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 the 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

STATEMENT OF THE CASE

Introduction and interest of *amicus curiae*, the State of Oregon

This judicial review involves the interpretation and application of several provisions of Oregon's Public Records Law, ORS 192.410 - ORS 192.505. The State of Oregon, through Attorney General Ellen Rosenblum, appears as *amicus curiae* because of the state's interest in ensuring that the Public Records Law is interpreted in a way that protects the public's interest in government transparency and is consistent with the intent of the legislature. The state's amicus brief will focus on two issues: (1) whether ORS 192.496 creates an exemption to disclosure under the Public Records Law; and (2) whether ORS 192.505 applies to all exemptions regardless of where they are codified and how they are worded.

First Question Presented

ORS 192.495 provides that all public records more than 25 years old must be disclosed "except as otherwise provided in ORS 192.496." ORS 192.496(1), in turn, exempts certain medical records less than 75 years old from disclosure. Does ORS 192.496 create an exemption from the disclosure requirement of the Public Records Law independent of the exemptions listed in ORS 192.501 - ORS 192.502?

First Proposed Rule of Law

No. ORS 192.496 is not an independent exemption from disclosure, but is instead an exception to ORS 192.495, which makes all public records available for inspection after 25 years.

Second Question Presented

ORS 192.505 provides that "[i]f any public record contains material which is not exempt under ORS 192.501 and ORS 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." Does that statute apply to exemptions codified outside ORS 192.501 - ORS 192.502 and exemptions that cover "records" that "contain information"?

Second Proposed Rule of Law

Yes. When a public record contains both exempt and nonexempt information, ORS 192.505 requires disclosure of the nonexempt information in the record regardless of where the exemption is codified and how it is worded.

Summary of Argument

The context and legislative history of ORS 192.496 demonstrate that the statute was not intended to create an independent exemption to disclosure under

the Public Records Law.[1] First, ORS 192.496 must be read in context with ORS 192.495, which provides that all public records more than 25 years old must be disclosed "except as otherwise provided in ORS 192.496." ORS 192.496, in turn, creates exceptions to the 25-year rule for certain classes of records. Thus, ORS 192.496 does not create independent exemptions from disclosure, but instead preserves narrow categories of existing exemptions that would otherwise expire after 25 years by operation of ORS 192.495. Second, the legislative history demonstrates that in enacting ORS 192.495 and ORS 192.496, the legislature did not intend to create exemptions to the Public Records Law, but instead, intended to expand access to public records.

ORS 192.505 creates a segregation requirement when a public record contains both exempt and nonexempt information. Consistent with Oregon's policy favoring disclosure of public records, that statute applies to all

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[1] In both the trial court and the Court of Appeals, the parties assumed that the records in question were exempt under ORS 192.496(1), and "framed the question to be whether certain information in those potentially exempt records * * * must be disclosed under ORS 192.505." *OHSU v. Oregonian Publishing Co., LLC*, 278 Or App 189, 203, ___ P3d ___ (2016). But this court must decide the correct meaning of a statute regardless of whether a particular interpretation was offered to the trial court. *See, e.g., Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997) ("In construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties.").

exemptions from disclosure, regardless of where they are codified. In addition, ORS 192.505 requires disclosure of nonexempt information regardless of whether an exemption applies to "records" or "records" that "contain information."

ARGUMENT

This case presents the question of the correct interpretation of ORS 192.496 and ORS 192.505. The court's goal, in construing a statute, is to discern what the legislature intended at the time that it originally enacted the critical statutory language. In pursuing that inquiry, the court considers the text and context of the statute in light of any legislative history that appears useful to the court's analysis. *State v. Gaines*, 346 Or 160, 172, 206 P3d 1042 (2009).

A. ORS 192.496 was not intended to create an independent exemption from public disclosure, but instead establishes an exception to the general rule that exempt information becomes public after 25 years.

