IN THE SUPREME COURT OF THE STATE OF OREGON

OREGON HEALTH AND SCIENCE UNIVERSITY, a public corporation, Plaintiff-Appellant, Respondent on Review, v. OREGONIAN PUBLISHING COMPANY, LLC, a domestic limited liability company, Defendant-Respondent, Petitioner on Review.	Multnomah County Circuit Court Case No. 11-12-16443 CA No. A152961 S064249

RESPONDENT ON REVIEW'S BRIEF ON THE MERITS

Petition for review of decision of the Court of Appeals on appeal from judgment of the Circuit Court for Multnomah County, Hon. Richard Maizels, Judge Pro Tempore

Opinion Filed:	May 11, 2016
Author of Opinion:	Sercombe, Presiding Judge
Concurring Judges:	Hadlock, Chief Judge; Tookey, Judge

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Respondent on Review Oregon Health and Science University ("OHSU") respectfully submits this Brief on the Merits.

I. QUESTIONS PRESENTED ON REVIEW

QUESTION 1:

Does the federal Health Insurance Portability and Accountability Act Privacy Rule, 42 USC § 1320d; 45 CFR Part 160 and 164, Subparts A & E ("HIPAA" or "HIPAA Privacy Rule"), prohibit disclosure of the patient information requested by Petitioner on Review ("The Oregonian"), as "protected health information" ("PHI")? Assuming that the information is PHI, does the HIPAA exception allowing for disclosures "required by law" apply to the request here under the OPRL?

PROPOSED RULE OF LAW:

The HIPAA Privacy Rule preempts state law, setting uniform national minimum standards for patient privacy, and prohibits disclosure of the patient information requested by The Oregonian because it is PHI. ORS 192.502(8), in turn, provides a categorical exemption from disclosure under the OPRL for information made confidential by federal law. The HIPAA exception for disclosures "required by law" does not apply because: a) general state public records laws are preempted by HIPAA, and b) disclosure is not required under Oregon law, pursuant to ORS 192.558(1)/ORS 192.502(9)(a); ORS 192.496(1); and/or ORS 192.502(2).

QUESTION 2:

Is the patient information requested by The Oregonian exempt from disclosure pursuant to ORS 192.496(1) and/or ORS 192.502(2)?

PROPOSED RULE OF LAW:

ORS 192.496(1) and ORS 192.502(2) exempt from disclosure a patient's health information and personal information, respectively. In order for disclosure to occur under ORS 192.496(1), The Oregonian must demonstrate by clear and convincing evidence that the public interest in disclosure of the individual patient's information requires disclosure in the particular instance, and that the disclosure would not be an unreasonable invasion of privacy. In order for disclosure to occur under ORS 192.502(2), The Oregonian must demonstrate by clear and convincing evidence that the public interest requires disclosure in the particular instance, and by a preponderance of the evidence that disclosure would not be an unreasonable invasion of privacy. On *de novo* review pursuant to ORS 192.490(1), this Court should conclude that The Oregonian failed to meet those statutory burdens.

QUESTION 3:

Does ORS 192.496(1) apply to public records less than 25 years old? If so, does ORS 192.496(1) by its terms exempt from disclosure an entire record that

contains health information or only the health information itself? And if ORS 192.496(1) by its terms exempts from disclosure an entire record, then must the record nonetheless be disclosed, with only the health information redacted, pursuant to ORS 192.505?

PROPOSED RULE OF LAW

ORS 192.496(1) applies to public records less than 75 years old, including records less than 25 years old. ORS 192.496(1) by its terms exempts an entire record that contains health information and, therefore, no redaction would be required pursuant to the procedural redaction requirements of ORS 192.505.

If the Court considers this issue on review and concludes that ORS 192.496(1) protects health information but not the entire record, the Court then nonetheless would be obliged to consider either or both of Question 1 and Question 2 above, either of which should lead to an appellate judgment protecting the patient information here from disclosure.

QUESTION 4:

The Oregonian's public records request expressly requested that OHSU provide certain specified information from tort claim notices in a spreadsheet, separate from the tort claim notices themselves. Should the information in the

spreadsheet be disclosed even if the information in the tort claim notices themselves is exempt from disclosure?

PROPOSED RULE OF LAW

The Oregonian waived and failed to preserve this claim, and it should not be considered. In all events, an exemption for information in a requested spreadsheet, derived from tort claim notices, must be analyzed the same under the OPRL as the information in the tort claim notices themselves.

QUESTION 5:

Are the names of students, who have submitted tort claim notices related to their education, covered by the personal privacy exemption of ORS 192.502(2), or protected by the Family Education Records and Privacy Act, 20 USC § 1232g and 34 CFR Part 99 ("FERPA"), and thus unconditionally exempt from disclosure pursuant to ORS 192.502(8)?

PROPOSED RULE OF LAW

The names of students who have submitted tort claim notices related to their education are covered by ORS 192.502(2) or are protected by FERPA, and thus are unconditionally exempt from disclosure pursuant to ORS 192.502(8).

II. STATEMENT OF FACTS

OHSU set forth the facts accurately at pages 8-11 of its Amended Opening Brief in the Court of Appeals and at pages 4-5 of OHSU's Response to the Petition for Review. The most salient facts for purposes of review are set out below.

The Oregonian's public records request sought:

> [A] list of tort claims filed against Oregon Health & Science University and its affiliated entities, preferably in spreadsheet form, with information dating back to Jan 1, 2006 and including only the following types of information or data fields: claim number, claimant full name, attorney full name, date of alleged tort, date of tort claim notice, and whether it is closed or open.

OHSU has withheld from disclosure only the following patient information, information that remains at issue on review: names of patients, date of the alleged tort, and name of the patient's attorney.[1] The Oregonian expressly sought that information to be derived from tort claim notices, the elements of which are defined by law in ORS 30.275(4), as follows:

> Formal notice of claim is a written communication from a claimant or representative of a claimant containing:
>
> (a) A statement that a claim for damages is or will be asserted against the public body or an officer, employee or agent of the public body;
>
> (b) A description of the time, place and circumstances giving rise to the claim, so far as known to the claimant; and

1 APP-71-75. OHSU also is withholding the name of students who have claims pertaining to their education, which is addressed separately by the parties.

> (c) The name of the claimant and the mailing address to which correspondence concerning the claim may be sent.

Accordingly, coupling The Oregonian's specific requests with the statutory elements of a tort claim notice, the following patient information would be necessarily express or implicit as a matter of law in a disclosure of the information that the Oregonian sought and that OHSU has refused to disclose: the name of the patient and the patient's lawyer; that the named patient had a medical condition; that the named patient's medical condition was diagnosed or treated by OHSU; that the named patient allegedly suffered an injury as a result of the diagnosis or treatment; the date of that alleged injury; and that monetary damages are required to compensate the named patient for the alleged injury caused by OHSU.

After The Oregonian's request for review and OHSU's contingent requests for review were granted by this Court, and before The Oregonian's brief on the merits was due on November 7, 2016, OHSU provided The Oregonian with the spreadsheet that The Oregonian had requested, with only the information still at issue on review redacted. *See* ORS 192.505 (providing procedure for responding to public records request with a combination of disclosure and redaction).[2]

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2 The attendant correspondence between counsel for OHSU and The Oregonian is attached at Appendix 71-75. While the lengthy spreadsheet itself is not attached in the Appendix, its contents are described by OHSU in the correspondence, as follows:

III. SUMMARY OF ARGUMENT

A. RESETTING THE LEGAL ISSUES FOR REVIEW

OHSU is committed to protecting the privacy of its patients. That fundamental commitment is integral to its legal positions on review. By contrast, The Oregonian seeks to force OHSU to disclose its patients' personal health information to a newspaper, with no restrictions on the newspaper's ability to contact those patients about their personal health or to publish such information.

Not only do the parties have fundamentally different positions with respect to the privacy of patient information, but they also see this case from fundamentally different legal perspectives. As their primary basis for seeking review, The Oregonian (and the Attorney General as *amicus curiae*) seized on an issue injected by the Court of Appeals opinion and not ultimately necessary for a decision in this

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> OHSU will provide the claim number, date of tort claim notice, and whether the claim is open or closed for patient health care claims. And OHSU will provide all requested information except for the student's full name for student claims.
>
> In addition, for all other tort claims, including premises liability, employment claims, etc., the spreadsheet will provide a list of the requested information, all of which is not at issue – claim number, claimant full name, attorney full name, date of alleged tort, date of tort claim notice, and whether the claim is closed or open.

