



MIKE SCHMIDT, District Attorney for Multnomah County

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January 8, 2024

Monica Samayoa
Reporter
Oregon Public Broadcasting
7140 S. Macadam Avenue
Portland, Oregon 97219

Ken McGair
Sr. Deputy City Attorney
Portland City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Monica Samayoa challenging the withholding of Clean Energy Tax
payor information by the City of Portland

Dear Ms. Samayoa and Mr. McGair:

Counsel for Oregon Public Broadcasting (OPB), on behalf of climate reporter Monica Samayoa, has petitioned this office for an order requiring the City of Portland to release “the name of all businesses that paid into the Portland Clean Energy Fund for the year of 2022 and the amount paid by each business.” Ms. Samayoa submitted this request to the City of Portland on October 19, 2023. The City denied the request on October 30, 2023, citing Portland City Code section 7.02.230. After further communication, the City further asserted exemption under ORS 192.355(4), which exempts certain confidential submissions. This petition ensued.

In its reply to the petition, the City withdrew its claim of exemption under ORS 192.355(4), a concession that is well-taken, and instead asserts the records are exempt under the following: ORS 192.355(9), the catch-all provision for records made confidential elsewhere in Oregon law; ORS 192.355(10), which permits agencies to assert exemptions on behalf of another agency; and ORS 192.345(5), which exempts production, sale or purchase records submitted for determination of a fee. The City has made the record at issue available for our review pursuant to ORS 192.422(2).

For the reasons discussed below we grant the petition in part.

DISCUSSION

A. Standing and Third-Party Submissions

In addition to the statutorily required response from the City under ORS 192.422(2), this office received a submission from counsel on behalf of the Portland Metro Chamber (PMC) and the Oregon Business & Industry Association (OBI), two organizations with members whose tax information is contained in the disputed record. OPB has submitted an objection to our consideration of this submission on legal and equitable grounds.

This office has historically been willing to consider information that bears on a public records petition, regardless of source, if it assists us in properly applying the public records law in a particular case. Submissions from interested third parties usually fall into four categories:

- 1) Factual information necessary to evaluate the facial applicability of an exemption asserted by a public body.
- 2) Contextual information that bears on the public's interest in disclosure for purpose of evaluating a conditional exemption.
- 3) Legal argument and analysis as to why a claim of exemption asserted by a public body should or should not be sustained.
- 4) A claim of exemption not previously raised by the public body and any legal or factual argument in support.

A third party has no statutory right to intervene in a public records proceeding before the district attorney and, likewise, has no ability to independently assert exemptions in such a proceeding. ORS 192.422(2) (“The *public body* shall thereupon transmit the public record disclosure of which is sought, or a copy, to the Attorney General, together with a statement of *its* reasons for believing that the public record should not be disclosed.”) (emphasis added). This is, in part, because even if a record is covered by a public records exemption, a public body is nonetheless free to elect to release it under most circumstances.¹ *Jordan v. MVD*, 308 Or 433, 444 (1989) (Gillette, J. concurring) (“Although the agency is permitted by the statute to refuse to disclose information of this kind under these circumstances, it is not required to keep such information confidential. The language [...] is permissive, not mandatory. *Oregon AFSCME Council 75 v. DAS*, 150 Or App 87 (1997) (“Even if information is exempt, [former] ORS 192.502 does not prohibit disclosure. The agency has the discretion to decide whether to disclose the records.”)

Whatever equitable remedies a third party may have in circuit court, there is no analog in the sub-judicial adjudication process created by ORS Ch. 192. As such, this office will not consider arguments and assertions in the fourth category above.² We will continue to consider timely-received submissions in the first three categories from any person or entity and will give them whatever weight is appropriate to the circumstances.

