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This opinion answers several questions asked by the Oregon Government Ethics Commission concerning the Public Meetings Law requirement that "representatives of the news media" be allowed to attend executive sessions of public meetings. We first provide a short summary of the opinion, then set out the questions and our short answers, followed by a lengthier discussion.

## SUMMARY

The Oregon Public Meetings Law, ORS 192.610 to 192.690, generally requires Oregon governing bodies to allow the public to attend their meetings. ORS 192.660, the "executive session law," sets out the exceptions. That provision allows a governing body to have a discussion in "executive session" under certain circumstances. Although the public may be excluded from executive sessions, "representatives of the news media" must be allowed to attend except in very limited cases. ORS 192.660(4). The Oregon Government Ethics Commission (commission), among its other functions, investigates complaints that public officials have violated the executive session law. ORS 192.685.

This opinion addresses several issues pertaining to the commission's duty to investigate and enforce the requirement that representatives of the news media be allowed to attend executive sessions. It first attempts to clarify the meaning of "representatives of the news media." We conclude that the law permits news-gathering representatives of institutional media to attend executive sessions. We determine that the term "news media" is broad and flexible enough to encompass changing technologies for delivering the news. We also clarify the meaning of several related terms as set out below in "Question 1."

We next conclude that a governing body may not exclude a representative of the news media from an executive session except as provided in ORS 192.660(4) and (5). We then address the commission's authority to make rules to carry out its duty to enforce the executive session law. Since the commission first inquired, the Legislative Assembly has clarified in

ORS 244.290 that the commission may adopt rules to carry out its duty to enforce the executive session law. The legislature established one exception, however: The commission is prohibited from adopting a rule that establishes which entities are considered representatives of the news media. ORS 192.660(10).

We next explain that a governing body may not lawfully enforce a policy that permits it to exclude from executive session a representative of the news media who would be permitted to attend under ORS 192.660(4) and (5). Finally, we conclude that in evaluating allegations that an individual was wrongly excluded from executive session, the commission must assess compliance with the statute regardless of a governing body's policies.

## QUESTIONS AND SHORT ANSWERS

### QUESTION 1

What is the meaning of the following terms as used in ORS 192.660(4), ORS 192.660(5), and the ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2014)(Manual):

1. "Representatives of the news media" [ORS 192.660(4)];
2. "Employee, agent or contractor of a news media organization" [ORS 192.660(5)];
3. "Member of the news media" [ORS 192.660(5)];
4. "Institutionalized news media" [MANUAL p 172]; and,
5. "Bloggers and others using these technologies" [MANUAL p 172]?

### SHORT ANSWER

1. For purposes of ORS 192.660(4), "representatives of the news media" means individuals who gather news and who have a formal affiliation, whether through employment, by contract or some other agency authorization from or with an institutional news media entity, including both general interest media and media that cover specific subject areas for special audiences.

2. For purposes of ORS 192.660(5):

(a) "employee of a news media organization" means a person who is paid wages or a salary by a news media organization;

(b) "contractor of a news media organization" means a person who contracts to perform work for a news media organization; and,

(c) "agent of a news media organization" means a person who is authorized to act for or in the place of a news media organization.

3. "Member of the news media" as used in ORS 192.660(5) is effectively synonymous with a representative of the news media.

4. "Institutionalized news media" means an entity that is formally organized for the purpose of gathering and disseminating news.

5. "These technologies" as used in the phrase "bloggers and others using these technologies" in the Manual refers to more recent news mediums, including the internet, that are used to disseminate news in addition to traditional print, radio and television. "Bloggers" refers to individuals who use online technology to disseminate the news. A "blog" in the sense of a regular feature appearing as part of an online publication may qualify as a "news medium," depending on the particular facts.

**QUESTION 2**

Are there any permissible grounds to exclude representatives of the news media from attendance at executive sessions other than those identified in ORS 192.660(4) and (5)?

**SHORT ANSWER**

No.

**QUESTION 3**

May the commission adopt administrative rules to carry out the duties imposed on it by ORS 192.685?

**SHORT ANSWER**

Yes. As amended in 2015, ORS 244.290(2) gives the commission explicit authority to adopt rules necessary to carry out its duties under ORS 192.660 and 192.685. However, ORS 192.660(10) prohibits the commission from adopting a rule to establish which entities are representatives of the news media for purposes of ORS 192.660(4). ORS 244.290(2)(h) also requires the commission to adopt a rule specifying the criteria it will use to impose civil penalties for violations of ORS 192.660.

**QUESTION 4**

When evaluating alleged violations of ORS 192.660(4), what is the significance of policies adopted by governing bodies to implement the statutes? Specifically, what would be the legal significance of a policy to exclude a person who:

1. Does not meet adopted screening criteria to determine who qualifies as a "representative of the news media";

2. Does not gain preapproval of media credentials in advance of executive sessions;

3. Fails to give advance notice of attendance; or,

4. Is believed to have unlawfully reported on a prior executive session or to represent a news media organization that did?

## SHORT ANSWER

Public bodies are required to comply with the statute. They cannot modify the statutory requirement by adopting a policy. In evaluating allegations that an individual was wrongly excluded from executive session, the commission must assess compliance with the statute regardless of a governing body's policies.

With respect to the specific types of policies the commission asks about (numbered 1 through 4 above) we answer as follows:

1. If enforcement of the policy definition results in the exclusion of a representative of the news media, that exclusion would violate ORS 192.660(4).

2. To the extent that a credentialing requirement simply requires an individual to demonstrate that he or she is a representative of the news media, its enforcement would be consistent with the law. But if a policy requires specific credentials, and an individual offering different credentials that are sufficient to demonstrate that he or she is a representative of the news media is excluded based on that policy, that exclusion would not be consistent with ORS 192.660(4).

3. Advance notice of attendance is not required by the Oregon Public Meetings Law. Excluding a representative of the news media for failure to comply with a policy requiring advance notice of attendance would violate ORS 192.660(4).

