IN THE SUPREME COURT OF THE STATE OF OREGON

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

Plaintiff-Petitioner,

v.

CITY OF EUGENE, OREGON, a municipal corporation,

Defendant-Respondent,

and

CIVILIAN REVIEW BOARD OF THE CITY OF EUGENE, OREGON,

Defendant.

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

CA No. A150403

SC No. S063430

PETITIONER'S BRIEF ON THE MERITS FOR REVIEW

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, Judge.

Opinion Filed: May 20, 2015
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Proposed Rule: ORS 181.854(4)(a) requires disclosure of records otherwise exempt from disclosure under ORS 181.854(3) where the identity of the officers and the fact of the investigation is already public—meaning those officers no longer have a countervailing privacy interest—and where the public body has no countervailing confidentiality interest sufficient to overcome the presumption in favor of disclosure and the public's interest in transparency and oversight.

2. Does the public body have the burden of proof to sustain nondisclosure of records under ORS 192.502(9)(a) based on ORS 181.854(3) and (4)(a)?

Proposed Rule: Under ORS 192.490(1), the public body has the burden of sustaining its action in not disclosing public records.

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Proposed Rule: Under ORS 181.854(4)(c), the exemption from disclosure in ORS 181.854(3) no longer applies when disclosure is necessary for an investigation by a citizen review body designated by the public body.

NATURE OF ACTION, RELIEF SOUGHT IN THE TRIAL COURT, AND NATURE OF JUDGMENT BY THE TRIAL COURT

This is an appeal from a denial of a public records request. Plaintiff American Civil Liberties Union of Oregon, Inc. ("Plaintiff" or the "ACLU") sought disclosure under Oregon's public records law of "all documents used by the Civilian Review Board of the City of Eugene, Oregon in reviewing and deciding the May 30, 2008 Ian Van Ornum Community Impact Case." Defendant City of Eugene ("Defendant" or "City") declined to disclose the requested documents, relying on ORS 181.854(3), which prohibits disclosure of records of a personnel investigation of a public safety employee if the investigation does not result in discipline. Plaintiff countered that under subsection (4) of that statute, subsection (3) does not apply where the public interest requires disclosure or where disclosure is necessary for an investigation by a citizen review body. Following a bench trial, the Circuit Court declined to order disclosure. Plaintiff appealed to the Court of Appeals, which affirmed the trial court's ruling. Plaintiff seeks reversal of the Court of Appeal's and trial court's judgment and remand with instructions to order disclosure of the requested documents.

STATEMENT OF MATERIAL FACTS

I. UNDERLYING INCIDENT

On May 30, 2008, Ian Van Ornum[1] was participating in a protest rally and march in downtown Eugene in opposition to the use of pesticides. (ER 30 [Stip Fact, ¶ 5]). Mr. Van Ornum had an interaction with two Eugene police officers. (Ex 6 [Van Ornum Criminal Trial Tr, Vol I (Apr 14, 2009), 58:1-62:20]). They attempted to arrest him. (*Id.*) When Mr. Van Ornum did not comply with their requests, Officer Solesbee attempted to restrain him. (*Id.*) Officer Solesbee then forcibly put Mr. Van Ornum's face down on the ground, with either both arms under Mr. Van Ornum's body or one arm locked behind his back. (*Id.*) While Mr.Van Ornum was immobilized in that position, Officer Warden used his Taser stun gun on Mr. Van Ornum, not once, but twice, just seconds apart. (*Id.*) Mr. Van Ornum was then handcuffed, arrested, and charged with disorderly conduct and resisting arrest. (*Id.*)

Following that incident, complaints were filed with the police department asserting that the police officers in question had used excessive force in first restraining and then using the Taser stun gun on Mr. Van Ornum. (Ex 37

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[1] In this proceeding and in the criminal trial of Mr. Van Ornum discussed below, Mr. Van Ornum's surname is shown as "Van Ornum." In the appellate and Supreme Court proceedings following his conviction, see note 2, *infra*, his surname is shown as "Vanornum." We will refer to him as Mr. Van Ornum in this brief as we have done previously.

[Deposition of Pete Kerns ("Kerns Dep"), 8:6-9:21]). The matter was subject to an internal affairs investigation by the police department and was selected by the Citizen Review Board ("CRB") of the City of Eugene for further investigation. (ER 30 [Stip Fact, ¶¶ 6, 7]). The CRB designated the Van Ornum case as a "Community Impact Case," the first and, as of the trial below, only such designation by the CRB. (ER 30 [Stip Fact, ¶ 6]). The designation as a "Community Impact Case" changed the process for the investigation and heightened the CRB's role in the process. (ER 30; Ex 37 [Kerns Dep, 23:24-25:19]). There was a great deal of public and media interest in this high profile matter and in how the CRB performed its function in the case. (Tr 52:16-53:6, 59:4-14; Ex 11-24).

