

# Responding to Public Records Requests

Legal Requirements, Best Practices,  
Common Mistakes and How to Avoid Them



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## Table of Contents

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Introduction.....	1
Records Retention.....	1
Cell Phones – Personal v. Public .....	2
What Constitutes a Public Records Request?.....	2
Are you the custodian? .....	2
Timeline for Response.....	3
Upon receipt of a public records request .....	4
Fees .....	5
Segregation of Exempt and Non-Exempt Records .....	6
Information vs. Records.....	7
Public Interest.....	7
Asserting Exemptions.....	8
Computerized Records.....	10

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## Introduction

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There are a lot of traps for the unwary in responding to a public records request. Experienced public records lawyers can take advantage of these provisions of the law and leave your department on the hook for substantial attorney’s fees that, in many cases, the court is mandated to impose. The document below is intended to outline the best practices for promptly and efficiently responding to requests for records from the public while also suggesting strategies to avoid potentially expensive pitfalls. At bottom, remember this: you can never get in (legal) trouble if you just turn a record over and do so promptly. ORS 192.335.

The Attorney General periodically publishes a “Public Records and Meetings Manual” that contains advice for public bodies on how to interpret various provisions of the public records law. This can be found on her website and, if desired, purchased in hard copy from the Department of Justice. The most recent edition is 2019 and is cited throughout this outline as MANUAL. This is a useful resource but not binding authority. I have, on occasion and in the absence of judicial authority, disagreed with DOJ’s interpretations of an exemption. Do this rarely and cautiously, but you may do so.

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## Records Retention

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This training does not address records retention schedules. You need to have one, but should consult with your legal counsel about county procedures in that regard.

### **Voicemails**

Somewhat oddly, for purposes of records *retention*, voicemails are expressly identified in statute as not public records so long as they are in a voicemail retention system. That is, you do not have to retain them so long as you don’t affirmatively save them somewhere else. However, they are public records for purposes of the records *production* statutes. Putting these two together means you don’t have to keep them, but if someone asks for them while you still have them, you have to turn them over. And do be cautious, particularly on cell phones, “deleted” voicemails stick around for a long time unless they’re affirmatively purged.

## Cell Phones – Personal v. Public

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We all use cell phones. Many of us likely use their personal phones for work purposes on occasion. Text messages contained on personal cell phones are public records if they relate to the conduct of the public's business. Text messages must be retained, regardless of what device they are on, consistent with the retention schedule applicable to them. Best practice, that few if any follow, would be to at the conclusion of a case export all text messages relating to a case and archive them with the casefile. Well, best best practice would be to not have work-related discussions by text message, but let's not tilt at windmills...

Public employees will be understandably reluctant to part with their cell phones to allow IT to forensically image them in response to a subpoena or public records request. So you will want to stress to them the importance of using work phones (if provided) or their own archiving protocol to ensure that when a request comes in it can be promptly and completely responded to.

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## What Constitutes a Public Records Request?

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All public bodies in Oregon are required by law to post on their website the procedure for making a public records request and a specific person to whom such requests should be directed. ORS 192.324(7)(a). As an example, ours can be found here: <https://www.mcda.us/index.php/about-the-da/public-records-request/>.

You should ensure that you have published this process and not just because you're required to do so by law. An incoming public records request that does not follow your published procedure is not a perfected records request. While you will almost always want to give wide latitude in interpreting requests as public records requests and responding accordingly, a requestor's failure to follow your published procedures can be a safety net in the event you find yourself in litigation about a technical deficiency in your response to a request. The triggering event for all relevant timelines in responding to a public records request is the receipt of a public records request by "an individual who is identified in a public body's procedure described in subsection (7)(a)." ORS 192.324(2).

Frequently you will get media requests for information or request for comment. These are not public records requests. A critical premise of the public records law is that agencies are not required to create new records in response to a public records request, nor explain or analyze their records on request. MANUAL at 7. Rather, you do have to provide copies of non-exempt, existing, records. All that said, do not stand on formalities. The fact that a person erroneously cites FOIA instead of the Oregon Public Records Law in support of their request does not change the essence of the request.

