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THE OREGON PUBLIC RECORDS ACT

Oregon has a longstanding policy in favor of access to public records. The general statement of legislative policy regarding public records has remained virtually unchanged for almost 140 years. An 1862 law originally granted Oregon citizens the statutory right to “inspect any public writing of this state, except as otherwise expressly provided by this code or some other statute.” General Laws of Oregon, ch 8, § 707, p 326 (Deady 1845-1864). Although the 1909 legislature limited that right to persons having “a lawful purpose,” Or Laws 1909, ch 98, the legislature deleted that restriction 52 years later and restored the general right to inspect any public record, subject to certain statutory exemptions, Or Laws 1961, ch 160, § 4. The Oregon legislature made a structural revision of public records law in 1973, gathering records statutes into ORS Chapter 192 and organizing the basic structure of the public records law as it is today. The current statement of legislative policy regarding public records, ORS 192.420, provides that “[e]very person has a right to inspect any public record * * * except as otherwise expressly provided by ORS 192.501 to 192.505.” A public record “includes 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.” ORS 192.410(4).

Oregonian Publishing Co. v. Portland School Dist., 329 Or 393, 399, 987 P.2d 480 (1999).

I. INTRODUCTION

“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.” ORS 192.420.

The passage above sets forth the basic premise of the Oregon Public Records Act (“OPRA”), ORS 192.410 - .505: “Freedom of information is now, by statute, the rule and secrecy the exception.” *Papadopolous v. State Board of Higher Education*, 8 Or App 445, 454 (1972). This is the fundamental policy underlying Oregon's Public Records Act. *See* ORS 192.410 *et. seq.* “Under the statutory scheme, disclosure is the rule. Exemptions from disclosure are to be narrowly construed.” *Guard Publishing Company v. Lane County School District 4J*, 310 Or. 32, 37, 791 P.2d 854, 857 (1990); *see also* *Attorney General's Public Records and Meeting Manual* at 26-27 (Oregon Department of Justice, 2014) (“Oregon courts interpret the exemptions of the Public Records Law narrowly, as does the Attorney General.”).

The legislative policy concerning public records is expressed in ORS 192.420 which provides: “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.” *City of Portland v. Rice*, 308 Or 118, 121 (1989).

Under the statutory scheme, disclosure is the rule, there is a “strong public policy favoring public access to government records.” *Papadopolous v. State Board of Higher Education*, 8 Or App 445, 454, (1972); *Jordan v. Motor Vehicles Division*, 308 Or 433, 438 (1989) (en banc). “Disclosure is the norm; exclusion is the exception that must be justified by the public body.” *Guard Publishing Co. v. Lane County School Dist.*, 310 Or 32, 39 (1990). Exemptions from disclosure are to be narrowly construed and courts will “presume” that the exemptions do not apply. *Guard Publishing Co.*, *supra*, 310 Or at 37; *Jordan v. MVD*, *supra*, 308 Or at 438-39; *Coos County v. Or. Dept. of Fish and Wildlife*, 86 Or App. 168, 173 (1987). The legislative history of the Act indicates that the legislature intended that exemptions be applied simply, quickly and with a large measure of uniformity. *Guard Publishing Co.*, *supra*, 310 Or at 37; *Pace Consultants v. Roberts*, 297 Or 590, 594 (1984).

The clear language of the Act itself and the rulings of Oregon Supreme Court as well as the Court of Appeals forcefully indicate that the burden is always on the public body to justify its action when denying a public records request. *See, e.g.*, ORS 192.450(1); *Guard Publishing Co.*, *supra*, 310 Or at 39; *Turner v. Reed*, 22 Or App 177, 182 (1975); *Papadopolous v. State Board of Higher Education*, 8 Or App 445, 458 (1972).

II. DEFINITIONS

Understanding and applying the definitions of key components of the Act is crucial for an effective use of the law.

The Act allows “**every person**” the right to inspect any nonexempt public record of an Oregon public body. ORS 192.420(1). This mandate extends to any natural person, corporation, partnership, firm, or association. *See* ORS 192.410(2). The identity or the requester and the reason for the request are completely irrelevant unless one of the disclosure exemptions allows consideration of such factors. *See, e.g.*, ORS 192.501 (certain exemptions conditionally exempts certain records from disclosure “unless the public interest requires disclosure in the particular instance.”); *see also State ex rel Frohnmayer v. Oregon State Bar*, 307 Or 304, 311 (1989) (lawyer who is subject of bar disciplinary proceeding may use Public Records Law to gather records in the same manner as a non-lawyer).