The CRB's review, however, was delayed because of the ongoing criminal investigation and ultimately the criminal trial of Mr. Van Ornum.[2] (Ex 26, at 2; Ex 28, at 2; Ex 30, at 2; Ex 31, at 2-3; Ex 32, at 4; Ex 33, at 4).

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[2] Mr. Van Ornum's criminal trial resulted in a conviction that was initially affirmed by the Court of Appeals based on failure to preserve instructional error. *State v. Vanornum*, 250 Or App 693, 282 P3d 908 (2012). On review, this Court reversed and remanded, concluding that ORCP 59 H did not apply to or control appellate review of claims for instructional error, including claims for plain error, and that the trial court's use of a uniform instruction on self-defense was plain error. *State v. Vanornum*, 354 Or 614, 317 P3d 889 (2013). On remand, the Court of Appeals exercised its discretion to review the claimed error and reversed and remanded for a new trial. *State v. Vanornum*, 273 Or App 263, 356 P3d 1161 (2015). On remand to the trial court, the state declined to continue to prosecute Mr. Van Ornum. *State v. Vanornum*, Lane County Circuit Court, No. 200818082A, Order Dismissing Count 1 of the Indictment and Judgment (November 12, 2015).

Following the criminal trial, the internal affairs investigation was completed and presented to the Chief of Police. (ER 30 [Stip Fact, ¶¶ 7, 9]). The Chief of Police made a recommendation to the CRB that the officer's conduct was within the department's policy and that no discipline was appropriate. (ER 30 [Stip Fact, ¶ 10]). The CRB voted 4 to 2 to confirm the Chief's recommendation. (ER 31 [Stip Fact, ¶ 11]). In connection with its review, the CRB was provided with all of the materials assembled in connection with the internal affairs investigation including the investigator's interview notes, analysis, and recommendations. (ER 30 [Stip Fact, ¶ 9]; Ex 37 [Kerns Dep, 12:2-5]). The identities of the officers involved in the incident—Officers Warden, Solesbee, and Haywood—were all well-known; all had testified at the criminal trial of Mr. Van Ornum and/or had been publicly identified in the press. (Ex 6 [Van Ornum Criminal Trial Tr, Vol I (Apr 14, 2009), at 48; Vol II (Apr 15, 2009), at 141, 217]; Ex 20; Ex 37 [Kerns Dep, 23:13-23]).

II. PLAINTIFF'S PUBLIC RECORDS REQUEST

Plaintiff made a proper request for documents, which included a request for all of the documents reviewed by the CRB. (Ex 3a). The City initially refused to produce any documents. (Exs 2, 3b). Chief Kerns, the City's designated witness and the person who made the decision not to disclose the documents, could not or would not explain the basis for the decision not to disclose. (Ex 37 [Kerns Dep, 5:18-7:3 (and Ex 1), 14:2-16:2, 27:9-30:13]). After the ACLU petitioned the

District Attorney for Lane County to require disclosure, the City produced some of the requested material. (Exs 3, 4). The District Attorney, in turn, declined to require the production of the remaining requested documents. (Ex 5).

While the Van Ornum case was the very first "Community Impact Case" reviewed by the CRB, (ER 30 [Stip Fact, ¶ 6), it was not the only case involving the controversial use of a Taser by a Eugene Police Officer. On September 22, 2009, the same officer who used his Taser on Mr. Van Ornum—Officer Warden —used his Taser on a Chinese University of Oregon student in the student's own apartment. (Ex 3c; Ex 37 [Kerns Dep, 23:13-23]). The case involving the Chinese student, however, was not designated as a Community Impact Case. (Ex 37 [Kerns Dep, 24:25-25:4]). As a result, although the CRB had authority to review the case, it had no power to take any formal action or to force a reopening of the investigation. (Ex 37 [Kerns Dep, 24:11-19]).

In response to the ACLU's request for public records in that case, the City produced everything. Specifically, the City disclosed the same types of personnel investigation files for which it has claimed confidentiality here. (Ex 4). When the ACLU noted the disclosure in the Chinese student case in its Petition for Review to the District Attorney in this case, the City tried to distinguish the two cases on the basis that the CRB disagreed with Chief Kerns' findings in the

Chinese student case, but agreed with the findings in the Van Ornum case. (Ex 4, at 3).