4. The Oregon Public Meetings Law does not authorize any mechanism for enforcing the requirement that representatives of the news media refrain from reporting designated information discussed in executive session. Enforcement of a policy excluding representatives of the news media on this basis would violate ORS 192.660(4).

## DISCUSSION

### I. Statutory background

#### A. ORS 192.660 – Executive session law

ORS 192.630(1) requires governing bodies to allow the public to attend their meetings "except as otherwise provided by ORS 192.610 to 192.690." ORS 192.660(2) lists eighteen subjects that governing bodies may discuss privately in "executive session." For example, when a governing body consults with its attorney about pending litigation, it may do so privately.

Although the public may be excluded from executive sessions, "representatives of the news media" usually must be allowed to attend. ORS 192.660(4). However, governing bodies may exclude even the news media when deliberating with their labor negotiators, considering the expulsion of minor students, or examining students' confidential medical records. *Id.* And governing bodies meeting with their counsel about pending or likely litigation must exclude a "member of the news media" who is a party to the litigation or an "employee, agent or contractor of a news media organization that is a party to the litigation." ORS 192.660(5). When representatives of the news media attend executive sessions, the governing body "may require that specified information be undisclosed." ORS 192.660(4).

### C. ORS 192.685 – Commission's authority to enforce executive session law

ORS 192.685(1) permits persons to complain to the commission that a public official violated the executive session law. When the commission receives a complaint, it reviews and investigates it "as provided by ORS 244.260" and may impose civil penalties "as provided by ORS 244.350." ORS 192.685(1).

### D. ORS 244.260 – Procedure for addressing alleged violations

ORS chapter 244 sets out ethics laws for Oregon public officials and charges the commission with enforcing those laws. ORS 244.260 establishes the complaint, investigation and adjudicatory process for violations of ORS chapter 244. ORS 192.685 requires the commission to use the process specified in ORS 244.260 to respond to complaints of executive session law violations.

### E. ORS 244.350 – Civil penalties

ORS 244.350(2)(a) authorizes the commission to impose civil penalties of up to $1000 for a violation of any provision of ORS 192.660, except as provided in subsection 2(b). Subsection 2(b) prohibits the commission from imposing a civil penalty "if the violation occurred as a result of the governing body of the public body acting upon the advice of the public body's counsel."

## II. Question 1 - Meaning of terms concerning news media

We first address the meaning of "representatives of the news media" for purposes of ORS 192.660(4). We then clarify the meaning of terms used in Attorney General Opinions that attempted to clarify the meaning of "representatives of the news media," specifically "institutionalized" news media and "bloggers and others using these technologies." Last, we discuss the meaning of "member" of the news media and "employee, agent or contractor of a news media organization" as used in ORS 192.660(5).

### A. "Representatives of the news media"

The fundamental issue underlying the commission's questions is the difficulty of interpreting and applying the provisions of the Public Meetings Law permitting "representatives of

the news media" to attend executive sessions of public meetings. Understanding the scope of this statutory phrase will illuminate many of the related questions posed by the commission. The Public Meetings Law itself does not define "representatives of the news media" for purposes of ORS 192.660(4) and Oregon appellate courts have not interpreted the phrase. This office has interpreted the phrase in several Attorney General Opinions, including the Manual. We start by summarizing those opinions.

### 1. Attorney General Opinions

#### a. 1976 Opinion

ORS 192.660(4) was enacted as part of the original Public Meetings Law in 1973. Or Laws 1973, ch 172, § 6. In 1976 we were asked to specify the criteria that a public body should use to determine whether a person qualifies as a "representative of the news media." We were also asked whether high school newspapers qualified as "news media." Letter of Advice dated May 31, 1978, to Representative Dave Frohnmayer. We opined that by using the word "representatives," the legislature intended the requirement to be limited to "institutionalized" news media. We did not expound on our thinking or explain what we meant by "institutionalized." We also concluded that "news media" encompassed only media that have a natural interest in the subject matter of the executive session, because only they would use information gained in executive sessions for future reporting. We further opined, based on federal law from another context, that the size of the medium's audience is not a proper criterion. Finally, we advised that determining who is a representative of the news media is a question of fact to be made in accordance with those criteria. Applying those criteria, we concluded that a reporter for a high school newspaper was a representative of the news media. *Id.* at 2.

#### b. 1979 Opinion

In 1979 we were asked essentially the same question – whether a high school newspaper reporter qualified as a representative of the news media for purposes of an executive session held by a school board. 39 Op Atty Gen 600 (1979). We observed that the purpose for allowing news media representatives to attend executive session was twofold: (1) to permit them to get background information to understand and report about the ultimate decision; and, (2) to serve as watchdogs to help ensure that governing bodies use executive sessions for legitimate purposes. *Id.* at 600-01. We concluded that the first purpose:

> is fulfilled by attendance of *news-gathering* representatives (i.e. reporters) of those news-disseminating media which ordinarily report activities of the body. Thus the advertising manager of a newspaper is *not* a representative of the newspaper for purposes of this statute, and a periodical containing only hunting and fishing news and related material is not a news medium for purposes of the statute.

*Id.* at 603 (emphasis in original).

We concluded that a "bona fide representative of a school newspaper" is a representative of the news media if "the newspaper ordinarily covers news germane to the subject of the executive session." *Id.* We further concluded that, if the board had prohibited the paper from covering the matters discussed in executive session (such as faculty discipline), the paper would not qualify as a news medium for purposes of ORS 192.660(4), because it would not cover news germane to the subject of the executive session. In other words, it was not enough that the paper ordinarily reported about activities of the school board, it qualified as a news medium for purposes of ORS 192.660(4) only if it also covered the matters to be discussed in the executive session.

#### c. 2014 Manual

In Attorney General Manuals issued after those opinions, including the 2014 update, we clarified that:

> [Representatives of the news media] include[s] *news-gathering* representatives of institutionalized news media that ordinarily report activities of the body. This interpretation should be expanded to include representatives of media that ordinarily report to the general public on matters of the nature under consideration by the body.

