IN THE SUPREME COURT OF THE STATE OF OREGON

AMERICAN CIVIL LIBERTIES UNION OF OREGON, INC., an Oregon non-profit public benefit corporation,

Plaintiff-Appellant,
Petitioner on Review,

v.

CITY OF EUGENE, OREGON, a municipal corporation,

Defendant-Respondent,
Respondent on Review,

and

CIVILIAN REVIEW BOARD OF THE CITY OF EUGENE, OREGON,

Defendant.

Lane County Circuit Court
Case No. 16-10-24398

CA A150403

S063430

RESPONDENT ON REVIEW CITY OF EUGENE'S BRIEF ON THE MERITS

Petition for Review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Lane County;
Honorable Josephine H. Mooney

Opinion Filed:	May 20, 2015
Author of Opinion:	Nakamoto, Judge
Concurring Judges:	Armstrong, Presiding Judge, and Egan, Judge

[continued]

January 2016

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I. Introduction and Overview of City's Brief

Unlike most statutory exemptions in the Public Records Law, which authorize public bodies to choose not to disclose certain records, the statute at issue in this case prohibits disclosure of certain records – specifically, records of an internal police investigation that does not result in discipline. ORS 181.854(3) provides "A public body may not disclose information about a personnel investigation of a public safety employee of the public body if the investigation does not result in discipline of the employee." That prohibition does not apply, however, if the public interest "requires" disclosure. ORS 181.854(4)(a). Since the public always has an interest in government transparency, that exception necessarily contemplates proof of a public interest in disclosure above and beyond what is always present – and evidence that, in the particular circumstances of the case, the public interest *requires* disclosure of the documents at issue. Moreover, even assuming for the sake of argument that the prohibition on disclosure were not qualitatively different from the exemptions in ORS 192.501 and .502 that merely authorize nondisclosure, the outcome in this case would not change, because evidence in the record supports the trial court's decision under either approach.

The documents at issue are portions of an investigation conducted by the Eugene Police Department's Internal Affairs Division. The investigation concerned a complaint that Eugene police officers used excessive force when

they arrested protesters at a demonstration in downtown Eugene. The investigation file was provided to the City's Civilian Review Board (CRB) for the CRB to review the internal affairs investigation. The CRB concluded that the investigation had been conducted properly. Petitioner sought access to the materials that the CRB reviewed; the City provided some but not all of the records. Pursuant to ORS 192.460, petitioner asked the district attorney to order the City to release the records. When the district attorney denied that request, petitioner filed its complaint in circuit court under ORS 192.490. The trial court reviewed *de novo* a record consisting of stipulated facts, exhibits, and the ACLU executive director's testimony about its interest in reviewing the records.

The trial court determined that, regardless of which party bore the burden of proof, the public's concern and curiosity were adequately satisfied through the CRB process. That process included reviews by both the City's independent police auditor and the CRB, as well as a lengthy, well-attended public meeting at which the CRB discussed the police department policies at issue, witness statements about the incident, the internal affairs investigation, and the CRB's analysis of the police chief's recommended adjudication. The CRB concurred in the police chief's preliminary findings.

On appeal, petitioner assigned error to (1) the trial court's allocation of the burden to prove the existence or nonexistence of the public interest

exception to the statutory prohibition on disclosure of the records in ORS 181.854, (2) the trial court's decision that the public interest did not require disclosure of the requested documents on the record before it, and (3) the trial court's interpretation of ORS 181.854(4)(c). The Court of Appeals determined that it was unnecessary to address the merits of the first assignment of error, because the trial court had explained that the outcome would have been the same regardless of who bore the burden of proof. *American Civil Liberties Union v. City of Eugene*, 271 Or App 276, 285, 350 P3d 507 (2015) (hereinafter, *ACLU*). As to the second assignment of error, the Court of Appeals affirmed the trial court's ruling that the public interest did not require disclosure of the records. *Id.* at 289. Finally, the Court of Appeals rejected the third assignment of error, concerning the interpretation of the exception in ORS 181.854(4)(c), without discussion. *Id.* at 285, n 6.

Throughout this litigation, petitioner's arguments have focused mainly on issues related to sufficiency of evidence – who bore the burden of proof and what the evidence in the record demonstrated. On review, petitioner's brief on the merits renews substantially the same arguments it made in the Court of Appeals. The City's responses to those arguments also track its responses in the court below; it relies on the Court of Appeals' analysis, the City's brief in the Court of Appeals (*see* ORAP 9.20(4)) and on some additional points made in this brief.

Three questions are properly before this Court: First, did the trial court correctly interpret ORS 181.854(3) and (4)(a), which prohibit a public body from disclosing information about a personnel investigation of a public safety employee unless the public interest requires disclosure? Second, is there evidence in the record to support the trial court's finding that the public interest did not require disclosure in this case? Third, did the trial court, affirmed by the Court of Appeals, correctly interpret ORS 181.854(4)(c) to provide that, when a public body discloses information about a personnel investigation to aid the Department of Public Safety Standards and Training (DPSST) or a local citizen review board to fulfill its responsibilities, that limited disclosure does not constitute a blanket waiver of the exemption in ORS 181.484(3)?[1] The answer to all three questions is: Yes. The trial court's and the Court of Appeals' decisions were correct.

II. Response to Petitioner's Proposed Rules of Law

1. Petitioner proposes a narrow rule of law tailored to its perception of two specific aspects of this case: its inference as to the meaning and purpose of the statutory prohibition on disclosure in ORS 181.854(3), and petitioner's version of the record in this case. The City disagrees with both prongs of the argument. The City's and public's interest in confidentiality of the records

[1] The City uses both "prohibition" and "exemption" to refer to ORS 181.854(3), because that statute contains a prohibition (subject to the exceptions in ORS 181.854(4)(a) and (c)), but it is also an exemption under ORS 192.502(9).

includes, but is not limited to, the officers' privacy interest; and even if officers' privacy were the only interest at stake, that privacy interest would not evaporate simply because the officers' names and the existence of the investigation is already known to the public. Moreover, petitioner's arguments about the evidence supporting its position ignore the standard of review. Because the record contains evidence to support the trial court's findings, those findings must be affirmed.

