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 No. 1112-16443

CA A152961

S064249

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 Multnomah County, Honorable Richard Maizels, Judge Pro Tempore

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

Duane A. Bosworth, OSB #825077
Derek D. Green, OSB #042960
DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2400
Portland, OR 97201
Telephone: (503) 241-2300
duanebosworth@dwt.com
derekgreen@dwt.com

Attorneys for Petitioner on Review

Roy E. Pulvers, OSB #833570
HOLLAND & KNIGHT LLP
111 S.W. Fifth Avenue, Suite 2300
Portland, OR 97204
Telephone: (503) 243-2300
roy.pulvers@hklaw.com

Attorneys for Respondent on Review

continued …
November 2016

Ellen F. Rosenblum, OSB #753239
Attorney General
Benjamin Gutman, OSB #160599
Solicitor General
Inge D. Wells, OSB #881137
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
benjamin.gutman@doj.state.or.us
inge.d.wells@doj.state.or.us

Attorneys for *Amicus Curiae*

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Does the segregation requirement of ORS 192.505 apply to every public records exemption in Oregon and federal law?

B. First proposed rule of law.

Under ORS 192.420(1), every public record must be disclosed unless ORS 192.501 to 192.505 provide otherwise. ORS 192.496(1), if it is an exemption, and several hundred other exemptions strewn throughout Oregon statutes are incorporated into ORS 192.501 and 192.502 through ORS 192.502(9)(a) and are subject to ORS 192.505's requirement to separate exempt and non-exempt material in a public record and to disclose the non-exempt material. Every exemption of every kind, regardless of whether it is framed in terms of "records," "documents," or otherwise, is subject to the requirements of ORS 192.505.

C. Second question presented on review.

Does ORS 192.496(1) or ORS 192.502(2) exempt from disclosure any part of a public record that is a list containing only: the names of those who have filed tort claim notices and their attorneys, the dates of alleged torts and tort claim notices, the claim numbers and whether the claims are open – without identifying either the nature of the claim or the claimants' relationship with the public body?

D. Second proposed rule of law.

Information potentially exempt from disclosure in the context of one public record is not therefore exempt in a different public record. A record that does not itself contain medical or health information is not exempt from disclosure under ORS 192.496(1) or ORS 192.502(2).

E. Third question presented on review.

Does the Health Insurance Portability and Accountability Act Privacy Rule, 45 CFR parts 160 and 164 ("HIPAA Privacy Rule"), provide any exemption that is in addition to the exemptions in ORS 192.501 to 192.505 and does it, through Oregon law, exempt from disclosure all or any part of a public record that is a list consisting only of: the names of those who have filed tort claim notices and their attorneys, the dates of alleged torts and tort claim notices, the claim numbers and whether the claims are open – without identifying either the nature of a claim or the claimant's relationship with the public body?

F. Third proposed rule of law.

A public record consisting solely of the above information, without any information identifying a claimant as a patient or containing or relating to any medical information, cannot constitute "protected health information" under the HIPAA Privacy Rule. Moreover, even if all or part of that information might be "protected health information" under the Privacy Rule, whether it is exempt

from disclosure is determined by application of Oregon's Public Records Law only.

G. Fourth question presented on review.

(1) Is a tort claim notice submitted on behalf of a student an "education record" under the Family Educational Rights and Privacy Act ("FERPA"), 20 USC 1232g; (2) if only the custodian of the tort claim notice knows that requested information derived from a tort claim notice was submitted on behalf of a students, must that information therefore be treated as an "education record" under FERPA and subject to exemption from disclosure under ORS 192.502(8), even where the requested information does not identify the claimant as a student or identify the nature of the claim?

H. Fourth proposed rule of law.

A tort claim notice is not an "education record." Even if it were, information derived from that notice must be examined on its own in the public record requested to determine if any exemption applies.