MANUAL at 172 (2014) (footnote omitted) (emphasis in original). Under that test, a person could qualify as a representative of the news media *either* because the news medium that they represent ordinarily reports activities of the governing body *or* because the medium ordinarily reports to the general public on the matters being considered by the governing body.

In addition, the Manual observes that "[c]urrent technologies make it easy to disseminate information to a potentially broad audience. Bloggers and others using these technologies sometimes * * * assert[] that they are representatives of the news media." *Id.* We opined that "representatives of the news media" is not limited to "traditional print media[.]" *Id.* We advised that, because "[t]he law does not establish bright lines regarding publication schedule, the size of the media organization, or audience size" and "no clear definition of 'news media' exists" the decision whether representatives of non-traditional news media qualify "must be made on a case-by-case basis." *Id.* We advised governing bodies to consult with counsel when faced with such a request. *Id.*

### 2. Reconsidering the meaning of "representatives of the news media"

#### a. Methodology for interpreting statutory text

The commission asks us to clarify the meanings of "representatives of the news media," "institutionalized" and "bloggers and others using these technologies." It also asks whether a governing body may exclude a person claiming to be a representative of the news media because the person is not a "news-gathering" representative, or because the medium they represent does not ordinarily report about the activities of the governing body or matters under consideration by the body.

Our 1976 and 1979 opinions predate the Oregon Supreme Court's adoption of the current statutory interpretation methodology in ***PGE v. Bureau of Labor and Industries***, 317 Or 606, 610, 859 P2d 1143 (1993) as modified in ***State v. Gaines***, 346 Or 160, 171, 206 P3d 1042 (2009). These questions prompt us to revisit the meaning of "representatives of the news media" applying that methodology.

Under that methodology, the goal is to determine the legislature's intent. We do so by examining the text, context and pertinent legislative history. ***State v. Gaines,*** 346 Or at 171-172. If the meaning of the text remains ambiguous after examining the text, context and pertinent history, we may apply maxims of statutory interpretation. *Id.* at 172.

**b. Text**

Courts usually give commonly-used terms their ordinary meanings. *See, e.g.*, ***State v. Briney,*** 345 Or 505, 511, 200 P3d 550 (2008)(stating rule). The phrase "representatives of the news media" has no commonly-accepted plain meaning. *See* MANUAL (1973) at 5, n 3 ("there is no common definition of 'representatives of the news media.'"), MANUAL (2014) at 172 ("no clear definition of 'news media' exists.").

Alternatively, courts will apply the well-established legal meaning of a phrase. *See, e.g.*, ***Nibler v. ODOT,*** 338 Or 19, 22, 105 P3d 360 (2005) (applying well-established legal meaning of a term gleaned from the case law). But "representatives of the news media" does not have a well-established legal meaning either. To the contrary, many courts have pointed out that determining who is a representative of the media is notoriously difficult. *See, e.g.*, ***Snyder v. Phelps,*** 580 F3d 206, 219 n 13, (4th Cir 2009), *aff'd* 131 S Ct 1207 (2011) ("Any effort to justify a media/nonmedia distinction rests on unstable ground given the difficulty of defining with precision who belongs to the 'media.'"); ***Flamm v. Am. Ass'n of Univ. Women,*** 201 F3d 144, 149 (2d Cir 2000)("a distinction drawn according to whether the defendant is a member of the media or not is untenable.").

Because the phrase has no clear ordinary meaning or well-established legal meaning, we attempt to determine its meaning by first parsing its constituent words. There are two pertinent ordinary meanings of the noun "representatives." The first is "one that stands for a number or class (as of persons or things) : one that in some way corresponds to, replaces, or is equivalent to someone or something else[.]" WEBSTER'S THIRD NEW INT'L DICTIONARY at 1926-27 (2002).[1/] The second is "one that *represents* another or others in a special capacity: such as * * * * * *b (1)* : one that represents another as agent, deputy, substitute, or delegate usually being invested with the authority of the principal[.]" *Id.* It is not clear from the text alone, whether the legislature intended "representative" in the first or second sense.

Turning to "news media," the plain meanings of "news" are "a report of a recent event: new information: fresh tidings[,]" "what is reported in a newspaper, news periodical, or news broadcast[,]"and "matter that is interesting to newspaper readers or news broadcast audiences : matter that is suitable for news copy." *Id.* at 1524. "Media" is the plural of "medium" the pertinent definition of which is "a channel, method, or system of communication [or]

information * * * <a book needs the widest possible discussion in the reviewing *media* of the country – whether magazine, newspaper, radio, television, or public platform[>.]" *Id.* at 1401, 1403, respectively. Putting the terms together, "news media" means channels, methods, or systems of communicating recent events or new information of interest to the recipients. Daily or weekly newspapers or broadcasts, for instance, would qualify as they report "recent events" and "new information" that is newsworthy.

Questions left unanswered by examination of the text alone are: (1) whether a person must demonstrate a special relation to a particular news medium to qualify as a "representative"; (2) if so, what that relationship must be; (3) whether and what "public platforms" qualify as "news media" and, (4) how often a medium must publish or broadcast for what it reports to be considered "recent events" or "new information?"

**c. Context**

Turning to the context, the phrase is used in ORS 192.660, the executive session law. The purpose of that law is to permit governing bodies to discuss certain matters outside of public view. It reflects the legislature's judgment that the public is better served by confidentiality than transparency in those circumstances. Consistent with that judgment, ORS 192.660(4) permits governing bodies to require news media who attend executive sessions not to disclose sensitive information to the public. At the same time, the function of the news media is to disseminate news to the public. ORS 192.660(4) permits media representatives to attend executive sessions and report non-confidential information to the public while keeping sensitive information confidential. This statutory context does not shed much light on who the legislature intended "representatives of the news media" to include.[2/] On the other hand, the history of media technology advances prior to 1973 provide compelling contextual reasons to think that the legislature would have anticipated that new mediums for disseminating news could emerge. There is nothing to suggest that the legislature intended to preclude individuals working in as-yet-undeveloped mediums from qualifying as representatives of the media for purposes of executive session attendance.