2. Petitioner's second proposed rule of law, concerning the burden of proof, fails to distinguish between the public body's undisputed burden to prove the existence of an *exemption* from required disclosure of a public record and the requestor's burden to prove that an *exception* to that exemption applies in a particular case. In any event, the trial court's express finding that it would reach the same result regardless of which side bore the burden of proof on that question effectively mooted the question that petitioner poses.

3. ORS 181.854(4)(c) allows a public body to share otherwise-confidential records with the DPSST or a civilian review board, so that those entities may perform the functions that the law assigns them. That limited disclosure does not nullify the more general prohibition on disclosure in ORS 181.854(3). Petitioner's contrary interpretation of the statute would deter public bodies from using civilian review boards or the DPSST and is contrary to the manifest intent of the statute.

III. Nature of Action, Relief Sought in Trial Court, and Nature of Trial Court Judgment

The City accepts petitioner's statement under this heading.

IV. Statement of Material Facts

The Court of Appeals' description of the events surrounding Mr. arrest and the Civilian Review Board's review of the City's Internal Affairs Division's investigation of the officers' use of force is more accurate than petitioner's version. *ACLU*, 271 Or App at 279-83. On appeal from an adverse judgment, petitioner is not entitled to its version of disputed facts.

Except for two paragraphs, petitioner's statement of facts is almost identical to the one in its Court of Appeals brief. In the City's view, it is incomplete and, in some relatively minor aspects, inaccurate. The statement of facts that follows draws heavily from respondent's brief in the Court of Appeals.

The records in question involve a personnel investigation of public safety officers employed by the City of Eugene, a public body. The investigation did not result in discipline. ER 30-31, Stip. Facts ¶ 1, 8 and 12. The internal investigation concerned the police officers' use of force and use of a Taser stun gun while arresting Ian at a demonstration in downtown Eugene. Ex. 37, pp. 9-10. The internal investigation report was provided to the CRB to enable the CRB to review the adequacy and fairness of the investigation and the police chief's preliminary adjudication. ER 30, Stip. Facts ¶ 9.

The CRB was created in 2005 to increase transparency of, and public confidence in, the police complaint process. ER 29 - 30, Stip. Facts ¶ 3, 4. It oversees the work of the City's independent police auditor, and it reviews completed investigations of complaints about police officers to comment on whether the investigation was handled fairly and with due diligence. Eugene Code (EC) 2.240; ER 29-30; Stip. Facts ¶ 2, 3, 4 and 5. (The Eugene Code provisions concerning the CRB and police auditor are attached as Appendix A.) Both the CRB and the City's police auditor report to the city council, which enhances their independence from the police chief and the police department, which report to the city manager. Ex. 9, p. 2.

The police auditor receives and processes complaints about police employees, monitors the investigation and is authorized to require the police department to undertake additional investigation. EC 2.450(1), 2.454(1)(e), 2.456(2)(d). Although the police chief adjudicates the complaint, the police auditor may recommend an adjudication to the chief. EC 2.454(4). The auditor did so in this case, and he provided a copy of his recommended adjudication to petitioner in response to its request. ER 12.

Upon recommendation of the police auditor, the CRB may accept a case as a "community impact" case, a designation that expands the CRB's role. When a case is designated a community impact case, the CRB gains authority to require the police department to reopen the investigation if the CRB

determines that the investigation was incomplete or inadequate or that the adjudication was not supported by substantial evidence. (Here, the CRB did not make any such finding.) In cases not designated as community impact cases, the CRB reviews a "closed case" file, and the investigation and adjudication are final before the CRB reviews the investigation. *Compare* EC 2.244(2) (review of cases other than community impact cases) *to* EC 2.244(4) (community impact cases).[2] *See also* EC 2.246(10) (describing limits on CRB authority).

When the CRB reviews a complaint investigation in any case, the internal affairs investigation file is provided to the CRB "for its confidential review." EC 2.244(4). In this case, in addition to the City's police auditor's report and its own thorough review of the internal affairs investigation, the CRB retained an outside private investigator to perform an independent investigation on its behalf. Ex. 30, p. 2; Ex. 31, p. 2.

In this case, the police chief made preliminary findings that the officers had acted "within policy" in effecting the arrest of .[3] The CRB held

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[2] Contrary to petitioner's assertion (Pet Br, p. 4), the designation as a community impact case did not change the internal affairs investigation, and the only change in Police Chief Kerns' role was that his findings did not become final until the CRB concurred with it.

[3] Petitioner's characterization of the arrest requires clarification. According to the portions of the trial transcript cited in petitioner's brief at p. 3, Mr. did more than "not comply with [the officers'] requests" (Pet Br, p. 3); he actively resisted arrest, pulling his arm away, pushing up against the officer, and swinging his arm, even after the arm had a handcuff attached to it. Ex. 6 (Trial Tr, 4/14/09, 58:6 – 62:17). Nor was he "immobilized" after the first Taser application (Pet Br, p. 3); he

a public meeting to consider those findings, and they discussed the incident and the evidence gathered during the investigation The CRB unanimously concurred with all of the chief's findings except the one concerning the use of a Taser, with which they concurred by a 4-2 vote. *ACLU*, 271 Or App at 279-80.

As petitioner notes (Pet Br, p. 4), the designation of the excessive force complaint as a "community impact case" changed the CRB's role by giving it the power to order re-opening of the internal affairs investigation if it concluded that the investigation was inadequate or that the police chief's preliminary adjudication was not supported by substantial evidence. The CRB found no reason to exercise that power in this case.

The City's response to the ACLU's request for the records explained that ORS 181.854(3) prohibited release of the records and that the City had determined that no exception to that prohibition applied in this case. ER 31, Stip. Facts ¶ 14. Police Chief Kerns testified that he decided not to release the requested records after consulting with the city attorney's office. Ex. 37 (Kerns Deposition Tr 14:2 – 16:2).