II. NATURE OF ACTION, RELIEF SOUGHT AND NATURE OF JUDGMENT

Plaintiff Oregon Health and Science University ("OHSU") initiated this action under Oregon's Public Records Law, ORS 192.410 *et seq*., to prevent disclosure of a public record requested by Defendant Oregonian Publishing Company, LLC ("the Oregonian"), which contained limited information derived from tort claim notices. The Oregonian did not seek the tort claim

notices themselves or redacted notices. OHSU sought declaratory relief from the Circuit Court in response to the Multnomah County District Attorney's decision ordering OHSU to disclose the record requested by the Oregonian.

On cross-motions for summary judgment, the Circuit Court granted the Oregonian's motion and entered a General Judgment that ordered OHSU to disclose the requested information. The Circuit Court entered a Supplemental Judgment awarding the Oregonian statutory attorney fees, costs and disbursements.

OHSU appealed the General Judgment and Supplemental Judgment. The Court of Appeals reversed and remanded both the General Judgment and Supplemental Judgment. The Oregonian asks this Court to reverse the Court of Appeals' decision and award the Oregonian its reasonable attorney fees, costs and disbursements on appeal pursuant to the Public Records Law.

III. CONCISE STATEMENT OF FACTS

A. The Oregonian's public records request sought a list, only, containing limited information from tort claim notices, not the notices themselves nor any information that would identify the nature of the claim or the nature of the claimant's relationship with OHSU.

This matter arises out of an August 5, 2011 public records request to OHSU from a reporter on behalf of The Oregonian. In relevant part, the request provided:

> "Under Oregon Public Records Law, I am requesting 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."

This request emphasized that The Oregonian was *not* requesting information that would identify any claimant's relationship with OHSU nor the nature of the claim, was not requesting any "health information of any kind," and was not requesting the actual text of tort claim notices. It also reflected OHSU's own acknowledgment to the reporter that "tort claims can be filed by anyone for any reason. That means students, employees, contractors, neighbors, visitors, business partners -- the list goes on and on." TCF 8/30/12 Declaration of Duane Bosworth ISO Cross Motion for Summary Judgment, Ex. 1 at 1 ("Bosworth Decl.").

Soon after this request, OHSU in fact created a single public record containing exactly the information requested and only that information. P Tr 104-05, 108-09. OHSU declined to disclose that record to the Oregonian.

B. The District Attorney orders OHSU to disclose the requested information.

The Oregonian appealed the denial of the public records request to the Multnomah County District Attorney. The District Attorney noted that the Oregonian had requested a list, only, of limited information. It rejected all

grounds given by OHSU for declining to provide the information. TCF 8/30/12 Bosworth Dec., Ex. 6.

C. The Circuit Court orders OHSU to disclose the requested records.

OHSU appealed the District Attorney's order to the Multnomah County Circuit Court. The Oregonian answered and made counterclaims, seeking injunctive relief requiring the disclosure of the requested record and a statutory award of attorney fees and costs. *See* TCF 2/29/12 Answer and Counterclaims.

On the parties' cross-motions for summary judgment, the Circuit Court issued a letter opinion and order in the Oregonian's favor, granting the Oregonian's summary judgment motion and denying OHSU's motion. ER 8-9, 10-11. The Circuit Court entered a General Judgment ordering OHSU to disclose the information requested and a Supplemental Judgment awarding the Oregonian a stipulated amount of attorney fees, costs and disbursements. TCF 10/26/12 Judgment; 12/17/12 Supplemental Judgment.

D. The Court of Appeals reverses and remands the general judgment and the supplemental judgment for fees and costs.

The Court of Appeals reversed and remanded. *Oregon Health and Science University v. Oregonian Pub. Co., LLC*, 278 Or App 189, 373 P3d 1233 (2016). Notably, its opinion indicates a mistaken understanding of the undisputed facts concerning the public record at issue. In particular, the opinion states that OHSU received eight tort claim notices during the date range of the Oregonian's request, and that OHSU offered to submit these notices to

the Circuit Court for *in camera* review as part of summary judgment. 278 Or App at 192 and *id.* at 206 n 11. The opinion further assumes that each of these eight claims revealed whether the claimant a patient, a student, a faculty member or other employee. *Id*. at 192-93.