After the District Attorney declined to require the production of any additional materials, (Ex 5), Plaintiff filed suit seeking an order directing the City to disclose the requested documents. (ER 1-5). Following a short trial, the Circuit Court declined to order disclosure. (ER 48). Plaintiff then appealed to the Court of Appeals.

III. THE LOWER COURTS' DECISIONS

The trial court concluded, and the Court of Appeals agreed that the findings were supported by the evidence, that there were

> "two competing interests: the public's interest in ensuring that police officers are using appropriate force in their interactions with the public and the public interest in having a police force that can effectively review its own actions and provide discipline and training for its officers. It then determined that the CRB was created to balance those interests—to allow for oversight of police misconduct while maintaining confidentiality of the police's internal investigation of complaints against its officers."

American Civil Liberties Union v. City of Eugene, 271 Or App 276, 288, 350 P3d 507 (2015) (*ACLU*). The trial court then concluded that Petitioner failed to demonstrate that the public's interest in transparency required disclosure here. *Id.* at 291. The Court of Appeals affirmed the trial court's decision. Plaintiff petitioned for review. This Court granted review.

SUMMARY OF ARGUMENTS

This appeal presents a straight-forward issue of statutory interpretation. Under ORS 181.854(3), "[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." But that exemption has four explicit exceptions. Specifically, ORS 181.854(4) provides:

> "Subsection (3) of this section does not apply:
>
> "(a) When the public interest requires disclosure of the information.
>
> "(b) When the employee consents to disclosure in writing.
>
> "(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.
>
> "(d) When the public body determines that nondisclosure of the information would adversely affect the confidence of the public in the public body."

Two of these exceptions are relevant here: (4)(a) and (4)(c).[3]

To answer the first question on review, under Oregon's long and enduring policy that public records should be open to the public, the text and

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[3] For the Court's convenience, the full text of ORS 181.854 and ORS 192.490 are included in the Appendix.

context of the public records law and ORS 181.854(4)(a) makes clear that the public interest in this case required disclosure. Disclosure was required under subsection (4)(a) because of the strong public interest in ensuring the appropriate use of less lethal weapons by police and in the transparency of the police internal affairs investigation of the officers involved. There was a great deal of public and media interest in this high profile matter and in how the CRB performed its function in reviewing the actions of the officers.

By contrast, there was no countervailing interest in confidentiality. The identities of the officers involved in the incident were public, as was the fact of the investigation into their conduct. The City did not offer any evidence or argument of any countervailing interest in favor of confidentiality. Even though the investigation did not result in discipline of the officers involved, the officers had no reasonable expectation of privacy in the investigation in light of the public criminal trial of Mr. Van Ornum and the fact that the officers' involvement in the incident was well known.

For the second question, ORS 192.490(1) provides that "the burden is on the public body to sustain its action." Thus, it is the City's burden to establish that the exceptions in ORS 181.854(4) do not apply here. The text and context of the public records laws and ORS 181.854 place the burden of nondisclosure on the

government body, including establishing that the public interest did not require disclosure here.

Finally, the trial court's conclusion that the disclosure of the records by the City to the CRB does not eliminate the confidentiality of the records is contrary to the text of the statute. For the reasons explained below, this Court should reverse the Court of Appeals' and trial court's ruling and remand the case with instructions to enter judgment ordering disclosure of the requested documents.

ARGUMENT

I. THE PUBLIC INTEREST REQUIRES DISCLOSURE OF CONDITIONALLY EXEMPT RECORDS WHERE THERE IS NO COUNTERVAILING INTEREST SUPPORTING NON-DISCLOSURE (FIRST QUESTION)

Under Oregon's Public Records Law, "[e]very person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). ORS 192.501 and 192.502 set forth various exemptions from the disclosure requirement. ORS 192.502(9)(a) 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." ORS 181.854 is one such exemption.

Under ORS 181.854(3), "[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." But

that prohibition is not unlimited. Under ORS 181.854(4)(a), "[s]ubsection (3) of this section does not apply * * * [w]hen the public interest requires disclosure of the information." Thus, ORS 181.854(3) and (4)(a) create a conditional exemption from disclosure just like those listed in ORS 192.501, which provides: "The following public records are exempt from disclosure under ORS 192.410 to 192.505 *unless the public interest requires disclosure in the particular instance*[.]" (Emphasis added.)

