

A-Engrossed
Senate Bill 316

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Including Senate Amendments dated April 23

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SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

[Prohibits service provider from disclosing contents of communication and certain other information except in certain circumstances.]

[Prohibits public body from obtaining contents of communication and certain other information without search warrant except in certain circumstances.]

[Requires that public body provide notice to person if contents of communication or certain other information is obtained. Provides for delay of notification and prohibition on disclosure of warrant when ordered by court.]

[Provides that contents of communication and certain other information obtained in violation of Act are inadmissible in adjudicative proceeding. Requires that parties be provided with warrant and application when lawfully obtained contents or information is used in adjudicative proceeding.]

[Requires public body to issue annual report to Legislative Assembly if public body requests or obtains contents of communication or certain other information.]

[Creates cause of action for person harmed as result of violation of certain sections of Act.]

[Prohibits public body from obtaining customer information from pawnbroker without search warrant.]

Allows polygraph test as condition of employment for pre-employment screening of law enforcement officers. Exempts polygraph test from inspection of public records.

A BILL FOR AN ACT

1
2 Relating to privacy; amending ORS 192.502, 659.840 and 659A.300.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1.** ORS 659.840 is amended to read:

5 659.840. (1) **Except as provided in paragraphs (a) and (b) of this subsection**, no person, or
6 agent or representative of such person, shall require, as a condition for employment or continuation
7 of employment, any person or employee to take a breathalyzer test, polygraph test or any other form
8 of a so-called lie detector test. *[However,]*

9 (a) Nothing in this section shall be construed to prohibit the administration of a breathalyzer
10 test to an individual if the individual consents to the test. If the employer has reasonable grounds
11 to believe that the individual is under the influence of intoxicating liquor, the employer may require,
12 as a condition for employment or continuation of employment, the administration of a blood alcohol
13 content test by a third party or a breathalyzer test. The employer shall not require the employee
14 to pay the cost of administering any such test.

15 (b) **Nothing in this section shall be construed to prohibit the administration of a**
16 **polygraph test to an applicant for a position as a law enforcement officer in this state. This**
17 **paragraph applies to pre-employment screening only and does not apply to law enforcement**
18 **officers during their employment.**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 (2) For the purposes of this section, an individual is “under the influence of intoxicating
2 liquor” when the individual’s blood alcohol content exceeds the amount prescribed in a collective
3 bargaining agreement or the amount prescribed in the employer’s work rules if there is no applica-
4 ble collective bargaining provision.

5 **SECTION 2.** ORS 659A.300 is amended to read:

6 659A.300. (1) Except as provided in this section, it is an unlawful employment practice for any
7 employer to subject, directly or indirectly, any employee or prospective employee to any
8 breathalyzer test, polygraph examination, psychological stress test, genetic test or brain-wave test.

9 (2) As used in this section:

10 (a) “Breathalyzer test” means a test to detect the presence of alcohol in the body through the
11 use of instrumentation or mechanical devices.

12 (b) “Genetic test” has the meaning given in ORS 192.531.

13 (c) “Polygraph examination or psychological stress test” means a test to detect deception or to
14 verify the truth of statements through the use of instrumentation or mechanical devices.

15 (d) An individual is “under the influence of intoxicating liquor” when the individual’s blood al-
16cohol content exceeds the amount prescribed in a collective bargaining agreement or the amount
17prescribed in the employer’s work rules if there is no applicable collective bargaining provision.

18 (3) Nothing in subsection (1) of this section shall be construed to prohibit the administration of
19 a polygraph examination to:

20 (a) An individual, if the individual consents to the examination, during the course of criminal
21 or civil judicial proceedings in which the individual is a party or witness or during the course of a
22 criminal investigation conducted by a law enforcement agency, as defined in ORS 181.010, a district
23 attorney or the Attorney General[.]; or

24 (b) **An applicant for a position as a law enforcement officer in this state as a pre-**
25 **employment screening measure before the applicant’s initial date of hire as a law enforce-**
26 **ment officer.**

27 (4) Nothing in subsection (1) of this section shall be construed to prohibit the administration of
28 a breathalyzer test to an individual if the individual consents to the test. If the employer has rea-
29sonable grounds to believe that the individual is under the influence of intoxicating liquor, the em-
30ployer may require, as a condition for employment or continuation of employment, the
31administration of a blood alcohol content test by a third party or a breathalyzer test. The employer
32shall not require the employee to pay the cost of administering any such test.