The undisputed facts are quite different, however. The record does not support that OHSU received only eight tort claim notices. More importantly, no tort claim notices were provided to the Circuit Court. Rather, what OHSU offered to provide to the Circuit Court was – based on OHSU's description – exactly what the Oregonian requested to be disclosed: a list that OHSU derived from the (non-disclosed) tort claim notices that listed only the names of claimants, their attorneys, the dates of the alleged torts, the tort claim number assigned by OHSU, and the status of the claim. P Tr 91, 104-05, 108-09; *see also* Plaintiff-Appellant's Opening Br at 11. As described by OHSU, this flat-list would not identify any claimant by status, and would not provide a sufficient basis for anyone to know the claimant's relationship with OHSU. *See* TCF 9/19/2012 OHSU Response & Reply to Cross-Motions for Summary Judgment at 7. This flat-list is the record that OHSU offered to provide the Circuit Court for *in camera* review – and it is this public record that the Oregonian requests to have disclosed.[1]

[1] The Court of Appeals' factual misunderstanding in this regard appears to have been based on a demonstrative chart prepared by OHSU to "aid the District Attorney in the * * * analysis of each exemption," TCF 7/23/12 OHSU Motion

The Court of Appeals did not hold that any specific records were, in fact, exempt from disclosure. But it appears that the court accepted OHSU's general premise that some of the asserted exemptions could apply because of the claimants' known status.[2]

In particular, the Court of Appeals held that "some of the requested information" by the Oregonian "may be exempt from public disclosure if it is contained in a document described in ORS 192.496(1)," related to medical and health records. 278 Or App at 191. Notably, the court based its conclusion on two related theories that neither party advocated. *See, e.g.,* 278 Or App at 204 (stating that "the parties led the court down the wrong path."). First, the court held that ORS 192.505, which requires the separation of exempt and non-exempt information in a public record, has no application to ORS 192.496 because ORS 192.505 applies only to exemptions found in ORS 192.501 and 192.502. 278 Or App at 204. Second, the court held that ORS 192.505's segregation requirement has no application to exemptions that are framed in terms of "records," such as ORS 192.496, as opposed to "exemptions within ORS 192.501 and ORS 192.502 that apply to parts of a writing." 278 Or App at

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for Summary Judgment at 4, which OHSU included as an exhibit to its Amended Complaint. This exhibit, included as ER-3, is nothing more than OHSU's graphical characterization of its arguments.

[2] The Decision rejected OHSU's arguments against disclosure of the requested information related to claims filed by employees (including faculty). *See* 278 Or App at 206-210. OHSU's request for contingent review does not challenge that conclusion. *See* Response to Petition for Review at 16-17.

205-06 (citation omitted). "[N]o sorting is necessary," the Court of Appeals concluded, if an exemption "classif[ies] an *entire record* as exempt from disclosure." *Id.* at 205 (emphasis original).

The Court of Appeals further held that tort claim notices involving students may qualify as "education records" under the Family Educational and Privacy Act ("FERPA"), 20 USC §1232g, and thus may qualify for exemption from disclosure under ORS 192.502(8). The court's opinion states that the exemption may apply if a claim notice "describes and directly relates to activities of a student or the educational status of a student." 278 Or App at 211.

The Court of Appeals remanded the case for review of the specific contents of each tort claim notice consistent with its interpretation of ORS 192.492(1) and FERPA. *Id.* at 206. The Court also remanded the Supplemental Judgment's award of attorney fees under ORS 192.490(3) because "The Oregonian may no longer be entitled to an award of attorney fees as a matter of right" if certain records are held to not be subject to disclosure. 278 Or App at 211.

IV. SUMMARY OF ARGUMENT

The Oregonian requested from OHSU a list of those who had filed tort claim notices with OHSU since January 1, 2006, containing only the name of the claimant, the claim number, attorney name if any, date of the alleged tort, date of the notice, and whether the claim was opened or closed. OHSU created

a public record containing exactly *that* list, with only *that* information provided. The Oregonian contends that because of the limited nature of that information, none of the exemptions urged by OHSU apply.