APP-71-72. Given the description of the spreadsheet provided by OHSU in its letter and quoted above in this footnote, it does not appear that a copy of the spreadsheet itself is required for the Appendix or the record, although OHSU would of course provide it if the Court were to so order.

case, concerning whether *an entire record* that contains personal health information can be withheld from disclosure or rather whether *only the personal health information* in the record may be withheld, pursuant to ORS 192.496(1) and ORS 192.505.

By contrast, OHSU filed this appeal initially and renewed its position in this Court by its contingent requests for review that were granted, in order to protect the privacy of its patients' information. Accordingly, the primary focus of OHSU's brief here, as it was in the Court of Appeals, is application of the provisions in state and federal law that each manifestly *protect that information from disclosure*: HIPAA (preempts state law and protects PHI) and ORS 192.502(8) (unconditional exemption for information made confidential by federal law); ORS 192.553 *et seq.*, including ORS 192.558(1) (protection for protected health information) and ORS 192.502(9)(a) (unconditional exemption for information made confidential by state law); ORS 192.496(1) (conditional exemption for health information); and/or ORS 192.502(2) (conditional exemption for personal information).

Application of any one of these statutory provisions should result in reversal of the circuit court judgment and entry of an appellate judgment protecting the patients' information from disclosure. The Oregonian's brief on the merits nonetheless largely ignores these provisions, even though they are dispositive of The

Oregonian's requests for disclosure.[3] And the Attorney General has ignored the application of these provisions altogether, because the Attorney General's interest in this case is limited to challenging the Court of Appeals' reasoning on the issue of whether the protection in ORS 192.496(1) applies to records less than 25 years old and, if so, whether ORS 192.496(1) protects the entire record or certain information in the record, when considered in conjunction with ORS 192.505.

1. HIPAA PREEMPTS STATE LAW AND PROTECTS THE PATIENT INFORMATION HERE FROM DISCLOSURE

The patient information that The Oregonian seeks to force OHSU, a public provider of health care, to disclose under the Oregon Public Records Law is individual identifying information that is categorically and expressly protected by the HIPAA Privacy Rule, which sets uniform national minimum standards for patient privacy and preempts state law. In addition, ORS 192.502(8) provides an unconditional exemption from disclosure under the OPRL for information that is confidential pursuant to federal law.[4]

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3 In this Court's Order granting OHSU's contingent requests for review, the Court expressly directed that the original briefing schedule would be maintained, which provides for a single brief on the merits by each party.

4 ORS 192.502(8) provides: "The following public records are exempt from disclosure under ORS 192.410 to 192.505: (8) Any public records or information the disclosure of which is prohibited by federal law or regulations."

The Oregonian nonetheless relies on an exception in HIPAA for disclosures "required by law." However, HIPAA's preemption provisions trump a state public records law that could permit disclosure of the PHI of a vast class of patients of public health care providers and thereby undermine HIPAA's core purpose to provide uniform minimum national standards for the protection of patient privacy.

Moreover, the disclosure sought here actually is *not* required by Oregon law. In fact, to the contrary, Oregon law *prohibits* disclosure. ORS 192.553 *et seq*., and specifically ORS 192.558(1), generally prohibit disclosure of individual identifying health information without patient authorization, including the information that The Oregonian has requested. ORS 192.496(1) and/or ORS 192.502(2) also exempt the health information and personal information here, respectively, from disclosure made pursuant to a public records request.

In addition to OHSU's own briefing on these HIPAA points, OHSU expects the Oregon Medical Association to submit an *amicus* brief in support and underscoring the critical importance of protecting patient privacy.

2. OREGON LAW PROTECTS THE PATIENT INFORMATION FROM DISCLOSURE

ORS 192.556 defines "protected health information" and "individually identifiable health information" in accord with the definition of PHI in HIPAA. ORS 192.558(1), in turn, generally prohibits disclosure of individual identifying health

information without written patient authorization. And the OPRL, ORS 192.502(9)(a), provides an unconditional exemption for information made confidential by state law.

ORS 192.496(1) and ORS 192.502(2) also protect from disclosure a patient's health information and personal information, respectively. In order for disclosure to occur under ORS 192.496(1), The Oregonian must demonstrate by clear and convincing evidence that the public interest in disclosure of the individual patient's information requires disclosure in the particular instance, and that the disclosure would not be an unreasonable invasion of privacy. In order for disclosure to occur under ORS 192.502(2), The Oregonian must demonstrate by clear and convincing evidence that the public interest requires disclosure in the particular instance, and by a preponderance of the evidence that disclosure would not be an unreasonable invasion of privacy.[5] The Oregonian's brief actually has not addressed the

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5 ORS 192.496(1) provides in pertinent part as follows:

> The following public records are exempt from disclosure: (1) Records less than 75 years old which contain information about the physical or mental health or psychiatric care or treatment of a living individual, if the public disclosure thereof would constitute an unreasonable invasion of privacy. The party seeking disclosure shall have the burden of showing by clear and convincing evidence that the public interest requires disclosure in the particular instance and that public disclosure would not constitute an unreasonable invasion of privacy.

ORS 192.502(2) provides in pertinent part as follows:

application of these statutory tests to the information it seeks here from each patient, presumably because there can be only one answer to the statutory inquiry, which is that OHSU properly has refused to disclose each patient's information.

Instead, The Oregonian has made three arguments to try to avoid application of these statutes altogether. The first is that the information is not protected health information or personal information because The Oregonian requested only names and dates and not the patient's actual health information. However, HIPAA itself and ORS 192.553 *et seq*. make clear that names of patients and their lawyers and dates of treatment alone are protected as individual identifying information. Moreover, the required statutory elements of a tort claim notice, coupled with The Oregonian's request for names of patients and lawyers and dates of treatment, necessarily and implicitly discloses far more patient information than only the names and dates.

> The following public records are exempt from disclosure under ORS 192.410 to 192.505: (2) Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

The Oregonian's second argument is that because it made a request for this information from *all* tort claim notices, then there is no way to know which names would be the names of patients and which names would be the names of others who had filed tort claim notices, including ordinary premises liability claimants for example. However, OHSU has produced to The Oregonian a spreadsheet with all of the information that The Oregonian requested and with only the information that remains at issue redacted, thereby making clear which claims are those of patients and which are not.

The Oregonian's third argument is that the information must be disclosed because it is redacted on a spreadsheet prepared by OHSU, rather than redacted on the actual tort claim notices themselves. That argument does not even purport to refute that the information is protected by HIPAA and ORS 192.553 *et seq*., regardless of where the information appears. Moreover, The Oregonian affirmatively requested the spreadsheet as the form of disclosure for the information, never objected to its use or claimed that it was to be analyzed differently from the information in the tort claim notices themselves, and now points to no provision in the OPRL that would treat the information any differently on the spreadsheet than on the tort claim notices themselves.

3. ORS 192.496(1): ENTIRE RECORD OR INFORMATION?

Finally, as noted at the beginning of this Summary of Argument, the Court of Appeals decision injected a new consideration into the analysis, which appears to have provided The Oregonian with its primary basis for seeking review and which also caught the attention of the Attorney General, who has filed an *amicus* brief on the issue. The Court of Appeals concluded that ORS 192.496(1) was outside ORS 192.501 and ORS 192.502, and that it conditionally exempted *the entire record* if the record contained health information, rather than providing a conditional exemption for just the health information in the record. *OHSU v. Oregonian Pub. Co., LLC*, 278 Or App 189, 205-06, 373 P3d 1233, *rev allowed*, 360 Or 400, 360 Or 422 (2016). Applying that interpretation of ORS 192.496(1), the Court of Appeals concluded that the OPRL redaction provision, ORS 192.505, did not apply.[6]

There are substantial reasons detailed in this brief, based on application of standard statutory interpretation principles and reference to the legislative history of ORS 192.496(1) (which OHSU has provided as an Appendix), to conclude that the Court of Appeals decision reached a correct conclusion. Regardless, however, of whether the Court of Appeals was correct or not about whether ORS 192.496(1)

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6 ORS 192.505 provides: "If any public record contains material which is not exempt under ORS 192.501 and 192.502, as well as material which is exempt from disclosure, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination."

protects an entire record or protects information from the record, the fact would still remain that *the information* that The Oregonian has requested concerning OHSU's patients is protected from disclosure by the multiple provisions of law discussed above: HIPAA/ORS 192.502(8); ORS 192.558(1)/ORS 192.502(9)(a); ORS 192.496(1); and/or ORS 192.502(2). Thus, whether or not this Court considers the issue concerning the scope of ORS 192.496(1) that was raised by the Court of Appeals, this Court should enter an appellate judgment that protects the patient information here from disclosure to The Oregonian.

