

Protecting the public's right to know

A QUICK REFERENCE GUIDE TO OREGON'S PUBLIC RECORDS LAW

For elected and appointed local and state public officials, members of Oregon boards and commissions, citizens, and nonprofit groups

The guide is published as a public service by Open Oregon: a Freedom of Information Coalition in collaboration with the Oregon Attorney General's office.



“Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided...”

• Oregon Public Records Law

How to Use this Guide

This publication is a quick step-by-step guide to the Oregon Public Records Law for those seeking information from government as well as for those keeping the records. It is divided into 12 sections, and includes TIPS and EXAMPLES on accessing public records.

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The entire law may be found in Oregon Revised Statutes 192.410 to 192.505. Additional information may be obtained by sending an e-mail request to info@open-oregon.com or contacting Open Oregon, PO Box 172, Portland, Oregon 97207. For the Legislative Counsel text of the law as of the 2005 legislative session, go to www.open-oregon.com.

For a comprehensive analysis of the law, refer to the latest edition of the **Attorney General's Public Records and Meetings Manual**. The manual is reviewed and updated for consistency after each legislative session. Each new edition also incorporates appellate court decisions and Attorney General opinions interpreting the public records law. For information about purchasing the manual, go to www.doj.state.or.us/oregonians/pubs.shtml or call 503-378-2992, ext. 325, or write to Department of Justice, 1162 Court St. NE, Salem, OR 97301-4096.

THE SPIRIT OF OREGON'S PUBLIC RECORDS LAW

The state of Oregon has a policy of openness. The most important advocate for open government is the public itself. The news media often acts on the public's behalf in seeking public records to inform citizens about the work done in their name. Individual citizens also perform this watchdog function using the public records law to inform themselves about how well the government is functioning.

"Open records laws that are effective and well-understood are a fundamental component of democracy. Oregon's law ensures that public agencies conduct affairs in a transparent and accountable manner and provide that citizens have access to public processes."

• **Hardy Myers**
Oregon Attorney General

"Government can only serve the people when citizens have the tools they need to witness it in action. Public records give every American those crucial tools."

• **Bill Bradbury**
Oregon Secretary of State
Honorary Co-Chair, Open Oregon

"Public access to public records is an essential component for effective governance in a democracy. The Oregon Public Records Law enhances good government and serves the interests of the people of Oregon."

• **Dave Frohnmayer**
President, University of Oregon
Honorary Co-Chair, Open Oregon

1. OREGON'S PUBLIC RECORDS LAW

Oregon's public records law - ORS 192.410 to 192.505 - attempts to balance the need for efficient government with the public's need to know how government operates.

In 1973, Oregon joined many other states across the country in enacting the Public Records and Public Meetings Laws. At the time the Public Records law was passed, Oregon's law was one of the most sweeping in the nation. In the decades since, however, lawmakers have steadily added exemptions allowing more information to be kept from the public. While personal privacy was always protected by the law, recent heightened concerns about privacy, public safety and homeland security have caused agencies to further limit release of information. Ultimately, the law is intended to open government activities, not citizens' private lives, to the public.

The law makes an important distinction between elected officials and public bodies. The law applies to each similarly but two differences are noteworthy:

- The law imposes a seven-day deadline for elected officials to respond to a records request. Public bodies do not have a specific deadline; they simply must respond as soon as practicable and without unreasonable delay.
- The law provides for no administrative appeal of an elected official's denial; the requestor must file a lawsuit in court to pursue the denied records. Denials by non-elected public-body officials may be appealed to either the county district attorney or the state attorney general, depending on whether the agency is a state agency or a local agency; this appeal must precede the filing of a lawsuit.

TIP: Don't call it FOIA

The state public records law is similar to the federal Freedom of Information Act in some ways, but they are separate laws with different provisions. For information about seeking records from the federal government, go to the Reporters Committee for Freedom of the Press: <http://www.rcfp.org/foi.html>

2. POLICY

On its face, Oregon's public records law sounds simple. It applies to all government records and writings. The law favors disclosure as the rule, and agencies have the burden of proving an exemption allows them to withhold information.

In practice, though, the law is more complex. The attorney general's office, 36 county district attorneys and Oregon's courts all have a role in interpreting the application of the law.