Instead of squarely reaching this issue, the Court of Appeals made four rulings that the Oregonian disagrees with, and one ruling regarding HIPAA with which the Oregonian agrees.

First, the Court of Appeals held that the segregation requirement of ORS 192.505 does not apply to ORS 192.496(1) both because that statute is not within ORS 192.501 or 192.502 and because that statute exempts[3] entire records, without segregation. The Oregonian argues that if it were an exemption, ORS 192.496(1) would be subject to ORS 192.505, because of its incorporation through ORS 192.502(9)(a). This Court's recent opinion in *American Civil Liberties Union v. City of Eugene*, 360 Or 269, 380 P3d 281 (2016), describes how state restrictions on disclosure codified outside of the Public Records Law are incorporated through ORS 192.502(9)(a). Following the universal rule of ORS 192.420, the *only* exemptions that allow non-disclosure of any public record are contained in 192.501 to 192.505. That ORS 192.496 has been placed in a statute outside of ORS 192.501 to 192.505 does

[3] The Oregonian fully agrees with the amicus argument that ORS 192.496(1) is not itself an exemption to disclosure. Instead, when properly read in conjunction with the simultaneously enacted ORS 192.495, it is a list of *exceptions* to ORS 192.495, which is itself a rule of disclosure, not of exemption. *See* Brief of the State of Oregon as *Amicus Curiae* in Support of Petition for Review at 5-6.

not mean that the segregation requirement of ORS 192.505 does not apply to it. The only way in which ORS 192.496(1) *could* be a valid exemption[4] is through incorporation by ORS 192.502(9)(a).

Second, the court ruled that because of its wording, ORS 192.496(1) exempts entire "records" or "documents" and thus the segregation requirement of ORS 192.505 does not apply to it. The Oregonian argues that neither precedent, legislative history, the plain words of ORS 192.505, or statutory construction regarding exemptions, supports this novel rule.

Third, the court found that if particular information contained in one record is exempt, the analysis of exemption "does not change" if that same information is contained in "a different public record." While that result may sometimes obtain, the Oregonian argues that whether or not particular information is exempt must be decided in the context of the "different public record."

Fourth, the court remanded issues of exemption under FERPA. The Oregonian argues that the court misunderstood the sole public record at issue, which could never be an "education record," and that in all events, even the tort claim notices themselves that the court incorrectly determined to be at issue are not exempt as "education records."

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[4] *See* footnote 1.

Finally, the Oregonian agrees with the Court of Appeals that the HIPAA Privacy Rule does not provide a basis for exemption here. The Oregonian contends that the dispositive argument is that the record requested does not contain "protected health information." The Oregonian also agrees with the Court of Appeals' conclusion: because the HIPAA Privacy Rule has a "required by law" exception to non-disclosure, it does not "prohibit" disclosure, as described in ORS 192.502(8). Claimed exemptions under the Privacy Rule must be analyzed under the exemptions contained in ORS 192.501 to 192.505.

V. ARGUMENT

A. The requested public record does not contain medical or student information.

Neither the restrictions on disclosure of medical and health records contained in ORS 192.496(1), ORS 192.502(2) and the HIPAA Privacy Rule nor the conditions on disclosure of educational records contained in FERPA exempt from disclosure a public record, derived from tort claim notices, that lists only the following information: the names of claimants, their attorneys, the dates of the alleged torts, the claim number, and whether the claim is open or closed. Such a record does not identify any claimant as a patient or disclose any medical information that could trigger ORS 192.496(1), ORS 192.502(2) or the HIPAA Privacy Rule. Nor does it identify any claimant as a student or disclose any information about a student's education records that could implicate FERPA.

The Oregonian contends that this argument is dispositive as to any records not ordered to be disclosed by the Court of Appeals. Nevertheless, the Oregonian addresses each of the specific rulings at issue below.