The only argument raised by PMC and OBI, and not raised by the City, that we will address, is that this office lacks jurisdiction to hear the petition because the underlying records request was not properly a public records request. Courts have an independent obligation to

¹ A public body may contract or otherwise legally obligate itself to not electively release exempt information, and a private party may be able to litigate a claim against a public body to enjoin it from doing so, but that is not a claim that can be considered in this forum. Certain exemptions or redactions are mandatory, but they are the exception. See, e.g. ORS 419B.035 (child abuse reports), ORS 192.377 (personal information submitted in confidence), ORS 192.345(40)(c) (facial features in body worn camera footage).

² Therefore we reject, without consideration on the merits, PMC and OBI's assertion that these records are exempt under ORS 192.355(8), ORS 192.345(2), ORS 317A.149, ORS 192.355(2), and IRC § 6103.

ensure they have jurisdiction, whether or not it is raised by the parties, and we see no reason that this principle would not likewise apply to sub-judicial adjudication in this forum. See, e.g., *Hood River County v. Stevenson*, 177 Or. App. 78 (2001) (“A jurisdictional question need not be preserved by a party, much less raised at a specific point in a proceeding, for a court to consider it. Courts have an obligation to consider jurisdictional issues *sua sponte*, because courts lack ability to enter judgments in cases where no justiciable controversy exists.”)

Here, that argument is readily disposed. Although the phrasing of the request here refers to information, as opposed to any particular record, a record with the information does exist (we have been provided it). The City understood it as a public records request and treated it as such. And, finally, the data sought were defined by “concrete criteria to frame what records are and are not responsive” and were “identified as precisely as [requestor] is able to.” *Petition of M. Kessler*, MDCA PRO 21-40 (2021).

The “record” in this case is data stored in a city database, which must be accessed under the public records law using the same tools and protocols that the City uses to access it for its own purposes. See *Petition of A. Kessler*, MCDA PRO 20-12 (2020) (“the public records law does apply to all of the data contained in [a] database, which the City must provide (if not otherwise exempt) to a requestor to the extent it is able with the processes that it regularly uses to access that data for its own purposes.”) (emphasis in original). Considering the factors above, petitioner’s request was a public records request and we have jurisdiction to adjudicate its denial by the City. ORS 192.415(1).

We turn, then, to the merits of the exemptions asserted by the City.

B. Transferred Records – ORS 192.355(10)

ORS 192.355(10) exempts from disclosure,

Public records or information described in this section, furnished by the public body originally compiling, preparing or receiving them to any other public officer or public body in connection with performance of the duties of the recipient, if the considerations originally giving rise to the confidential or exempt nature of the public records or information remain applicable.

The City urges us to conclude that, because tax information of the sort requested here would be exempt from disclosure if it were in the custody of the Oregon Department of Revenue that, therefore, this section exempts it if in the possession of the Portland Bureau of Revenue. The City bears the burden of establishing every element of any asserted exemption and, here, the City has provided no evidence that the information was “furnished by” Department of Revenue to the Bureau of Revenue. Indeed, the City’s own argument in support of this exemption acknowledges that it was not:

[I]f the City did not require taxpayers to submit this information on its Clean Energy Tax return, the same information would only exist on a state or federal corporate tax return which would be exempt from disclosure and prohibited from being disclosed. If the Oregon DOR or IRS provided it to the City in order to compute the Clean Energy Surcharge (something that occurs in other tax

contexts) it would clearly be exempt under ORS 192.355(10). For the same reason it should similarly be exempt if provided by the taxpayer.

Letter of Ken McGair (December 5, 2023) at 5.

The City has not sustained its burden of establishing that ORS 192.355(10) exempts this information from disclosure.

C. Other Provisions of Oregon Law – ORS 192.355(9)

ORS 192.355(9)(a) unconditionally exempts from disclosure,

Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

The Portland City Code 7.020.230 provides,

It is unlawful for any City employee, agent or elected official, or for any person who has acquired information pursuant to Section 7.02.240 A. and C., to divulge, release or make known in any manner any financial information submitted or disclosed to the City under the terms of the Business License Law, unless otherwise required by law.