What constitutes "public interest" under these statutes presents an issue of statutory construction, which this Court analyzes by applying the familiar principles of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), and *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). The Court's goal is to "attempt to discern the meaning of the statute most likely intended by the legislature that enacted it, examining the text in context, any relevant legislative history, and pertinent rules of interpretation." *OR-OSHA v. CBI Services, Inc.*, 356 Or 577, 584-85, 341 P3d 701 (2014). In this instance, the text and context of Oregon's Public Records Laws and ORS 181.854 make clear that public interest requires disclosure of the City's records when there is no countervailing privacy interest because the officers' identities and roles in the incident are known and where there is a strong public interest in both the

underlying incident and the investigation of that incident, including the work of the CRB in reviewing the Police Chief's recommendation.

A. The text and context of ORS 181.854 confirm the legislature's intent to require a presumption in favor of disclosure.

The public records law does not define the phrase "public interest," and this Court has yet to address what that phrase requires. But the Court of Appeals and the Attorney General have defined that phrase in the context of ORS 192.490(1). The Attorney General, following the guidance of the Court of Appeals, advises state agencies as follows:

> "[T]he Oregon Court of Appeals has stated that 'the Public Records Law expresses the legislature's view that members of the public are entitled to information that will facilitate their understanding of how public business is conducted.'[96] Similarly, the Court of Appeals previously characterized the public interest in disclosure as 'the right of the citizens to monitor what elected and appointed officials are doing on the job.'[97] This might include, for example, the right to inspect records of alleged misuse and theft of public property by public employees or to inspect records that bear directly on the integrity of a high ranking police officer to enforce the law evenhandedly.[98] Public interest means the value to the public at large, not to a particular person at a particular time. For example, we concluded that a labor organization's interest was private and did not represent the public interest when the interest of the organization's membership in obtaining disciplinary documents could be remedied under state collective bargaining laws.[99]

> "Accordingly, we advise public bodies to measure confidentiality interests against the public interest in learning, not only how the public bodies generally are conducting their business, but also how they are administering particular programs. If disclosure would prejudice or prevent the carrying out of the public body's functions, that fact would be relevant. The Oregon Court of Appeals has indicated that the fact that a government action attracts significant attention or provokes heated controversy may be relevant to weighing the strength of the public interest in disclosure of related public records.[100]
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> ---
>
> "[96] *Guard Publishing Co [v. Lane County School Dist. No. 4J],* 96 Or App [463,] [774 P.2d 494 (1989), *rev'd on other grounds*, 310 Or 32, 791 P2d 854 (1990)] (see App C).
>
> "[97] *Jensen v. Schiffman*, 24 Or App 11, 17, 544 P2d 1048 (1976) (see App C).
>
> "[98] *Oregonian Publishing v. Portland School Dist. No. 1J*, 144 Or App 180, 925 P2d 591 (1996), *modified* 152 Or App 135, 952 P2d 66 (1998), *aff'd on other grounds* 329 Or 393, 987 P2d 480 (1999) (see App C); *City of Portland v. Anderson*, 163 Or App 550, 988 P2d 402 (1999) (see App C).
>
> "[99] Public Records Order, July 3, 1995, Garrettson (see App F).
>
> "[100] *City of Portland v. Oregonian Publishing Co.*, 200 Or App 120, 127, 112 P3d 457 (2005) (see App C)."

Attorney General's Public Records and Meeting Manual, 30-31 (2014).

The structure and language of ORS 192.490(1) and ORS 181.854 are essentially identical and there is no reason the Attorney General and Court of Appeal's reasoning and definition of "public interest" would not apply. Pursuant to

ORS 192.501, various types of public records are exempted from the requirements of disclosure "unless the public interest requires disclosure." Likewise, ORS 181.854(4)(a) provides: "Subsection (3) of this second does not apply * * * [w]hen the public interest requires disclosure of the information."

Under ORS 192.501, "the policy that permeates the disclosure statutes and 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 governmental confidentiality, *with the presumption always being in favor of disclosure*." *Turner v. Reed*, 22 Or App 177, 187, 538 P2d 373 (1975) (emphasis added). Instead of a presumption in favor of disclosure, the Court of Appeals in this case accorded equal or greater weight to the existence of the exemption itself rather than to the public interest to be served by disclosure. With the proper presumption in place, it is clear that government transparency favors disclosure in this instance.

B. The exemption in ORS 181.854 is intended only to protect the identity and privacy of the public safety employee.

To be clear, ORS 181.854(3) and (4)(a) provide for a conditional exemption for disclosure of public records concerning a personnel investigation that does not result in discipline. Had discipline resulted, presumably the City would have disclosed the documents (or tried to rely on some other exemption) because ORS 181.854(3) would not apply. Thus, the apparent purpose of the

statute at issue is to protect officers who were found innocent of any wrongdoing by protecting their privacy.