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## Are you the custodian?

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The answer is probably yes. Unless the request is obviously misdirected assume you are the custodian. For example, I've gotten requests for county property tax records before, to which I politely respond that I'm only the custodian for the district attorney's office, not the county as a whole. Do keep in mind that multiple agencies can be the custodian, so a police report submitted to the district attorney for prosecution is likely both the DA's record and the police agency's despite the fact that they created it. The DA received it in the ordinary course of business and is holding it for their own purposes. The "agent for another" theory of non-custodianship in ORS 192.311(2)(b) does not, in my opinion, extend far at all and certainly should not be interpreted as "if I didn't create it I'm not the custodian."

**"It's a trap!"**

It is tempting to simply refer a requestor seeking police reports to the appropriate police agency. And at a first pass, this may be the right move. However, if they persist you need to give them your copy. Some time ago this office paid out a large attorney's fees award over a lawsuit filed against us because the requestor was demanding OUR copy of the reports.

However, you are not the custodian of records that remain solely in another agency's custody, but to which you have a right of *access* as opposed to *control*. By way of example, my office has access credentials to allow us to log into various police agencies' body worn camera systems to review and download video. This does not make us the custodian of all records in that system. To be sure, if we download a video onto our system for our purposes, we become an independent custodian of that video. But until such time as we do, requests for these records are properly referred to the police agency.

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## Timeline for Response

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Your response to a public records request must be “as soon as practicable and without unreasonable delay.” ORS 192.329(1). You are required to acknowledge a public records request within five business days of receipt. ORS 192.324(2). And you are required to either complete your response to the request as soon as reasonably possible or fifteen business days from receipt, whichever is sooner. ORS 192.329(5). If you cannot reasonably complete your response within fifteen days, you must still contact the requester within fifteen days and provide an estimate of time within which you intend to complete your response. **Ignore these deadlines at your peril.** A request that is fully fulfilled on the 16<sup>th</sup> business day, without notice to the requestor of the expected delay within the 15 days, constitutes a statutory denial of the request for purposes of allowing a person to seek judicial review. ORS 192.407.

In summary:

<b>Day 0</b>	Request received
<b>Day 5</b>	Written acknowledgement of request due
<b>Day 15</b>	Completed response due or, alternatively, estimate of time to completion

### Tolling of Time

The clock on your response to a records request can be stopped in one of two ways: 1) by providing the requester with an estimate of the fees necessary to complete your response to the request, or 2) by responding to the requester with a good faith request for additional information or clarification. ORS 192.329(3)(a) & (4)(a) respectively. Once a requester responds, the clock starts again. However, if a requester fails to respond within 60 days, the statutes each provide that you “shall” close the request. ORS 192.329(3)(b) & (4)(b). This does not prevent a requester from starting the process over again on the same request, but does relieve you of any legal obligation to continue working on that particular request unless that happens.

### Elected Official “Seven Day Rule”

It is sometimes asserted that, if the request is directed at an elected official, they are required to complete your response to a records request within seven days based on the following language in ORS 192.418(2): “The failure of an elected official to deny, grant, or deny in part and grant in part a request to inspect or receive a copy of a public record within seven days from the day of receipt of the request shall be treated as a denial of the request for the purpose of determining whether a person may institute proceedings for injunctive or declaratory relief[.]”

## Upon receipt of a public records request

This is not the case. After seven days the circuit court gains jurisdiction to review whether or not you have responded to the request “as soon as practicable and without unreasonable delay” as provided in ORS 192.329(1). The Attorney General writes in the 2019 edition of the Public Records and Meetings Manual, “Even if the elected official has not denied the request, the court will have jurisdiction after seven days from the date the elected official receives the records request. ORS 192.418(2). However, this does not mean that an elected official has improperly withheld records by not fulfilling a records request within seven days.” MANUAL at 46. Every time this argument has been raised in the circuit court by a requestor, to my knowledge, it has been rejected.<sup>1</sup> There is not, yet, any appellate authority construing this section.