IV. ARGUMENT

A. FEDERAL LAW (HIPAA) PROHIBITS DISCLOSURE OF PROTECTED HEALTH INFORMATION, AND ORS 192.502(8) EXEMPTS THAT INFORMATION FROM DISCLOSURE

1. INTRODUCTION

The parties do not dispute that HIPAA prohibits a "covered entity" – including OHSU – from disclosing "protected health information" ("PHI"), except as permitted or required under the HIPAA Privacy Rule. The requested names/dates for OHSU's patients constitute "Individually Identifiable Health Information," classified by HIPAA as PHI. The PHI, therefore, is categorically exempt from disclosure under the OPRL, pursuant to HIPAA's preemption provisions and ORS 192.502(8), which provides an unconditional exemption for records made confidential by federal law.

The object of HIPAA was to create strong, uniform, minimum national standards to protect the confidentiality of *all patients'* PHI. HIPAA is preemptive and contains no exception that would authorize The Oregonian to use the OPRL to request, receive and publish the PHI of patients who receive their medical care from a *public* health care provider.

2. THE INFORMATION REQUESTED BY THE OREGONIAN IS PHI

HIPAA protects patient information from disclosure by a health care provider as "protected health information" and "Individually Identifiable Health Information." 45 CFR Part 160 and 164, Subpart A & E; 45 CFR §§ 164.103, 164.502; App-1-5. PHI expressly includes information received by a health care provider relating to a patient's health, condition or provision of health care to the individual, that either identifies the individual, including demographic information, or provides a reasonable basis to believe the information can be used to identify the individual. *Id*. Accordingly, the Court of Appeals correctly concluded that PHI includes the name of the patient and the date of service and, in this circumstance, also would include the name of a claimant's attorney who can in turn identify the claimant. *OHSU*, 278 Or App at 201; *see* 65 Fed Reg 82462-01 at 82612 (Official Commentary to the Final HIPAA Privacy Rule); App-18-19.

Disclosure of a patient's name or the fact that she received health services, without a permissible purpose or a patient's written authorization, is a violation of

HIPAA. 74 Fed Reg 42740-01, at 42745 (U.S.D.H.H.S. Commentary re HIPAA violations); App-20-21. In order for PHI to lose HIPAA confidentiality protections, HIPAA provides that 19 separate identifiers must all be removed from PHI, including the very information requested by The Oregonian here: patient names, all elements of dates, and any other information that could be used alone or in combination with other information to identify an individual. 45 CFR § 164.514(b). HIPAA's protection of a patient's identity also is evident from HIPAA's provisions regarding a facility's patient directory – where the patient controls whether or not her name is included. If a patient opts out of inclusion, then the facility is precluded from disclosing even the name alone (*i.e.*, the fact that the person is a patient in the facility). 45 CFR § 164.510(a); App-6-7.

3. THE OREGONIAN'S ARGUMENT THAT THE PATIENTS' INFORMATION IS NOT PHI LACKS LEGAL SUPPORT AND IS MERITLESS

The Oregonian nonetheless contends, without citation to any support in the law, that the name of a patient who submitted a tort claim notice, name of patient's attorney, and patient's treatment date are not individually identifiable patient health information, and therefore are not protected as PHI under HIPAA. The arguments relied on are: a) The Oregonian requested only names and dates, not patients' actual health information, and b) The Oregonian requested the same individual identifying information for *all* tort claim notices, including *not only* patients regarding their

health care but also the names/dates of anyone else who submitted a tort claim notice, so purportedly no individual name/date is readily identifiable as a patient.

With regard to the first argument, as detailed in OHSU's brief above, HIPAA is clear that the individual identifying information requested by The Oregonian – names of patients and their attorneys, and dates of treatment – is and remains PHI, whether or not any additional health information accompanies release of the individual identifying information. Moreover, even if the rest of the tort claim notice were redacted (as it is on the spreadsheet here), disclosure of the names and date from a tort claim notice necessarily, as a matter of law, by virtue of the statutory elements of a tort claim notice, also discloses that: the named patient had a medical condition; the named patient's medical condition was diagnosed or treated by OHSU; the named patient allegedly suffered an injury as a result of the diagnosis or treatment; the date of that injury; and monetary damages are allegedly required to compensate her for the injury caused by OHSU. *See* ORS 30.275(4) (stating the required elements of tort claim notice).

Clearly, disclosure of the patient information sought by The Oregonian would violate HIPAA if the disclosure were made by a private physician or private hospital. Indeed, OHSU expects that the Oregon Medical Association will file a brief *amicus curiae* in this Court that will make this point absolutely clear, so that the Court is not

just hearing this from OHSU but from a credible, knowledgeable organization that represents, *inter alia*, private health care providers.

There are multiple responses to The Oregonian's second argument, that by virtue of seeking information about tort claims by persons other than patients (*e.g.*, premises liability), no individual name/date of a patient is readily identifiable as such. The Oregonian's argument does not acknowledge that if the newspaper reporter had requested names/dates from tort claim notices *only by patients* related to their health care, that such individually identifiable patient health information would clearly qualify as PHI covered by HIPAA. Neither creation of a spreadsheet with only names and dates, nor inclusion in the spreadsheet of names and dates from tort claim notices submitted by persons other than patients, can change that immutable conclusion here.[7]

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7 Ironically, The Oregonian's Editorial Board has asserted that the National Security Agency's explanation that it keeps secure the wholesale collection of metadata should provide "small comfort" to "[a]nyone spooked by the revelation that his or her phone and Internet records were snagged in a vast intelligence-gathering sweep." The Oregonian Editorial Board, *Ron Wyden's Call for NSA Accountability is Right on Time*, The Oregonian, June 29, 2013; App-69-70. That same editorial professes concern for unjustified invasion of medical privacy: "What started out as a sweep for phone and internet data could just as easily have been expanded to indiscriminately collect *medical*, library, banking or other *records most folks consider to be their own business*, save for the providers involved." *Id*. (emphases added). The speculative threat to individual medical privacy by the NSA is much less than the actual threat posed here by The Oregonian itself to the health care privacy of OHSU patients.

Finally, the fact is that OHSU has provided The Oregonian with a spreadsheet that contains all of the information that The Oregonian's public records request sought, except for redaction of the information that is still at issue on review. App-71-72, 74. ORS 192.505 requires precisely that procedure:[8]

> If any public record contains material which is not exempt under ORS 192.501 and 192.502, as well as material which is exempt from disclosure, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination.

The spreadsheet thus sets out all of the requested information for all claims except: a) for claims by patients, the name of claimant, date of tort, and name of claimant's attorney, and b) the name of claimant for student claims assertedly subject to FERPA (of which there are only a couple). App-71-72. That spreadsheet thereby makes clear that all of the claims listed for which there is no name of the claimant and no date of tort and no name of attorney, *are all claims by patients*. The

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8 The Attorney General's Public Records Manual also makes that prescribed procedure clear:

> The public body must separate the nonexempt material and make it available where it is reasonably possible to do so. * * * No specific request to segregate exempt and nonexempt information is necessary. However, the obligation to separate and disclose the nonexempt material may not occur to the public body, so a specific request to do so — even after a refusal to disclose — can be helpful. A public body should inform the requester when it is disclosing less than all of the information requested and state the reason for nondisclosure.

Attorney General's Public Records and Meetings Manual, 116-17 (2014) (footnote omitted).

Oregonian no longer has any basis for arguing that there is no way to differentiate the claims by patients from other claims.

4. HIPAA PREEMPTS STATE LAW AND PROTECTS THE PATIENT INFORMATION HERE

The fundamental purpose of HIPAA is to "create a national framework for health privacy protection" and set a "floor of ground rules for health care providers * * * to follow." 65 Fed Reg 82462-01 at 82463-64 (Commentary to the HIPAA Privacy Rule); App-13-14. The question then becomes whether, in establishing a uniform national framework for the minimum level of protection of patients' individual health care information, including the PHI here, HIPAA nonetheless carved out a vast class of individuals who receive care from a public health care provider and relegated the protection of those patients' privacy wholesale to the vagaries of a less protective state public records law. OHSU expects that the Oregon Medical Association will file an *amicus* brief that supports OHSU's position that HIPAA did not exempt patients of public health care providers from its protections.

The Eleventh Circuit in *Opis Management Resources, LLC v. Secretary, Florida Agency for Health Care Administration*, 713 F3d 1291 (11th Cir 2013), recently reinforced that HIPAA confidentiality protections for PHI preempt less protective disclosure under general state records laws from covered entities such as OHSU. *Id*. at 1294-98 (HIPAA controls over general state law regarding access to decedents' medical records). The court held:

> In drafting HIPAA, Congress included an express preemption provision. 42 U.S.C. § 1320d-7(a). A state law is "contrary" to HIPAA if:
>
> (1) A covered entity [including here, OHSU] would find it impossible to comply with both the State and Federal requirements; or
>
> (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes of … section 264 of Public Law 104-191
>
> * * * * *
>
> 45 C.F.R. § 160.202.