The specific purpose of protecting an officer's identity can be discerned from the text and context of ORS 181.854. Subsection (2) prohibits disclosure of photographs of officers. Subsection (3), as noted above, prohibits disclosure of information about a personnel investigation that does not result in discipline. And under subsection (6), the public body must notify the officer if a request is made for information protected by subsections (2) or (3) or other personal information. Specifically, ORS 181.854(6) provides:

> "A public body must notify a public safety employee of the public body if the public body receives a request for:
>
> "(a) A photograph of the employee.
>
> "(b) Information about the employee that is exempt from disclosure under ORS 192.501 or 192.502 (2) or (3).
>
> "(c) Information about the employee that is prohibited from disclosure by subsection (3) of this section."

In turn, ORS 192.502(2) exempts "[i]nformation of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy." And ORS 192.502(3) exempts "[p]ublic body employee or volunteer addresses, Social Security numbers, dates of birth and telephone numbers contained in personnel records maintained by

the public body." Accordingly, all the information the legislature sought to protect under ORS 181.854 is the private, personal information of the officers.[4]

Looking at the statutes as a whole, the statutory protection conditionally prohibiting disclosure of information about a personnel investigation that does not result in discipline is simply another protection of the privacy of officers. It allows officers to avoid public disclosure concerning complaints that were not substantiated unless the public interest requires otherwise. But that interest in non-disclosure disappears in a case like this where the underlying incident, investigation, and the identity of the involved officers has been publicly disclosed, particularly where there has been a public criminal trial.

More importantly, the interest that is conditionally protected by ORS 181.854(3) is the employee's privacy interest, not an interest of the public or the public body. The public body has no statutory interest in conducting secret investigations. The interest that the trial court and the Court of Appeals should have balanced against the presumption in favor of disclosure and the public interest in transparency and oversight is the officer's privacy interest—an interest not present here. Properly analyzed, there was no countervailing interest in

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[4] Although not otherwise particularly enlightening, the legislative history of ORS 181.854 confirms this general principle: The intent of the statute was to protect the integrity of the employer-employee relationship by keeping unsubstantiated claims against police officer's out of the public eye. Testimony, Senate Committee on Judiciary, SB 975, Apr 16, 1999 (statement of Brian Delashmutt, Oregon Council of Police Associations).

confidentiality here to balance against the public's interest in transparency and oversight (including oversight of the CRB) and in ensuring that police officers are using appropriate force in their interactions with the public. The public interest thus required disclosure here.

C. The evidence at trial amply demonstrated, without contradiction, a strong public interest to be served by disclosure.

As demonstrated by the testimony of David Fidanque, (Tr 49:12-59:14; Ex 36), by the CRB's interest in this case, (Ex 7-9), and the media attention this incident received, (Ex 11-35), there was (and is) a great deal of public interest in and public controversy surrounding the use of Taser stun guns by the Eugene police department. In addition, there is significant public interest in the work of the CRB, which was established by ballot measure to create a watchdog organization to review allegations of police misconduct.

Specifically, as set forth in paragraphs 3 and 4 of the parties' Stipulations of Fact:

> "3. The CRB was 'established * * * to increase the transparency of, and public confidence in, the police complaint process. In general, the civilian review board shall evaluate the work of the independent police auditor, and may review completed complaint investigations involving sworn police employees to provide comment, from a civilian perspective, about whether the complaint was handled fairly and with due diligence.' Eugene City Code § 2.240(1).

> "4. The CRB was 'intended [to] provide a system of independent oversight of the police complaint process and implement section 15-A of the Eugene Charter Of 2002 as adopted by the city electorate on November 8, 2005 [and to] serve as an advisory body to the city council.' Eugene City Code § 2.240(2) and (4)."

(ER 29-30).

The importance of the ACLU's public records request was not simply limited to the Eugene Police Department's policy on Tasers or this particular Tasing incident. There was also a public interest in evaluating how the CRB was performing its intended functions. The Van Ornum case was the very first "Community Impact Case" reviewed by the CRB. (ER 30 [Stip Fact, ¶ 6]). As the first case of its type, and given the media attention the case drew, the public interest in this case weighed in favor of disclosure. The trial court and Court of Appeals' apparent conclusion that, because the CRB was created to provide oversight of the police bureau, no other public oversight is needed is troubling. *See ACLU*, 271 Or App at 290-91. The public has—as it rightly should—just as much interest in ensuring that the CRB is performing its function adequately as it does in ensuring the police officers are performing their function. Oregon's public records laws protect the public's right in that transparency and openness.