B. The segregation requirement of ORS 192.505 applies to every exemption.

The Court of Appeals concluded that segregation required by ORS 192.505 does not apply to exemptions not found in ORS 192.501 or 192.502. The court also concluded that the segregation requirement of ORS 192.505 does not apply to any exemption that describes the writing exempted as a "record" or "document." Each of these conclusions is without precedent and is incorrect.

1. The segregation requirement of ORS 192.505 applies even if an exemption is not statutorily located in ORS 192.501 or 192.502.

The Court of Appeals concluded that "[o]n its face, ORS 192.505 applies only to records that contain material that is nonexempt and material that is exempt from disclosure '*under ORS 192.501 and 192.502*.'" 278 Or App at 204 (emphasis added). The court found that any exemption of "medical records" in question would have its source in ORS 192.496(1), *not* "under ORS 192.501 and 192.502." *Id*. That analysis is incorrect.

As this Court recently indicated, ORS 192.502(9)(a) "incorporate[s] into the Public Records Act" a statutory restriction on disclosure of records codified outside of ORS 192.501 and ORS 192.502. *American Civil Liberties Union v. City of Eugene*, 360 Or 269, 283 n 6, 380 P3d 281 (2016) (discussing ORS

181.254). Indeed, ORS 192.502(9)(a) incorporates *all* exemptions "for all records 'the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law,'" 360 Or at 283 n 6 (quoting ORS 192.502(9)(a)), and makes them exemptions "under ORS 192.501 and 192.502." ORS 192.505.

The Court of Appeals erred in its conclusion that ORS 192.496, if it is an exemption, is not "under" ORS 192.501 and ORS 192.502. As the universal rule of ORS 192.420(1) states, there are no exemptions from disclosure of "any public record of a public body in this state" except those "expressly provided by ORS 192.501 to 192.505." ORS 192.496 could provide an exemption only if it is within "ORS 192.501 to 192.505." Despite its location in Oregon statutes, ORS 192.496 would be "under" ORS 192.501 to 192.505 through incorporation by ORS 192.502(9)(a), if it is an exemption, and ORS 192.505 applies to it.

2. ORS 192.505 applies to exemptions that describe the writing exempted as "record," "records," or "documents."

In *Brown v. Guard Publishing*, 267 Or App 552, 563-64, 341 P3d 145 (2014), the Court of Appeals indicated that some exemptions "describe particular types of documents" and others "are phrased in terms of particular types of data or information within public records." The court explained that "although the definition of 'public records' -- and by incorporation, the exemptions, * * * -- are phrased in terms of whether a writing 'contains' information related to public business, the specific exemptions themselves may

apply to a writing in whole or in part." *Id*. From this understanding, the court concluded in dicta that the segregation requirement of ORS 192.505 "applies only to the exemptions within ORS 192.501 and ORS 192.502 that apply to parts of a writing." *Id.* at 564-65. The court here applied the same analysis to ORS 192.496(1), which it found described the exemption of an entire "record" rather than segregable "information." The court held that the correct analysis of ORS 192.496(1) is whether a "record" contains certain information that is exempt, in which case the entire record is exempt and the segregation requirement of ORS 192.505 cannot be applied.

The analysis described in *Brown*, now a holding of this case, is without precedent and not supported by the text, context or relevant legislative history.

a. Precedent.

The Oregonian can find no previous Oregon decision that remotely resembles this new rule, with the exception of dicta in *Brown*. Here, the Court of Appeals cited *Port of Portland v. Oreg. Center for Environ. Health*, 238 Or App 404, 409-10, 243 P3d 102 (2010), *rev. den.* 350 Or 230 (2011), as "analogously" concluding that an entire document was exempt, thus "dispos[ing] of defendant's argument that the Port should separate exempt and nonexempt material under ORS 192.505." 278 Or App at 206 n 10 (quoting *Port of Portland*, 238 Or App at 413). That "analogy" doesn't support the court's novel rule. It has been beyond question, almost since the advent of the

Public Records Law, that some records may be exempt in their entirety *after* an analysis of every part of their content, and some cannot practicably be parsed or segregated. *See Turner v. Reed*, 22 Or App 177, 186 n 8, 530 P2d 373 (1975).[5] That long-held conclusion, applied in *Port of Portland*, *supra*, is a far cry from a rule that if an exemption is "phrased" in terms of a "record" or "document," then a public body (or a court), may simply forego the analysis required by ORS 192.505.

