

# Records and Confidentiality

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**Also:**

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# What is a public record?

- **ORS 192.410(4)(a) defines a public record as being made up of three components:**
  - **Any writing that contains 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**

**Good business rule is to assume everything you write could be a public record.**

# What is a writing?

- A writing is defined in ORS 192.410(6) as
  - “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.”
    - ❖ Email
    - ❖ Sticky note
    - ❖ Submissions from dischargers/vendors
    - ❖ Phone call? (VOIP)
    - ❖ Duplicates

# Prepared, Owned Used or Retained

- **Records do not have to be prepared originally by the public agency to qualify as public records.**
  - **If the record is prepared by someone outside of the public agency but it contains “information relating to the conduct of the public’s business” and is “owned, used or retained” in the public agency’s records then it is within the scope of the Public Records Law.**
  - **Best way to protect a “public record” from required disclosure is to not have it become one.**

# Procedure for Responding to Public Records Requests

- **Refer to your procedure**
- **Written Procedure must include**
  - **Name of person(s) and address(es) to send request to**
  - **Amount and manner of calculating fees**
- **Don't have one? Develop it**
  - **Oregon Attorney General's Public Records and Meetings Manual (available online)**

# Procedure for Responding to Public Records Requests

- **Procedure ensures**
  - ❖ **Consistency and timeliness in response**
  - ❖ **Don't inadvertently waive a privilege or exemption.**
- **Make sure your staff are trained.**

# Acknowledging a Request

- **Responding to a written request involves:**
  - **The request itself (in writing)**
  - **Acknowledging receipt of the request**
    - ❖ **Form**
    - ❖ **Usually an estimate of the time and cost**
    - ❖ **“As soon as practicable and without unreasonable delay”**

# Stress on Reasonable Responses

- **“Proper and reasonable opportunities for inspection and examination of the records in the office of the custodian”**
- **Applies to nonexempt records**
- **Need to provide in alternative Formats – ADA**
- **Ask requester how want to receive the records**
- **Reasonable time period-10 Working Days**

# Approaches

- **What is a reasonable approach?**
  - **Working with citizens**
    - ❖ **Clarify, narrow request**
  - **Working with attorneys**
    - ❖ **Alternative to discovery – request subpoena**
  - **Multiple people want same document**
    - ❖ **Coordinate, suggest representative or viewing period**

What is not required

**To respond to a public records request,  
you are not required to create a public  
record.**

**In fact, DO NOT do so.**

# Review of Records

- **Before you provide the records for review, you need to review the records for possible exempt materials that need to redacted.**
- **Public Records Law is primarily a disclosure law but there are two types of exemptions where that information or record can be redacted or held back from disclosure:**
  - **Conditional Exemptions under ORS 192.501, and**
  - **Unconditional Exemptions under ORS 192.501.**

# Conditional Exemptions

- **36 conditional exemptions**
- **Contained in ORS 192.501**
- **Conduct a case-by-case balancing test**
- **Determine if withholding the information outweighs the public interest's in disclosure in the particular instance.**

- **“Public interest in disclosure”**
- **Not specifically defined**
- **Oregon Court of Appeals case stated legislature’s view:**
  - **“members of the public are entitled to information that will facilitate their understanding of how public business is conducted.”**

# Conditional Exemptions

## Some Conditional Exemptions are:

- **Records pertaining to Litigation**
  - ❖ **Puts public agencies on same footing as private parties**
  - ❖ **Work with your legal counsel to determine how and what can be protected**
  - ❖ **There are conditions**
- **Trade Secrets – Bids, Proposals, Permits**
- **Real Estate Appraisal Information**

# Unconditional Exemptions

- **37 “so called” unconditional exemptions:**
- **ORS 192.502**
- **Internal Advisory Communications**
  - ❖ **Purely factual materials**
  - ❖ **Preliminary to final determination within public body or between public bodies**
  - ❖ **Not a strong exemption. Oregon Court of Appeals has written opinions that give more weight to disclosure.**

# Unconditional Exemptions (continued)

## **Personal Privacy Exemption**

- **Needs to be Personal Information**
- **The release of which would constitute a “unreasonable invasion of privacy”**

# Other Unconditional Exemptions

**Records otherwise made confidential or privileged under Oregon law**

- **Attorney-Client Privilege**

**Records generally protected by attorney-client privilege also usually exempt under Oregon Public Records Law.**

# Confidential Submissions

- **Confidential submissions - ORS 192.502(4), five conditions have to be met**

**“Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure”**

# District's Industrial Permit Application

- **District's Industrial Permit Application form includes the following:**
- **“Any information submitted by an IU which is deemed “confidential” must be accompanied by a cover letter from an attorney representing the IU stating that the submitted information meets the definition of confidentiality per 40 CFR Part 403.14 and 40 CFR Part 2.”**

# District's SOP on Confidential Info.

**Information received that is marked “confidential” and accompanied by an attorney’s letter will be reviewed and documented by the Source Control Manager for applicability to the confidentiality rules. If it meets confidentiality standards as identified above, it will be sequestered in a locked drawer.**

# What do you do next?

- **Redact exempt materials**
  - **Blacking out the information if < one page**
  - **Remove each page containing the exempt information**
  - **May want to keep exempt materials in a separate file (CWS audit)**
- **Provide the requester either copies or the ability to review the non-exempt records**
- **Charge per your procedure (copies and any staff time)**

# Appeals of Exemption Decision

- **The requester may appeal your decision to withhold information pursuant to an exemption and request an order compelling disclosure to the following:**
  - **For State agencies or officials but not elected officials – requester can petition the Attorney General for an order compelling disclosure.**
  - **For entities that are not a state agency or elected official, requester may petition the district attorney in the county where the public body is located.**

# Other Public Agency responsibilities for Confidentiality

- **Fair and Accurate Credit Transactions Act (FACT Act) of 2003 as codified in the Oregon Identity Theft Act in ORS 646A.622(2) applies**

**“If you own, maintain or otherwise possess data that contains a consumer’s personal information must develop, implement and maintain reasonable safeguards to protect security, confidentiality and integrity of the personal information including disposal of data.” See ORS 646A.622**

# Personal Information

- **“Personal information”:**
- **(a) Means a consumer’s first name or first initial and last name in combination with any one or more of the following data elements, when the data elements are not rendered unusable through encryption, redaction or other methods, or when the data elements are encrypted and the encryption key has also been acquired:**
  - **(A) Social Security number;**
  - **(B) Driver license number or state identification card number issued by the Department of Transportation;**
  - **(C) Passport number or other United States issued identification number; or**
  - **(D) Financial account number, credit or debit card number, in combination with any required security code, access code or password that would permit access to a consumer’s financial account.**

# Notification of Breach

- **If a breach occurs, must give a notice of the breach to any consumer whose personal information was included in the information breached. Notice may be written, electronic, telephone, major statewide television and newspaper media**
  - **Made in most expeditious time possible and without unreasonable delay and consistent with law enforcement needs**
  - **Sufficient contact information to the consumers involved, be able to determine the scope of the breach and**
  - **Restore reasonable integrity, security and confidentiality**

Any Questions?

# Contact Information

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