33 (5) Subsection (1) of this section does not prohibit the administration of a genetic test to an in-
34dividual if the individual or the individual’s representative grants informed consent in the manner
35provided by ORS 192.535, and the genetic test is administered solely to determine a bona fide oc-
36cupational qualification.

37 **SECTION 3.** ORS 192.502 is amended to read:

38 192.502. The following public records are exempt from disclosure under ORS 192.410 to 192.505:

39 (1) Communications within a public body or between public bodies of an advisory nature to the
40 extent that they cover other than purely factual materials and are preliminary to any final agency
41 determination of policy or action. This exemption shall not apply unless the public body shows that
42 in the particular instance the public interest in encouraging frank communication between officials
43 and employees of public bodies clearly outweighs the public interest in disclosure.

44 (2) Information of a personal nature such as but not limited to that kept in a personal, medical
45 or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the

1 public interest by clear and convincing evidence requires disclosure in the particular instance. The
2 party seeking disclosure shall have the burden of showing that public disclosure would not consti-
3 tute an unreasonable invasion of privacy.

4 (3) Public body employee or volunteer addresses, Social Security numbers, dates of birth and
5 telephone numbers contained in personnel records maintained by the public body that is the em-
6 ployer or the recipient of volunteer services. This exemption:

7 (a) Does not apply to the addresses, dates of birth and telephone numbers of employees or vol-
8 unteers who are elected officials, except that a judge or district attorney subject to election may
9 seek to exempt the judge's or district attorney's address or telephone number, or both, under the
10 terms of ORS 192.445;

11 (b) Does not apply to employees or volunteers to the extent that the party seeking disclosure
12 shows by clear and convincing evidence that the public interest requires disclosure in a particular
13 instance;

14 (c) Does not apply to a substitute teacher as defined in ORS 342.815 when requested by a pro-
15 fessional education association of which the substitute teacher may be a member; and

16 (d) Does not relieve a public employer of any duty under ORS 243.650 to 243.782.

17 (4) Information submitted to a public body in confidence and not otherwise required by law to
18 be submitted, where such information should reasonably be considered confidential, the public body
19 has obliged itself in good faith not to disclose the information, and when the public interest would
20 suffer by the disclosure.

21 (5) Information or records of the Department of Corrections, including the State Board of Parole
22 and Post-Prison Supervision, to the extent that disclosure would interfere with the rehabilitation of
23 a person in custody of the department or substantially prejudice or prevent the carrying out of the
24 functions of the department, if the public interest in confidentiality clearly outweighs the public in-
25 terest in disclosure.

26 (6) Records, reports and other information received or compiled by the Director of the Depart-
27 ment of Consumer and Business Services in the administration of ORS chapters 723 and 725 not
28 otherwise required by law to be made public, to the extent that the interests of lending institutions,
29 their officers, employees and customers in preserving the confidentiality of such information out-
30 weighs the public interest in disclosure.

31 (7) Reports made to or filed with the court under ORS 137.077 or 137.530.

32 (8) Any public records or information the disclosure of which is prohibited by federal law or
33 regulations.

34 (9)(a) Public records or information the disclosure of which is prohibited or restricted or other-
35 wise made confidential or privileged under Oregon law.

