshine Committee: The Sunshine Committee has undergone a rigorous study of how to deal with personal information in public records law (see Legislative Recommendations on PII). HB 2016 would contradict those recommendations, specifically, that access to public employee personal information should be available to the public upon the requestor showing "by clear and convincing evidence that the public interest requires disclosure in a particular instance." HB 2016 would preclude disclosure even when the public interest is clearly served by disclosure.

b. HB 2331: The legislature should maintain the public interest balancing test for access to public records pertaining to information received through a tip line.

The Sunshine Committee has recommended (see Legislative Recommendations on PII) that all personal information be at least accessible if the requestor can show "by clear and convincing evidence that the public interest requires disclosure in a particular instance." HB 2331 would remove this public-interest access to personal information.

Legislative Recommendations on PII

For the purpose of this document, and under current Oregon law, Personally Identifiable Information (PII) can include a home address, personal telephone numbers, personal email, driver's license, date of birth and social security number. A person's name and employment status with a public employer is not PII.

The Sunshine Committee recommends that the Legislature should:

- Strike a balance that generally protects the personal privacy of Oregonians while still allowing release of PII in the public interest.
- Refrain from expanding any public records laws exemptions or roll back current access to personal information.
- Guarantee that any change to existing law would help speed along public interest access to PII.
- Maintain existing standards for protecting PII of individual public employees consistent with ORS 192.363.
- Apply the public interest balancing test to current exemptions for PII that don't currently have the balancing test, and clarify the criteria that the public entity should use in making a determination.

Further, we have two main issues we recommend the Legislature consider addressing regarding the obligations and concerns of public entities with regard to PII and public records request. Although there are exceptions, if a local public entity withholds or hesitates to disclose requested records it is usually for one or more of the following reasons:

1. **They do not understand their obligations under the public records laws.**
2. **They fear reprisals – public or legal -- for disclosing what should not be disclosed, or what the person who is the subject matter of the request believes should not be disclosed.** Typically risk-averse by nature of the job, they err on the side of non-disclosure.

Each of these is addressed further below, with recommendations.

1. They do not understand their obligations under the public records laws.

Most public entities have at least one person on staff or on the governing board who knows to consult ORS chapter 192 as well as the AG's *Public Records and Meetings Manual* for guidance on public records questions. And, those who have an attorney to advise them will usually consult with him or her when in doubt about how to respond.

Clarifying and streamlining ORS chapter 192 so that it is easier for a layperson to read, and revising the AG's Manual accordingly, would help to encourage timely compliance by creating as much of a "bright line" as possible for public entities to know what the law does and does not require.

With respect to PII specifically, we recommend:

1. Refer all statutes allowing or requiring withholding of PII to ORS chapter 192 so that there is one guiding statute for this type of information.
2. Develop a standard definition of what is included in "Personally Identifiable Information." Clarifying this explicitly in ORS chapter 192 would be helpful.
3. Apply ORS chapter 192 to all public bodies and agencies in Oregon.
4. Consider providing criteria for the public entity to consider when deciding whether disclosing a record is "in the public interest." Define the circumstances when PII shall be disclosed; shall not be disclosed (absent a court order); and may be withheld (i.e., absent a clear and convincing showing of the public interest in disclosure).
5. If the balancing test is applied to a request for PII and the request is denied, require the public body or agency to document in writing the reason the test failed. We recommend clarifying 192.329 to this effect.
6. Establish periodic review of the requests and denials for records to help determine whether further adjustments to the law are needed.
7. Provide a template request for records that substantially conforms to ORS 192.363.

Continued emphasis should be placed on education and training of public officials, both staff (who typically respond to records request) and elected officials (who turn over about every four years and often have no experience working in the public sector). Opportunities for the AG's office and the Office of the Public Records Advocate to work with other organizations that provide this kind of training should continue to be explored. Such organizations include the Association of Oregon Counties, League of Oregon Cities, and Special Districts Association of Oregon.

2. They fear reprisals – public or legal -- for disclosing what should not be disclosed, or what the person who is the subject matter of the request believes should not be disclosed.

The fear of public reprisals can be mitigated somewhat by providing clarifying direction as discussed in section 1 above. With respect to legal protections, ORS chapter 192 already includes three statutes that protect public entities from liability for inadvertently, or otherwise acting in good faith, disclosing protected information:

> **192.335 Immunity from liability for disclosure of public record; effect of disclosure on privilege.** (1) A public body that, acting in good faith, discloses a public record in response to a request for public records is not liable for any loss or damages based on the disclosure unless the disclosure is affirmatively prohibited by state or federal law or by a court order applicable to the public body. Nothing in this subsection shall be interpreted to create liability on the part of a public body, or create a cause of action against a public body, based on the disclosure of a public record.
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> (2) A public body that discloses any information or record in response to a written request for public records under ORS 192.311 to 192.478 that is privileged under ORS 40.225 to 40.295 does not waive its right to assert the applicable privilege to prevent the introduction of the information or record as evidence pursuant to ORS 40.225 to 40.295.
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> **192.368 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.
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> *** (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.
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> **192.380 Immunity from liability for disclosure of certain personal information; recovery of costs.** (1) A public body or any official of the public body that determines that a party requesting information under ORS 192.355 (3), 192.363 or 192.365 has demonstrated by clear and

convincing evidence that the public interest requires disclosure in a particular instance is immune from civil or criminal liability associated with the disclosure.

(2) A public body that receives a request for disclosure of records under ORS 192.355 (3) or 192.365 is entitled to recover the cost of complying with ORS 192.363 without regard to whether the public body determines that the party requesting disclosure has demonstrated by clear and convincing evidence that the public interest requires disclosure in a particular instance.

It would be clearer and more powerful to combine these into one overarching statute, and possibly move it toward the beginning of the chapter to emphasize this protection.