The term “**Public Body**” is very broadly defined to include “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(3). This definition must be viewed in context with ORS 192.410(5) which incorporates another large group of state entities covered by the Act as “agencies” within the meaning of a “public body.”

The term “**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.” ORS 192.410(5). It should be noted that “public corporations” such as the Oregon Health Sciences University or the Eugene Water & Electric Board also fall within the definition of “public body.” *See, e.g.*, ORS 353.100(1) (establishing that OPRA applies to OHSU), *In Defense of Animals v. OSHU*, 199 Or App 160, 112 P3d 336, 340 (2005) (applying OPRA to OHSU as public corporation); *see also, Trojan Horse Committee, et al. v. EWEB*, Lane Cty. Cir. Ct. No.# 16-95-10768 (1995) (same).

The term “**Public Record**” is defined to include “any writing containing 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.” ORS 192.410(4). This definition, illuminated by the sweeping mandate of ORS 192.420, applies to *all* government records of *any* kind. This definition is also expanded by the definition of “**Writing**” to include “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 electronic recordings.” ORS 192.410(6). Note that these definitions encompass email generated by public employees.

III. INITIATING A PUBLIC RECORD REQUEST

A. A request may be either oral or written. However, one should *always* submit the request as a written document (and retain a *signed* copy to the file) to maintain a record in the event that there are subsequent factual disputes, or a need to present evidence of the form and date of the record request. Preferably, the letter should be sent certified mail, return receipt requested.

1. Right to inspect. Agency may adopt reasonable rules regarding manner of inspection, public does not have a right to rummage through agency file cabinets.

2. The requester may request copies of public records, or simply inspection of the records.

B. Fees and fee waivers.

1. A public body may charge 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.” ORS 192.440(4)(a).

2. However, a public body “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.” ORS 192.440(5).

C. There is no set time limit for an agency's response to a public records request.

1. The agency must respond within a reasonable time.

2. “Three Strikes” rule. If no response, send at least three letters to public body before appealing their failure to respond as a denial of the records request.

D. Exemptions To Disclosure Of Certain Types Of Records.

1. The “conditional exemptions” of ORS 192.501. These exemptions require the agency to undertake a public interest “balancing test” in order to determine if the exemption applies. This is essentially a two-tiered process. First, the public body must first consider whether a given exemption applies. Second, notwithstanding the exemption, it must consider whether the public interest requires disclosure in the particular instance. *See, e.g., Guard Publishing*, 310 Or. at 38, 791 P.2d at 857. The burden of showing that a public record can be withheld is always on the

public body. ORS 192.490(1); *See, e.g., Guard Publishing*, 310 Or. at 38, 791 P.2d at 858. It is this interest that must be weighed against the public body's asserted interest in attempting to avoid public record disclosure.

2. The exemptions of ORS 192.502 are generally more absolute, they do not necessarily mandate the public interest balancing of ORS 192.501. However the first five exemptions of ORS 192.502, and several other exemptions contain exceptions to the exemptions, conditional language which allow the use of a public interest balancing test. Oregon courts have rules that an exemption allowing a document to be withheld may have a limited time duration, and that “secrecy would last only as long as there was a reason for secrecy” to protect the interest of the public body. *See Jensen v. Schiffman*, 24 Or App 11, 16 n.7, 544 P.2d 1048 (1976). The Oregon Supreme Court also has a long standing policy favoring a narrow construction of all public record exceptions. *See, e.g., Jordan v. MVD*, 308 Or 433, 438; 781 P.2d 1203 (1989).

3. Note that ORS 192.505 mandates that any nonexempt materials contained in the requested documents must be segregated (separated or blocked out) from the exempt portions and released to the public.

IV. APPEALING A DENIAL OF YOUR REQUEST

A. You may appeal a denial of your right to inspect or receive a copy of any public record, or fee waiver. ORS 192.450.

B. There are three routes of appeal.

1. If request is for a record from a local governmental entity, the appeal is to the local District Attorney. ORS 192.460.

- a. The D.A must respond within 7 days.
- b. Failure to respond within 7 days constitutes a denial and the requester may proceed to court.
- c. If the D.A rules against you, you may proceed to court.

2. If request is for a record from a state governmental entity, the appeal is to the State Attorney General. ORS 192.450.

- a. The A.G. must respond within 7 days.
- b. Failure to respond within 7 days constitutes a denial and the requester may proceed to court.
- c. If the A.G. rules against you, you may proceed to court.

3. If request is for a record from an elected body, the requester may proceed directly to circuit court. ORS 192.480, .490. The appeal is to the Circuit Court for Marion County or the circuit court for the county in which the elected official is located.