3. WHO IS SUBJECT TO THE LAW

The law applies to any "public body," and it defines that term broadly: 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 the state. Schools, police and fire departments, county and state agencies, cities: all are subject to the public records law.

The public records law does not apply to private entities such as nonprofit corporations. Even some organizations that sound public or conduct some public functions are not public bodies. Oregon Public Broadcasting and the Oregon School Activities Association, for example, are not public bodies, according to the Attorney General's office.

In 1994, however, the Oregon Supreme Court ruled that the law applies to an entity that is judged the "functional equivalent" of a public body.

Ruling on private bodies

- Was the entity created by government or independently?
- Is the entity's functions traditionally performed by government?

- Does it have authority to make binding decisions or only recommendations?
- How much financial and non-financial support does it receive from government?
- Does the government employ the entity's officers and employees?
- What is the scope of governmental control over the entity.

TIPS for seekers of public records:

- Invest time in learning about the agency and the records it creates or maintains and routinely releases to the public. If you are seeking fire department records, find out what reports are generated after a house fire or a hazardous materials incident. That helps you later when you need to know what record to request. It helps the agency to know the specific document title because that's the easiest and most efficient process for the agency.
- All public bodies are required to follow state-approved schedules defining categories of records and how long they are to be maintained. These Records Retention Schedules act as an index to government records. Unless you specifically know the name of the record you are seeking, first contact the agency's Records Management program or officer. If the agency does not have a program, you may find additional information on the Oregon State Archives' Records Management website:
<http://arcweb.sos.state.or.us/banners/recmgmt.htm>.
- Work the chain of command: Overworked public employees may deny release of a record that is indeed public. They might be uncertain, wrong or just busy. Refer the request to a supervisor in the agency who might be more knowledgeable or have more authority. Do this in a courteous and non-confrontational way.
- Ask whether the agency employs a public affairs or public information official. That person typically is well-versed in the requirements of the records law and often is the person who responds to records requests.

- If the agency does not employ a public information specialist, ask the public employee to seek legal advice on the issue of releasing records. Often a quick phone call to the county counsel or the local district attorney clears up the matter.

4. HOW IT WORKS

Requests - by regular citizens, reporters, attorneys or investigators - can be made in person, by letter, e-mail or phone. Most agencies prefer that initial requests be made informally to discuss the specific needs of the seeker. Media members, for example, often begin with a phone call and, if requested by the custodian, will follow up with a more detailed written request.

5. SEEKERS VS. KEEPERS

While most public records are readily provided to those requesting them, contentiousness can arise between those seeking records and the custodians of public body records.

Because disclosure is the spirit of the law and most records are available for public disclosure, regular seekers of records often simply assume that the records they seek exist and are accessible. Conflicts can occur when record keepers are unaccustomed to requests or don't realize that their only concern should be whether the law exempts a record from disclosure.

Example

When responding to a public records request, custodians should:

- Make sure that any claim that the records are exempt from disclosure is supported by the law.
- Make sure that processing fees are reasonable.

- Make sure that the seeker's reason for wanting the record doesn't inappropriately influence the response.

While a seeker's approach should not technically influence whether or not a custodian will release a record, the projection of a professional, courteous and flexible demeanor can go a long way in enlisting the record holder's cooperation.

Custodians say that most records seekers who work with them daily wisely try to build a level of trust with record keepers.

Example | Tips for those requesting records include

- Familiarization with the department to which the request is made. If you are uncertain which department is responsible for the records, ask.
- Patience, since many offices handle dozens of requests each day. Most requests are handled by workers in addition to their normal responsibilities.
- Avoid using offensive language and don't threaten the staff with lawsuits.
- Be clear with a request, which helps speed the information-gathering process. A written request could help with clarity.
- Don't stiff the record keeper, i.e. request a record, agree to the cost and then not follow through.
- A seeker does not need to provide a reason for wanting the records; however, it is often helpful to explain why disclosure of the record is in the public interest so that the proper information can be obtained.