## Overwhelmed Agencies

The timelines in ORS 192.329 and 192.324 are suspended if extraordinary circumstances make complying with them impracticable. We have discussed this section at some length in *Petition of Winterling*, MCDA PRO 18-26 (2018). I would not recommend relying on this section unless absolutely essential. Most public bodies do not usually receive such volumes of requests that they cannot even acknowledge and provide an estimate of time within 15 business days.

This is not to say that you will not receive voluminous requests. A request for “all email” within a certain period might result in tens of thousands of unique records to review. That it will take you a long time to complete your response does not mean you’re overwhelmed as these sections intend, just stay on top of your notifications to requesters and makes sure you continue to diligently work toward completion of the request. You may even choose (or need) to outsource your review of these records to outside counsel who can perform the work more quickly than your staff. We discussed the practical problem of massive requests, and how an agency must respond, in *Petition of Buchal*, MCDA PRO 18-38 (2018).

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## Upon receipt of a public records request

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Once you have confirmed that you have received a public records request (see above) as opposed to an informational inquiry, you should immediately acknowledge that request and quote the statutory language from the applicable section of ORS 192.324(2). I would recommend a form response that reads:

This is to acknowledge our receipt on [DATE] of your public records request for [INSERT LANGUAGE OF REQUEST HERE]. This office is uncertain if we are the custodian of any responsive records. Once we have determined if we have any responsive records, and how many there are, we will either provide you with the records, or an estimate of our costs to produce those records.

Alternatively, if responding to a request is trivial, you can skip the acknowledgment and just immediately provide the record. For example if I receive a request for “the prosecution decline memorandum for case 12-34567.” I will just immediately provide it rather than going through the formal acknowledgment and fee estimate process. It’s just easier for everyone that way and helps earn you good will with your frequent requesters.

You may not insist that a requester inform you why he or she wants the records. However, a requester’s purpose is relevant in assessing the public’s interest in disclosure both as to the applicability of conditional exemptions and in assessing whether or not you will grant a full or partial fee waiver.

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<sup>1</sup> See, e.g. 18CV46961. I can provide other citations on request.

Many requests are made in good faith from requesters not familiar with the public records law. Frequently a “hey, what do you really want” conversation can be fruitful and save both of you time and expense. This requires some trust and good faith on both sides, but if you establish yourself as a trusted actor in this area you have credibility to cut to the core of an issue. That is, a request for “all of the mayor’s emails for the last seven days” could be narrowed if the requestor is really interested in an exchange on a particular topic between the mayor and the county chair that he believed occurred in that window.

Be cautious of requests for all records “relating to” a particular topic. This is fraught with peril as you are now being asked to use your own judgment and reasoning to determine if a record is or is not “related” to a particular topic. You are not required to analyze your own records and, practically speaking, you’re likely to miss something and that oversight will invariably be seen as malicious if it comes out in subsequent litigation. Be clear what you are and are not producing when responding. For example, a request for all records “relating to” the criminal prosecution of George Washington for Criminal Mischief II cannot practically be filled. Rather, best practice is to respond something similar to the following:

I cannot analyze every record in this office to determine whether it is related to or not related to this case. However, I can search our email system for certain search terms and provide you with the non-exempt portions of our physical and electronic case files. I’d propose the following search terms for the email accounts of DDA Smith, the case prosecutor, and DDA Jones, his supervisor, “George Washington” “Washington” “18CR12345” and “cherry tree.” We estimate that this search will take XX hours of time to perform, with an estimated cost of \$YYY. Please advise if you would like to proceed on these terms, or if you would like to propose additional search terms or accounts to be searched.