The ACLU's executive director, Mr. Fidanque, testified generally that the ALCU had a longstanding interest in the use or misuse of Tasers, was actively involved in the creation of the police auditor's office and the CRB, and had

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continued to move around, and the officer was unable to control him until after the second Taser application. Ex. 6, Tr 4/14/09 at 62:7 – 62:20.

maintained its interest in their performance and their interaction with the police department. Tr. 53-55. He also described two specific concerns. One related to his perception that some CRB members had "discounted" statements from some witnesses to the arrest. The other arose from his perception that the internal affairs investigation included an interview of "an undercover agent employed by the Federal Department of Homeland Security," who allegedly was the person who called the Eugene Police Department to the scene of the demonstration. Tr 56. In response to a question from the court, Fidanque summarized the public interest as follows:

> "[T]he public interest is to help the public understand whether the system they created in order to provide independent oversight of the police department in police misconduct allegation cases is operating as intended * * *.
>
> So that, just to put that in plain English, is the review board acting in the way that the voters intended when they created it?"

Tr 59; quoted in *ACLU*, 271 Or App at 282.

Based on the testimony, the stipulated facts and its *in camera* review of the requested documents, the trial court determined that the public interest in confidentiality outweighed the public interest in disclosure. Tr 82-83; ER 45-46.

V. Summary of Argument

ORS 181.854(3) expressly prohibits a public body from disclosing information about a personnel investigation of a public safety employee if the

investigation does not result in discipline. In this case, the parties stipulated to facts that established all the elements for that prohibition, and the dispute focused on two exceptions to it.

Petitioner tried its case to the circuit court on a theory that its evidence supported disclosure and that the City failed to present sufficient evidence to carry its purported burden to establish not only the prohibition on disclosure, but also to negate the existence of an exception to that prohibition. The trial court ruled against petitioner on both the law concerning burden of proof and on the evidence.

On appeal, petitioner again argued burden of proof and weight of evidence. It asked the Court of Appeals to review the record *de novo*, which the court declined to do as a matter of discretion allowed by ORS 19.415(3) and guided by ORAP 5.40(8)(c). *ACLU,* 271 Or App at 278-79.

The trial court had ruled not only that the statutes did not allocate to the City the burden to prove the absence of an exception to the statutory prohibition on required disclosure, but also that the evidence supported the City's position, no matter who bore the burden of proof. As the Court of Appeals correctly held, that alternative basis for decision mooted petitioner's burden-of-proof argument. In any event, even if this Court chooses to decide which party bore the burden of proof regarding the exception to the prohibition/exemption, the trial court was correct: Once the City carried its burden to prove facts sufficient

to invoke the prohibition on disclosure in ORS 181.854(3), it did not also need to prove a negative – *i.e.*, what the public interest does *not* require. Instead, it was up to petitioner to prove that the public interest requires disclosure.

In public records cases, both this Court and the Court of Appeals have treated the meaning of the phrase "the public interest" as a matter of law and the question of what the public interest "requires" as a matter of evidence that involves balancing competing interests in public disclosure and confidentiality. Oregon appellate courts affirm a trial court's finding of fact if there is any evidence in the record to support it. Here, there was evidence to support the trial court's determination that there were competing public interests and that the interest in confidentiality outweighed the interest in disclosure.

The fact that the Eugene Police Department provided its Internal Affairs Division's investigation report to the CRB, as required by the Eugene Code and allowed by ORS 181.484(4)(c), does not waive the confidentiality of the report. Instead, it authorizes disclosure in a specific situation, to a very narrow class of public bodies, for a limited purpose. Petitioner's construction of the exception in ORS 181.484(4)(c) is implausible, because it would nullify the exemption in ORS 181.484(3) in every case where an investigation is referred to the DPSST or a local civilian review board.

VI. Argument

A. The Court of Appeals correctly affirmed the trial court's decision on public interest

The Court of Appeals summarized its analysis and decision concerning ORS 181.854(3) and (4)(a) as follows:

> "Furthermore, we agree with the city that the mere existence of a public interest in government transparency is insufficient to warrant release of the kinds of records protected by ORS 181.854(3). Under [ORS 181.854(3)], the legislature has expressed a policy decision that, as a general rule, the records in this case be kept confidential. The public-interest exception to that general rule in ORS 181.854(4)(a) allows for the release of those records only when the public interest *requires* disclosure. Here, the court could reasonably determine that ACLU failed to demonstrate that the public's interest in transparency required release of the records. The evidence demonstrated that the CRB extensively reviewed the investigation in a public forum, in which they discussed the police policies at issue, witness statements of the incident, the nature of the investigation, and their own conclusions regarding the chief's findings. After its *in camera* review of the personnel investigation records, the court concluded that the public interest did not require disclosure of the records so that the public could see the normally confidential material considered by the CRB and could, in essence, come to their own conclusions about the propriety of the police chief's handling of the matter and the CRB's review of the case. Given the evidence presented, the court did not err in concluding that the public interest did not require disclosure."

271 Or App at 290-91.

Under Oregon's Public Records Law, ORS 192.410-.505, members of the public generally have the right to inspect and copy any record of a public body that contains information relating to the conduct of the public's business, except as provided by law. ORS 192.420. ORS 192.501, not directly

applicable here, lists records that "are exempt from disclosure * * * unless the public interest requires disclosure in the particular instance." ORS 192.502 contains a long list of records that "are exempt from disclosure," and ORS 192.502(9)(a) exempts "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." Exemptions under ORS 192.502 are unconditional, except as specified in the subsection describing the exemption or in the statute incorporated by reference.