TIP: Make sure to follow through

- If you requested records, be prompt at picking them up and paying for them.
- If, for some reason, you cannot get them right away, let the custodian know you still plan to pick them up.
- If you plan to make future requests, ask the custodian of the records if there is anything you can do to make filling the next request easier.

6. CITE THE LAW

A request in writing should: **1.** indicate that the request for records is allowable under the Oregon Public Records Law; **2.** be as specific as possible about the record sought, with record title and date if possible; **3.** include a request that the agency cite any exemption it relies on in its response; and **4.** include a provision that fees over a specified amount (say \$10 or \$50, depending on the scope of the request) should be discussed in advance. See the “Automated Form Letters” at www.open-oregon.com.

▶ Example | Tips for a request

- Type of document sought, being as specific as possible about the subject matter.
- Specific date ranges of the document.
- Other information that can narrow the search, such as dates and names.
- Ask the custodian whether the record is kept in paper or electronic form.
- To keep costs at a minimum, especially for voluminous requests, ask first to inspect a file, then ask for copies of relevant pages. (Note: the agency could charge for staff time, so this may end up not being less expensive.)

If a seeker is uncertain of the title or exact nature of a specific document, a good approach is to tell the custodian what you are trying to learn and enlist his or her help in seeing if that information can be retrieved through public records.

TIP: Don't be adversarial

- Start with a phone call or a visit to ask about the availability of the records you are seeking. You might want to, or be asked to, put your request in writing, but a conversation in advance can clear up many issues. Some questions to ask: How hard is it to make the record available? How much time does the agency estimate it will need?

Is the agency even the custodian for the record at issue? What is the proper name for the record you are seeking?

- Keep in mind that records requests can add to busy government employees' regular duties. That's not to say they are not required by law to respond, but it is worth remembering that if you can make the task easier you might get the records more quickly.
- If you believe you ultimately will be in an adversarial position with the agency, start with a written request.
- Ask the agency to cite in writing any exemption it is relying on for withholding the information.

The law does not give a deadline for agencies to respond. Instead, it says the public body shall respond as soon as practicable and without unreasonable delay. The timing may depend, for example, on the size and scope of the request, how accessible the records are and whether legal review is necessary.

7. WHAT IS EXEMPT FROM DISCLOSURE UNDER THE LAW

The guiding principle of the records law is that every public record is subject to disclosure unless it is specifically exempted. However, most exemptions do not prohibit disclosure; they merely exempt the public body from the law's mandate to disclose public records.

Custodians presented with a records request should first ask themselves whether disclosure is prohibited by certain sections of the public records law or by another state or federal law.

If not, then ask whether the record is subject to a conditional exemption. Many exemptions are conditional in nature and disclosure is favored.

Examples

- Police might withhold investigatory information compiled for criminal law purposes if untimely release would compromise a specific investigation.
- Public bodies might withhold records generated by the threat of – or filing of – litigation if release would give a plaintiff an advantage in that litigation. Records qualifying for this exemption must be records developed for the litigation rather than records from ordinary public body business.
- Public bodies might withhold information regarding their real estate transactions if release might give the other party an advantage in negotiations.
- While the intent of the records law is to create a transparent government, it is mindful of personal privacy.

Technically, no such balancing is required for “unconditional” exemptions because the Legislature already has struck the balance of these competing interests and has concluded that confidentiality interests outweigh public disclosure interests as a matter of law. These include public employee addresses, Social Security numbers, birth dates and telephone numbers, as well as personal privacy information that would “constitute an unreasonable invasion of privacy.”

While the section of the law on “unconditional” exemptions does not specifically contain the “public interest” stipulation, some specific exemptions do contain language of condition. One of those exceptions, for example, involves the internal advisory communications exemption, which protects the confidentiality of advice and observations a public employee gives to a superior or associate.

However, the public body must show that the public interest in encouraging frank communication between its officials and employees clearly outweighs the public interest in disclosure.

8. PUBLIC INTEREST VS. CONFIDENTIALITY

The phrase “public interest in disclosure” is not defined in the records law. The Oregon Court of Appeals has stated, however, that the law “expresses the Legislature’s view that members of the public are entitled to information that will facilitate their understanding of how public business is conducted.” Similarly, the court has characterized the public interest in disclosure as “the right of citizens to monitor what elected and appointed officials are doing on the job.”