36 (b) Subject to ORS 192.423, paragraph (a) of this subsection does not apply to factual information
37 compiled in a public record when:

38 (A) The basis for the claim of exemption is ORS 40.225;

39 (B) The factual information is not prohibited from disclosure under any applicable state or fed-
40 eral law, regulation or court order and is not otherwise exempt from disclosure under ORS 192.410
41 to 192.505;

42 (C) The factual information was compiled by or at the direction of an attorney as part of an
43 investigation on behalf of the public body in response to information of possible wrongdoing by the
44 public body;

45 (D) The factual information was not compiled in preparation for litigation, arbitration or an

1 administrative proceeding that was reasonably likely to be initiated or that has been initiated by
2 or against the public body; and

3 (E) The holder of the privilege under ORS 40.225 has made or authorized a public statement
4 characterizing or partially disclosing the factual information compiled by or at the attorney's di-
5 rection.

6 (10) Public records or information described in this section, furnished by the public body ori-
7 ginally compiling, preparing or receiving them to any other public officer or public body in con-
8 nection with performance of the duties of the recipient, if the considerations originally giving rise
9 to the confidential or exempt nature of the public records or information remain applicable.

10 (11) Records of the Energy Facility Siting Council concerning the review or approval of security
11 programs pursuant to ORS 469.530.

12 (12) Employee and retiree address, telephone number and other nonfinancial membership records
13 and employee financial records maintained by the Public Employees Retirement System pursuant to
14 ORS chapters 238 and 238A.

15 (13) Records of or submitted to the State Treasurer, the Oregon Investment Council or the
16 agents of the treasurer or the council relating to active or proposed publicly traded investments
17 under ORS chapter 293, including but not limited to records regarding the acquisition, exchange or
18 liquidation of the investments. For the purposes of this subsection:

19 (a) The exemption does not apply to:

20 (A) Information in investment records solely related to the amount paid directly into an invest-
21 ment by, or returned from the investment directly to, the treasurer or council; or

22 (B) The identity of the entity to which the amount was paid directly or from which the amount
23 was received directly.

24 (b) An investment in a publicly traded investment is no longer active when acquisition, exchange
25 or liquidation of the investment has been concluded.

26 (14)(a) Records of or submitted to the State Treasurer, the Oregon Investment Council, the
27 Oregon Growth Board or the agents of the treasurer, council or board relating to actual or proposed
28 investments under ORS chapter 293 or 348 in a privately placed investment fund or a private asset
29 including but not limited to records regarding the solicitation, acquisition, deployment, exchange or
30 liquidation of the investments including but not limited to:

31 (A) Due diligence materials that are proprietary to an investment fund, to an asset ownership
32 or to their respective investment vehicles.

33 (B) Financial statements of an investment fund, an asset ownership or their respective invest-
34 ment vehicles.

35 (C) Meeting materials of an investment fund, an asset ownership or their respective investment
36 vehicles.

37 (D) Records containing information regarding the portfolio positions in which an investment
38 fund, an asset ownership or their respective investment vehicles invest.

39 (E) Capital call and distribution notices of an investment fund, an asset ownership or their re-
40 spective investment vehicles.

41 (F) Investment agreements and related documents.

42 (b) The exemption under this subsection does not apply to:

43 (A) The name, address and vintage year of each privately placed investment fund.

44 (B) The dollar amount of the commitment made to each privately placed investment fund since
45 inception of the fund.

1 (C) The dollar amount of cash contributions made to each privately placed investment fund since
2 inception of the fund.

3 (D) The dollar amount, on a fiscal year-end basis, of cash distributions received by the State
4 Treasurer, the Oregon Investment Council, the Oregon Growth Board or the agents of the treasurer,
5 council or board from each privately placed investment fund.

6 (E) The dollar amount, on a fiscal year-end basis, of the remaining value of assets in a privately
7 placed investment fund attributable to an investment by the State Treasurer, the Oregon Investment
8 Council, the Oregon Growth Board or the agents of the treasurer, council or board.

9 (F) The net internal rate of return of each privately placed investment fund since inception of
10 the fund.

11 (G) The investment multiple of each privately placed investment fund since inception of the fund.

12 (H) The dollar amount of the total management fees and costs paid on an annual fiscal year-end
13 basis to each privately placed investment fund.

14 (I) The dollar amount of cash profit received from each privately placed investment fund on a
15 fiscal year-end basis.