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## Fees

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Fees are a fraught issue. They are simultaneously the biggest single barrier to transparency and absolutely essential to meter expansive requests from hostile or indifferent requesters. How you choose to weigh these competing interests in addressing fees in your office is, of course, your decision. I will set out below the state of the law on imposition of fees and then my office’s general practices for your consideration.

### Oregon Law on Public Records Fees

A public body is entitled to pass on to a requester its costs in responding to a public records request. ORS 192.324(4). This may include the time necessary for the public body’s legal counsel to review the records and segregate exempt records from non-exempt records. But, you may not charge for lawyer time necessary to research the law and determine if exemptions apply or not, only to actually conduct the document review and sort them into piles or redact.

Be mindful of who is doing the work on a request vs. who *could* do the work. The City of Portland got an adverse judgment (and \$61,000 attorney’s fee award) over having a manager do work that was within the competency of a cheaper subordinate to do.<sup>2</sup> To be clear, it doesn’t matter who actually does the work, but you need to bill at the rate of the cheapest employee who could have done it. See, *Kessler v. City of Portland*, Opinion & Order of Nov. 19, 2019, Mult. Co. Cir. Ct. 18CV43134 (Russell, J.).

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<sup>2</sup> The relevant overcharge was less than \$100. Yes, you read that right, \$61,000 of attorney’s fees for a judgment granting less than \$100 in relief.

## Segregation of Exempt and Non-Exempt Records

You are also required to establish a publicly available fee schedule and not charge fees that are in excess of your actual costs in producing records. Ours is available here: <https://www.mcda.us/index.php/documents/public-records-fee-schedule.pdf/>

### Multnomah County DA's Practice

It has been our practice to waive fees for media requests in all but the most extreme and unreasonable circumstances. Most of our media requesters are happy to work with us to narrow the scope of requests and filling them is usually not overly expensive.

If a request will take less than ~30 minutes of time to fulfill, quoting fees and processing payment is usually more trouble than it's worth.

If there's even a nominal public interest in a case, we apply some form of fee reduction, usually 20-50 percent.

If a request will require a substantial amount of work (in excess of five hours) we'll require prepayment of 50% of our estimate before we begin work. In extreme cases, based on a history of non-payment or similar, we may require full payment upfront.

When assessing the amount of work that a request will take we look at a requestor's requests in the aggregate, not just at the particular request in front of us at present.

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## Segregation of Exempt and Non-Exempt Records

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ORS 192.338 requires that you go through responsive records and separate out those portions that are releasable. Our office uses Adobe Acrobat Pro to perform redaction of documents, but there are other options. Ensure you're familiar with the system you use to ensure that you're actually redacting the material you think you are redacting.

### Practice Tip

Using Word to set the background color of the text to black does not actually remove the text. Even though you can't see it, when you convert the document to PDF you can still copy-paste the "redacted" text out of the document and read it. This is not a hypothetical concern, I've seen it multiple times, to the embarrassment of the releasing agency.

Some examples – if you have emails that are exempt, say between a DDA and a detective discussing a search warrant that they were working on to execute, the body of the email would likely be exempt (at least so long as the case remains open). However, the header information (To, From, Date, and (potentially) Subject) would be disclosable. So too would the paragraph about how you can't believe that the Sheriff's softball team beat the District Attorney's team last Saturday... Exemptions are narrowly construed and you need to make sure they actually apply to the specific material being redacted.

**"IT'S A TRAP!"**

A lawyer seeking to exploit an agency unsophisticated in the public records law can frequently trip up an agency in this area. As discussed above, with few exceptions, you are required to line-item redact exempt information out of records rather than withholding records in their entirety. So, if you receive a request for a police report and you withhold the entire thing under ORS 192.345(3) (because releasing it would interfere with a prosecution) the requestor could sue you, and win, because you failed to release to the requestor mundane, irrelevant, and totally useless portions of the report such as the generic headers, the name of the police agency, or basic factual information that is already in the public record by way of your own probable cause affidavit. Having thus prevailed, on a triviality, you are now on the hook for attorney's fees. ORS 192.431(3).