Id. at 1294.

HIPAA preemption thus applies here because it is impossible for OHSU to comply both with the confidentiality that HIPAA requires and any purported disclosure that the OPRL would provide for. Alternatively, HIPAA preemption applies here because if the OPRL would subject PHI of patients only at public hospitals to disclosure, that clearly would subvert and "stand[] as an obstacle to the accomplishment and execution of the full purposes" of HIPAA, to provide across-the-board minimum national standards for the enforced confidentiality of personal health care information. *See id*. at 1294-95 (detailing Congress' objective to establish minimum national standards preserving confidentiality of individually identifiable health information).

In addition, when federal law protects PHI from disclosure, that also is the end of the inquiry under the OPRL. ORS 192.502(8) provides an unconditional

exemption from disclosure for "[a]ny public records or information the disclosure of which is prohibited by federal law or regulations." Accordingly, when OHSU identified tort claim notice information as submitted by patients related to their care, OHSU had both the statutory obligation under HIPAA and the concomitant statutory exemption under ORS 192.502(8) not to release the PHI.

5. HIPAA CONTAINS NO EXCEPTION FOR DISCLOSURE OF THE PHI OF PATIENTS OF PUBLIC HEALTH CARE PROVIDERS PURSUANT TO THE OPRL

The Oregonian nonetheless contends that state public records law trumps the federal HIPAA Privacy Rule. The Oregonian relies for its position on the exception in HIPAA that permits disclosure of PHI when "required by law." 45 CFR § 164.512(a)(1). "Required by law" is defined as follows:

> a mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law. *Required by law* includes, but is not limited to, court orders and court-ordered warrants, subpoenas or summons issued by a court, grand jury, a governmental or tribal inspector general, or an administrative body authorized to require the production of information; a civil or an authorized investigative demand; Medicare conditions of participation with respect to health care providers participating in the program; and statutes or regulations that require the production of information, including statutes or regulations that require such information if payment is sought under a government program providing public benefits.

45 CFR § 164.103 (emphasis original).

a. HIPAA PREEMPTION APPLIES

The specific examples provided in the definition of HIPAA's "required by law" exception are all extremely narrow and specific, including subpoenas, court

orders, disclosures to comply with health care regulatory requirements and related to government program payments.[9] By contrast, The Oregonian's effectively unlimited interpretation of the scope of the "required by law" exception would allow for *any* state law to provide an exception to HIPAA, regardless of its potential for disclosures that otherwise would be prohibited by HIPAA and that would "stand[] as an obstacle to the accomplishment and execution of the full purposes" of HIPAA. *Opis Management*, 713 F3d at 1294-95. That result, however, is precisely what the preemption holding in *Opis Management* would prohibit.

b. THE HIPAA EXCEPTION FOR DISCLOSURES "REQUIRED BY LAW" DOES NOT APPLY, BY ITS TERMS, BECAUSE DISCLOSURE IS *NOT* REQUIRED BY OREGON LAW

ORS 192.553 *et seq*. make clear that the Oregon Legislature sought to *augment*, not diminish, HIPAA's patient privacy protections. ORS 192.553(2) expressly so states: "In addition to the rights and obligations expressed in ORS 192.553 to ORS 192.581, [HIPAA] establish[es] additional rights and obligations regarding the use and disclosure of protected health information and the rights of individuals regarding the protected health information of the individual." *See*

9 Indeed, even the exception within the definition for disclosures authorized pursuant to "statutes or regulations that require the production of information" is coupled directly with an example that is quite specific and limited and which does not provide for disclosure to the media and general public, *viz.*, "including statutes or regulations that require such information if payment is sought under a government program providing public benefits."

Classen v. Arete NW, LLC, 254 Or App 216, 233, 294 P3d 520 (2012) (stating that the legislative history of ORS 192.553 *et seq.* included the intent to preserve the preexisting policy and protections for patients' information).[10] That is entirely consistent with the terms of HIPAA preemption, which sets a national uniform floor for protection of patient privacy and permits states to provide additional protections.

ORS 192.553(1)(a) provides:

> (1) It is the policy of the State of Oregon that an individual has:
>
> (a) The right to have protected health information of the individual safeguarded from unlawful use or disclosure[.]

"Protected health information" is a defined term, which includes the patient information here squarely within its coverage and protections. ORS 192.556(11)(a) defines "Protected health information" to mean:

> [I]ndividually identifiable health information that is maintained or transmitted in any form of electronic or other medium by a covered entity [including OHSU].

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10 *See also* legislative history for House Bill (HB) 2305 (2003) (codified at ORS 192.553 *et* seq.), set forth in OHSU's Plaintiff-Appellant's Amended Opening Brief in the Oregon Court of Appeals at pp. 25-26, and App-8-17, 19, 21-25 of that brief.

And, ORS 192.556(8) pertinently defines "Individually identifiable health information":

> (8) "Individually identifiable health information" means any oral or written health information in any form or medium that is:
>
> (a) created or received by a covered entity * * *; and
>
> (b) identifiable to an individual, including demographic information that identifies the individual, or for which there is a reasonable basis to believe the information can be used to identify an individual and that relates to:
>
> (A) The past, present or future physical or mental health or condition of an individual;
>
> (B) The provision of health care to an individual[.]

ORS 192.558(1), in turn, generally permits the disclosure of an individual's protected health information only "in a manner that is consistent with an authorization provided by the individual or a personal representative of the individual." The OPRL then honors the prohibition against unauthorized disclosure in ORS 192.558(1) by providing an unconditional exemption for information made confidential by state law, pursuant to ORS 192.502(9)(a). Accordingly, there is no disclosure here that is "required by law." The HIPAA exception for disclosures "required by law" thus does not apply, by its terms.[11]

11 ORS 192.496(1) and ORS 192.502(2), discussed further *infra*, also protect the information sought by The Oregonian here, with the same result.

One final point in this context should be addressed. ORS 192.558(2)(a) and (3) contain certain particular, specific exceptions to the prohibition in ORS 192.558(1) against nonconsensual disclosures, allowing disclosures such as the exception in ORS 192.558(2)(a) "[f]or the provider's or plan's own treatment, payment or health care operations." ORS 192.558(2)(b) also contains a general exception allowing disclosure "[a]s otherwise permitted or required by state or federal law or by order of the court."

Oregon laws that specifically require disclosure of protected health information, in very limited circumstances, and which would comport with the intent of the exception in ORS 192.558(2)(b) for disclosures "[a]s otherwise permitted or required by state * * * law" include: ORS 676.260 (disclosure of blood alcohol level of a named patient after a motor vehicle accident); ORS 419B.015 (child abuse reporting); ORS 124.065 (elder abuse reporting); ORS 430.743 (abuse of person with a disability); ORS 146.100 (reporting drug overdoses that result in death, apparent suicide, and deaths related to disease that might be a danger to public health); and ORS 433.004 (reporting certain infectious diseases). Each of those Oregon laws is specific, concerning the disclosure of otherwise-protected health information for a distinct purpose. In contrast, the OPRL does not specifically require disclosure of protected health information.

The only sensible way to read ORS 192.553 *et seq*. and the OPRL together is to conclude that ORS 192.556 defines the information requested here as protected and ORS 192.558(1) prohibits its disclosure without a patient's written authorization; ORS 192.502(9)(a) then exempts that information from disclosure under the OPRL because it has been made confidential by state law. Moreover, even if there were any possible conflict between that conclusion and the "otherwise required by law" provision of ORS 192.558(2)(b), that conflict would be resolved by preferring and applying the more specific provisions (the prohibition against unauthorized disclosure of this particular information in ORS 192.556 and ORS 192.558(1), coupled with the OPRL unconditional exemption for such confidential information in ORS 192.502(9)(a)), over the more general provision (the "otherwise required by law" exception in ORS 192.558(2)(b)). *See* ORS 174.020(2) ("When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.").[12]

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12 The statutory analysis set out above has been prescribed by this Court:

> Two basic rules govern this court's resolution of a conflict between statutes. The first is that, when multiple statutory provisions are at issue in a case, this court, if possible, must construe those statutes in a manner that "will give effect to all" of them. ORS 174.010; *see State v. Guzek*, 322 Or 245, 268, 906 P2d 272 (1995) (noting that when two statutes deal with the same subject, "the two should be read together and harmonized, if possible, while giving effect to a consistent legislative

6. CONCLUSION

In summary, the patient information that remains at issue from The Oregonian's public records request constitutes PHI, which is protected from disclosure by HIPAA. HIPAA preempts state law, and the OPRL likewise exempts information made confidential by federal law. Furthermore, the HIPAA exception for disclosures "required by law" does not apply, due to HIPAA preemption and to the fact that Oregon law does not actually require the disclosures here; rather Oregon law protects the information here from disclosure.