Consistently, this Court and the Court of Appeals have stated that disclosure is the norm and that the statutory policy favors disclosure. *E.g., Oregonian Publishing v. Portland School Dist. No. 1J*, 329 Or 393, 398, 987 P2d 480 (1999); *Guard Publishing Co. v. Lane County School Dist.,* 310 Or 32, 37, 791 P2d 854 (1990); *Turner v. Reed*, 22 Or App 177, 187, 538 P2d 373(1975); *ACLU*, 271 Or App at 287. A public body claiming that a record is exempt from required disclosure bears the burden of proving that an exemption applies. ORS 192.490; *Guard Publishing Co.*, 310 Or at 38. In this case, none of the foregoing principles is in dispute.

The cases also recognize, however, that the statutory exemptions from required disclosure reflect the Legislature's recognition of a competing interest in nondisclosure. Since the first case decided under the Public Records Law in 1975, appellate courts have recognized that the Public Records Law and/or

another statute, such as ORS 181.854, may prescribe a competing interest in favor of confidentiality. *Turner v. Reed*, 22 Or App at187 ("*** the policy that permeates the disclosure statutes and the legislative history is that disclosure decisions should be based on balancing those public interests that favor disclosure of governmental records against those public interests that favor confidentiality ***" .). *See also Guard Publishing Co.,* 310 Or at 38 ("Under [*former* ORS 192.502(2)], a party seeking disclosure may defeat a claimed exemption by showing by a preponderance of evidence that the public record being sought is not 'information of a personal nature' *or* 'that the public disclosure thereof would not constitute an unreasonable invasion of privacy'"); *ACLU*, 271 Or App at 287 ("[A] court must balance the public's interest in disclosure against the public body's interest in nondisclosure, with the presumption in favor of disclosure"); *In Defense of Animals v. OHSU,* 199 Or App 160, 175, 178, 112 P3d 336 (2005) ("On balance, even considering the presumption in favor of disclosure, we conclude that the public interest does not require disclosure of the names of ORPRC staff."); *Springfield School Dist. #19 v. Guard Publishing Co.*, 156 Or App 170, 179, 967 P2d 510 (1998) ("Most exemptions from disclosure under the Public Records Act are conditional, depending on a balancing of the confidentiality interest against the public interest in disclosure. (footnote omitted)").

The specific exemption at issue in this case is found in one of the statutes that ORS 192.502(9)(a) refers to. ORS 181.854(3) provides: "A public body *may not* disclose information about a personnel investigation of a public safety employee of the public body if the investigation does not result in discipline of the employee." (emphasis added.)[4] However, the prohibition "does not apply * * * [w]hen the public interest requires disclosure of the information," ORS 181.854(4)(a), or "when disclosure is necessary for an investigation by the public body, the Department of Public Safety Standards and Training or a citizen review body designated by the public body," ORS 181.854(4)(c). (A copy of the full text of ORS 181.854 is attached as Appendix B.)

Again, the parties' dispute about the operation of the statute is narrow. Petitioner acknowledges that the records in question are records of a "personnel investigation of a public safety employee" that did "not result in discipline of the employee," so that ORS 181.854 applies. The disagreements concern the meaning and application of the exceptions in ORS 181.854(4). *See generally*, *ACLU*, 271 Or App at 281.

Neither this Court nor the Court of Appeals (until this case) has construed ORS 181.854. While decisions construing exemptions in ORS 192.501 and

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[4] ORS 192.501(12) provides a similar exemption for records of a "personnel discipline action, or materials or documents supporting that action." Those records are exempt from required disclosure "unless the public interest requires disclosure in the particular instance."

.502 provide some guidance as to the application of the exemptions and the evidence required to support an exemption or an exception to an exemption, there is one at least one significant difference between those exemptions and ORS 181.854(3). By affirmatively *prohibiting* disclosure of the records of a personnel investigation of a public safety employee that does not result in discipline, the Legislature has recognized an interest in confidentiality greater than that afforded to records that are merely exempt from required disclosure. Thus, the balancing of interest starts from a different point.[5]

Analysis of what the public interest requires in a specific case presents a mixed question of law and fact. The meaning of the term "public interest" in ORS 181.484(4)(a) and related statutes in ORS chapter 192 is a question of law; how to weigh the competing interests and deciding what the public interest does or does not "require" in a specific case is a question of fact. *See generally, Defense of Animals,* 199 Or App at 169, 176.

In *Defense of Animals*, the Court of Appeals reviewed the record *de novo* pursuant to *former* ORS 19.415(3). Since that statute was amended in 2009, however, the court reviews *de novo* only in exceptional cases when it, in its sole discretion, decides to do so in accordance with ORAP 5.40(8)(c). *See, ACLU v.*

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[5] Even if that were not true, however, the trial court's findings, the existence of evidence in the record to support those findings, and the scope of appellate review would compel affirmance of the judgment here. See below, pp. 23-24, 29.

City of Eugene, 271 Or App at 278, n.3. Because most of the reported appellate decisions were decided under the former version of ORS 19.415(3), the distinction between law and fact was less significant for purposes of appellate review than in this case, where the trial court's factual determinations are reviewed under an "any evidence" standard. ORS 19.415; Or Const, Art VII (Amended), § 3.

The public interest in access to records generally is to acquire information about how public business is conducted and to monitor public officials' performance of their duties. *Defense of Animals*, 199 Or App at 176. Those interests are nearly always present, and evidence in the record in some cases may show additional reasons that weigh in favor of disclosure.[6] Here, the gist of Mr. Fidanque's testimony in favor of disclosure was simply that the ACLU and many members of the public wanted access to the records to decide for themselves if the CRB was performing as intended, especially considering the controversy surrounding the arrest of *ACLU*, 271 Or App at 282. In the City's view, while that interest is certainly legitimate, the testimony added little or nothing to the general public interest in transparency that was

[6] Contrary to petitioner's assertion in its brief, Pet Br at 27, the City agrees that there is at least some public interest in access to the records at issue in this case, and the City expressly stated that in its brief in the Court of Appeals. Resp Br at 14, 18; *see also ACLU*. 271 Or App at 286.

well known to the Legislature when it adopted the prohibition in ORS 181.854(3).

