

PUBLIC RECORDS LAW APPENDIX A

FREQUENTLY ASKED QUESTIONS

Q. Does the Public Records Law require a public body to create a record by collecting information, recording oral statements or otherwise?

A. Generally, no. A public body is required to allow inspection (subject to applicable exemptions) of any public records in its possession.

However, the Public Records Law does require public bodies to use computer software or programs to retrieve and make available data or information the public body stores in computer or electronic form, if the public body employs the computer software or programs to retrieve information for its own purposes. This requirement reaches data retrieval only; it does not mean, for example, that public bodies are required to cut and paste from word processing documents or similar documents to create a new document in response to public records requests. Also, a public body cannot be required to generate data that do not already exist in agency's records, 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 public records available for inspection or copying on a periodic basis, or as records come into the possession of the public body, in response to a "continuing request" for records?

A. No. A public body is only required to make nonexempt records that are in the public body's possession at the time the request is made. Persons seeking to inspect or to obtain copies of records of a public body on a continuing basis may be required to make successive requests for records. Of course, an agency may choose to honor a continuing request.

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, so long as that arrangement will not result in unnecessary delay.

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 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, but only if that amount 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 how the Public Records Law applies to the requested records, 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. Is a public body obligated to disclose the personal addresses, or personal telephone numbers of public employees?

A. It depends. This information about elected officials *generally* is not exempt. For other employees, this information "contained in personnel records maintained by the public body" is exempt from disclosure under ORS 192.502(3). The exemption can be overcome, however, if the requester provides clear and convincing evidence that the public interest clearly requires disclosure under the particular circumstances. 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, licensed by, or seeking to be licensed by public bodies?

A. Generally, yes. In some cases, however, the information may be exempt from disclosure.

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 possibly can be redacted under the personal privacy exemption, ORS 192.502(2).

Q. Can I get a transcript of material that is on tape?

A. In general, 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. 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 considered as part of this manual's discussion of the Public Meetings Law.

Q. What if I am an inmate of the state penitentiary and the rules do not permit me to possess a public record that I am seeking?

A. The Public Records Law does not authorize inmates to possess materials that are forbidden by the rules of the Oregon Department of Corrections. It may be possible to arrange for public records to be delivered to someone who is not incarcerated on your behalf.

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.

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.

Q. Must police officer notebooks be disclosed? Must access be given to police logs?

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. The fact that a document is currently a draft generally is not, in itself, a basis for withholding it. But it might be withheld if one or more specific exemptions apply to it. *See* discussion of ORS 192.502(1), Internal Advisory Communications Exemption.

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 taken into custody available for inspection?

A. 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 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, 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.²⁸⁵ 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.

²⁸⁵ See, e.g., 42 USC §§ 1301 *et seq.* (Health Insurance Portability and Accountability Act of 1996) and 45 CFR Part 160.

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.²⁸⁶ Because the only Oregon case concerning SSNs²⁸⁷ predates the Oregon Supreme Court's interpretation of ORS 192.502(2),²⁸⁸ 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,²⁸⁹ public bodies should not disclose any SSNs without advice from their legal counsel. Also, the 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.

²⁸⁶ 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) (see App C); *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) (see App C); *Oliva v. United States*, 756 F Supp 105, 107 (ED NY 1991) (see App C); *Swisher v. Department of the Air Force*, 495 F Supp 337, 340 (WD Mo 1980), *aff'd* 660 F2d 369 (8th Cir 1981) (see App C); *United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry v. Department of the Army*, 841 F2d 1459, 1466 (9th Cir 1988) (see App C).

²⁸⁷ *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) (see App C).

²⁸⁸ *Jordan v. Motor Vehicles Division*, 308 Or 433, 781 P2d 1203 (1989) (see App C).

²⁸⁹ 42 USC § 405(c)(2)(C)(viii).

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.²⁹⁰ 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.

²⁹⁰ 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).