**d. Legislative history**

ORS 192.660(4) was a provision of the original Public Meetings Law, which was enacted in 1973 as Senate Bill 15 (1973). Or Laws 1973, ch 172, § 6. As introduced, Senate Bill 15 did not require governing bodies to allow news media to attend executive sessions. The first suggestion that it should permit such attendance arose in a public hearing before the Joint Special Committee on Professional Responsibility. Co-chair Ingalls mentioned that "newspapers" had been attending school board meetings and labor negotiations and asked if the bill would close those meetings. He also asked whether school boards or teachers could vote to close those meetings to "the press." Charles Habernigg, representing Common Cause, responded that although the public would not have a right to attend labor negotiations, if a "member of the press" had a previous understanding, it should continue. Minutes, Joint Special Committee on Professional Responsibility (SB 15), February 26, 1973 at 6. Myer Avedovech, Attorney for the City of Milwaukie, testified that the city council often held "pre-meetings" before its public

meetings. Representative Paulus asked if "the press" was invited to those meetings. He replied that they were invited but most chose not to attend; usually one reporter came. *Id.* at 9.

In a March 5th meeting of the committee, two other witnesses testified about instances where "the press" had been allowed to attend private meetings. A Woodburn Common Council member, Harold Reaume, testified that the city regularly held non-public pre-meetings that "the press" was welcome to attend. He opined that when the press did not attend "undesirable things" happened. He said that pre-meetings were used to obtain agreement before the public meeting and that statements made in the pre-meeting were not repeated in the public meeting, hence citizens had no way of knowing their public officials' opinions on the issues. Minutes, Joint Special Committee on Professional Responsibility (SB 15), March 5, 1973 at 2.

Bill Keller, an education reporter for *The Oregonian*, testified about an instance where "the press" had been allowed to attend a closed school board meeting but had been asked not to disclose any information except the board's general direction. He testified that although there were times that school board business should be conducted privately, the privilege could be abused. He suggested that when a school board met privately, the press should be allowed to attend "as observers." In response to a question from Co-chair Ingalls, he testified that he felt no obligation to obey a prohibition on reporting certain information and would report matters he felt vital to the public unless given good reason not to. *Id.* at 3-4.

Representatives from several local newspapers and from the Oregon Newspapers Publishers Association (ONPA) testified at a hearing on March 12th. Wally Cowen, a local newspaper publisher and representative of the ONPA, testified that "the press" and the public were the same thing and that the press was a vehicle for information to the public. He felt that Senate Bill 15 did not afford any privilege to the press, but assured the public access, through the media, to the workings of the bureaucracy. Cowen testified that the ONPA's position was that all meetings should be open to the public. Minutes, Joint Special Committee on Professional Responsibility (SB 15), March 12, 1973 at 1-2. Senator Fadeley asked whether he would support executive sessions if the press was allowed to attend but the public was not. Cowen answered that if the press were entitled to attend, then everyone should be invited. *Id.* at 2.

Phil Bladine, also a newspaper publisher and representative of the ONPA, testified against allowing any executive sessions except in personnel cases where he suggested that the press should be allowed to attend but "use good judgment in relating things to the public." He stressed that it was a "newspaperman's responsibility" to see that the public get to meetings. He said that in sensitive areas concerning individuals the press "has a confidence with that individual and it is seldom broken." Chair Ripper asked about the problem of an "unfriendly press" and what should be done when it distorted facts. Bladine responded that everyone should not be penalized for the actions of a few. *Id.* at 3. Hal Schlitz, a publisher of a local paper, testified that relations between the paper and the public bodies had been very good. *Id.* at 4.

Following that testimony, the bill was amended to permit – but not require - representatives of the news media to attend executive sessions. It specified that they could attend under such conditions governing the disclosure of information "as may now exist" and may be

agreed to by the governing body and the representatives of the news media. Amendments to Second Amended Draft SB 15, § 6(3) (1973). The committee considered those amendments at a March 19th work session. An unidentified legislator suggested that the section be deleted. Senator Heard responded that the section was in the bill because of the testimony heard by the committee that some members of the press had good relations with governing bodies and that if the section was not included, this relationship would change. Co-chair Ingalls said that without the section the press could be excluded from meetings where they were presently included. Minutes, Joint Special Committee on Professional Responsibility (SB 15), March 19, 1973 at 10. Senator Fadeley suggested making the requirement mandatory rather than permissive. Co-chair Ingalls suggested deleting the "as may now exist" language. Both suggestions were adopted. *Id.*

At an April 7th meeting, Senator Carson moved to delete the requirement, which he considered potentially "dangerous." Minutes, Joint Special Committee on Professional Responsibility (SB 15), April 7, 1973 at 7. He stated that the press in Lane County had an excellent working relationship with governing bodies that should not be disturbed by permitting the press to be the only "public" invited to watch the governing body. He argued that if the meeting concerned something the public should know, the public should be allowed to attend and a requirement that allowed only "the press" to watch the governing body might endanger good relations with governing bodies, because who, he asked, would watch the press? He also observed that allowing the press to attend and to operate under a shield law would put them in a very interesting position. *Id.*

Co-chair Ingalls replied that the press was allowed to attend executive sessions not to report the meeting but to use the results of the meeting as background information for future reporting. *Id.* He asked Roger Williams, a representative of the ONPA, for his thoughts. Williams testified that "the press" did not want the privilege of attendance; it wanted to be the vehicle for reporting. *Id.* at 7-8. Senator Carson's motion to delete the requirement failed. *Id.* at 8.

Subsequent discussions and proposed amendments concerned whether the requirement should be mandatory or permissive and whether the governing body and representative were required to agree to nondisclosure. For example, on May 15, 1973, Senator Carson expressed concern that the bill mandated that parties agree to what could not be disclosed and the effect would be to have "the news media (rather than the legislature) determining what is or is not an executive session." He recommended remedying that by making both press attendance and nondisclosure agreements discretionary. Minutes, Joint Special Committee on Professional Responsibility (SB 15), May 15, 1973 at 1.