That conclusion provides an independent and sufficient basis to reverse the circuit court judgment and enter an appellate judgment for OHSU, protecting its patients' information from disclosure. In the alternative, ORS 192.558(1) (as discussed above), and ORS 192.496(1) and/or ORS 192.502(2) (as discussed in Section B immediately below) each separately protect the information here from disclosure.

> policy"). The second rule is that, if two statutes are inconsistent, the more specific statute will control over the more general one. ORS 174.020(2) * * *. In short, if the court can give full effect to both statutes, it will do so, and if not, it will treat the specific statute as an exception to the general.

Powers v. Quigley, 345 Or 432, 438, 198 P3d 919 (2008) (certain citations omitted).

B. ADDITIONAL STATE STATUTORY PROTECTIONS FOR HEALTH CARE INFORMATION (ORS 192.496(1)) AND INFORMATION OF A PERSONAL NATURE (ORS 192.502(2))

1. ELEMENTS OF THE STATUTORY TESTS

The statutory exemptions for health care information, ORS 192.496(1), and for information of a personal nature, ORS 192.502(2), both expressly place an exceptionally high burden on a party that seeks public disclosure, and they contain no presumption in favor of disclosure. As such, they are materially different from any more general presumption in the OPRL in favor of disclosure.

ORS 192.496(1) protects an individual's health information from disclosure:

> The following public records are exempt from disclosure: (1) Records less than 75 years old which contain information about the physical or mental health or psychiatric care or treatment of a living individual, if the public disclosure thereof would constitute an unreasonable invasion of privacy. The party seeking disclosure shall have the burden of showing by clear and convincing evidence that the public interest requires disclosure in the particular instance and that public disclosure would not constitute an unreasonable invasion of privacy.

ORS 192.502(2) exempts from disclosure "information of a personal nature":

> Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

The public body must initially show that withholding information sought through a disclosure request is justified under ORS 192.496(1) and ORS 192.502(2). *See* ORS 192.490(1) ("the burden is on the public body to sustain its action"); *Guard Pub. Co. v. Lane Cty. Sch. Dist. No. 4J*, 310 Or 32, 38, 791 P2d 854 (1990); *Mail Tribune, Inc. v. Winters*, 236 Or App 91, 96, 237 P3d 831 (2010).[13] As a general matter, the fact that the public body has made a determination after review of the records is sufficient to meet the burden of production. *City of Portland v. Anderson*, 163 Or App 550, 555, 988 P2d 402 (1999).

Specifically here, OHSU must produce some evidence that information sought by The Oregonian is health care information or information of a personal nature and that disclosure would constitute an "unreasonable invasion of privacy." *Mail Tribune*, 236 Or App at 96. An "unreasonable invasion of privacy" is a generic term that is subject to common understanding. *Jordan v. Motor Vehicles Division*, 308 Or 433, 442, 781 P2d 1203 (1989).

13 The case law cited in text above interprets and applies the statutory exemption for information of a personal nature, ORS 192.502(2). The structural terms of the statute specifically protecting health care information, ORS 192.496(1), are similar enough that this portion of the analytic framework for each should be the same.

Once OHSU has met its initial burden, for ORS 192.496(1), the statutory burden shifts to The Oregonian to prove by clear and convincing evidence that "the public interest requires disclosure in the particular instance *and* that public disclosure would not constitute an unreasonable invasion of privacy." ORS 192.496(1) (emphasis added).

For purposes of ORS 192.502(2), once OHSU has met its initial burden, The Oregonian has the burden to establish by a preponderance of the evidence that the information is *not* information of a personal nature and that the disclosure *will not* unreasonably invade privacy. *See City of Portland*, 163 Or App at 555 (re: information of a personal nature). If The Oregonian does not meet that burden, then as with ORS 192.496(1), ORS 192.502(2) places a very high burden on The Oregonian, *viz*., to establish by clear and convincing evidence that the public interest "requires disclosure in the particular instance." *See id.* at 555 (stating burden); *Mail Tribune*, 236 Or App at 96 (same). Per the terms of the statutes, an individualized showing is required. *See, e.g., Guard Publishing*, 310 Or at 39-40 (considering individualized determinations in context of a public body's assertion of blanket exemption).[14]

14 The Court of Appeals did not address the application of the statutory tests here because it remanded the case to the circuit court to apply its new interpretation of ORS 192.496(1). And the *pro tempore* trial court judge had based his ruling on a

2. OHSU MADE AN INDIVIDUALIZED DETERMINATION FOR EACH PATIENT'S CLAIM

OHSU met its initial burden of production to "sustain its action." ORS 192.490(1). The trial court record establishes that OHSU *reviewed every document individually* to determine whether the record information was subject to The Oregonian's request. R-30 (Rensklev Affid ¶ 24). As detailed in the section of this brief discussing PHI under HIPAA, the requested information alone is protected by HIPAA. Moreover, as also discussed therein, the disclosure of the requested names and dates, coupled with the information necessarily implicit from a tort claim notice, would reveal even more individual health information about OHSU's patients.

OHSU also made a list of the individual record information available to the trial court by offering to submit to an *in camera* inspection. *See* ORS 192.490(1) ("The court, on its own motion, may view the documents in controversy in camera before reaching a decision."). The trial court did not conduct an *in camera* review.

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fundamentally incorrect understanding of the law, which OHSU had never agreed applied, an understanding which was actually the reverse of what the law provides by its terms:

> [The Oregonian's] request is not an unreasonable invasion of privacy. Everyone agrees that public policy presumes that release of information is to be favored unless good cause can be shown why it should not be disclosed. [OHSU] has not carried that burden.

OHSU's Amended Opening Brief in the Court of Appeals, ER-9.

That is sufficient to meet the initial burden to show that OHSU made an individual determination with respect each record's information that was requested, *City of Portland,* 163 Or App at 555, and/or that OHSU produced some evidence to the court showing that the requested information was subject to the statutory protection from disclosure.[15]

3. DISCLOSURE OF THE REQUESTED INFORMATION WOULD BE AN UNREASONABLE INVASION OF PRIVACY

OHSU also met its initial burden to demonstrate that disclosure of the personal health information would constitute an "unreasonable invasion of privacy." Indeed, disclosing to the newspaper the name of someone who has claimed to their health care provider that they sustained a physical, mental or emotional injury as a result of negligence in their medical treatment invades the very core of a patient's personal privacy. *See Jordan*, 308 Or at 444 (Gillette, J. concurring) ("[A] disclosure 'constitutes' an unreasonable invasion of privacy if the agency's act of releasing the information, *or the acts of those to whom the information is released,* are reasonably anticipated by the agency to lead to such an unreasonable invasion of privacy.") (emphasis in original). The *Oregon Attorney*

15 OHSU did not assert blanket protection for the records. That distinguishes this case from *Guard Publishing*, 310 Or at 39-40, in which the court did not favor the assertion of a blanket privacy exemption.

General's Public Records and Meetings Manual, 78 (2014), expressly recognizes this when it states: "Personal medical information plainly is 'information of a personal nature,' public disclosure of which ordinarily constitutes an unreasonable invasion of privacy."

A survey OHSU placed in the trial court record showed that 89% of those surveyed would not expect written complaints about their medical care to be released by OHSU to a newspaper reporter. R-22 (Davis Affid, Ex 1, p 2). Imagine the shock, betrayal, helplessness and embarrassment, of a patient who receives a cold call from a newspaper reporter, who tells her that he knows that she was a patient at OHSU on a certain date and that she has claimed a personal injury as a result of her health care. *See* R-21 (Cuykendall Affid, re: standard journalist practices).

If a *private* doctor or hospital disclosed such names to the press simply on request and without patient authorization, the doctor would no doubt be subject to a common law tort action by the patient for invasion of privacy or breach of confidentiality (even putting to one side exposure to liability under HIPAA as well). The torts thus provide yet another way to gauge whether OHSU met its

initial burden to demonstrate that disclosure would constitute an "unreasonable invasion of privacy."[16]

4. THE OREGONIAN FAILED TO MEET ITS BURDEN TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT THE PUBLIC INTEREST REQUIRES DISCLOSURE IN EACH PARTICULAR INSTANCE AND THAT PUBLIC DISCLOSURE WOULD NOT CONSTITUTE AN UNREASONABLE INVASION OF PRIVACY

As detailed above, OHSU made a determination that the individual records were exempt from disclosure and met its initial burden to show that in the trial court. The Oregonian brought forward no evidence to refute that OHSU acted as it did or that any of the individual determinations made by OHSU was incorrect.