Even though the Van Ornum case was the first Community Impact Case, it was not the only case involving the controversial use of Tasers by a Eugene Police Officer. On September 22, 2009, the same officer who used his

Taser stun gun on Mr. Van Ornum—Officer Warden—used his Taser stun gun on a Chinese University of Oregon student in the student's own apartment. (Ex 3c; Ex 37 [Kerns Dep, 23:13-23]). In response to the ACLU's request for public records in that case, however, the City disclosed everything, including the same types of personnel investigation files for which it is claiming confidentiality here. (Ex 4). The City's rational for distinguishing the two cases—that the CRB disagreed with Chief Kerns' findings in the Chinese student case, but agreed with his findings in the Van Ornum case, (Ex 4, at 3)—does not support the decision not to disclose the requested records here. The City's disclosure of the records in the Chinese student case—even though no discipline resulted—demonstrates that the statutory proscription on disclosure is not as absolute as the City has asserted in this proceeding.

And, contrary to the City's assertions below, the fact that the City previously disclosed similar types of records and information in connection with the Chinese student case demonstrates that public disclosure serves the public interest in cases like this. Moreover, to the extent it is relevant to a determination of what the public interest requires, the fact that the CRB agreed with the determination of the Police Chief heightens the public interest in transparency of the work of the CRB.

In sum, the evidence at trial amply demonstrated that the public interest in the officers' use of Tasers, the ensuing internal affairs investigation, and the CRB's review of the Chief's recommendations following the internal affairs investigation required disclosure of the public records here.

D. There is no countervailing interest in confidentiality here.

As explained above, the text and context of ORS 181.854(3) make clear that the exemption to disclosure is intended to protect the privacy of public safety officers. The officers involved in the Van Ornum case have been publicly identified in the public criminal proceedings against Mr. Van Ornum. Thus, whatever interest the officers may have had in maintaining confidentiality over an investigation that did not result in discipline are substantially diminished, if not eliminated completely, because both the fact of the investigation and the identity of the officers involved are publicly known. (Ex 6, 10). That is particularly true with respect to Officer Warden, who voluntarily disclosed his role in the Chinese student case at a time when his role in the Van Ornum matter was already public. (Ex 37 [Kerns Dep, 23:13-23]).

Moreover, where the CRB agrees with the Chief—as it did here—there is an even greater need for the public to have visibility to the work of the CRB to determine whether the CRB is appropriately fulfilling its watchdog function. By denying access to the records at issue here, the City is seeking to

preclude the public from the transparency to which it is entitled under both the Eugene City Code and Oregon's public records law.

Additionally, the Van Ornum case generated an intense amount of media attention, both regarding the underlying incident and regarding the CRB's review of the case. (Exs 10-24). The fact that the case generated substantial press attention is a relevant factor in determining how and whether the public interest will be served by disclosure. *See City of Portland v. Oregonian Publishing Co.*, 200 Or App 120, 127, 112 P3d 457 (2005) (stating that the public has an interest in disclosure in "high profile" police misconduct cases). It demonstrates that there is interest in the community regarding the issues at hand, including the use of Taser stun guns by the Eugene Police Department and the work of the CRB in providing "independent oversight of the police complaint process." Eugene City Code § 2.240(2).

As the Court of Appeals explained in *City of Portland v. Oregonian Publishing Co.*, when rejecting the City of Portland's argument that the need for confidentiality was even weightier in high profile cases:

> "It is beyond dispute, however, that the public's (and the police bureau's) need to have complete confidence that a thorough and unbiased inquiry has occurred is most urgent and compelling in 'high profile' cases where a police officer has killed a citizen in the line of duty. That confidence comes from transparency and its value is not outweighed by the speculation that transparency will quell candor at some future date."

200 Or App at 127. While, thankfully, no one was killed here, the Van Ornum case was still a high profile case that garnered significant news and public attention, not to mention the attention of the District Attorney, who chose to prosecute Mr. Van Ornum in a multi-day trial. (Ex 6).

The City has offered no justification for why the public interest does not require disclosure here, apart from the assertion that the CRB agreed with Chief Kerns. In its Answering Brief in the Court of Appeals, for the first time in these proceedings, the City argued that

> "depending on the circumstances and the contents of the investigation, the specific reasons for confidentiality may be numerous: protecting witnesses from retaliation; protecting the identity of confidential informants; preventing identified officers from allegations that, upon further investigation, turned out to be false; preventing disharmony within the police department; preserving confidentiality of security procedures; protecting confidential information related to other investigations."

(Court of Appeals Answering Brief, at 16-17 (emphasis added)). But the City has never asserted or put forward any evidence that any witness here would be at risk for retaliation, that it relied on any confidential informant, that releasing its reports would expose these identified officers to allegations that turned out to be false, that disclosing the reports would lead to disharmony in the police department (and, even if it did, why that should be sufficient to find that the public interest does not require disclosure), that disclosing the reports would compromise security

procedures, or that disclosing the reports would compromise confidential information related to other investigations. None of the proffered hypothetical reasons were shown to have been actually implicated here.