ORS 192.496 provides:

> The following public records are exempt from disclosure:
>
> (1) Records less than 75 years old which contain information about the physical or mental health or psychiatric care or treatment of a living individual, if the public disclosure thereof would constitute an unreasonable invasion of privacy. The party seeking disclosure shall have the burden of showing by clear and convincing evidence that the public interest requires disclosure in the particular instance and that public disclosure would not constitute an unreasonable invasion of privacy.
>
> (2) Records less than 75 years old which were sealed in compliance with statute or by court order. Such records may be

> disclosed upon order of a court of competent jurisdiction or as otherwise provided by law.
>
> (3) Records of a person who is or has been in the custody or under the lawful supervision of a state agency, a court or a unit of local government, are exempt from disclosure for a period of 25 years after termination of such custody or supervision to the extent that disclosure thereof would interfere with the rehabilitation of the person if the public interest in confidentiality clearly outweighs the public interest in disclosure. Nothing in this subsection, however, shall be construed as prohibiting disclosure of the fact that a person is in custody.
>
> (4) Student records required by state or federal law to be exempt from disclosure.

In isolation, the text of this statute might be thought to create a blanket exemption to disclosure for all of the listed records. The context and legislative history of ORS 192.496, however, demonstrate that the statute is not an independent exemption from disclosure, but is instead a limited exception to the expiration of the exemptions in ORS 192.501 and ORS 192.502 after 25 years.

First, ORS 192.496 must be read in context with ORS 192.495, which was enacted at the same time as part of HB 2011 (1979). *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993) ("Context" includes "other provisions of the same statute and other related statutes."). As enacted, ORS 192.495 provided:

> Notwithstanding ORS 192.500 and except as otherwise provided in ORS 192.496, public records that are more than 25 years old shall be available for inspection.

In other words, ORS 192.495 provided that, for the vast majority of public records, the exemptions contained in ORS 192.500 no longer applied after 25 years, and those records became available for public inspection.[2] But that 25-year rule does not apply to the sensitive records described in ORS 192.496. Viewed in that context, ORS 192.496 does not create independent exemptions from disclosure, but instead preserves narrow categories of existing exemptions that would otherwise expire after 25 years by operation of ORS 192.495.

The legislative history confirms this interpretation. HB 2011, which was codified as ORS 192.495 to ORS 192.496, was intended to set "reasonable limits on the duration of access restrictions which presently inhibit inspection of many public records." Staff Measure Analysis, Senate Judiciary Committee, HB 2011 (May 16, 1979). *See also* Tape Recording, Senate Committee on Judiciary, HB 2011, May 29, 1979, Tape 48, Side 2 (statement of state archivist J.D. Porter that the "primary purpose of the entire bill is to provide access as

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[2] In 1979, the only exemptions from the public disclosure requirement of ORS 192.420 were codified at ORS 192.500, and the catch-all exemption now contained in ORS 192.502(9)(a) did not exist. The current version of ORS 192.495 provides:

"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."

quickly as possible to records that are currently restricted by the provisions of ORS 192.500 and other statutes"); Tape Recording, House Judiciary Committee, HB 2011, January 31, 1979, Tape 4, Side 2 (discussion between Chairman Gardner and Porter to the effect that HB 2011 was not intended to restrict access to public records).

The legislative history also confirms that HB 2011 was not intended to create new exemptions, but was instead intended to open access to public records after a specified period of time had passed. Legislative counsel Joan Robinson stated that "[t]he general provision of the bill is that after a public record is 25 years old, it will be available for inspection." She went on to explain that the bill contained four exceptions, and that "records containing medical information about a living person will be exempt for 75 years." Testimony, House Committee on Judiciary, HB 2011 (March 5, 1979).

In sum, nothing in the legislative history of HB 2011 suggests that the legislature intended to create independent exemptions to the disclosure requirements of the Public Records Law, and the Court of Appeals erred in concluding otherwise.

B. ORS 192.505 applies to all exemptions to disclosure under the Public Records Law regardless of where they are codified and how they are worded.

ORS 192.505 provides:

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

Thus, the statute 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.

The Court of Appeals interpreted ORS 192.505 in two erroneous ways. First, it concluded that because the statute "applies only to records that contain material that is nonexempt and material that is exempt from disclosure 'under ORS 192.501 and 192.502,'" it did not apply to material that "might be exempt from disclosure under a different statute." *OHSU*, 278 Or App at 204. Second, it concluded that the statute does not apply to exemptions that classify "records" containing certain "information" as exempt from disclosure, but that it *does* apply to exemptions that are "framed to exempt 'information' instead of 'records.'" *Id.* at 205-07.[3] The court erred in both respects.