There are several distinct elements to The Oregonian's consequent statutory burdens: 1) identify the relevant *public interests*; 2) identify the *particular instances* for which disclosure is sought; 3) determine whether the public interest *requires* disclosure in the particular instance; 4) in making the determination under item 3,

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16 *See Flowers v. Bank of Am. Nat. Trust & Sav. Ass'n*, 67 Or App 791, 796-97, 679 P2d 1385 (1984) (to establish a claim for invasion of privacy, a plaintiff must plead: "(1) the facts disclosed were private facts; (2) the defendant disclosed them to the public generally or to a large number of persons; and (3) the disclosure was in a form of publicity of a highly objectionable kind.") (internal quotation marks and citations omitted); *Humphers v. First Interstate Bank of Oregon*, 298 Or 706, 717-22, 696 P2d 527 (1985) (breach of confidentiality claim resulting from unauthorized disclosure of medical information); *Tollefson v. Price*, 247 Or 398, 402, 430 P2d 990 (1967) (the tort of invasion of privacy is an attempt to determine whether the conduct was "consistent with what a reasonable [person] would have done under the same or similar circumstances[.]").

determine whether there is clear and convincing evidence that disclosure is required in the particular instance; and 5) determine whether there is clear and convincing evidence (ORS 192.496(1)) or a preponderance of evidence (ORS 192.502(2)) to establish that public disclosure would not be an unreasonable invasion of privacy.

Public interest must take into account not only any public interest in disclosure but also the nature of the individual information and the public interest in not disclosing the information. *In Def. of Animals v. OHSU*, 199 Or App 160, 176-77, 112 P3d 336 (2005). The legislature in ORS 192.496(1) and ORS 192.553 *et seq*. has specifically identified the personal health information sought here as normally protected from disclosure.

The Oregonian asserted a public interest in knowing about tort claims against OHSU and relied primarily on an asserted public interest in knowing whether there was malfeasance, misspending or breaches of public integrity. Nothing was identified as imminent or arising from a serious or identifiable public health problem in health care practices, as opposed to a more generalized fishing expedition on a range of topics. Indeed, by lumping patient information into a general request for 5-years' worth of information from any and all tort claim notices, The Oregonian necessarily failed to recognize or address the express public policy of the State of Oregon in non-disclosure of records containing personal

health information, which have little if anything to do with the more general policy interests that The Oregonian relies upon for its disclosure argument.

By contrast, there are significant countervailing public interests and individual privacy interests in *nondisclosure* that must be taken into account. Those *public* interests are manifest by provisions of federal law contained in HIPAA and its regulations, which recognize the underlying importance of protecting this information in the private as well as the public sector. Those public interests, as well as the individual privacy interests, also are stated by the Oregon legislature in ORS 192.553:

> (1) It is the policy of the State of Oregon that an individual has:
>
> (a) The right to have protected health information of the individual safeguarded from unlawful use or disclosure[.]

See also ORS 192.556(6), (8) (defining protected health information).

In addition, ORS 192.553(2) expressly recognizes that Oregon law was amended with the intent to maintain Oregon's preexisting patient privacy protections and to augment the protections for individual privacy contained in HIPAA. Oregon law thereby reflects the public interest in non-disclosure of patient health information without patient authorization.

The record below also established material harm to OHSU and its patients that would occur as a result of forced disclosure of patient information to The

Oregonian. Those harms include adversely affecting OHSU's ability to attract and retain prospective clinical faculty and skilled nurses, deterring prospective patients from seeking health care at OHSU, violating existing patients' expectations of confidentiality for their personal health information and eroding the trust between patient and health care provider. R-24, 25, 28, 29 (Affidavits of Kathy Dean ¶¶ 4-6, Jeanette Mladenovic ¶¶ 5-8, Jennifer Jacoby ¶¶ 3-5, and Tom Heckler ¶¶ 7-9). Each of those is a manifest public interest that argues against disclosure.

Finally, the law requires tort claim notices as a prerequisite to filing a claim, pursuant to ORS 30.275. In order to protect the privacy of their health information, the public interest should not favor forcing patients to choose between giving notice of a claim or not. Moreover, to use a tort claim notice to force disclosure of otherwise protected patient information would defeat certain core purposes of communications by patients or their lawyers that would constitute such notices, including to facilitate an open and candid communication between the patient and the provider about the patient's care.

In sum, The Oregonian has not provided clear and convincing evidence establishing a decided public interest requiring disclosure of patient information. The Oregonian also has pointed to no particular claim for which disclosure would be so required. And The Oregonian has not established by any standard, much less

by clear and convincing evidence, that public disclosure would not constitute an unreasonable invasion of privacy. Accordingly, the trial court erred when it entered judgment in favor of The Oregonian and required disclosure of patient information.

C. ORS 192.496(1) EXEMPTS THE ENTIRE RECORD CONTAINING HEALTH INFORMATION FROM DISCLOSURE

OHSU's arguments set forth in sections IV.A and IV.B above contain multiple independent and sufficient bases for reversing the trial court judgment and entering an appellate judgment for OHSU, protecting the patients' information from disclosure. If the Court nonetheless decides to address the issue in this section IV.C, then the analysis of text, context and legislative history below establishes that the Court of Appeals correctly concluded that the legislature in ORS 192.496(1) intended to make entire records containing personal health information conditionally exempt from disclosure, and not just information in those records. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (discussing statutory interpretation framework).

1. STATUTORY TEXT

ORS 192.495 provides generally that all records more than 25 years old are available for public disclosure: "Notwithstanding ORS 192.501 to ORS 192.505 and except as otherwise provided in ORS 192.496, public records that are more than 25 years old shall be available for inspection."

ORS 192.496 provides that "the following public records are exempt from disclosure:" health care and treatment "[r]ecords" (ORS 192.496(1)); "records" sealed by court order (ORS 192.496(2)); custodial "records" (ORS 192.496(3)); and student "records" (ORS 192.496(4)). ORS 192.496(1), the statute at issue here, provides:

> The following public records are exempt from disclosure: (1) Records less than 75 years old which contain information about the physical or mental health or psychiatric care or treatment of a living individual, if the public disclosure thereof would constitute an unreasonable invasion of privacy. The party seeking disclosure shall have the burden of showing by clear and convincing evidence that the public interest requires disclosure in the particular instance and that public disclosure would not constitute an unreasonable invasion of privacy.

ORS 192.496(1) refers to "[r]ecords" "which contain information" as exempt, not limited by its terms to the information itself. Compare, for example, ORS 181A.825(2), which refers only to "information" and does not contain the word "record" at all.[17]

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17 ORS 181A.825(2) provides:

> Unless a law other than ORS 192.410 to 192.505 requires disclosure or the employee consents in writing to the disclosure, a law enforcement agency may not disclose information about an employee of the agency while the employee is assigned duties the agency considers undercover investigative duties and for a period of six months after the conclusion of those duties.

ORS 192.496(1) likewise clearly provides that it applies to records that are "less than 75 years old." That includes, by its express terms, records that span that entire 75 years, not just years 26-75 as The Oregonian and the Attorney General as *amicus* contend.

ORS 192.496(1) then describes the records less than 75 years old that are conditionally exempt, as records "which contain information about the physical or mental health or psychiatric care or treatment of a living individual[.]" This description provides the records custodian with the legislative guidance needed for the records custodian to identify which records may be exempt.

Once those records are identified, then the statute provides that they may be exempt from disclosure "if the public disclosure thereof would constitute an unreasonable invasion of privacy." Having identified the records and required that initial determination by the records custodian, the statute then sets out circumstances in which such a record may nonetheless be subject to disclosure, *viz*., when and if the requesting party can establish "by clear and convincing evidence that the public interest requires disclosure in the particular instance and that public disclosure would not constitute an unreasonable invasion of privacy."

2. STATUTORY CONTEXT

Contextual support for the proposition that ORS 192.496(1) exempts the entire record can be found in the subsections to ORS 192.496. Each of the four subsections consistently refers to "records" as exempt. *See Force v. Dept. of Rev.*, 350 Or 179, 188, 252 P3d 306 (2011) ("'[C]ontext' includes, among other things, other parts of the statute at issue.").

The contextual relationship between ORS 192.495 and ORS 192.496 starts with the fact that both statutes refer to "records." The two statutes were adopted by the legislature in the same bill, and the history behind that is explored in the discussion of legislative history in section IV.C.3 below. *See State v. Klein*, 352 Or 302, 309, 283 P3d 350 (2012) (a statute's context includes "related statutes").