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## Information vs. Records

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A careful read of various public records exemptions will show that some exempt "information" and others exempt "records." This distinction is important, particularly in light of the segregation requirement in ORS 192.338. A few examples:

ORS 192.345(3) exempts "investigatory *information* compiled for criminal law purposes." That means that the details of your armed robbery case are exempt from disclosure whether contained in a police report, an email between DDAs discussing the case, or a scribbled post-it note.

ORS 192.345(12), by contrast, exempts "personnel discipline action, or materials or documents supporting that action." This means that the only exempt records are those that are actually part of the disciplinary process, but the information itself is not exempt from disclosure if it appears in a different type of record in the public body's possession, such as a tort claim notice.

The most common, and crucially important, application of this distinction is found in ORS 419B.035. We have interpreted this section to broadly exempt police reports documenting the investigation of child abuse. However, the exemption only exempts investigative reports, it does not exempt the underlying information. So case summaries, declination memos, and similar documents prepared by the DA's office based on the exempt reports are not exempt under this section. They may well be exempt for other reasons, such as ORS 192.355(2) or 192.345(3), but those exemptions require word-by-word redaction and do not apply on a blanket basis.

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## Public Interest

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The MANUAL has a good discussion on evaluating the public's interest, and I won't repeat that here. Some practical tips, however:

- If a requestor is requesting information about himself or his client, there is not a public interest.
- If the media is requesting information, it's almost certain in the public interest.

That there is a public interest does not mean that you have to turn the records over for free. However, I would recommend a significant fee reduction (20-50%) if the request is in the public interest if a full waiver is not practical or appropriate for whatever reason. A determination of whether or not a request is in the public interest is

## Asserting Exemptions

reviewed *de novo* but, having found a public interest, a determination to grant a partial as opposed to complete fee waiver is pretty much an abuse of discretion review.

If an exemption is “conditional” that means it applies unless the public interest requires otherwise. All conditional exemptions are found in ORS 192.345.

If an exemption is “unconditional” it means it applies even if the public interest is overwhelmingly in favor of disclosure. Unconditional exemptions are found in ORS 192.355. Though, note, in most cases you can elect not to assert an otherwise applicable exemption if you want to release something.

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## Asserting Exemptions

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There are over 500 exemptions to the Oregon Public Records law. However, for most agencies there are only a small handful that you need to be familiar with on a daily-use basis. Importantly, with very few exceptions, exemptions to the public records law are discretionary. That means that, as a records custodian, you may disclose a record even if an exemption could potentially apply to it. More extensive discussion and notes of decision on these, and many other, exemptions can be found in the MANUAL and the MCDA Public Records Outline.

Having asserted an exemption, even as to part of a response, you must include the following language (or similar) in your response to the requester:

You may seek review of my application of public records exemptions pursuant to ORS 192.401, 192.411, 192.415, 192.418, 192.422, 192.427 and 192.431.

This notification is required by statute. ORS 192.329(2)(f). I would further recommend noting that you have completed your response and no further records will be forthcoming:

Per ORS 192.329(2), this completes our response to your request.

### **ORS 192.398 – medical records**

This is a catch-all that exempts medical records (likely in many criminal files involving assault or sexual misconduct), records sealed by court order, and inmate records.

### **ORS 192.345(3) – ongoing criminal investigations/proceedings**

When you deny a request, this is usually going to be what you’re going to cite, so get familiar with it. This is a conditional exemption (see discussion above of the public interest) that exempts “investigatory information compiled for criminal law purposes.” However, it goes on to say that “the report of a crime shall be disclosed unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation.” This means that, in order to withhold records under this section you need to be prepared to articulate how release would interfere with an investigation. You’re not required to so articulate to a requester, but do the exercise to ensure you’re able to do so if challenged. And if you can’t, then turn it over!

This exemption continues to apply while if enforcement proceedings resulting from the investigation are pending or contemplated. *Jensen v. Schiffman*, 24 Or App 11 (1976); MANUAL at 58.