16 (15) The monthly reports prepared and submitted under ORS 293.761 and 293.766 concerning the
17 Public Employees Retirement Fund and the Industrial Accident Fund may be uniformly treated as
18 exempt from disclosure for a period of up to 90 days after the end of the calendar quarter.

19 (16) Reports of unclaimed property filed by the holders of such property to the extent permitted
20 by ORS 98.352.

21 (17)(a) The following records, communications and information submitted to the Oregon Business
22 Development Commission, the Oregon Business Development Department, the State Department of
23 Agriculture, the Oregon Growth Board, the Port of Portland or other ports as defined in ORS
24 777.005, or a county or city governing body and any board, department, commission, council or
25 agency thereof, by applicants for investment funds, grants, loans, services or economic development
26 moneys, support or assistance including, but not limited to, those described in ORS 285A.224:

27 (A) Personal financial statements.

28 (B) Financial statements of applicants.

29 (C) Customer lists.

30 (D) Information of an applicant pertaining to litigation to which the applicant is a party if the
31 complaint has been filed, or if the complaint has not been filed, if the applicant shows that such
32 litigation is reasonably likely to occur; this exemption does not apply to litigation which has been
33 concluded, and nothing in this subparagraph shall limit any right or opportunity granted by discov-
34 ery or deposition statutes to a party to litigation or potential litigation.

35 (E) Production, sales and cost data.

36 (F) Marketing strategy information that relates to applicant's plan to address specific markets
37 and applicant's strategy regarding specific competitors.

38 (b) The following records, communications and information submitted to the State Department
39 of Energy by applicants for tax credits or for grants awarded under ORS 469B.256:

40 (A) Personal financial statements.

41 (B) Financial statements of applicants.

42 (C) Customer lists.

43 (D) Information of an applicant pertaining to litigation to which the applicant is a party if the
44 complaint has been filed, or if the complaint has not been filed, if the applicant shows that such
45 litigation is reasonably likely to occur; this exemption does not apply to litigation which has been

1 concluded, and nothing in this subparagraph shall limit any right or opportunity granted by discov-
2 ery or deposition statutes to a party to litigation or potential litigation.

3 (E) Production, sales and cost data.

4 (F) Marketing strategy information that relates to applicant's plan to address specific markets
5 and applicant's strategy regarding specific competitors.

6 (18) Records, reports or returns submitted by private concerns or enterprises required by law
7 to be submitted to or inspected by a governmental body to allow it to determine the amount of any
8 transient lodging tax payable and the amounts of such tax payable or paid, to the extent that such
9 information is in a form which would permit identification of the individual concern or enterprise.
10 Nothing in this subsection shall limit the use which can be made of such information for regulatory
11 purposes or its admissibility in any enforcement proceedings. The public body shall notify the tax-
12 payer of the delinquency immediately by certified mail. However, in the event that the payment or
13 delivery of transient lodging taxes otherwise due to a public body is delinquent by over 60 days, the
14 public body shall disclose, upon the request of any person, the following information:

15 (a) The identity of the individual concern or enterprise that is delinquent over 60 days in the
16 payment or delivery of the taxes.

17 (b) The period for which the taxes are delinquent.

18 (c) The actual, or estimated, amount of the delinquency.

19 (19) All information supplied by a person under ORS 151.485 for the purpose of requesting ap-
20 pointed counsel, and all information supplied to the court from whatever source for the purpose of
21 verifying the financial eligibility of a person pursuant to ORS 151.485.

22 (20) Workers' compensation claim records of the Department of Consumer and Business Services,
23 except in accordance with rules adopted by the Director of the Department of Consumer and Busi-
24 ness Services, in any of the following circumstances:

25 (a) When necessary for insurers, self-insured employers and third party claim administrators to
26 process workers' compensation claims.

27 (b) When necessary for the director, other governmental agencies of this state or the United
28 States to carry out their duties, functions or powers.

29 (c) When the disclosure is made in such a manner that the disclosed information cannot be used
30 to identify any worker who is the subject of a claim.