The Oregonian and the Attorney General as *amicus* argue that ORS 192.496 is not an independent exemption for certain specified records less than 75 years old, but rather that ORS 192.496 operates only in context as an exception to ORS 192.495 for records that are more than 25 years old.[18] The general disclosure provision in

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18 The Attorney General as *amicus* cherry picks legislative history excerpts helpful to its position, while failing to address the legislative history overall. OHSU's brief has attached an Appendix containing what it believes is a complete relevant history for HB 2011. A review of the legislative materials as a whole shows that the legislators did not express a clear intent that ORS 192.496 would operate only as an exemption from ORS 192.495 for records more than 25 years old. Indeed, the

ORS 192.495 for records more than 25 years old does provide that the disclosure of those records is required "except as otherwise provided in ORS 192.496[.]"

However, the contextual circumstance here – that ORS 192.495 provides that records older than 25 years are subject to an exemption from disclosure under ORS 192.496 – does not thereby translate into a *limitation* on ORS 192.496 itself, such that the exemptions in that statute *can only apply* to records more than 25 years old. Rather, the separately-stated exemptions for sensitive records in ORS 192.496, including the exemption for records with health care and treatment information in ORS 192.496(1), do not refer back to ORS 192.495 at all.

Indeed, contrary to the temporal scope of ORS 192.495 which applies to records that are more than 25 years old, ORS 192.496(1) applies by its own terms to records containing health information that are "less than 75 years old[.]" It would make little sense for the legislature to seek to protect sensitive health records from

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exchange between the House committee chair and the State Archivist, quoted at pages 46-47 *infra*, leads directly to a contrary conclusion.

The Attorney General's position as *amicus* also appears to vary from the guidance that it provides to public bodies in its Public Records Manual and rulings, where it apparently has applied ORS 192.496(4) to prevent disclosure of a record less than 25 years old. The manual explains "we denied a request for disclosure of an unedited copy of the Portland State University security office daily log, which records arrests and criminal reports on campus" as "exempt under ORS 192.496(4), which exempts '[s]tudent records required by state or federal law to be exempt from disclosure.'" *Attorney General's Public Records and Meetings Manual*, 92 (2014).

disclosure, but do so only when those records are between 26 and 75 years old, and not when they are 25 years old or less.

3. LEGISLATIVE HISTORY

The legislative history of ORS 192.495 and ORS 192.496 further confirms that the legislature intended those statutes to apply to the entire record and for 75 years. Although HB 2011 (1979) was not discussed in detail on the House or Senate floor, it was discussed extensively by the Judiciary Committee of both the House and the Senate. App-25-31; 33-40; 42-46; 53-57. Those discussions show that the goal of HB 2011 was to relieve the burden felt by records custodians faced with an ever longer list of exemptions that must be evaluated when presented with a public record request, especially for sensitive records. App-26-28, 30, 35, 54-55, 61. The 75-year exemption for records, and not just for information, is consistent with that goal.

Indeed, in five days of testimony before the House and Senate Judiciary committees, there is no mention of protecting only certain material or information within a record. App-25-31; 33-40; 42-46; 53-57. Nor is there specific reference to *former* ORS 192.500(3) (1979), the predecessor statute to ORS 192.505, that would require redaction of exempt material and production of non-exempt material in a single record. Nor was there any discussion of exempt versus non-exempt portions of a record. In fact, none of the legislators, and no one who testified before the

House and Senate committees, expressly contemplated redaction of the records subject to exemption under HB 2011.

On the contrary, and consistent with the statutory text and context, the minutes contain many statements suggesting that the legislature contemplated exempting the record as a whole in its consideration of HB 2011 and that the exemption would apply for the entire 75-year period. For instance, the following exchange between the chairman of the House Judiciary Committee, Representative Gardner, and the Oregon State Archivist shows not only a straightforward intent that HB 2011 cover the record as a whole and for 75 years, it also shows that the legislature did not intend the statute to be subject to any provision of *former* ORS 192.500 (1979), including its redaction provision (*former* ORS 192.500(3)):

> "CHAIRMAN GARDNER asked if it was Mr. Porter's intent that all records more than 25 years old be available for inspection except cases 1, 2, and 3. Those cases 1, 2, and 3 apply regardless of ORS 192.500. There is no balancing test. There is no limited access. If the record is less than 75 years old and contains information about the physical or mental health or psychiatric care of an individual, that record should remain confidential."
>
> "JAMES PORTER replied in the affirmative. He stated that the intent of this bill is simply to remove the discretionary authority and the judgmental decisions that must be made by a records custodian. The burden of judgment will still be faced for the first 25 years of most records and the first 75 years of those records specified. After that, even if the custodian does not believe a person is [a] qualified researcher or that the use of the records is reasonable, Mr. Porter would like to take the custodian out of the position of determining whether a person can have access.

Minutes, House Committee on Judiciary, Jan 31, 1979, 7; App-30.[19]

In light of Mr. Porter's testimony above, Rep. Gardner requested a redraft of HB 2011. Specifically, Rep. Gardner "stated that the present extent to which items under 1, 2, and 3 of subsection 2 [(the list of exemptions)] can be reached needs to be thoroughly explained. That should then be inserted into the bill. This should resolve the ambiguity in the reference to ORS 192.500." Minutes, House Committee on Judiciary, Jan 31, 1979, 8; App-31.

Accordingly, HB 2011 was redrafted, and reference to *former* ORS 192.500 in the now separate section providing for exemptions was removed. Exhibit B, House Committee on Judiciary, Feb 12, 1979; App-41. After that redraft, the bill closely resembled its current form. It included the current lead in to the exemption section ("[t]he following public records are exempt from disclosure"), which made the records exempt from disclosure rather than merely "confidential" as provided for in the original bill. The redrafted bill also placed the provisions relating to exemptions of sensitive documents in their own statutory section (to be codified as ORS 192.496), separate from the provision providing for the disclosure of documents after 25 years (to be codified as ORS 192.495).

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19 The minutes also contain substantial additional support for interpreting the ORS 192.496 to refer to the record as a whole. App-26-31, 35, 37, 43-44, 55-57, 61.

Those changes indicate two things. First, ORS 192.496 is not merely an exception to ORS 192.495. While the bill originally was formatted consistently with that structure, the legislature specifically amended the bill to make the exemption provisions that would constitute ORS 192.496 separate from the general disclosure provision that would constitute ORS 192.495. Second, the changes to the bill support a conclusion that ORS 192.496 is not subject to redaction under current ORS 192.505, because the legislature purposefully removed reference to *former* ORS 192.500, which contained the predecessor statute to ORS 192.505, *former* ORS 192.500(3).

In sum, there is much in the legislative history that supports application of HB 2011 to the entire record and for 75 years, including what is now the exemption for health information in ORS 192.496(1). Such statements are consistent with HB 2011's primary purpose of simplifying the job of records custodians tasked with responding to public records requests, especially for sensitive records. Ultimately, the legislative history confirms what the text and context already makes plain – that ORS 192.496(1) applies to the record as a whole and for 75 years.

4. ORS 192.505 DOES NOT REQUIRE REDACTION WHEN THE ENTIRE RECORD IS PROTECTED BY ORS 192.496(1)

The Oregonian and the Attorney General as *amicus* argue that even if ORS 192.496(1) is interpreted to exempt an entire record from disclosure, that ORS 192.505 nonetheless requires redaction and disclosure of information in the record

that is not health information. They assert that ORS 192.502(9)(a) exempts from disclosure records made confidential by other provisions of state law, thus including ORS 192.496(1), and that the redaction requirement of ORS 192.505 applies in turn to ORS 192.502(9)(a).

This argument appears to be based on a fundamentally flawed application of the logic principle of transitivity, without paying any heed to what ORS 192.505 actually provides. ORS 192.505 is a straightforward procedural statute that explains to public bodies what to do when confronted with a public records request that seeks records containing some material that is subject to disclosure and some material that is exempt from disclosure. It is not a substantive statute somehow requiring all records to be redacted, as The Oregonian and the Attorney General appear to contend.

ORS 192.505 provides:

> If any public record contains material which is not exempt under ORS 192.501 and 192.502, as well as material which is exempt from disclosure, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination.

If an entire record is exempt from disclosure, pursuant to ORS 192.496(1) (or any other statute wherein the legislature has seen fit to exempt the entire record), then ORS 192.505 simply does not apply. Indeed, the Attorney General's own Public Records Manual expressly recognizes precisely this point:

> The confidentiality protection of any record covered by an Oregon statute outside of the Public Records Law is incorporated into the Public Records Law by ORS 192.502(9)(a). *Such a record is exempt, conditionally exempt or partially exempt from disclosure to the extent provided in the incorporated statute.*

Attorney General's Public Records and Meetings Manual, 91 (emphasis added).

5. CONCLUSION

Application of the standard tools of statutory interpretation leads to the conclusion that ORS 192.496(1) exempts from disclosure an entire record containing health information that is less than 75 years old. ORS 192.505 does not require redaction.

