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. 111216443 CA A152961 SC S064249

BRIEF OF THE STATE OF OREGON AS AMICUS CURIAE IN SUPPORT OF OREGONIAN PUBLISHING COMPANY, LLC

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, P.J.
Before: Sercombe, Presiding Judge, and Hadlock, Chief Judge,
and Tookey, Judge

Continued…

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BRIEF OF THE STATE OF OREGON AS AMICUS CURIAE IN SUPPORT OF OREGONIAN PUBLISHING COMPANY, LLC

INTRODUCTION

The State of Oregon, through Attorney General Ellen Rosenblum, respectfully submits this brief as amicus curiae in support of the petition for review. This court should grant review because the case involves a significant question of first impression about the meaning of the Public Records Law, ORS 192.410-.505. The question concerns the scope of ORS 192.505, which requires public bodies to "segregate" exempt "material" out of public records and make nonexempt material in the same records available. The Court of Appeals erroneously concluded that whether ORS 192.505 applies depends on where the exemption is codified and whether it uses the word "records" in describing its scope. The court also misread ORS 192.496, a statute that merely preserves some exemptions that otherwise would expire after 25 years, as creating an independent exemption from disclosure. As explained below, when a record contains both exempt and nonexempt information, ORS 192.505 requires disclosure of the nonexempt information in a record regardless of where the exemption is codified and how it is worded.

Because ORS 192.505 is a significant safeguard of the public's right to know, the state urges this court to grant petitioner's request for review.

Granting review will also give this court an opportunity to clarify that ORS 192.496 is not an independent exemption from public disclosure.

A. The interpretation of ORS 192.505 adopted by the Court of Appeals is erroneous and will curtail meaningful access to public records in Oregon.

ORS 192.505 generally requires public bodies to disclose information that is not exempt from public disclosure even if other information in the same record is exempt from disclosure:

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

The Court of Appeals interpreted this statute in two novel and erroneous ways. First, it concluded that the requirement to segregate exempt and nonexempt "material" does not apply to information that is exempt from disclosure under a statute other than ORS 192.501 or 192.502. 278 Or App at 204. This is incorrect because *all* public records that are exempt from disclosure are exempt under ORS 192.501 or 192.502. Specifically, ORS 192.420(1) provides that public records are subject to public disclosure "except as otherwise expressly provided *by ORS 192.501 to 192.505*"(emphasis added).[1]

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[1] The only statutes in that range are: ORS 192.501, which creates exemptions; ORS 192.502, which creates exemptions; ORS 192.505, which requires nonexempt material to be disclosed even if some material in a record is exempt; and ORS 192.504 which was placed in that range by the compiler of

Footnote continued…

Exemptions that are codified in Oregon law outside of those statutes are brought within them by ORS 192.502(9)(a), which exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law."

Second, the court erroneously concluded that the segregation requirement does not apply to public disclosure exemptions that use the word "record" in describing their scope, rather than "information" or some other term. In fact, ORS 192.505 applies whenever there is material in a record that is *not* exempt under ORS 192.501 or 192.502, along with material that is exempt from disclosure. Whether a particular exemption applies to information or—as in the case of ORS 192.496—to records that "contain information," if there is non-exempt information in a record, ORS 192.505 requires that information to be disclosed to the extent it is reasonably possible to do so while not disclosing exempt information. Some records, of course, will contain only exempt information. And, while some exemptions may apply to records in their entirety, an exemption that applies to "records" that "contain" specified information is not such an exemption. The information should be removed as

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(…continued)
statutes but was not actually made a part of that range by the legislative assembly, as the note following that statute acknowledges.

required by ORS 192.505, after which the record will no longer "contain" that information.

A number of exemptions from disclosure apply to "records."[2] Before the Court of Appeals' decision, that fact alone was not understood to make the records completely unavailable to the public. Instead, the records were generally available to the public after being redacted to remove that information from them, leaving only nonexempt information. Not only would the Court of Appeals' decision remove these records from public view, it also would allow an unscrupulous public official to render any record completely inaccessible to the public by inserting information that would qualify for such an exemption. The novel interpretation of the Court of Appeals is inconsistent with the text of ORS 192.505 and could significantly damage Oregon's "strong and enduring policy that public records and governmental activities be open to the public." *Jordan v. Motor Vehicles Division*, 308 Or 433, 438, 781 P2d 1203 (1989). This court should grant review of the decision to restore ORS 192.505 to its full intended scope.

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[2] Still other exemptions—such as ORS 192.502(5)—apply to "information or records" or "records or information." It is unclear what the Court of Appeals' decision means with respect to such exemptions.

B. ORS 192.496 does not create an independent exemption from public disclosure, but only establishes narrow exceptions to the general rule that exempt information becomes public after 25 years.

ORS 192.496 lists four kinds of public records that are "exempt from disclosure," including records less than 75 years old that contain certain confidential medical information. Although at first blush the text of the provision might suggest that this provides a blanket exemption for all records containing any confidential medical information, a closer consideration of the text, context and legislative history of ORS 192.496 reveals that the statute is intended to operate more narrowly. It is not an independent exemption from disclosure, but rather a limited exception to the expiry of the exemptions in ORS 192.501 and 192.502 after 25 years.

ORS 192.496 was enacted simultaneously with ORS 192.495, which establishes the expiry rule. Or Laws 1979, ch 301. No other substantive provisions were enacted in the bill. Thus, ORS 192.495 provides significant context for understanding ORS 192.496. The text of the former statute indicates that the latter is an exception to it:

> Notwithstanding ORS 192.501 to 192.505 and except as otherwise provided in ORS 192.496, public records that are more than 25 years old shall be available for inspection.

That contextual clue is consistent with the fact that the specific subsections of ORS 192.496 are duplicative of other existing exemptions. For example, ORS 192.496(1)—the provision at issue here—essentially duplicates ORS

192.502(2). Together, those indicators suggest that ORS 192.496 is meant to act as an exception to ORS 192.495, not an exception to the general disclosure requirement in ORS 192.420.

As the state will explain in more detail if review is granted, the history of ORS 192.495 and 192.496 confirms this interpretation. At the time these provisions were enacted, the only exemptions from the public disclosure requirement of ORS 192.420 were codified at ORS 192.500. The legislature did not add ORS 192.496 to ORS 192.500. At that time, the current catch-all exemption of ORS 192.502(9)(a) did not exist. Instead, ORS 192.500(2)(h) included a list of specific statutes outside of ORS 192.500 that acted as exemptions. In enacting ORS 192.496, the legislature did not add that statute to that list. Given that ORS 192.420 required disclosure of public records except a expressly provided by ORS 192.500, the fact that the legislature did not place ORS 192.496 within that statute or add it to the list of other statutes strongly suggests that the legislature did not intend to create new exemptions. Instead, it appears that the legislature intended to create narrow exceptions from the 25-year expiry rule it was enacting at the same time. The legislative history of the measure is consistent with this narrower understanding of its purpose.

CONCLUSION

For the reasons discussed above, this court should grant the petition for review and reverse the Court of Appeals' decision. The segregation requirement

of ORS 192.505 is an important tool for preserving public access to government records, and the decision of the Court of Appeals threatens to curtail that access. And the conclusion that ORS 192.496 creates independent exemptions from disclosure threatens to create an unwarranted expansion of public records disclosure exemptions.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 3, 2016, I directed the original Brief of the State of Oregon as Amicus Curiae to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Roy Pulvers, attorney for respondent on review; and upon Duane A. Bosworth, attorney for petitioner on review; by using the court's electronic filing system.

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

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 1,401 words. I further 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(2)(b).

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