Indeed, the history of Oregon appellate decisions regarding the application of ORS 192.505 and its predecessor, ORS 192.500(3), provides no indication of obviating the segregation rule thereunder if the exemption contains descriptions. For example, shortly after the 1973 passage of the Public Records Law,[6] the Court of Appeals described in *Turner v. Reed* that ORS 192.505's predecessor, ORS 192.500(3), simply required segregation without mention of or distinction regarding the words used to describe the writing that could be subject to exemption. 22 Or App at 186 and n 8.

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[5] It may be that a "security plan," for example, is in fact exempt from disclosure in its entirety, but that would be because analysis under ORS 192.505 determined that: (1) no part of it is found to be disclosable; (2) "deleted portions of a document could possibly be inferred from the balance"; or (3) "deletions may reach the point that it would be meaningless to disclose the balance." *See Turner*, 22 Or App at 186 n 8.

[6] It is notable that, despite multiple amendments to the Public Records Law since the *Turner* opinion, the legislature has not substantively amended the segregation requirement. *See ACLU*, 360 Or at 284 (Court will presume the legislature is aware of existing case law).

In *Gray v. Salem-Kaizer School Dist.*, 139 Or App 556 (1996), the Court of Appeals stated that "we note, moreover, that the Inspection of Public Records laws explicitly recognize that document disclosure is not an 'all-or-nothing' proposition," citing the language of ORS 192.505. The court found that a public body "was not entitled to withhold two forms in their entirety" but instead must disclose those forms, "deleting respondents' names, addresses, positions and answers to 'How long have you supervised the applicant?'" *Id*. at 566-67. In requiring segregation, the decision made no mention of the words used to describe the writing that could be subject to exemption.

Citing both ORS 192.505 and *Gray*, this Court's recent opinion in *ACLU v. City of Eugene* similarly acknowledged the same conclusion: "disclosure of requested records is not an all-or-nothing proposition." 360 Or at 300.

b. Legislative history.

The Oregonian has combed through the written legislative history of ORS 192.501 and ORS 192.502, including their predecessors, along with that of ORS 192.496 and cannot find any reference to the concept that the applicability of ORS 192.505 was intended to depend upon the description of the writing in any exemption. Nor is there any explanation for why the Legislative Body chose "records and information" "information and records," or any of the other myriad ways in which the writing in a public record has been described.

c. The plain words of ORS 192.505.

ORS 192.505 begins with reference to "any public record." Those words appear at odds with the court's novel ruling that some public records are not subject to ORS 192.505. Were the court's new rule correct, one might have expected the addition of "except those which are exempt in their entirety because of the particular description of a writing to which they apply * * *."

d. Rules of construction of the Public Records Law.

The new rule that the Court of Appeals would add is at odds with long established rules of the construction of exemptions in the Public Records Law. Citing *Guard Publishing Co. v. Lane County School Dist.*, 310 Or 32, 91 P2d 854 (1990) as well as Court of Appeals precedent, the Court of Appeals in *Colby v. Gunson* described the standard analysis as follows:

> "Any exemption from disclosure under the Public Records Law must be explicitly stated by statute and not merely implied by the law. * * * [E]xemptions from disclosure must be 'expressly' stated in the law. * * * Oregon courts have paraphrased this rule of construction of the Public Records Law to note that 'disclosure is the rule. Exemptions from disclosure are to be narrowly construed.' * * * The 'narrow construction' rule means that, if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails."

224 Or App 66, 676, 199 P3d 350 (2008). Further, "the statutory construction methodology of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), must be applied 'keeping in mind the policy in favor of disclosure.'" 224 Or App at 677 (citations omitted). Although the court here

insists it is providing a plain meaning of the words in various exemptions, the court's new rule, creating a vast extension of exempt information, is not consonant with or supported by these rules of construction.