Moreover, even if all of that is incorrect – and ORS 192.496(1) only applies to records more than 25 but less than 75 years old, or if ORS 192.496(1) exempts only health information that is subject to redaction under ORS 192.505 but not the entire record – the fact remains that multiple provisions of state and federal law (discussed in sections IV.A and IV.B above) protect and exempt the patient information here from disclosure.

D. THE OPRL DOES NOT TREAT THE INFORMATION PROVIDED ON A SPREADSHEET ANY DIFFERENTLY THAN THE INFORMATION IN THE TORT CLAIM NOTICES FROM WHICH THE SPREADSHEET WAS CREATED

1. THE COURT SHOULD REFUSE TO CONSIDER THE OREGONIAN'S SPREADSHEET ARGUMENT

The Oregonian's Fourth Question presented for review asserts that the spreadsheet that it affirmatively asked for from OHSU, with information derived

from tort claim notices, should be given less protection from disclosure under the OPRL than the same information from which it was derived in the tort claim notices themselves. This strange contention fails for several reasons, including the complete lack of a statutory basis for the position. That is followed close behind by obstacles to review including preservation and waiver, and a fundamental misreading of the Court of Appeals footnote from which the argument here appears to have sprung.

The Court of Appeals accurately observed that "*in this case*" the creation of a public record (here, a spreadsheet) from a set of other public records (here, tort claim notices), "does not change the public records disclosure issues that are presented." *OHSU*, 278 Or App at 194 n 3. That observation was based on the parties' briefs:

> The parties assume, as do we, that the question presented in this case is whether the requested information * * * can be redacted from the tort claim public records that could otherwise be provided to The Oregonian pursuant to its demand and whether OHSU may disclose any of the information in some of the tort claim notices. For purposes of this case, the compilation of that information into a different public record does not change the issues that must be resolved.

Id.

The court did not conclude as a matter of law that the information in the spreadsheet was *ipso facto* exempt because it was exempt in the tort claim notices or that such an issue would necessarily be analyzed that way. The court merely clarified what was at issue and what was not. This court should reject The

Oregonian's attempt to recast a clarifying footnote into an erroneous holding worthy of review.

The Oregonian's argument also suffers from lack of preservation, waiver and/or invited error. The Oregonian's argument is not preserved. *See* ORAP 5.45 ("No matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court * * *."); *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 380-81, 823 P2d 956 (1991) (discussing preservation requirement, citing ORAP 5.45). The argument was not presented to the District Attorney, the trial court, or the Court of Appeals (as the Court of Appeals' footnote 3 makes clear). Now, for the first time before this Court, The Oregonian attempts to argue that the information in the spreadsheet should be analyzed without reference to the original tort claim notices from which it derives. The Oregonian has had ample opportunities to advance that argument. By doing so at this late date and before the court of final review, The Oregonian offends the "efficient administration of justice and the saving of judicial time" which are the bases of preservation. *Shields v. Campbell*, 277 Or 71, 77-78, 559 P2d 1275 (1977).

The Court may also decline to reach the spreadsheet issue because The Oregonian waived the argument when it requested information from tort claim notices in spreadsheet format and declined to argue at any point below that the information in the spreadsheet should be treated differently than the tort claim

notices themselves under the OPRL. *See Waterway Terminals Co. v. P. S. Lord Mech. Contractors*, 242 Or 1, 26, 406 P2d 556 (1965) ("waiver * * * is the intentional relinquishment of a known right. * * * It must be manifested in some unequivocal manner[.]") (citations omitted). The Oregonian cannot at this juncture abruptly take issue with the very format of the public record that it affirmatively requested.

Alternatively, The Oregonian invited the claimed error. *See State v. Steen*, 346 Or 143, 145-46, 206 P3d 614 (2009) (where record demonstrates counsel made a deliberate choice not to object to admission of hearsay testimony, associated claim of error by counsel not subject to appellate review). The Oregonian deliberately sought information in the form of a spreadsheet derived from other public records and made no argument based on that. It cannot now claim error based on that tactic.

Finally, this Court may decline to consider the issue, as an issue that is not properly before the court. *See* ORAP 9.07(7) (among items relevant to decision to grant discretionary review is "[w]hether the legal issue is properly preserved, and whether the case is free from factual disputes or procedural obstacles that might prevent the Supreme Court from reaching the legal issue."). In addition to the preservation, waiver, and invited error obstacles, The Oregonian has never before briefed the issue, has not meaningfully briefed the issue before this Court, cites no

authority for its position, and does not acknowledge the true import of the Court of Appeals' note 3 or the case-specific and fact-dependent nature of the issue.

2. THE OREGONIAN'S SPREADSHEET ARGUMENT IS MERITLESS

Should this court reach The Oregonian's argument (which the Attorney General notably does not join), it is without merit. Nothing in the OPRL requires information in a record derived from information in other public records to be analyzed without reference to the records from which it is derived. And nothing in the terms of the OPRL requires the court to ignore the context surrounding the information in a record, which in this case includes the fact that the requested information was for a spreadsheet compiling patient information from tort claim notices. Accepting The Oregonian's argument would allow it to evade the privacy statutes that were carefully designed to both acknowledge and protect the sensitive nature of certain information and records.

E. STUDENT NAMES ARE EXEMPT UNDER ORS 192.502(2) AND FERPA

1. ORS 192.502(2)

OHSU has withheld the names, and only the names, of a couple of students who submitted tort claim notices pertaining to their education. App-71-72. Consistent with the analysis of the disclosure of patient names under the exemption for personal information under ORS 192.502(2) (section IV.B above), the student names withheld by OHSU likewise are exempt under that statute.

As was discussed in the context of the privacy exemptions for patients' information, disclosure of a student's name alone, in the context of a tort claim notice, necessarily conveys significantly more information than just the fact that the individual is or was a student at OHSU. To disclose the student's name from her or his tort claim notice would also convey that the student has claimed a compensable injury related to the named student's education. The Oregonian cannot meet its burden to establish that the public interest requires disclosure in each of these particular instances.

2. FERPA

The Court of Appeals correctly held that the student names were protected from disclosure by the Family Educational Rights and Privacy Act, which protects the privacy of a student's "education records," 20 USC § 1232g; 34 CFR Part 99. *OHSU*, 278 Or App at 210-11.[20]

FERPA applies to OHSU as an educational institution that receives federal funds. *See* 34 CFR § 99.1(d); R-26 (Robinson Affid. ¶13). "Education records" is defined broadly to include all records directly related to a student and maintained by

20 This limited, fact-based issue of federal law hardly seems independently worthy of supreme court review. This Court properly could simply affirm the Court of Appeals on the issue or decline to review the issue in the Court's discretion. Alternatively, if the Court concludes that the students' names are exempt under ORS 192.502(2), there would be no need to reach the federal law issue.

the educational institution. 34 CFR § 99.3. Absent an exception, an educational institution is prohibited from disclosing certain education records without the student's written consent. 20 USC § 1232g(b); 34 CFR § 99.31.

Contrary to The Oregonian's apparent suggestion, the law does not prescribe where within the institution that the record must be maintained, nor would a privacy decision based on that criterion make sense. The point is about whether the information should be disclosed or not, to protect the student's privacy. That determination should not turn on the happenstance of precisely where a record is maintained within the institution. Here, it is maintained by OHSU in the risk management department. R-30 (Rensklev Affid ¶ 7).

As noted above, to disclose the student's name here also would convey that the student has claimed a compensable injury related to the named student's education. That is information clearly within the broad scope (indeed it is at the core) of the federal protection for educational privacy. Accordingly, FERPA provides an unconditional exemption from disclosure under the OPRL, pursuant to ORS 192.502(8) (exempting information made confidential by federal law).

F. CONCLUSION

For each of the several independent reasons stated above, rooted firmly in multiple provisions of state and federal law, OHSU respectfully requests that the circuit court judgment be reversed in part, with respect to the remaining patient

and student information that OHSU has withheld from disclosure. An appellate judgment should be entered that exempts that information from disclosure under the OPRL.

In addition, the circuit court's supplemental judgment awarding attorney fees to The Oregonian should be reversed, vacated and remanded to the circuit court, for relief as may be appropriate, pursuant to ORS 20.220(3)(b), ORS 192.490(3), and ORCP 71 B(1)(e).

Respectfully submitted this 21st day of December, 2016.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 13,113 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Respectfully submitted this 21st day of December, 2016.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 21, 2016, I caused to be electronically filed the foregoing RESPONDENT ON REVIEW'S BRIEF ON THE MERITS with the Court of Appeals Administrator through the eFiling system and served on the parties or attorneys for Parties identified herein, in the manner set forth below:

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