[3] In reaching that result, the court relied on its opinion in *Brown v. Guard Publishing Co.*, 267 Or App 552, 554, 341 P3d 145 (2014), for the proposition that ORS 192.505 applied only to exemptions "that apply to parts of a writing." *Id.* at 205-06.

1. All public records that are exempt from disclosure are exempt under ORS 192.501 or ORS 192.502; thus ORS 192.505 applies to all exemptions regardless of where they are codified.

ORS 192.420(1) provides that "[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." Stated differently, *all* public records that are exempt from disclosure are exempt under either ORS 192.501 or ORS 192.502 (setting forth conditional and unconditional exemptions). 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." *See American Civil Liberties Union v. City of Eugene*, 360 Or 269, 283 n 6, ___ P3d ___ (2016) (noting that ORS 181.854, which exempts from inspection information about a personnel investigation of a public safety officer, "is incorporated into the Public Records Act by ORS 192.502(9)(a)").

As noted above, the Court of Appeals erred in concluding that ORS 192.496 created an exemption to disclosure under the Public Records Law. But regardless, ORS 192.505 is applicable, because all exemptions created by Oregon law are encompassed within the catch-all provision of ORS 192.502(9)(a), and are subject to the segregation requirements of ORS 192.505.

C. The segregation requirement of ORS 192.505 applies to all public records containing both exempt and nonexempt material, regardless of how the exemption is characterized in ORS 192.501-192.502.

A "public record" is defined as "any writing that contains information relating to the conduct of the public's business * * *." ORS 192.410(4)(a). And as described above, ORS 192.505 provides that if "any public record" contains both exempt and nonexempt material, the nonexempt material must be disclosed.

Under the Court of Appeals' interpretation of ORS 192.505, if there is an exemption for a "record" containing "information" of a certain type, the record is entirely exempt from disclosure, even though the information in question may constitute only a small part of the overall content of the record. That construction ignores the plain text of the statute, and it is contrary to the intent of the Public Records Law, which is to require disclosure of all public information that does not implicate one of the law's express exemptions.[4]

ORS 192.420(1) provides that "[e]very person has a right to inspect any public record of a public body in this state, except as otherwise expressly

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[4] Moreover, the Court of Appeals' distinction between exemptions for "records containing information" and exemptions for "information" as opposed to records fails to account for the exemptions applying to "information or records." *See, e.g.*, ORS 192.502(5) ("Information or records of the Department of Corrections"); ORS 192.502(8) ("Public records or information" prohibited from disclosure by federal law).

provided by ORS 192.501 to ORS 192.505." And historically, Oregon has had 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). In furtherance of that policy, the Public Records Law mandates "disclosure of public records unless an exemption expressly applies." *ACLU v. City of Eugene*, 360 Or at 282; *see also Guard Publishing Co. v. Lane County School Dist. No. 4J*, 310 Or 32, 37, 791 P2d 854 (1990) ("Under the statutory scheme, disclosure is the rule. Exemptions from disclosure are to be narrowly construed."). Thus, the intent of the Public Records Law generally is to construe exemptions narrowly in favor of disclosure, and when possible to redact records so that the presence of exempt material will not prevent disclosure of nonexempt material.

To be sure, some public records contain only exempt information. But that determination must be made based on an examination of the content of the record in question, not on whether the exemption applies to "information" (or similar terms) on the one hand, or to "records" that contain certain kinds of information on the other. In each case, the proper question is whether a record contains "material" that *does not* specifically implicate the exemptions of ORS 192.501 or 192.502 alongside "material" that *does* implicate an exemption. When an exemption applies to a record that contains a certain kind of information, and a particular record can be redacted in such a way that it no

longer contains that kind of information, ORS 192.505 requires disclosure of the nonexempt information and allows redaction of the exempt information contained within the record.

In sum, a record "containing information" about a person's medical history may contain nothing but that sensitive information. But it is equally possible that the record may contain other, nonexempt information as well. To categorically classify those records as entirely exempt, as the Court of Appeals appears to have done, defeats the purpose of ORS 192.505, which is intended to encourage transparency by requiring public bodies to redact records so that they no longer "contain" exempt information.

CONCLUSION

This court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on November 7, 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, Duane A. Bosworth, attorney for petitioner on review; and upon Derek Douglas Green, 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 2,656words. 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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