The competing public interests favoring disclosure and nondisclosure are balanced on a case-by-case basis, according to the evidence in the record, to determine whether disclosure is required. For example, in *Defense of Animals,* the Court of Appeals reviewed and analyzed the evidence favoring both disclosure and confidentiality in detail; "on balance," it held that the public interest did not require disclosure of names of research center staff members. 199 Or App at 175-78.

The record in this case reflects competing interests in public access and in maintaining the confidentiality of the records of the Internal Affairs Division's investigation file into the complaints about the arrest. As noted above, the City agrees that there is a general public interest in learning how a public body fulfills its responsibilities, and there was evidence in this case that the arrest was a high-profile issue in the community that prompted curiosity both about the CRB's review of the IA investigation.

The countervailing evidence demonstrated several aspects of the interest in maintaining confidentiality of the CRB records. First, the statutory prohibition on disclosure in ORS 181.854(3) reflects a general legislative policy that investigations of public safety officers that do not result in discipline should remain confidential. Similarly, the Eugene Code provisions and the

protocols governing the CRB require the IA investigation files to be provided to the CRB "for its confidential review." EC 2.244(4).

Second, evidence in the record demonstrates that the policies supporting nondisclosure apply to the records at issue in this case. The investigation file includes numerous interviews of witnesses who observed the demonstration at which was arrested and were able to comment on his and other protesters' behavior, the officers' response and the crowd's reaction. The ability to assure witnesses that their statements will not be publicized unless required by the public interest serves to encourage both civilian observers and police department colleagues of those being investigated to be interviewed and to be candid in their statements; that increases the thoroughness of the investigation and the report. The file also includes at least one example of a witness who observed threats to police officers and who feared retaliation.

More generally, maintaining confidentiality of internal investigation files also protects officers from publicity about unjustified allegations, prevents unnecessary infringements upon liberty interests and helps to focus discipline on improving officers' performance instead of on controversies about precisely what did or did not occur. As petitioner recognizes, the statute serves "to protect the integrity of the employer-employee relationship by keeping unsubstantiated claims against police officers out of the public eye." Pet Br, p. 16, n4. The trial court summarized: The public interest includes "having a

safe, high quality police department, one that can effectively review its own actions and provide discipline, evaluation, and training for its officers." 10/21/11 Tr, p. 81; 271 Or App at 288.

Third, the records and information that were available to the public include a vast amount of information about the arrest that gave rise to the complaint, the police department's internal investigation of the complaint, the CRB's review of that investigation and the police chief's adjudication, as well as the reasons for the CRB's decision to concur with the adjudication of the complaint. The availability of so much information about both the arrest and the CRB's review of the internal affairs investigation mitigates the need for greater public disclosure. The following four paragraphs describe some of that information.

The complaint that prompted the Internal Affairs Division investigation alleged that the officer who arrested Ian used excessive force. The arrest was discussed in detail at trial, where the force used in arrest was a prominent issue. *E.g.,* Ex. 6, 4/14/009 Tr pp. 22 (Defense Opening Statement), 56-61 (Officer Solesbee direct exam re arrest), 103-07, 113 (Solesbee cross re arrest); 4/15/09 Tr pp. 148-152 (Officer Warden direct re arrest), 166-203 (Warden cross); 220-23 (Officer Haywood direct), 229-34 (Haywood cross); 4/16/09 Tr pp. 435-44 (direct

exam re arrest), 490-98 (cross). In addition, seven other witnesses to the arrest testified about their observations. Ex. 6.

The CRB received updates on the Internal Affairs Division's investigation of the complaint against the officer and the status of Police Chief Kerns' adjudication on at least eight occasions at its public meetings. Ex. 26, pp. 1-2; Ex. 27, pp. 2-3; Ex. 28, pp. 2-3; Ex. 29, pp. 3-4; Ex. 30, p. 2; Ex. 31, pp. 2-3; Ex. 32, p. 4; Ex. 33, p. 4. The CRB's discussion of the completed investigation and Chief Kerns' preliminary adjudication occurred in a public setting and lasted for three hours; approximately 70 people attended, and the discussion was well covered by the press. Ex. 7 (minutes of CRB meeting); Ex. 9, p. 9; Ex. 10; Ex. 14. The discussion included extensive analysis of the evidence by board members, several of whom disagreed with one another. In addition, the CRB discussed the police department's policy regarding use of Tasers and received public testimony on the arrest and the use of Tasers on numerous occasions. *See e.g.,* Ex. 8, pp. 3-4; Ex. 25, pp. 1-4; Ex. 31, pp. 9-12; Ex. 32, pp. 2-4, 6-11; Ex. 33, pp. 7-8.

Certainly, those public discussions provided transparency about the officers' conduct during the arrest as well as the CRB's process and the basis for its decision to concur with Chief Kerns' findings. The CRB's minutes and the police auditor's report in the trial court record, Exhibits 26 – 35, also provide examples of the CRB's handling of other cases not designated as

"community impact" cases; as explained above, pp. 8 - 9, the only substantial difference between a community impact case and other cases reviewed by the CRB is that, in a community impact case, the CRB may require the police department to reopen the internal affairs investigation. In addition, the City's police auditor provided petitioner with a copy of his recommended adjudication of the complaint, with names redacted. ER 12.

In addition to providing the factual predicate to invoke ORS 181.854(3), those records and public discussions provide ample insight into the internal affairs investigation and the CRB's review of it, as well as ample basis to evaluate the CRB's performance of its duties generally in this case. As the 2009 CRB Annual Report explained, its public meeting to discuss the internal affairs investigation "provided a valuable and unique opportunity for the public to learn about the events leading to the complaints, and how the complaints were investigated by the police department." *ACLU*, 271 Or App at 289. The public's ability to review all that information supports the trial court's finding that the public interest did not *require* disclosure.