Federal courts have ruled that seekers must identify the public interest in disclosure with “reasonable specificity” whether they are simply seeking records or waivers of fees. Relevant specific factors include the seeker’s identity and purpose, the character of the information, whether the information is already in the public domain, and how able the seeker is to disseminate the information to the public.

For that reason, even though the identity and motive of anyone requesting a public record are considered irrelevant and are not required by law, the fact a news reporter is requesting it can weigh in favor of release.

The seeker’s motive (government accountability, say) and ability to spread the word (quickly and widely) often become deciding factors on whether a conditional exemption or disclosure shall rule.

Example

- Community concern can equal public interest. In one case, a district attorney ordered police shooting reports released because “(t)his matter has been one of great community concern ... (and) (f)ull disclosure can only prompt a more intelligent and informed public debate on the issues involved.”
- Public interest can mean furthering the public’s watchdog role and citizens’ interest in transparency. When a secret agreement

between an Oregon port and private companies was ordered released, the public interest was described this way: "It is inappropriate for a public body ... to participate with certain private enterprises in an investigation and evaluation of the pollution of the public waterways under circumstances hidden from public view. The public interest is not served by such secret agreements."

- There is more public interest in records involving top officials and - in general - when public safety, financial oversight or a pattern of problems is involved. A district attorney ordered a city agency to release its investigative findings in the public interest because "we are dealing with a high ranking public employee responsible for the expenditure of the public's money."

TIP: Keep lines of communication open

- If the request is routine, include in your written request a deadline. You can say that if you do not receive the records or a response by 5 p.m. on a specified date, you will consider the lack of response a denial for purposes of appeal, even though that determination is not binding. However, make sure your deadline affords the agency a reasonable time to respond.

- If you are not sure which record will be of the most use to you, narrow your request. Once you have reviewed one record, you can decide whether it is helpful. You can then go back and ask for the same records for a longer time period, for example. Additionally, you can ask the records custodian for advice about the types of records most applicable to your request.

- If an agency refuses to release a record, ask for more information about what - generally - the record contains. If all of the record is public, except for one section that includes someone's Social Security number - that discussion may help the agency worker realize he or she needs to redact the exempt section and release the rest of the record.

- If the agency balks at releasing records, ask it to briefly describe the records it has and which exemption it thinks applies to each record.

9. HOW RECORDS ARE MADE AVAILABLE

The “custodian” of the public record is the public body or person mandated to create, maintain, care for or control the records. The custodian is required to provide “proper and reasonable opportunities for inspection and examination” of such records. In short, custodians, or record holders, are directed to take “reasonable” steps to accommodate members of the public while they inspect records. That often includes copying of records, but custodians are not required to “create” a record for a seeker.

Custodians are required to adopt “reasonable” rules necessary to protect their records. For example, people requesting information don’t have the right to rummage at will through file cabinets, file folders or electronic files. The inspection of original documents that are not exempt from disclosure is ordinarily allowed if requested, but administrative measures may be adopted to supervise review of such documents.

10. HELPFUL HINTS FOR CUSTODIANS

- Designate one person to coordinate responses to requests.
- Make sure to listen to the seeker’s request. Not all requests for information need to be directed to the agency’s law office or risk management.
- If your agency is not responsible for the records, attempt to find the proper agency. Most records requests are made by people who are not familiar with government and they may be intimidated or not fully understand the bureaucracy. The more times a person is bounced from office to office, the more likely the situation will become adversarial.
- Clarify whether the seeker merely wants to inspect the records or actually wants copies.

- Seek clarification if a request is ambiguous, overly broad or misdirected.
- Estimate the time and expense required to respond.
- Consider whether any exemptions apply; if so, whether the public body wants to disclose the record despite an exemption.
- If you believe a record is exempt, discuss the request with a supervisor or anyone who may have more experience with such requests.
- Release of records may be delayed to consult with legal counsel about exemptions.
- When denying a request, cite the specific exemption(s) on which you rely.
- If no exemptions apply, coordinate release of the records in a timely manner.