Senator Heard agreed and said that he felt the Senate members on the floor would feel the same way. *Id.* Co-chair Ingalls said that the "question was a matter of honor" and "the news media would not print information until they received background information." *Id.* Senator Heard suggested that the news media be excused from the meeting if agreement could not be reached about what could be reported. Senator Carson agreed. Co-chair Ingalls felt that the bill already stated that. *Id.* The committee ultimately decided to amend the bill to provide that

representatives of the news media "shall" be allowed to attend "under such conditions governing the disclosure of information as may be agreed to by the governing body and the representatives of the news media prior to such executive session." Or Laws 1973, ch 172, § 6(4).

In sum, legislators and lay witnesses alike referred to "the press" when discussing the requirement to permit "representatives of the news media" to attend executive session. They appeared to consider "representatives of the news media" to be synonymous with "the press." Pertinent definitions of the "press" are "newspapers, periodicals, and often radio and television news broadcasting regarded as a group * * * news reporters, publishers, and broadcasters as a group." WEBSTER'S at 1794. Those definitions are consistent with "representatives of the news media" in the sense of representatives of newspapers, news periodicals and radio and television news broadcasts. Additionally, representatives of state and local newspapers, newspaper publishing associations and broadcasting associations were the ones who testified at the Public Meetings Law hearings generally and specifically about having been invited to attend closed meetings in the past.

The history also reveals that the purposes of the requirement were to: (1) require governing bodies to continue to allow news-gathering representatives who had been invited to closed meetings before enactment of the Public Meetings Law to attend executive sessions after enactment of the Public Meetings Law; (2) to foster good relations with news media organizations; (3) to provide a mechanism to ensure that governing bodies limited executive sessions to permissible purposes; and, (4) to permit the media to gain valuable background information for future reporting. At the same time, the legislature was concerned about the press not disclosing confidential information.

It is evident from the history that the legislature had in mind the news-gathering representatives of state and local newspapers who had been invited to attend closed meetings before enactment of the Public Meetings Law. Permitting their attendance served all of the purposes identified for the requirement. That limited and known group of trained professional journalists also would have been accountable for disclosing conflicts, reporting fairly, and protecting legitimately confidential information.

On the other hand, the legislature used broad and ambiguous language in enacting the requirement that potentially includes many other types of media representatives. The history contains no discussion about whether other types of media representatives should be allowed to attend executive sessions. And the 1973 Legislative Assembly could not have foreseen subsequent technological changes that would enable the rise of a large class of "citizen journalists."

### 3. Application of Interpretative Methodology to the Commission's Questions

Having set out the framework for interpreting these provisions, and having identified the relevant text, context and legislative history, we now apply those tools to the commission's various questions about the phrase "representatives of the news media."

### a. "Representatives" means news gatherers

We conclude that "representatives" in the phrase "representatives of the news media" is intended to encompass "news-gathering representatives." This determination is based on the legislative history, which strongly suggests that news gatherers were the people the legislature had in mind. The history establishes that news-gathering representatives would have been the ones invited to closed meetings before enactment of the Public Meetings Law, which is the practice that the legislature sought to codify. They are also the ones who would report non-confidential information and gather information for future reporting.

### b. "News media" means "institutionalized" news media

We next address whether the requirement is limited to "institutionalized media" as our earlier opinions conclude, and, if so, what that means. "Institutional media" is a phrase often employed by the federal courts as a synonym for "the media" or "the press." *See e.g.,* ***Austin v. Michigan Chamber of Commerce,*** 494 US 652, 668, 110 S Ct 1391, 108 L Ed 2d 652 (1990) (stating that the "media" exception is meant to prevent hindrance to the "institutional press."); ***Dun & Bradstreet, Inc. v. Greenmoss Building Inc.,*** 472 US 749, 784, 105 S Ct 2939, 86 L Ed2d 593 (1985) (distinguishing between "institutional media" and "other individuals or organizations engaged in the same activities"). "Institutional media" appears to be used as a term to distinguish between "media" and individual speakers engaged in speech. *Id.* at 784 & n 10 (noting the distinction between "institutional media" and other individual speakers and organizations as the distinction between "media" and "nonmedia."); *see also* 39 Op Atty Gen at 601 (concluding that "news media" means "institutionalized news media" because it applies to "representatives.").

As discussed, a "representative" represents others or another, rather than appearing personally. The statute's use of the term "representatives" is consistent with our longstanding interpretation that "news media" means institutional news media. An "institution" is commonly understood to mean an established society, corporation or organization. Hence, "institutional" news media" means an established news media organization.

Federal courts have not attempted to define "institutional media" with any precision. Instead, they consistently have concluded that it is not possible, for purposes of First Amendment analysis, to distinguish between the "institutional media" and other speakers. An Oregon Federal District Court, for instance, stated that:

> The protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others writings, or tried to get both sides of a story.

***Obsidian Finance Group v. Cox.*** No. 12-35319 at 7 (January 17, 2014).

But ORS 192.660(4) is not intended to ensure a First Amendment right. The United States Supreme Court has opined that the press has no constitutional right to access information not available to the public or to attend executive sessions. *See* ***Branzburg v. Hayes,*** 408 US 665, 684-85, 92 S Ct 2646, 33 L Ed 2d 626 (1972) (observing that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally and that the press is regularly excluded from executive sessions); *see also,* ***Trimble v. Johnson,*** 173 F Supp 651 (D DC 1959) (press has no constitutional right to attend meetings closed to the public). In fact, we are not aware of *any* other jurisdiction that permits representatives of the news media to attend executive sessions.

In this context, the legislature appears to have intended to distinguish between individuals and media entities and to permit only the latter to attend executive sessions. Without that distinction executive sessions essentially would be open to the public. Accordingly, we conclude that "representatives of the news media" for purposes of ORS 192.660(4) includes news-gathering representatives who have a formal affiliation with an institutional news medium. A news media entity is institutional if it is formally organized for the purpose of gathering and disseminating news. As discussed below, however, the proliferation of technologies for disseminating information can make it difficult to identify which entities are institutional news media.