Thus, the record contains evidence to support the trial court's findings that, on balance, the public interest did not require disclosure of the Internal Affairs Division's investigation file that the CRB reviewed. The appellate court must affirm a trial court's finding of fact when there is any evidence in the record to support it. ORS 19.415; Or Const, Art VII (Amended), § 3; *Campbell*

v. Karb, 303 Or 592, 596, 740 P2d 750 (1987) (findings of trial court are binding on appeal unless there was no evidence to support them); *Illingworth v. Bushong*, 297 Or 675, 694, 688 P2d 379 (1984) (A trial court's findings of fact have the same force and effect and are equally conclusive as a jury verdict; "an appellate court cannot reject the findings of fact of the trial court unless the appellate court can affirmatively say that there is no evidence to support the fact found by the trial court."). As described above, there is ample evidence in this record to support the trial court's findings that the public interest did not require disclosure of the records reviewed by the CRB.

B. Response to Petitioner's Argument No. 1: The statutes recognize an interest in maintaining confidentiality, and the record includes evidence to support the trial court's decision that it outweighed the public interest in disclosure in this case.

Above, the City has explained why the Court of Appeals decision is correct. In this and the following sections, the City responds to portions of petitioner's arguments not specifically addressed above.

Petitioner's heading for its first proposed rule of law asserts that the public interest requires disclosure of conditionally exempt records "where there is no countervailing interest in non-disclosure." But this assumes the conclusion: Of course, if there is no interest at all in nondisclosure, the interest favoring disclosure must prevail (assuming there is some interest in disclosure, as the City agrees there is in this case). Here, however, ORS 181.854(3) and the Eugene Code plainly express a countervailing policy supporting

confidentiality, and the stipulated facts and exhibits (as well as the records submitted for *in camera* review) demonstrate that the interest in confidentiality applies to the records in this case. Petitioner's versions of the interests at stake and the evidence in the record overlook the trial court's findings and conclusions to the contrary, which the Court of Appeals upheld. Indeed, petitioner fails to engage the Court of Appeals' analysis: It cites the opinion only once in this portion of its argument, and then for an "apparent conclusion" that neither of the lower courts actually made. Pet Br, p. 18.

Statutes

Much of petitioner's exposition of the statutory scheme is unexceptional and is substantially the same as outlined above in this brief at pp. 14-18. There are a few key points of disagreement, however.

First, petitioner overlooks a key difference between the exemptions in ORS 192.501 and .502 and the prohibition on disclosure in ORS 181.854(3). While an exemption under ORS 192.501 or .502 authorizes a public body to withhold a record if it deems it appropriate to do so, ORS 181.854 specifically forbids a public body from disclosing information from the records at issue here, unless the public interest *requires* it to be disclosed. In short, the Legislature has determined that there is a public interest in maintaining confidentiality of these records and that nondisclosure is the default mode. As to the other part of the balancing test – the interest in disclosure – the City

agrees that the analysis of "public interest" is substantially the same under ORS 192.501 and ORS 181.854. The Court of Appeals also followed that approach. *ACLU*, 271 Or App at 287-88.

Second, petitioner's narrow construction of ORS 181.854(3) (Pet Br, pp.14-16) is a series of unsupported assumptions and *ipse dixit* statements, and it would insert a limitation into the statute that is simply not there. Petitioner asserts that the exemption is intended to protect *only* the identity and privacy of the public safety employee that is the subject of the investigation. Unquestionably, that is one of its purposes, but the statute contains nothing to suggest that it is the only purpose.[7] The court should not insert a limitation that the Legislature omitted. ORS 174.010.

There are numerous reasons for the Legislature to have taken a broader view of the need for confidentiality. For example, maintaining confidentiality of the investigation file may protect witnesses from retaliation; shield the identity of confidential informants; prevent officers from allegations that, after further investigation, turn out to be false; protect confidential information relating to other criminal investigations. (These interests are discussed in more depth at pp. 20-21.) Yet, under petitioner's version, the statutory prohibition on

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[7] At pp. 15-16 of its brief, petitioner points to exemptions in ORS 192.502(2) and (3), both pertaining to personal information, and then states, "Accordingly, all the information the legislature sought to protect under ORS 181.854 is the private, personal information of the officers." The City does not understand how that conclusion follows from the two exemptions in ORS 192.502.

disclosure would almost never apply. ORS 192.501(3) requires disclosure of an arrest record except in exceptional circumstances and only for a limited period of time; as soon as that time expired, if not immediately after the arrest, the officer's name would be public and, under petitioner's version, the exemption in ORS 181.854(3) would not apply. (*See* App B for full text of statute.) In addition, the person filing a complaint that leads to an internal affairs investigation of the arresting officer could defeat the exemption simply by identifying the officer's name.

Finally, even if petitioner were correct that the only purpose of ORS 181.854(3) were to protect the officer's privacy, that interest would not evaporate simply because the officer's name has been publicized. The report may well contain personal information, beyond the officer's identity, that the public has no legitimate interest in knowing. Whether or not those interests are at stake in a particular case may affect the balancing of public interest under ORS 181.854(4)(a), but the scope of the statutory prohibition in the text of ORS 181.854(3) is not nearly as narrow as petitioner claims.

Petitioner's statutory argument is the premise for its blanket assertion that "[t]he public body has no statutory interest in conducting secret investigations." Pet Br, p. 16. Although that sweeping statement might sound appealing in the abstract, it is in fact contrary to the statutory terms of ORS 181.854(3), and the Public Records Law itself provides numerous exemptions to protect the

confidentiality of investigations of various kinds. For example: ORS 192.501(3) (investigatory information compiled for criminal law purposes); 192.501(8) (investigatory information related to certain complaints under ORS chapter 659A); 192.501(10) (information compiled by Director of Department of Consumer and Business Services to aid in enforcement of portions of ORS chapter 697), ORS 192.501(12) (records supporting personnel discipline action); ORS 192.502(4) (conditional exemption for information submitted to public body in confidence); ORS 192.502(9)(b) (limited exemption for portions of investigation conducted by attorney on behalf of public body).