11. FEES

Under the law, a public body may require a person to pay for the expense required to release public records. Fees are calculated to reimburse the agency for its “actual cost” in summarizing, compiling or tailoring a record to meet the person’s request - and no more. Charges may include time spent locating the records, reviewing in order to redact exempt material, supervision, attorney time, and copying and sending records.

Seekers who regularly request public records, such as media representatives, are often granted fee waivers or reductions. They ensure a fee is established before the work begins, and many will ask for a fee waiver if, in their opinion, the release of specific records is in the public’s interest.

Example

- A neighborhood association president seeking records concerning military aviation safety at an airbase near the neighborhood – to be disseminated to the general public – may satisfy the public interest standard for a waiver if it is demonstrated that fee requirements inhibit the neighborhood’s ability to obtain the government records in question. (Note: a more common reason to waive or reduce the cost is in instances in which it would cost more to calculate the fee than simply provide the requested record.)

Fee waivers are up to the agency, which can charge only a “reasonable amount.” The public body is directed to weigh the public interest issue when deciding on a waiver or reduction.

Agencies, however, are not required to grant a complete fee waiver, even if the public interest test is met. A seeker dissatisfied with a denial of either a waiver or a reduction may petition the attorney general or district attorney in the same manner as a person appeals when inspection of a public record is rejected.

TIP: Go narrow first

- To keep fees low, ask for just one document, review it and tailor your broader request.
- Ask to inspect the documents, rather than asking for copies. (Note: this could still cost the requestor in staff time.)
- Agencies should use lower-wage workers when possible, rather than top managers, to keep down the hourly cost of staff time assessed to seekers.

12. HOW TO APPEAL A DENIAL

If the initial request for a record is denied, the custodian should be prepared to give a written explanation for the refusal. It is suggested that upon first denial of access by a subordinate agency employee, the requestor should seek a decision at a higher agency level. In some cases there is a

negotiation that allows the release of portions of a record while protecting the privacy of those involved.

Make sure you have a written record of your original request and the denial. These documents will help with your appeal.

The offices of the state attorney general or local district attorney become involved when a record keeper has denied a citizen access to records or if the custodian has exceeded the "reasonable" amount of time responding to the request.

Once a public body denies a request, the seeker can file a public records petition with either the local district attorney or the state attorney general. See the "Automated Form Letters" at www.open-oregon.com.

▶ Example

The appeal should include:

- The name of the agency from which the records were requested and denied;
- Name of the custodian of the record and how to contact him or her;
- A copy of the denied request;
- A statement that the request was denied, and, if known, who denied it and when;
- The written response from the public agency, if available;
- Other information that clarifies the seeker's argument that the record should be disclosed.

Since the records law is one of disclosure and many of the exemptions are voluntary, the attorney general or district attorney may simply recommend that the public body in question release the records - even if they could be covered by an exemption. (Note: the attorney general or district attorney applies the law. Whether to choose to assert a

discretionary exemption that covers a requested record is for the agency to decide.)

If the agency refuses to disclose voluntarily, a petition for a public records order can be submitted to the attorney general for state agencies or district attorney for local public bodies. An order is issued within seven working days – to either deny the appeal or issue an order that the record be disclosed.

If a petition is denied, the requestor may still file a lawsuit in circuit court to try to force disclosure.

If a petition is granted, the public body has seven business days to decide what to do and then seven more days to actually do it. Typically, when ordered to release the records, agencies do so promptly. If the agency wishes to fight the order, it must file suit against the requestor in circuit court.



What is Open Oregon?

Open Oregon: A Freedom of Information Coalition is a nonprofit educational and charitable organization with a single purpose: to assist and educate the general public, students, educators, public officials, media and legal professionals to understand and exercise:

- Their rights to open government.
- Their right and responsibilities under the Oregon public records and meetings laws.
- Their rights under the federal Freedom of Information Act.

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Go to www.open-oregon.com for additional copies of this guide and other information about public records and meetings.

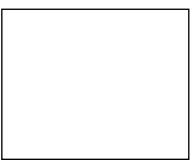
Funding for this project came from the National Freedom of Information Coalition through a generous grant from the John S. and James L. Knight Foundation.



A Freedom of Information Coalition

P.O. Box 172

Portland, Oregon 97207-0172



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