C. Particular information exempt from disclosure in the context of one public record is not *therefore* exempt in the context of a different public record.

The Court of Appeals concluded that if information contained in one record is exempt, then an analysis of the same information contained in "a different public record" does not change. 278 Or App at 194 n 8. The same information *may*, in fact, continue to be exempt when contained in a new or different public record, but that is because of an analysis of exemption in the context of the new record, not merely because the information was exempt in some different record or the information in a new record was derived from a record in which it was exempt.

Information often may be exempt from disclosure because of its context. The names of any OHSU administrators treated as patients at OHSU may not be disclosed in conjunction with any information related to medical treatment. Those names might be disclosed, however, in response to a public records request for a list of each administrators' number of days away from his or her job. In that instance, there may be no exemption provided by ORS 192.501 to 192.505. *See* Attorney General's Public Records and Meeting Manual (2014), pp. 80-81. That might be true even if that list of administrators' absences was

somehow derived in part or whole from the exempt records that contained information related to medical treatment. With no applicable exemption under ORS 192.501 to 192.505, the universal rule of ORS 192.420(1) would therefore require disclosure.

Here, the *same* information about names in "a different public record," would "change the issues," that is, the analysis of exemption. In short, that particular information is exempt in the context of one public record does not therefore make it exempt in "a different public record." Exemption within "a different public record" requires an analysis of the information in that record. The public record requested by the Oregonian, containing no medical or health information or any indication of the claimants' relationship to OHSU, is not subject to withholding as medical or health information under any of the statutory exemptions relied on by OHSU.

D. Any exemption of public records under HIPAA's Privacy Rule must be examined for exemption under the Oregon Public Record Law.

This same analysis is dispositive with respect to OHSU's HIPAA argument: A public record that does not include any information identifying a claimant as a patient or containing or relating to any medical information cannot constitute "protected health information" under the HIPAA Privacy Rule. 45 CFR 160.103 ("Protected health information means individually identifiable *health information*.") (emphasis added).

The Court of Appeals rejected OHSU's HIPAA argument on a different ground, but one with which the Oregonian also agrees: ORS 192.420(1) requires the disclosure of every public record of a public body in this state unless an express exemption is provided by ORS 192.501 to 192.505. The HIPAA Privacy Rule would be an exemption incorporated by ORS 192.502(8) if, in accord with that exemption, it concerned 'information the disclosure of which is *prohibited* by federal law or regulations." (Emphasis added.) The Privacy Rule, however, permits disclosure of otherwise exempt information if that disclosure is "required by law." 45 CFR § 164.512(a)(1). The Privacy Rule cannot be incorporated into ORS 192.501 or 192.502 because it is inconsistent with ORS 192.502(8), which addresses federal law or regulation that "prohibit" disclosure.

It is not easy to imagine what information could in fact be exempt from disclosure under the Privacy Rule but not exempt under the panoply of exemptions contained in ORS 192.501 and 192.502, including all exemptions incorporated by ORS 192.502(8) and (9)(a). Because the Privacy Rule cannot be incorporated by ORS 192.502(9)(a), if such information exists, its exemption from disclosure is determined by the provisions of ORS 192.501 to 192.505, only. As the Court of Appeals found, the Privacy Rule does not add to the scope of exemption under the Public Records Law.

E. FERPA does not apply to the public record or the information sought in the Oregonian's public records request.

The Oregonian requested a *list* of those who had filed tort claim notices with OHSU since 2006.

The public record sought by the Oregonian, in the possession of OHSU, contains no information that is "directly related to a student." 20 USC § 1232g(a)(4). In fact, disclosure of the information sought will contain no *indirect* information indicating in any way that the information is related to a student. OHSU's list, with no information related to a student, is not an "education record." Nor is the information sought maintained or located in any place that is the source of education. As the Court of Appeals found:

> "The summary judgment record does not show that the faculty member tort claim notice is actually "in the personnel file" of the affected faculty member. Instead, the record shows that the tort claim notices are regularly kept by claims managers in OHSU's risk management department."