Evidence

Petitioner's review of the evidence, Pet Br, pp. 17-23, consists of two portions: first, an adjective-laden description of its evidence that there is public curiosity and concern about the subject of the records that the CRB reviewed and about the quality of the CRB's review; and, second, relying in large part on its narrow interpretation of the scope of ORS 181.854(4), an attempt to brush aside the policies and evidence that supported the trial court's findings.

On its face, petitioner's argument about evidence of the public interest in disclosure goes to the weight of the evidence. As the City has acknowledged throughout this litigation, the City agrees that there is at least some public interest in disclosure of the records. Petitioner re-argues the weight of that evidence, *e.g.* pp. 18, 20, 23, but this Court is not the finder-of-fact. This Court

may reverse only if there is no evidence to support the trial court's findings. ORS 19.415; Or Const, Art VII (Amended), § 3; *Stelts v. State of Oregon,* 299 Or 252, 255, 701 P2d 1047 (1985); *Campbell v. Karb,* 303 Or at 596; *Illingwirth v. Bushong,* 397 Or at 694. As explained above, pp. 19-23, there is considerable evidence of a public interest in confidentiality in this case, and the trial court explained its reasons for finding that it outweighed the public interest in disclosure.

C. Response to Petitioner's Argument No. 2: The burden of proof is not an issue on review, but in any event the trial court's allocation was correct.

The trial court ruled that the City bore the initial burden to justify nondisclosure, but that if the City satisfied that initial burden, petitioner bore the burden to establish that an exception to the exemption applies. ER 39-40; *ACLU,* 271 Or App at 283-84. The court found that the City met its burden based on the stipulated facts, but that petitioner did not establish that the exception applied – *i.e.*, it did not establish that the public interest required disclosure in this case. ER 44-45.

1. This Court need not address petitioner's arguments on burden of proof.

Once the trial court has ruled and the case is on appeal, the burden of proof makes no difference, unless the appellate court reviews *de novo* and determines that the evidence is in equipoise, or the court finds a complete absence of evidence to support one party's position. *State v. James*, 339 Or

476, 487, 123 P3d 251 (2005); *Marvin Wood Products v. Callow*, 171 Or App 175, 179, 14 P3d 686 (2000). Here, the Court of Appeals declined to review *de novo*, and it disagreed with petitioner's contention that there is no evidence in the record to support an interest in nondisclosure.

Even if the trial court erred in its statements about who bore the burden of proof, the error would be harmless, because the trial court expressly concluded that it would reach the same result even if it allocated the burden of proof to defendant: "* * * [E]ven if, for purposes of argument, the burden remained with the City, I would still find that the evidence supports nondisclosure. In other words, I would find that the public interest does not require disclosure in this case." ER 45 (Tr 82:21-25.) In light of the trial court's statement, the Court of Appeals correctly held that it did not need to decide petitioner's assignment of error related to burden of proof. *ACLU*, 271 Or App at 285.

Despite the trial court's statement that the burden of proof did not affect its decision, petitioner asks this Court to address its burden-of-proof argument anyway. Petitioner's reasons are unclear. It suggests that "the trial judge's statement that she would have ruled the same way regardless of which party bore the burden of proof is belied by the factual record and, in any event, such a conclusion is not supported by evidence in the record. The Court of Appeals' conclusion that it need not reach the issue was also erroneous because it too

engaged in a balancing of interests." Pet Br, p. 24. The City is unsure what petitioner is suggesting here. The trial judge's statement about her reasoning is unexceptional on its face, and the point about the Court of Appeals' conclusion does not relate to burden of proof and, in any event, is incorrect: The Court of Appeals did not engage in balancing, but merely held that the trial court was correct when it did so. If petitioner is simply reiterating its arguments that no balancing of interests is appropriate or that no evidence supported the interest in confidentiality, the City rests on responses it has made in other parts of this brief.[8]

Petitioner also complains that the City did not present evidence that it had analyzed what the public interest required in this case. It suggests that it was incumbent on the City to explain why it released the internal investigation records in the so-called "Chinese student" case but declined to do so in this case. Petitioner questions the City's explanation for the different response. The City does not perceive that it bears any burden to explain the different response, but if it does, the explanation is reasonable. In the "Chinese student" case, the CRB disagreed with the police chief's adjudication, so the City concluded that there was a greater interest in allowing the public to see the information underlying that disagreement than in this case, where the CRB agreed with the

[8] Petitioner also claims that the City "merely asserted that the public had no interest here ***" Pet Br, p. 27. The City has never taken that position.

chief's adjudication. Ex. 37 (Kerns Tr), p. 16. The fact that the City released the records of the investigation in the Chinese student case refutes petitioner's contention that the City has failed to conduct a case-by-case analysis of whether the public interest requires disclosure in a particular case. Moreover, assuming solely for argument that the City did not engage in that analysis before denying petitioner's request, it would not matter: Nothing in ORS 192.502 or ORS 181.854 requires the City to explain how it evaluated competing public interests before it denies a request for confidential public records. In any event, the trial court reviews *de novo*, ORS 192.490(1), so its judgment substituted for the City's analysis. Without a persuasive reason to disregard the trial court's finding that it would reach the same decision regardless of which party had the burden of proof, any error in allocating the burden was harmless. *Cf. Gambaro v. Dept. of Justice*, 247 Or App 609, 616-17, 270 P3d 377 (2012) (when trial court's decision is premised on alternative grounds, appellant must take issue with both grounds in order to obtain relief).

2. If the Court does address the issue: the public body bears the initial burden to establish that an exemption applies, the burden shifts to the requestor to establish an exception to the exemption.

Assuming for purposes of argument that the trial court's allocation of the burden of proof makes a difference on appeal, it was correct. The trial court placed the initial burden on the City to prove facts supporting an exemption from disclosure under Oregon's Public Records Law, ORS 192.410 to .505. *See*

ORS 192.490(1); *Kluge v. Oregon State Bar,* 172 Or App 452, 455, 17 P3d 938 (2001). There is no dispute about the initial burden or that ORS 192.502(9)(a) and ORS 181.484(3) create an exemption for the records in question. The stipulated facts establish all the elements to invoke ORS 181.854(3). Stip. Facts ¶ 1, 7, 8, 12; ER 29-31. Unless an exception applies, the statute prohibits disclosure of the personal investigation records.