That there was already some public disclosure and oversight regarding the Van Ornum incident does not adequately address the core issue regarding whether the "public interest requires disclosure" of the withheld documents. The use of Taser stun guns and other less lethal weaponry is a significant and controversial issue in the City of Eugene as is the work and function of the CRB. In an age of increased scrutiny of police actions, the public interest in the CRB is only going to rise. Accountability of police to the citizenry is at the heart of our democracy, and its importance to the public cannot be overstated. The public interest here requires and demands disclosure of all of the information presented to the CRB. Only then can the public determine whether the CRB is fulfilling its mission and whether the City of Eugene is respecting the rights of the people in the community. The public interest thus requires disclosure in this instance.

II. THE PUBLIC BODY HAS THE BURDEN OF SUSTAINING ITS ACTION IN NOT DISCLOSING PUBLIC RECORDS THAT ARE CONDITIONALLY EXEMPT UNDER ORS 181.854(3) (SECOND QUESTION)

Under ORS 192.490(1), "the burden is on the public body to sustain its action" in not disclosing public records. Nothing in the text or context of ORS 181.854 shifts that burden. The trial court's conclusion to the contrary was

erroneous. And 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 the 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. When such balancing occurs, the burden can be determinative, especially when one party fails to come forward with any evidence at all.[5]

A. The text and context of ORS 192.490 and ORS 181.854 does not shift the burden to the requesting party.

Oregon has a "strong and enduring policy that public records and governmental activities be open to the public." *Jordan v. MVD*, 308 Or 433, 438, 781 P2d 1203 (1989). Under ORS 192.420(1), "[e]very person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided." And "[w]hen a public body withholds public records from disclosure, that body carries the burden of sustaining that action upon judicial review." *Kluge v. Oregon State Bar*, 172 Or App 452, 455, 19 P3d 938 (2001) (citing ORS 192.490(1)).

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[5] On appeal, the ACLU requested that the Court of Appeals review the record *de novo* pursuant to ORS 19.415(3)(b), which the court declined to do. But the balancing analysis that the court engaged in demonstrates that this is precisely the type of case that is appropriate for *de novo* review, particularly because most of the evidence was presented in a form that did not require or permit the trial court to assess credibility. There was only one live witness and the trial court did not make any findings regarding his credibility.

There is no provision in ORS 192.490(1) for shifting the burden of proof. Nor does it matter that the trial court was tasked here with determining whether an exception to an exemption applied. The exemptions and exceptions to the exemptions in ORS 181.854 are no different than those contained in ORS 192.501. Under ORS 192.501, various types of public records are exempted from disclosure "unless the public interest requires disclosure." The same is true under ORS 181.854(4)(a): "Subsection (3) of this section does not apply * * * [w]hen the public interest requires disclosure of the information." Under ORS 192.490(1), the burden remained with the City to sustain its action, including establishing that the public interest did not require disclosure.

Evaluating the public records statutes as a whole, thereby placing ORS 181.854 in its proper context, supports placing the burden on the City. *See State v. Carr*, 319 Or 408, 411-12, 877 P2d 1192 (1994) ("Context includes other related statutes."). When the legislature wants to place the burden of proof on the requesting party, it does so explicitly. For example, ORS 192.502 provides, in part:

> "The following public records are exempt from disclosure under ORS 192.410 to 192.505:
>
> "* * * * *
>
> "(2) Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable

> invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. **The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.**"

(Emphasis added.) Thus, the legislature explicitly shifted the burden away from the public body to the requesting party. *See Gladhart v. Oregon Vineyard Supply Co.*, 332 Or 226, 233, 26 P3d 817 (2001) (explaining that "when the legislature intends to condition [the operation of a statute on a certain event or requirement], it knows how to express that intention"); *PGE*, 317 Or at 614 ("The legislature knows how to include qualifying language in a statute when it wants to do so. It did not do so here.") (footnote omitted). There is no similar burden shifting provision in ORS 181.854 and, therefore, the explicit provision in ORS 192.490(1) controls.[6]

Nothing in the enactment of ORS 181.854, its text, context, or anything else suggests that the ordinary burden imposed upon a public body to sustain its action in refusing to disclose public records is altered here. The text of

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[6] Moreover, before this action was filed, even the City believed that the public interest inquiry under ORS 181.854(4)(a) would be similar to the inquiry under the public records law generally. (Ex 10). The City Attorney opined: "Regarding the exceptions to the general confidentiality rule, the analysis to determine whether 181.854(4) applies would be similar to that analysis conducted to determine whether records pertaining to a personnel investigation that *did* result in discipline should be released, *i.e.*, whether the public interest in disclosure outweighs the employee's interest in confidentiality." (Emphasis in original.)