PCC 7.020.230 on its face unambiguously prevents the City from complying with the public records request at issue. The more difficult question is whether or not PCC 7.020.230 can be harmonized with the State public records law.

OPB's argument on this point is straight forward: ORS 192.314 provides that all public records shall be subject to inspection, except as expressly provided elsewhere in Oregon law. To read ORS 192.355(9) to include any local confidentiality laws would, in OPB's opinion, create a hole in the public records law so large as to render it ineffectual at the local government level. That is to say, if any local public body could legislate confidentiality for any record it did not wish to release, that would subvert the "strong and enduring policy that public records and governmental activities be open to the public" that is the bedrock of the public records law. *Jordan v. MVD*, 308 Or 433, 438 (1989). Lastly, OPB cites *City of Portland v. Bartlett*, 369 Or 606 (2022), for the proposition that a local law may not override a provision of the State public records law requiring disclosure.

In *Bartlett* the Oregon Supreme Court determined that notwithstanding the City of Portland's legislation surrounding the confidentiality of its attorney-client communications, State public records law nonetheless required their release after 25 years. *Id.* at 625 ("State and local substantive laws can and do operate concurrently, but, when they are in conflict the state law will displace the local law.") (internal quotations omitted). The Public Records Law, the Supreme Court found, did not run afoul of the City's constitutional home rule authority because "the public records law ... simply has no effect on the 'structure and organization' of the city's government: It does not limit or alter the city's form of government, its charter's locus of governmental authority, or the procedures for adopting ordinances." *Id.* Put simply, the Oregon Public Records Law overrides any conflicting provision of local legislation.

The City acknowledges the holding in *Bartlett*, but focuses on what it means for there to be a “conflict” between a State and local law. In this case, the City urges, there is no conflict because State law provides that this type of tax information is exempt in the custody of the Oregon Department of Revenue. Therefore, the City argues, a local law providing that such information is exempt when in the custody of a local revenue agency is in harmony, not conflict, with state law.

The City also cites two prior orders of this office, *Petition of Schmidt*, MCDA PRO 15-31 (2015) and *Petition of Law* MCDA PRO 14-25 (2014), in support of its position. In *Law* DA Underhill found transient lodging tax information in the possession of the City of Portland exempt from disclosure under ORS 192.355(9). The City argues the same rationale applies to the Clean Energy Tax information. We disagree. The language used in *Law* is cursory, and arguably open to the City’s interpretation, however *Law* cites ORS 320.330 as the State law authority for the confidentiality of the information at issue. ORS 320.330 expressly provides that the State law confidentiality provisions for State income tax returns apply in the context of the transient lodging tax and, critically, “to the transient lodging tax collector required to collect the tax.” In that case, the City’s Bureau of Revenue collected the tax.

Schmidt likewise does not assist in resolving the presented question. In *Schmidt* this office wrote:

The city’s reliance on its own ordinances to exempt records from disclosure under the State’s public records law holds up only if the Portland City Code is considered “Oregon law” for purposes of ORS 192.355(9)(a). Because of our disposition below, we need not definitively answer this question today.

Schmidt at 2. This further reinforces our reading today of *Law* as not having held that a City confidentiality rule applied to records by way of ORS 192.355(9)(a). Had it so held, the question would not have remained open the next year in *Schmidt*. In any event, both *Law* and *Schmidt* predate *Bartlett*, which would override any prior inconsistent rulings.

Turning to the merits of that question, we believe OPB has the better of this argument. With very few exceptions, the provisions of ORS 192.345 and 192.355 do not specify what public records must be released; the legislature has already done this on a blanket basis as the foundational premise of the public records law. ORS 192.314 (“Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.338, 192.345 and 192.355.”) Any local law making a record confidential conflicts with ORS 192.314 and, per *Bartlett*, cannot prevent release of an otherwise non-exempt public record.