C. In all three circumstances, if court action is required,¹ the fully prevailing requester is entitled to reimbursement for court costs and attorney fees. ORS 192.490(3). This is a mandatory attorney fee award; the court must award costs and fees. If, however, the requester prevails only in part, then the court has discretion to withhold award of fees and costs. *Id.*

V. OTHER STATES' PUBLIC RECORDS LAWS

All states also have public records laws as well as some larger municipalities. State public records laws are not identical to FOIA; nor are state court interpretations of similar language in such state statutes necessarily the same as federal court interpretation of FOIA. Nevertheless, there is broad agreement on the basic propositions. Many of these laws are similar to Oregon's, but even if there are many similarities, you must be alert to recognize where there are differences. These distinctions may arise in regard to the breadth of coverage of an exemption from disclosure or in the implementation of response deadlines. Always review the specific law and regulation you are working with before you proceed. Be aware that merely because your failure to comply with a particular requirement is not raised immediately at the administrative level does not ensure that the problem will not come back to haunt you should you seek judicial review.

The citations for various state public records acts follows:

Alabama	Al. Code 36-12-40 <i>et seq.</i>
Alaska	A.S. 09.25.100 to .220
Arizona	Ariz. Rev. Stat. Ann. 39-121 to 1-24
Arkansas	"Freedom of Information Act of 1967" Ark. Code Ann. 25-19-101 to -107
California	"California Public Records Act" Cal. Gov. Code 6250 to 6270
Colorado	Colo. Rev. Stat. 24-72-201 to -206
Connecticut	Conn. Gen. Stat. Ann. 1-18 to -21K
Florida	Fla. Stat. Ann. 119.01 to .165
Georgia	Ga. Code Ann. 50-18-70 to 76
Hawaii	Hawaii Rev. Stat. Ann. 92F-11 to 19
Idaho	Idaho Code 9-338 to -347
Illinois	"Freedom of Information Act" Ill. Ann. Stt. Ch. 5, 140/1 to /11
Indiana	Ind. Code Ann. 5-14-3-1 to 10
Iowa	Iowa Code Ann. 22.1 to .14
Kansas	"Open Records Act" Kan. Stat. Ann 45-215 to 225
Kentucky	Ky. Rev. Stat. Ann. 61.870 to .884
Louisiana	La. Civ. Code Ann. 44:31 to :37

¹ Note that a requester who obtains a favorable appeal decision from a D.A./A.G. may become a defendant in a civil suit if the public body seeks judicial review. ORS 192.450(2). However, attorney fees are available only to a prevailing requester, not a public body. ORS 192.490(3).

Maryland	Md.Code Ann., State & Govt, 10-611 to 628
Massachusetts	Mass.Gen.Lw Ann. Ch.4, 7; Ch. 66,10
Michigan	“Freedom of Information Act” Mich.Comp.Laws Ann. 15-231
Minnesota	Minn. Stat. Ann. 13.03
Mississippi	“Mississippi Public Records Act of 1983” Miss.Code Ann. 25-61-1 to 17
Missouri	Mo.Ann.Stat. 109.180 to .190
Montana	Mont.Code Ann. 2-6-101 to 111
Nebraska	Neb.Rev.Stat. 84.712 to 713.05
Nevada	Nev.Rev.Stat.Ann. 239.005 to .040
New Hampshire	N.H.Rev.Stat.an. 91-A:1 to :8
New Mexico	14-2-1 N.M.S.A. 1978 et seq
New York	N.Y. Pub. Off.Law 84 to 90
North Carolina	N.C., Gen. Stat. 132-1 to 10
Oklahoma	Okla. Stat. An. Tit. 51,24A.1 to .18
Oregon	Or. Rev. Stat. Ann. 192.410 to .505
Pennsylvania	Pa. Stat. Ann. Tit. 65, 66..1 to .4
Rhode Island	R.I. Gen. Laws 38-2-1 to -14
South Carolina	“Freedom of Information Act” S.C. Code Ann. 30-4-10 to -110
South Dakota	S.D. Codified Laws Ann. 1-27-1 to -19
Tennessee	Tenn. Code Ann. 10-7-503 to -509
Texas	Tex. Gov. Code ann. 52.001 to .008
Utah	Utah.Code.ann. 63-2-101 to -207
Vermont	Vt. Stat. Ann.tit. 1, 315 to 320
Virginia	“Virginia Freedom of Information Act” Va. Code 2..1-340 to -346.1
Washington	Wash. Rev. Code Ann. 42.17.250 to .311
W. Virginia	W. Va. Code 29B-1-1 to -7
Wisconsin	Wis. Stat. Ann. 19.31 to .39
Wyoming	Wyo. Stat. 9-2-407