278 Or App at 210. Nothing in the record supports any claim that the list at issue is maintained as any "education record."

The FERPA analysis should end at that point. The public record at issue here, the list that OHSU created, which is the sole public record that OHSU has stated it would provide to the Oregonian if so ordered, is not an "education record."

The Court of Appeals held that an exemption under FERPA may apply to a *tort claim notice* if it "describes and directly relates to activities of a student or the educational status of a student." 278 Or App at 211. No tort claim notice is sought or would be provided, of course.[7] Further, even if the tort claims notices themselves were to be analyzed *and* a notice revealed that an individual was in fact a student, a tort claim notice is not an "educational record." In *Poway Unified School Dist. v. Superior Court*, 62 Cal App 4th 1496, 73 Cal Rptr 2d 777 (1998), a newspaper sought access to a tort claim notice submitted by a high school student under the California Tort Claims Act. The school district invoked FERPA to claim exemption of the tort claim notice as an "educational record." The appellate court held:

> "It defies logic and common sense to suggest that a Claims Act claim, even if presented on behalf of a student, is an "educational record" * * * within the purview of [FERPA]. Just because a litigant has chosen to sue a school does not transmogrify the Claims Act claim into such a record. We therefore conclude the release of such a claim [does not] implicate[] * * * FERPA."

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[7] Moreover, the court's analysis assumes that FERPA meets the requirements of ORS 192.502(8), which applies only to records or information "the disclosure of which is *prohibited* by federal law or regulations." (Emphasis added.) FERPA does not, in fact, "prohibit" anything; instead, it conditions the receipt of federal funds upon an institution not having a policy or practice of disclosing "education records." *Cf. Osborn v. Bd. of Regents of Univ. of Wisconsin Sys.*, 254 Wis 2d 266, 284-85, 647 NW2d 158, 167 (2002) ("In fact, FERPA does not prohibit disclosure of any documents. Rather, FERPA operates to deprive an educational agency or institution of funds if 'education records (or personally identifiable information contained therein * * *)' are disclosed without consent. 20 USC § 1232g(b)(1).").

62 Cal App 4th at 1507.

A tort claim notice is a statutory requirement for a potential litigant seeking recovery of damages from a public body. It is not an "institutional record" that a school "maintains" in a student file concerning the student's education. *Cf. Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 435, (2002) ("FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar * * *."). As described above, the record here establishes that all tort claim notices are kept by OHSU Claims Managers in a file in the Risk Management Office. Even the tort claims notices themselves, not at issue here, are not education records.

VI. CONCLUSION

For the reasons stated, the Oregonian asks this Court to reverse the decision as to the issues remanded to the trial court, and affirm the General Judgment and Supplemental Judgment of the trial court. The Oregonian further requests an award of its costs, disbursements and reasonable attorney fees pursuant to the Public Records Law, ORS 192.490.

Dated this 7th day of November, 2016.

DAVIS WRIGHT TREMAINE LLP

By: s/ Duane A. Bosworth
Duane A. Bosworth, OSB #825077
Derek D. Green, OSB #042960

Attorneys for Petitioner on Review

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and ORAP 9.05 (3)(a) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 5,811 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).

s/ Duane A. Bosworth
Duane A. Bosworth, OSB #825077
Of Attorneys for Petitioner on Review

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 7th day of November, 2016, I filed the original of the foregoing BRIEF ON THE MERITS by using the court's electronic filing system; I served the same on:

Roy E. Pulvers, OSB #833570
HOLLAND & KNIGHT LLP
111 S.W. Fifth Ave., Ste. 2300
Portland, OR 97204
Telephone: (503) 243-2300
roy.pulvers@hklaw.com

Ellen F. Rosenblum, OSB #753239
Attorney General
Benjamin Gutman, OSB #160599
Solicitor General
Inge D. Wells, OSB #881137
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
benjamin.gutman@doj.state.or.us
inge.d.wells@doj.state.or.us

by using the court's electronic filing system.

s/ Duane A. Bosworth
Duane A. Bosworth, OSB #825077
Of Attorneys for Petitioner on Review