ORS 181.854 does not assign the burden of production or proof to the requestor, which the legislature knows how to do. By contrast, ORS 192.490(1) specifically assigns the burden to the public body to sustain its action. Absent a stronger indication of intent by the legislature to shift the burden to the party seeking disclosure, this Court should not adopt the anti-disclosure bias offered by the City and accepted by the trial court.

B. The City did not meet its burden of proof.

Contrary to the Court of Appeals' and trial court's conclusions, the City did not present any evidence to sustain the decision not to disclose. Rather, the City, having relied on its incorrect argument for burden shifting, merely asserted that the public had no interest here and that the ACLU failed to meet its burden. There was no evidence that the City had complied with its obligations under Oregon's Public Records Law by engaging in any analysis of what the public interest required in this case. Chief Kerns, the City's designated witness, could not or would not explain the basis for the City's decision not to disclose. (Ex 37 [Kerns Dep, 5:18-7:3 (including Ex 1), 14:2-16:2, 27:9-30:13]). Because the City did not explain or offer any evidence to support the decision not to disclose, the City failed to sustain its decision.

III. ORS 181.854(4)(c) ELIMINATES THE CONDITIONAL EXEMPTION UNDER ORS 181.854(3) FOR RECORDS DISCLOSED TO A CITIZEN REVIEW BOARD (THIRD QUESTION)

The plain statutory text of ORS 181.854(4)(c) makes clear that if records are disclosed to a citizen review board, then the exemption from disclosure in ORS 181.854(3) does not apply. As relevant here, ORS 181.854 provides

> "(3) 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.
>
> "(4) Subsection (3) of this section **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."

(Emphasis added.) Because the records in this case were disclosed to the CRB as part of its review of the case and of Chief Kerns' recommendations regarding the officers' conduct, by the terms of the statute, the exemption in subsection (3) does not apply.

The trial court, however, found that subsection (4)(c) was a narrow exception that allowed the records to be disclosed only to the CRB without losing confidentiality. (ER 44-45). The Court of Appeals rejected the ACLU's assignment of error to that ruling without discussion.

Both lower courts erred by failing to give effect to the statutory text. Subsection (4)(c) does not limit disclosure to the reviewing body. Instead it provides that subsection (3) "does not apply" when the records are disclosed to a citizen review body designated by the public body like the CRB, without exception. As discussed above, the purpose of the statute is to protect the officer's privacy. It is not to provide for secret investigations. Thus, it makes sense that when information otherwise exempt from disclosure under ORS 181.854(3) is needed for an investigation by the CRB, there is no longer a justification for privacy.

Moreover, because the CRB is part of the City of Eugene, there would appear to be no need for an exception to the exemption in subsection (3) to permit information to be disclosed to the CRB as part of its investigation. Rather, and contrary to the trial court's conclusion, in context, it is apparent that the purpose of the exception in subsection (4)(c) is to eliminate the exception in subsection (3) for information that is shared with the CRB as part of the CRB's investigation. That makes sense, because the fact of such an investigation presumptively supports a public interest in disclosure.

Because the information at issue here was shared with the CRB, under ORS 181.854(4)(c), the exemption from disclosure in subsection (3) does not apply and the records must be disclosed.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the Court of Appeals' and trial court's decisions, and the matter should be remanded to the trial court with instructions to order the disclosure of the requested documents.

DATED this 16th day of December, 2015.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to ORAP 5.05, I certify that Petitioner's Brief on the Merits is proportionately spaced, has a typeface of 14 points or more, and contains 7,089 words.

DATED this 16th day of December, 2015.

s/ Steven M. Wilker
Steven M. Wilker, OSB No. 911882

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 16, 2015, I directed the original **PETITIONER'S BRIEF ON THE MERITS FOR REVIEW** be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system, and electronically served upon Jerry Lidz, attorney for Defendant-Respondent, by using the court's electronic filing system.

I further certify that on December 16, 2015, I mailed two copies of the foregoing **PETITIONER'S BRIEF ON THE MERITS FOR REVIEW** by United States Postal Service First Class Mail, postage prepaid, to the following parties at the address set forth below:

Glenn Klein, City Attorney
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Of Attorneys for Defendant-Respondent on Review City of Eugene and dismissed Defendant Civilian Review Board

DATED this 16th day of December, 2015.

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