The question under petitioner's proposed rule of law is who bears the burden of proving or disproving an *exception* to the prohibition or exemption. The trial court correctly held that the requestor has the burden to prove that an exception applies, and that approach is consistent with Court of Appeals' precedent.

The Court of Appeals considered the public interest exception to a similar exemption in ORS 192.501 in *City of Portland v. Anderson*, 163 Or App 550, 988 P2d 402 (1999). *Anderson* concerned a newspaper's public records request for a city police bureau's records relating to the investigation and discipline of a police captain. ORS 192.501(12) conditionally exempted "a personnel discipline action, or materials or documents supporting that action" from mandatory disclosure; the records were exempt "unless the public interest requires disclosure in the particular instance." The court held that, while the city bore the burden of showing that the records fit within the exemption, 163 Or App at 553, the newspaper had the burden to demonstrate that the public

interest required disclosure. 163 Or App at 554. Similarly, in *Mail Tribune, Inc. v. Winters*, 236 Or App 91, 237 P3d 831 (2010), the Court of Appeals analyzed the "personal privacy" exemption in ORS 192.502(3) and held that, if a public body produces evidence to satisfy the criteria for exemption, the burden shifts to the party seeking disclosure to show that the public interest demands disclosure. 236 Or App at 96.

Placing the burden on the requestor to establish the exception in ORS 181.854(4)(a) is consistent with the structure of the statute, which starts with the policy that the records are exempt, *except* when the public interest requires disclosure. That allocation also makes practical sense, because the requestor, as the advocate for disclosure, is the party best situated to provide evidence of what it claims the public interest requires. Otherwise, if the public body had the burden to prove a negative – that the public interest does *not* require disclosure – it would have to speculate about that the requestor claimed its interests were. ORS 181.854 does not require the public body to play "guess what I'm thinking" with the requestor.

D. Response to Petitioner's Argument No. 3: Under ORS 181.854(4)(c), providing internal investigation documents to the CRB for it to review in confidence did not nullify the prohibition in ORS 181.854(3).

ORS 181.854(4)(c) creates a narrow exception to the prohibition on disclosure in ORS 181.854(3), so that a public body may provide records of a personnel investigation to the DPSST or a local review board. A disclosure

under that exception does not nullify the prohibition that applies to other disclosure of the information from the personnel investigation.

As discussed above, ORS 181.854(3) prohibits a public body from releasing information from an internal affairs investigation of a public safety employee when the investigation does not result in discipline of the employee. An exception in ORS 181.854(4)(c) allows the public body to disclose the information to a citizen review body such as Eugene's CRB or to the DPSST when that disclosure is necessary to enable them to conduct their own investigation. In other words, the statute does not prohibit disclosure *to those entities* in those limited circumstances. It does not purport to allow disclosure to the public. Specifically, ORS 181.854(4) provides in pertinent part:

> "Subsection (3) [the prohibition on disclosure] does not apply: * * * (c) When disclosure is necessary for an investigation by the public body, the Department of Public Safety Standards and Training or a citizen review body designated by the public body."

Without that exception, citizen review boards and the DPSST would not have access to the internal investigation of a public safety officer if the investigation did not result in discipline. The exception enables them to carry out their duties despite the prohibition on disclosure that would otherwise apply. It is a narrow, limited exception for those entities to have access to records that their duties require them to review.

Petitioner's interpretation of the statute is that, once the DPSST or the CRB conducts an investigation that requires it to review a personnel

investigation file, the general public must have access to the information whose disclosure is otherwise prohibited. Petitioner apparently assumes that the word "when" in ORS 181.854(4)(c) means that, whenever a public body releases information to the DPSST or a citizen review board such as Eugene's CRB, the prohibition on disclosure simply evaporates and no longer prevents disclosure to anyone else for any purpose. Petitioner reads "when" too broadly. The prohibition does not apply when the disclosure is necessary for the DPSST or CRB to perform their duties, but the statute does not say that the prohibition does not apply at other times. If that is ambiguous, the court should construe the statute in a manner that effects the clear purpose of the statute, not to create a loophole that would prevent the statute from achieving its goal.

Petitioner also relies on its theory that the only purpose of the prohibition on disclosure is to protect the privacy of the officer being investigated and that the privacy interest evaporates as soon as the public knows the officer's name and that he or she is the subject of an internal investigation. As explained above at pp. 26-27, neither prong of that theory is correct.

Under petitioner's version of the statutory scheme, the exception would swallow the statutory prohibition in any case when the DPSST considers denial, suspension or revocation of a public safety officer's certification, even when the DPSST determined that there was no basis for such action. Similarly, in every case reviewed by the CRB, the statutory promise of nondisclosure would be

waived, even when the public interest clearly did not warrant disclosure. Petitioner's Catch-22 version of the consequences of the limited disclosure to review bodies as authorized by statute or city code has no basis in the statutory scheme, and this Court should reject it.

VII. Conclusion

Because the trial court and the Court of Appeals interpreted ORS 181.854 correctly and the evidence in the record supports the trial court's finding that the public interest did not require disclosure of the records reviewed by the City's CRB, this Court should affirm the Court of Appeals decision.

Dated this 27th day of January, 2016.

Respectfully submitted,

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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 9,160 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)(g).

CITY OF EUGENE

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CERTIFICATE OF SERVICE

I certify that on January 27, 2016, I caused to be filed the foregoing **RESPONDENT ON REVIEW CITY OF EUGENE'S BRIEF ON THE MERITS** with the Supreme Court Administrator by using the eFiling system.

The following participant in this case is a registered eFiler and will be served via the electronic mail function of the eFiling system.

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