31 (d) When a worker or the worker's representative requests review of the worker's claim record.

32 (21) Sensitive business records or financial or commercial information of the Oregon Health and
33 Science University that is not customarily provided to business competitors.

34 (22) Records of Oregon Health and Science University regarding candidates for the position of
35 president of the university.

36 (23) The records of a library, including:

37 (a) Circulation records, showing use of specific library material by a named person;

38 (b) The name of a library patron together with the address or telephone number of the patron;
39 and

40 (c) The electronic mail address of a patron.

41 (24) The following records, communications and information obtained by the Housing and Com-
42 munity Services Department in connection with the department's monitoring or administration of
43 financial assistance or of housing or other developments:

44 (a) Personal and corporate financial statements and information, including tax returns.

45 (b) Credit reports.

1 (c) Project appraisals, excluding appraisals obtained in the course of transactions involving an
2 interest in real estate that is acquired, leased, rented, exchanged, transferred or otherwise disposed
3 of as part of the project, but only after the transactions have closed and are concluded.

4 (d) Market studies and analyses.

5 (e) Articles of incorporation, partnership agreements and operating agreements.

6 (f) Commitment letters.

7 (g) Project pro forma statements.

8 (h) Project cost certifications and cost data.

9 (i) Audits.

10 (j) Project tenant correspondence.

11 (k) Personal information about a tenant.

12 (L) Housing assistance payments.

13 (25) Raster geographic information system (GIS) digital databases, provided by private forestland
14 owners or their representatives, voluntarily and in confidence to the State Forestry Department,
15 that is not otherwise required by law to be submitted.

16 (26) Sensitive business, commercial or financial information furnished to or developed by a
17 public body engaged in the business of providing electricity or electricity services, if the information
18 is directly related to a transaction described in ORS 261.348, or if the information is directly related
19 to a bid, proposal or negotiations for the sale or purchase of electricity or electricity services, and
20 disclosure of the information would cause a competitive disadvantage for the public body or its re-
21 tail electricity customers. This subsection does not apply to cost-of-service studies used in the de-
22 velopment or review of generally applicable rate schedules.

23 (27) Sensitive business, commercial or financial information furnished to or developed by the
24 City of Klamath Falls, acting solely in connection with the ownership and operation of the Klamath
25 Cogeneration Project, if the information is directly related to a transaction described in ORS 225.085
26 and disclosure of the information would cause a competitive disadvantage for the Klamath
27 Cogeneration Project. This subsection does not apply to cost-of-service studies used in the develop-
28 ment or review of generally applicable rate schedules.

29 (28) Personally identifiable information about customers of a municipal electric utility or a
30 people's utility district or the names, dates of birth, driver license numbers, telephone numbers,
31 electronic mail addresses or Social Security numbers of customers who receive water, sewer or
32 storm drain services from a public body as defined in ORS 174.109. The utility or district may re-
33 lease personally identifiable information about a customer, and a public body providing water, sewer
34 or storm drain services may release the name, date of birth, driver license number, telephone num-
35 ber, electronic mail address or Social Security number of a customer, if the customer consents in
36 writing or electronically, if the disclosure is necessary for the utility, district or other public body
37 to render services to the customer, if the disclosure is required pursuant to a court order or if the
38 disclosure is otherwise required by federal or state law. The utility, district or other public body
39 may charge as appropriate for the costs of providing such information. The utility, district or other
40 public body may make customer records available to third party credit agencies on a regular basis
41 in connection with the establishment and management of customer accounts or in the event such
42 accounts are delinquent.

43 (29) A record of the street and number of an employee's address submitted to a special district
44 to obtain assistance in promoting an alternative to single occupant motor vehicle transportation.

45 (30) Sensitive business records, capital development plans or financial or commercial information

1 of Oregon Corrections Enterprises that is not customarily provided to business competitors.