### **ORS 192.345(40) – private person’s email addresses**

Before releasing otherwise releasable records, you should redact out non-government issued email addresses appearing in them.

### **ORS 192.355(2)(a) – personal privacy exemption**

This is probably the most frequently, and improperly, used exemption in the public records law. The legal standard to assert this exemption is extraordinarily high. An individualized factual record must be made as to each particular denial under this section. That is, it is not permissible to blanket exempt home addresses, dates of birth, etc. in responding to a request under this section. It must be individualized to the situation of the particular person whose privacy is at issue. *Mail Tribune v. Winters*, 236 Or App 91 (2010). The courts have refused to apply this exemption under some pretty shocking circumstances. *Guard Publishing Co. v. Lane County Sch. Dist.*, 310 Or 32, 39 (1990) (ordering released personal information of substitute teachers working during a strike on a factual record demonstrating some intense attempts to intimidate and harass strike breakers.) We summarized this standard in an order:

We pause again to note the extraordinarily high bar that our Supreme Court has set to exempt personal contact information. The only case of which we are aware in which such an exemption was affirmed involved an individual who was seeking a woman’s contact information as part of a lengthy and active campaign to stalk her. *Jordan v. MVD*, 308 Or 433 (1989).

*Petition of Merrick*, MCDA PRO 17-63 (2018). Examples of information we have found exempt under this section: graphic details of a rape contained in a police report, ambulance records to the extent they reveal a person’s medical issue, personal cell phone numbers of high-ranking city employees with recent histories of stalkers, and identities of sex abuse complainants.

### **ORS 419B.035 – investigations of reports of child abuse**

Unlike almost every other exemption, this is mandatory. That is, release of information covered by this section is prohibited by law. We have interpreted this section to apply to police reports documenting investigations of child abuse, however it does not apply to information from those reports that is contained in other records, such as district attorney lognotes, case decline memoranda, or other DDA-generated materials. This is an exemption that applies to records, not information.

### **ORS 124.090 – investigations of reports of elder abuse**

See discussion of ORS 419B.035 above, the same rules apply here.

### **ORS 192.355(9) – Catch-all**

This is the catch-all in the public records law – if some other provision of Oregon law makes something confidential, this is the exemption you cite, though you also have to cite the source of law that passes through. This applies to, for example: LEDS printouts (OAR 257-015-0060); attorney work-product (see discussion in separately titled section); Pre-sentence investigations (ORS 137.077); grand jury recordings (ORS 132.270) and notes (common law); and identities of confidential informants (informer’s privilege OEC 510).

### **ORS 419A.255 – Juvenile Court Offender Information**

Records relating to proceedings in juvenile court are exempt and should not be released under the public records law by the district attorney.

### **ORS 192.345(40) – Body Camera Recordings**

If your local law enforcement wear body cameras, the recordings are conditionally exempt from disclosure. However, if you determine that the public interest requires disclosure you must redact the video so that faces are

## Computerized Records

obscured. This is a technical and often times expensive process. Costs can be passed on to the requester per ORS 192.324(4).

### Practice Tip

When dealing with a request for body camera footage on a case of some public interest, a good middle ground is often to release only the audio track from the footage. You can do this without running afoul of the mandatory redaction requirements of ORS 192.345(40) because no faces are visible. Your requester can then narrow the focus of the request to the specific seconds of footage that he/she wants based on the audio and thus substantially reduce the expense of the mandated redaction prior to release. Of course, if your requester wants the full video (and there's public interest to support releasing it) you've got to provide it once the faces are blurred.

### Things that aren't exempt – even though you want them to be

There are a number of things that we often think *should* be exempt but just aren't, so don't get tripped up. Either don't create the record in the first place, or turn it over on request.

#### *Drafts*

Initial drafts of policy memos, letters, etc. are not exempt from disclosure. Under *very* limited circumstances they *might* be considered internal advisory communications, but that exemption is much more limited than you'd like to think.