**c. Specialty publications and broadcasts may qualify to attend**

We conclude that media that cover specific subject areas for a special audience rather than a general audience also may qualify as news media if they regularly publish or broadcast the news. In previous guidance we have suggested that representatives of such media entities could only attend executive sessions if the entities ordinarily report on the activities of the governing body. Occasionally, we have also suggested that the specialty media must also ordinarily cover matters that are the subject of a particular executive session. Under that approach, a representative of a periodical containing only hunting and fishing news could attend the executive sessions of the Fish and Wildlife Commission but not of the Board of Chiropractic Examiners.

We see nothing in the text of the statute that requires or even suggests this result. Nor does the legislative history provide any reason to think that the legislature intended a rule under which news-gatherers would be admitted to some executive sessions but not to others. The text unambiguously permits representatives of the news media to attend executive sessions. Presumably the legislature intended that those representatives would select for themselves which executive sessions they were professionally interested in attending. Although that rule might marginally increase the likelihood of individuals attending executive sessions for reasons other than the reasons the legislature had in mind, we do not see any reason to expect that representatives of specialty media would be more likely to do so than representatives of general news media. We consequently conclude that news gathering representatives of specialty media entities are permitted to attend executive sessions, whether or not the public body generally exercises authority relevant to their specialty area.

### d. Use of technology to distribute news

We next address whether the requirement applies to mediums of communication like the internet. We suggest in the Manual that the requirement might apply, depending on the particular facts to "bloggers and others using these technologies." MANUAL at 172. When the 1973 Legislative Assembly enacted the language in ORS 192.660(4) technologies like the internet, cable and satellite broadcasting either did not exist or were not commonly used to disseminate news.

But there is no indication that the 1973 Legislative Assembly intended to foreclose mediums that did not yet exist from qualifying as "news media." On the contrary, the Oregon Supreme Court has declared that there is a "familiar legislative penchant for using general terms like a bucket, allowing various concepts to fall in (or out) with the passage of time. * * * * *. [T]he legislature need not constantly update each new addition to * * * [a] class—[if] the general terms are broad and flexible enough to adjust to changing circumstances." ***Cook v. Workers' Comp. Dept.***, 306 Or 134, 142, 758 P2d 854 (1988).

In this particular context, that "familiar legislative penchant" is consistent with the reality that legislators in 1973 probably did not regard "news media" as a fixed concept. Television news, for example, had started to become prominent only in the late 1940s – meaning that it was approximately 25 years old when the Public Meetings Law was adopted. The use of the medium for news distribution purposes had continued in the intervening years. Smith ed., Television: An International History (Oxford University Press 1995), 122-133 (tracing the development of television news from the late 1940s through the 1970s). Indeed, *local* television news came to prominence in the United States "[s]ometime around 1970[.]" *Id.* at 131. That shift presumably would have been familiar to legislators in 1973. And, given that the reporters most likely to attend executive sessions would be local reporters, the development would presumably have informed legislators' understanding about the nature of the "news media" in this context. Radio news, meanwhile, was approximately fifty years old, having developed since the 1920s and 1930s. Gorman and MacLean, Media and Society in the Twentieth Century (Blackwell 2003) at 57-58 (explaining the development of radio as a news medium starting in these decades). Both of these innovations represented significant advancement from the distribution of printed news following the introduction of the mobile printing press to Europe in the fifteenth century. There is nothing in the text, context or legislative history of the Public Meetings Law that suggests that, notwithstanding this history of innovation and change, legislators intended to adopt a definition of "news media" that would tie that concept to specific formats prevalent in 1973. We conclude that the term "news media" is broad and flexible enough to encompass subsequent technologies for delivering the news.

As a result, whether an online publication or broadcast qualifies depends on the same criterion for existing mediums: the entity must be institutional. "Blogs," for example, come in two general varieties. The first is "an online personal journal with reflections, comments and often hyperlinks, videos, and photos provided by the writer." www.merriam-webster.com/.[3/] The second is "a regular feature appearing as part of an online publication that typically relates to a particular topic and consists of articles and personal commentary by one or more authors[.]"

*Id.* The first type of "blogger" is an individual rather than a representative of a news media organization. But the second type of blogger might qualify as a representative of the news media depending on whether the particular facts demonstrated that the blogger represented an institutional news medium. Indications that an entity is institutional might include its business structure, the nature of its overall operations, regular public dissemination of news, and similar factors that demonstrate that it is formally organized for the purpose of gathering and disseminating news. For instance, an individual who regularly posts for websites maintained by traditional media companies, such as nytimes.com or cnn.com, would constitute a "representative of the news media" within the meaning of ORS 192.660(4). Short of an affiliation with a traditional media outlet, indications that a blogger represents institutionalized media might include the existence of staff (rather than a single individual), a formal business structure within which the blog operates and regular publication.

### B. Terms used in ORS 192.660(5)

We now turn to the meaning of terms used in ORS 192.660(5). A governing body may convene an executive session to consult with counsel about current litigation or litigation likely to be filed. ORS 192.660(2)(h). ORS192.660(5) requires governing bodies to "bar any member of the news media from attending the executive session if the member of the news media is a party to the litigation or is an employee, agent or contractor of a news media organization that is a party to the litigation." The commission asks us to clarify the meaning of the terms used in that provision relating to the news media.

#### 1. Member of the news media

The relevant definition of "member" is "one of the individuals composing a society, community, association or other group." WEBSTER'S at 1408. "Member" appears at first to be a potentially broader term than "representative." However, as ORS 192.660(5) is implicated only if a person is a "representative of the news media" otherwise entitled to attend executive sessions, in practice a "member of the news media" may be treated as synonymous with a "representative of the news media." The obvious purpose of this language is to bar individuals from using ORS 192.660(4) to gain access to confidential attorney-client discussions about litigation to which they are parties whether or not the media organization that they represent is a party.