As further support for this position, OPB argues that prior to the enactment in 1987 of what is now ORS 192.355(9), the public records law expressly enumerated all the statutes that created confidentiality provisions. There were no local ordinances among them. ORS 192.500(2)(h) (1985). Explaining the decision to switch from a comprehensive catalog of statutes to a catch-all, the Supreme Court wrote:

[B]efore 1987, the public records law exception for records that were confidential or privileged “attempted to list every *statute* outside the public records law that in

any way prohibited or restricted disclosure of public records,” but the legislature abandoned that effort in favor of the catchall exemption because of the difficulty of maintaining a comprehensive list when *statutes* were amended, added, and repealed so frequently.

Bartlett at 615-16 (emphasis added) (quoting *Oregonian Publishing v. Portland School Dist. No. 1J*, 329 Or. 393, 399 (1999)). Again, we agree. Prior to 1987, it was unambiguous that the public records law did not give force to local government confidentiality provisions. Nothing in the 1987 amendment, as elaborated by the Supreme Court in *Bartlett* and *Oregonian Publishing* gives any basis to conclude the legislature intended to change that. Where the legislature intends to give a local governmental body the authority to enact confidentiality regulations that have the force of public records exemptions, it does so expressly. See, for example, ORS 342.850(8) (authorizing school boards to create rules governing access to teacher personnel files). See also, *Petition of Loiselle*, Att’y Gen. PRO (March 6, 1996) at n.3 (“This exemption applies only if the records are protected by a statute outside the Public Records Law. [...] Absent a specific statutory provision making the records confidential (or authorizing the department to do so), the department’s administrative rule would not trigger the exemption in ORS 192.502(8) [now numbered ORS 192.355(9)]”).

This construction of ORS 192.355(9)(a) is consistent with the Oregon Supreme Court and Court of Appeals’ direction that public records exemptions are to be interpreted narrowly and, if presented with two ways to read a public records statute, we must choose the one that favors disclosure. *Guard Publishing v. Lane County School District No. 4J*, 310 Or 32, 37 (1990) (“disclosure is the rule. Exemptions from disclosure are to be narrowly construed.”) *Colby v. Gunson*, 224 Or App 666, 676 (2008) (“if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails.”)

Although we find that PCC 7.020.230 applies to the information contained in this record, we do not find that it provides a basis to exempt the record from disclosure under the Oregon Public Records Law.

Perhaps if the legislature were to consider the question, it would grant local governments the authority to keep business tax information confidential just as it has done for the state government. However, the Clean Energy Tax, Measure 26-201 (2018) was approved by voters in the absence of such legislation. Until such time as the legislature chooses to act in this area, we must interpret the law the legislature and voters have written, not the law we think it might be prudent for them to write.

D. Production, Sale, or Purchase Records – ORS 192.345(5)

This section conditionally exempts from disclosure,

(5) Information consisting of production records, sale or purchase records or catch records, or similar business records of a private concern or enterprise, required by law to be submitted to or inspected by a governmental body to allow it to determine fees or assessments payable or to establish production quotas, and the amounts of such fees or assessments payable or paid, to the extent that such

information is in a form that would permit identification of the individual concern or enterprise.

As a threshold matter, this exemption applies only “to the extent that such information is in a form that would permit identification of the individual concern or enterprise.” The public records law requires the segregation of exempt and non-exempt information. ORS 192.338. Even under an expansive application of this section to the present facts it would reach only a record including both the name and the dollar amount of that business’ payment.

That is to say a release of a list of names of companies who paid into the Clean Energy Fund, on its own, would only provide information that each business on the list had in excess of \$500,000 in retail sales revenue derived from the City of Portland and \$1 billion in total retail sales. PCC 7.02.100(N). Such information is not a “production record[], sale or purchase record[] or catch record[], or similar business record[]” or “the amounts of such fees ... paid.”