#### *Meeting notes*

There is no obligation to disclose to anyone what happened during a meeting. Unless, of course, someone took notes about what happened. At that point there is a "writing" under the public records law that is subject to release. It is possible that the notes will still be exempt depending on the contents of the meeting, but written notes from a meeting (and agendas sent out ahead) are certainly public records.

#### *Training Materials*

Training materials, CLE recordings, etc. An argument could be made for the exemption of technical law enforcement techniques/strategies that will be in ongoing use, the disclosure of which would hamper future investigative efforts. However this is a significant minority. Trial strategy trainings, general prosecution CLE materials, this outline, all public records subject to disclosure.

#### *File notes*

See the separate section in this outline on attorney work-product for prosecutors. In very short summary, although the doctrine does exist, not everything written by a prosecutor is "work product" and most of your procedural log notes will not fit into this category.

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## Computerized Records

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The public records law was drafted long before the present ubiquity of the computerized databases that underlie so many of the computer systems we take for granted, not to mention the headache that is cloud computing. On these questions we don't have great answers, only guidelines.

You are not required to allow a requester direct access to your computer systems so they can perform their own searches or “inspection” of records. *Petition of Babcock*, MCDA PRO 16-32 (2016) (“the public records law does not require an agency to make its databases open to direct public access; it does require an agency to provide any non-exempt data contained in those databases to the public.”); *Petition of Kelley*, Att’y Gen PRO (May 10, 1996) (denying direct access to DMV database). I suppose you could provide that access if you wanted to, but I, your IT team, and your CJIS compliance staff-member would all caution you not to.

You are required to pull data out of your databases using your existing software and routines to respond to a public records request. Here are some examples:

- “I want all case numbers for cases where your office charged a person with Assault II from 2010-present”
  - This is a proper request, assuming your case management system permits you to pull this data, you must respond.
- “Please provide data showing whether or not there is a racial disparity in your office’s charging decisions.”
  - This is not a proper request as it requires your staff to perform analysis and draw conclusions.

## Format of Records

For electronically stored records you must provide them “in the form requested, if available.” ORS 192.324(3). If that format is not available, you may provide them in the form in which you maintain the record. *Id.* Note, this is not “the format in which it’s easiest to provide the record” it is the record’s **native file format**. Please consult with your IT department if you have issues in this area, it’s easy to get tripped up.

### “IT’S A TRAP!”

Because you are required to provide electronically stored records either in their native format or in the format specified by the requestor, the failure to do so (even if reasonable under the circumstances) can result in losing a subsequent lawsuit and, accordingly, owing fees. ORS 192.431(3). This will commonly come up when a requestor specifies the “native” file format of email. It is routine practice in many agencies to convert documents to PDF format because those documents are easier to manage for all involved. 99.9% of requestors will appreciate that you have done this. But that format is NOT the format in which you maintain the record and if you’re dealing with a difficult requestor (you’ll know it when you have one) you must provide the native format unless the requestor specifies another format. Seek clarity from your requestor as to the preferred format if you anticipate an issue. Discuss with your IT department if you are uncertain about the formats at issue.

This can get even messier when you have to redact materials. Usually the native file format will not permit redaction. In those cases, it is permissible to convert it to a redactable format before responding. The “record” in this case is the record in its redacted format. You do not maintain that “record” in any form other than the final redacted format, so you should be good.

This can get slightly hairy when you’re dealing with a database. You are not, generally speaking, required to turn over your entire database. This frequently includes proprietary software that you may not release. Instead, we’ve held, that the format in which a database record is “maintained” is the format in which your existing reporting

## Computerized Records

system spits out data. See, *Petition of Kessler*, MCDA PRO 18-35 (2018) aff'd *Alan Kessler v. City of Portland*, Mult. Co. Cir. Ct. 18CV43134, Opinion and Order (Russell, J.), for a boringly thorough discussion of this topic.