#### 2. Employee, agent or contractor of a news media organization

The prohibition on admitting "an employee, agent, or contractor of a news media organization that is a party to the litigation" precludes a news media organization from gaining access through their representative to confidential discussions about litigation to which the organization is a party. An "employee" is "one employed by another usually in a position below the executive level and usually for wages." *Id.* at 743. The pertinent definition of "employ" in this context is "to provide with a job that pays wages or salary or with a means of earning a living." *Id.* An "employee of a news media organization" would mean a person who has a job with a news media organization that pays the person wages or a salary. The pertinent definition of "contractor" is "one that contracts: a party to a bargain: one that formally undertakes to do

something for another * * * one that performs work according to a contractual agreement." *Id.* at 495. A person who contracts with a news media organization to cover stories or to report on matters specified in a contract would be a contractor of a news media organization. An "agent" is a person "who is authorized to act for or in the place of another." *Id.* at 40. "Agent" is a broad term and may include representatives who are not "employees" or "contractors." The legislature likely specified all three of these terms to ensure that everyone who might qualify as a "representative of the news media" for purposes of gaining admittance to a meeting where the governing body discussed litigation with its counsel would be barred from attending if the news media organization that they represent is a party to the litigation.

## III. Question 2 - Permissible Grounds to Exclude News Media Representatives

The commission next asks whether governing bodies may exclude representatives of the news media from executive sessions for any reason other than those identified in ORS 192.660(4) (exclusion from deliberations with labor negotiators and meetings to consider confidential student records or expulsion) and ORS 192.660(5)(exclusion for parties to litigation being discussed with counsel).

### A. Limit attendance to one representative from each news medium

The Manual states:

> [a] governing body probably would be able to limit attendance to one representative of each medium wishing to be represented. The body should be able reasonably to limit total attendance to a number that would not interfere with deliberations.

MANUAL at J-5. Although this is a sensible policy and would not thwart the apparent purposes of the requirement, no statutory language supports it. The statute requires governing bodies to admit "representatives of the news media." That requires governing bodies to admit any person who qualifies as a representative of a news medium and who is not subject to exclusion under ORS 192.660.

An alternative interpretation would require us to insert language into the statute to specify that governing bodies are required to admit "one" representative from each medium. A governing body could request that a news medium send only one representative, but, in the event that the request is ignored, the governing body should admit representatives who ask to attend.

### B. Representatives with a personal interest in the matter discussed

The Manual also states that, with the exception of ORS 192.660(5) for parties to litigation being discussed with counsel, ORS 192.660 does not permit a governing body to exclude representatives who have a personal interest in the matter being discussed or a close relationship with someone who does. But we say that "[i]f the attendance of a reporter with a *direct* personal interest would frustrate the purpose of the executive session, a governing body could justify

barring the individual. A reporter's mere relationship to someone with a personal stake in the matter is probably not sufficient justification." MANUAL at J-6.

On reconsideration, we conclude that a governing body has no authority to exclude a reporter who has a direct personal interest in the matter being discussed other than as provided in ORS 192.660(5). ORS 192.660(4) requires governing bodies to permit representatives of the news media to attend executive sessions. While the scope of the statutory phrase "representatives of the news media" may be ambiguous, the requirement to admit those who qualify is not. ORS 192.660(5) states the only ground on which a governing body may exclude a representative who has a direct personal interest in the matter being discussed. The legislature could have specified other grounds, but it did not.

### C. Exclusion for failure to agree to nondisclosure or for disclosing confidential information from a prior executive session

The commission next asks whether it is lawful for a governing body to exclude a reporter who disclosed information from an earlier executive session that the governing body had specified should not be disclosed. ORS 192.660(4) requires governing bodies to allow media representatives to attend, but permits the body "to require that specified information be undisclosed." "Require" means "to ask for authoritatively or imperatively : claim by right or authority : insist upon usually with certainty or urgency : DEMAND, EXACT." WEBSTER'S at 1929. Although the provision does *not* state that a representative who refuses to agree to nondisclosure may be excluded from the meeting, one plausible interpretation is that the authority is necessarily implied from the governing body's authority to "require" that specified matters not be disclosed.

But the provision's amendment history does not support that interpretation. *See* ***Krieger v. Just,*** 319 Or 328, 336, 876 P3d 754 (1994) (amendment history is context for present version of statute); ***Strunk v. Public Employees Ret Bd.,*** 338 Or 145, 189-90, 108 P3d 1058 (2005) (applying presumption that material changes in language create material changes in meaning). As enacted in 1973, the provision required governing bodies to allow representatives to attend "under such conditions governing the disclosure of information as may be agreed to by the governing body and the representatives of the news media prior to executive session." Or Laws 1973, ch 172, § 6(4). That language generally was construed to allow governing bodies to exclude representatives who refused to agree to nondisclosure and to bar attendance at future sessions for violating an agreement. 38 Op Atty Gen 2122, 2124 (1978). That interpretation was consistent with the legislative history of the 1973 version of the statute discussed above.

But the 1975 Legislative Assembly amended the statute to remove the language that had been construed to allow governing bodies to condition attendance on a nondisclosure agreement and to bar future attendance for violating an agreement. Or Laws 1975, ch 664, § 3. This office explained that:

> The purpose of this amendment was evidently to make clear that news media representatives *must* be allowed to attend executive sessions * * * . At the same

> time, the governing body is given specific authority to *require* that specified information be undisclosed. However no specific statutory sanction is provided for use against a reporter who violates the nondisclosure requirement. The legislature apparently chose to rely upon the good faith of reporters in complying with the requirement.

38 Op Atty Gen at 2125.

In 1981, we specifically addressed whether a governing body could exclude a reporter who had disclosed confidential information from an earlier executive session until the reporter agreed to nondisclosure. Letter Opinion of the Attorney General dated March 30, 1981, to Representative Ben 'Kip' Lombard. We concluded that the statute provided no means of enforcement and we refused to imply one:

> While it is possible that a court will hold that the right to impose an appropriate sanction is implied, we decline to read into the statute something not placed there by the legislature. It is quite conceivable that the legislature did intend to rely only on the good faith of media representatives. We accordingly construe the statute as it reads, and it reads '[r]epresentatives of the news media shall be allowed to attend executive sessions.' We conclude that such a representative, who has arguably or actually violated a valid instruction not to disclose, cannot be barred from attending a later executive session.