2 (31) Documents, materials or other information submitted to the Director of the Department of
3 Consumer and Business Services in confidence by a state, federal, foreign or international regulatory
4 or law enforcement agency or by the National Association of Insurance Commissioners, its affiliates
5 or subsidiaries under ORS 86A.095 to 86A.198, 697.005 to 697.095, 697.602 to 697.842, 705.137, 717.200
6 to 717.320, 717.900 or 717.905, ORS chapter 59, 723, 725 or 726, the Bank Act or the Insurance Code
7 when:

8 (a) The document, material or other information is received upon notice or with an under-
9 standing that it is confidential or privileged under the laws of the jurisdiction that is the source of
10 the document, material or other information; and

11 (b) The director has obligated the Department of Consumer and Business Services not to dis-
12 close the document, material or other information.

13 (32) A county elections security plan developed and filed under ORS 254.074.

14 (33) Information about review or approval of programs relating to the security of:

15 (a) Generation, storage or conveyance of:

16 (A) Electricity;

17 (B) Gas in liquefied or gaseous form;

18 (C) Hazardous substances as defined in ORS 453.005 (7)(a), (b) and (d);

19 (D) Petroleum products;

20 (E) Sewage; or

21 (F) Water.

22 (b) Telecommunication systems, including cellular, wireless or radio systems.

23 (c) Data transmissions by whatever means provided.

24 (34) The information specified in ORS 25.020 (8) if the Chief Justice of the Supreme Court des-
25 ignates the information as confidential by rule under ORS 1.002.

26 (35)(a) Employer account records of the State Accident Insurance Fund Corporation.

27 (b) As used in this subsection, "employer account records" means all records maintained in any
28 form that are specifically related to the account of any employer insured, previously insured or un-
29 der consideration to be insured by the State Accident Insurance Fund Corporation and any infor-
30 mation obtained or developed by the corporation in connection with providing, offering to provide
31 or declining to provide insurance to a specific employer. "Employer account records" includes, but
32 is not limited to, an employer's payroll records, premium payment history, payroll classifications,
33 employee names and identification information, experience modification factors, loss experience and
34 dividend payment history.

35 (c) The exemption provided by this subsection may not serve as the basis for opposition to the
36 discovery documents in litigation pursuant to applicable rules of civil procedure.

37 (36)(a) Claimant files of the State Accident Insurance Fund Corporation.

38 (b) As used in this subsection, "claimant files" includes, but is not limited to, all records held
39 by the corporation pertaining to a person who has made a claim, as defined in ORS 656.005, and all
40 records pertaining to such a claim.

41 (c) The exemption provided by this subsection may not serve as the basis for opposition to the
42 discovery documents in litigation pursuant to applicable rules of civil procedure.

43 (37) Except as authorized by ORS 408.425, records that certify or verify an individual's discharge
44 or other separation from military service.

45 (38) Records of or submitted to a domestic violence service or resource center that relate to the

1 name or personal information of an individual who visits a center for service, including the date of
2 service, the type of service received, referrals or contact information or personal information of a
3 family member of the individual. As used in this subsection, “domestic violence service or resource
4 center” means an entity, the primary purpose of which is to assist persons affected by domestic or
5 sexual violence by providing referrals, resource information or other assistance specifically of ben-
6 efit to domestic or sexual violence victims.

7 (39) Information reported to the Oregon Health Authority under ORS 431.964, except as provided
8 in ORS 431.964 (2)(c) information disclosed by the authority under ORS 431.966 and any information
9 related to disclosures made by the authority under ORS 431.966, including information identifying
10 the recipient of the information.

11 (40)(a) Electronic mail addresses in the possession or custody of an agency or subdivision of the
12 executive department, as defined in ORS 174.112, a local government or local service district, as
13 defined in ORS 174.116, or a special government body, as defined in ORS 174.117.

14 (b) This subsection does not apply to electronic mail addresses assigned by a public body to
15 public employees for use by the employees in the ordinary course of their employment.

16 **(41) Polygraph tests administered to applicants for positions in law enforcement under**
17 **ORS 659.840. Documents, materials and other information relating to polygraph tests ad-**
18 **ministered under ORS 659.840 shall be treated as exempt from disclosure under ORS 192.505.**

19