Likewise, a list of the dollar amounts of payments to the Clean Energy Fund, divorced from the name of the company that made the payment, is not a “form that would permit identification of the individual concern or enterprise” and, thus, not exempt under this section.

The remaining question then is whether a record containing, as petitioner requested, an association between each business and the amount it paid would fall within this section. There are few Attorney General opinions, and no judicial opinions, construing this exemption.³ Moreover, the terminology used in the exemption, particularly “private concern or enterprise,” is not used elsewhere in Oregon law, so we cannot import analysis from related contexts to inform our analysis.

OPB proposes that we evaluate how closely held a company’s financial information is in determining if the fee is a “private concern or enterprise.” The City does not present a specific argument as to what this phrase means or to what specifically it relates. The Attorney General has, albeit summarily, stated that the phrase used here is synonymous with “private business.” *Petition of Nielson*, Att’y Gen. PRO (12/27/93). We agree that finding “private concern or enterprise” synonymous with “private business” is the most natural reading of the phrase in context.

Lastly, the City argues that disclosure of the fee, which is all OPB is asking for, would readily permit the calculation of the business’ sales records. That may well be the case, but we need not go that far. ORS 192.345(5) not only exempts sales records but the “amount” of fees generated from those records. Under the Clean Energy Tax, each qualifying business has to submit a tax return to the City containing its revenue generated within the City and the amount of tax that it owes on that revenue. This constitutes “sale ... records ... required by law to be submitted to ... a governmental body to allow it to determine fees ... and the amounts of such fees.”

³ We are aware of only three, the most recent of which is almost 28 years old: *Petition of Loiselle*, Att’y Gen. PRO (March 6, 1996) (information about fishing trawler location drops); *Petition of Nielson*, Att’y Gen. PRO (December 27, 1993) (individual business lottery revenue data); and *Petition of Bourgeois*, Att’y Gen. PRO (October 22, 1987) (production records showing income of certain fishing vessels).

ORS 192.345(5) is a conditional exemption, meaning that it only applies unless the public interest requires otherwise. It is clear to us that the general consensus of law is that tax information is to remain confidential. ORS 314.835 renders such information about local income taxes confidential in the possession of the State of Oregon. IRC § 6103(a) renders such information on federal tax returns confidential in the possession of any state, federal, or local government official. The technical failure of the law to not likewise unconditionally protect locally-generated tax information in the custody of a local government does not create a public interest in the information's release.

As such, we find that ORS 192.345(5) exempts a record that associates the name of a business paying into the Clean Energy Fund with the amount it paid into the Clean Energy Fund, and the public interest does not otherwise require its release. However, we also conclude that ORS 192.345(5) does not exempt the information in the City's database to the extent it is produced in a format that does not create such a linkage. Put differently, the request here requested three pieces of information: 1) the names of businesses subject to the Clean Energy Tax; 2) the amounts paid by each business; 3) a connection between each name and the amount that business paid. We conclude that the first two are not exempt under this section but the third is. Pursuant to ORS 192.338 the City must segregate the exempt from the non-exempt and provide the non-exempt to petitioner.

ORDER

Accordingly, the petition is granted in part. The City of Portland shall promptly produce records responsive to the portions of petitioner's request seeking names and dollar amounts in such a format as to not associate any individual business name with any dollar amount, or, within seven days, provide notice of intent to initiate further proceedings pursuant to ORS 192.411(2). This production is subject to the payment of fees, if any, as authorized by ORS 192.324(4).

Regards,

A handwritten signature in black ink, appearing to read "Mike Schmidt", with a stylized flourish at the end.

MIKE SCHMIDT
District Attorney
Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.411(2), 192.415, and 192.431(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

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Petition of Monica Samayoa

Cc: Jon Bial, OPB

William Rasmussen, Miller Nash LLP

Nikki Dobay, GreenbergTraurig, LLP