In a 1982 opinion, we were asked whether a governing body had any method to ensure that the media does not disclose confidential information. In light of that question "we reconsidered [the 1981 opinion] but f[ound] no basis for modifying it." 42 Op Atty Gen 392 (1982). We opined that a governing body "has no method of insuring that the media will not disclose confidential information. It can only request nondisclosure and rely on the good faith cooperation of the media, or drastically limit its own use of confidential information." *Id.* at 398. We continue to hold to the conclusion in those opinions.

## IV. Question 3 - Commission's authority to adopt rules to carry out its duties

We are next asked whether the commission has authority to adopt administrative rules to carry out its duty to review and investigate alleged violations of the executive session law. At the time the commission asked the question, it did not have explicit statutory authority to make rules. But since the commission asked the question, the Legislative Assembly has amended ORS 244.290, which gives the commission express rulemaking authority. Section (2) provides:

> The commission shall adopt rules necessary to carry out its duties under ORS 171.725 to 171.785, 171.992, 192.660 and 192.685 and this chapter.

But the legislature simultaneously amended ORS 192.660 to exclude from the commission's rulemaking authority the ability to determine by rule who qualifies as a representative of the news media:

(10) Notwithstanding ORS 244.290, the Oregon Government Ethics Commission may not adopt rules that establish what entities are considered representatives of the news media that are entitled to attend executive sessions under subsection (4) of this section.

Hence, the legislature has given the commission express authority to adopt rules necessary to carry out its duties under ORS 192.660 and 192.685. However, the commission may not adopt a rule that establishes what entities are representative of the news media.

We note that, in addition to its general rulemaking authority, the commission is required by ORS 244.290 to adopt one particular rule. Specifically, ORS 244.350(2)(a) authorizes the commission to impose civil penalties of up to $1000 for a violation of ORS 192.660. ORS 244.290(2) requires the commission to adopt certain rules to implement ORS chapter 244, subsection (h) of which requires the commission to adopt a rule to "[s]et criteria for determining the amount of civil penalties that the commission may impose." ORS 244.350(2) is a provision of ORS chapter 244 that authorizes the commission to impose civil penalties; therefore it must adopt a rule setting criteria for determining the amount of those penalties pursuant to ORS 244.290(2)(h).

## V. Question 4 – Effect of policies adopted by governing bodies

The next question arises because local governing bodies have begun adopting comprehensive policies establishing who they will consider to be "representatives of the news media" and what proof they will require to prove that status. The commission asks about the legal significance of such policies that: (1) impose screening criteria for determining who qualifies as a representative of the news media; (2) require preapproval of media credentials; (3) require advance notice that a representative of the news media will attend; or, (4) exclude persons for failing to give advance notice of attendance.

The short answer to this question is that governing bodies are bound by the statutory requirement to admit representatives of the media to executive sessions. To the extent that enforcing a policy would result in the exclusion of a person statutorily entitled to attend an executive session, the policy is inconsistent with ORS 192.660(4). In evaluating allegations that an individual was wrongly excluded from executive session, the commission must assess compliance with the statute regardless of a governing body's policies.

Turning to the first particular type of policy the commission is concerned about, governing bodies may adopt screening criteria for "representatives of the news media" that are consistent with the meaning intended by the legislature as described in this opinion.

On the other hand, governing bodies are not required to accept a person's mere assertion that they qualify as a representative of the news media. Consequently, a policy requiring proof of media status can be consistent with the Oregon Public Meetings Law. If the application of the policy results in excluding a person who offers sufficient proof to demonstrate that the person is, indeed, a representative of the news media, that outcome would be out of compliance with the

Public Meetings Law. (This seems most likely to arise if a policy requires specific types of credentials.) Similarly, the statute does not authorize excluding representatives of the news media for failure to provide their credentials within certain deadlines. The same is true for a policy requesting media representatives to notify the governing body in advance of their intent to attend an executive session. While that might be a good idea, and a courtesy, it cannot be made a requirement.

Finally, as discussed above, the Public Meetings Law does not permit a public body to exclude media representatives who have disclosed confidential information from prior executive sessions or who represent news media organizations that have done so. Enforcing a policy to the contrary would violate the statute.

## CONCLUSION

The law permits news-gathering representatives of institutional media to attend executive sessions. The statutory term "news media" is broad and flexible enough to encompass changing technologies for delivering the news. A governing body may not exclude a representative of the news media from an executive session except as specifically allowed by ORS 192.660(4) and (5). The commission generally may adopt rules to carry out its duty to enforce the executive session law, but it is prohibited by ORS 192.660(10) from adopting a rule that establishes which entities are considered representatives of the news media. Governing bodies may adopt policies relating to the admission of media representatives to executive sessions, but those policies cannot limit the statutory right of representatives of the news media to attend executive sessions. In evaluating allegations that an individual was wrongly excluded from executive session, the commission must assess compliance with the statute, regardless of a governing body's policies.

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[1/] The phrase was enacted by the 1973 Legislative Assembly. Or Laws 1973, ch 172, § 6. The pertinent definitions in the 1971 version of Webster's do not differ from the 2002 version so we cite to the latter for ease of reference.

[2/] ORS 192.660(5), which excludes from attending certain executive sessions "members of the news media" and an "employee, agent or contractor of a news media organization" does not shed light on the meaning of ORS 192.660(4), because the latter was adopted by the 1973 Legislative Assembly and the former was not adopted until 1997. Or Laws 1997, ch 596, § 1; *See* ***Stull v. Hoke,*** 326 Or 72, 79-80, 948 P2d 722 (1997) (stating that a later-enacted statute is not context for interpreting an earlier statute).

[3/] "Blog" is not defined in the 2002 print version of Webster's, but is defined in the online version.