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Mr. Michael Kron
Oregon Department of Justice
1162 Court St NE
Salem OR 97301

Re: Proposed Amendment to Public Records Law

Dear Mr. Kron:

I am writing for the purpose of asking the Public Records Law Reform Task Force to include an amendment to the Public Records Law ("PRL") to make it clear that an action may be brought under that statute against any judge who has denied a request under the PRL for disclosure of a court record. My proposed amendment is intended to correct a gap in the PRL caused by the Court of Appeals decision in *Oregonian Publishing Co., LLC v. Waller*, 253 Or App 123, 293 P3d 1046 (2012), *rev den*, 353 Or 714 (2013).

In a nutshell, the Court of Appeals in the *Waller* case rendered meaningless an amendment to the PRL that the legislature enacted in 1989.

In 1985, the Supreme Court considered whether the PRL applied to a circuit court. The court stated that because the PRL, at that time, did not expressly refer to "courts and court records," the court would "assume, *arguendo*," that the PRL did not apply to them. *State ex rel KOIN-TV v. Olsen*, 300 Or 392, 399-400, 711 P2d 966 (1985).

In 1989, the legislature responded to the *KOIN-TV* decision case by amending the PRL specifically for the purpose of bringing courts and court records within its coverage. It added the word "court" to the definition of state agency in what is now ORS 192.410(5), and it added the words "court records" to the definition of "public records" in what is now ORS 192.410(4)(a). Or Laws 1989, ch 377.

In 2001, *The Oregonian* asked Judge Fun of the Washington County Circuit Court to release a copy of a court order. When he rejected that request, I filed a mandamus petition with the Supreme Court, asking it to issue a writ of mandamus to Judge Fun, directing him to release the order. *Oregonian Publishing Company v. Department of Human Services*, Supreme Court No. S057114. The Department of Justice (representing the Department of Human Services) opposed

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my petition, on the ground that I should have filed a case against Judge Fun under the PRL. In its memorandum to the Supreme Court, the Department of Justice argued as follows:

“Here, the Oregonian has a remedy under the Public Records Law. 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.’ *This right extends to the Order at issue in this case.*”

(“Adverse Party’s Memorandum in Opposition,” SC No. S057114 (May 14, 2009), at 3 (emphasis added).) DOJ continued:

“If the Oregonian believes that Judge Fun’s decision [not to release the Order] was incorrect, it may ‘institute proceedings for injunctive or declaratory relief’ in circuit court pursuant to ORS 192.480. In that proceeding, it may raise its constitutional argument, and may also argue that—given the fact that the child is deceased and DHS does not object—Judge Fun abused his discretion in declining to disclose the Order.”

(*Id.* at 4.) The Supreme Court denied my mandamus petition on May 6, 2009.

It thus seemed clear that the proper way to challenge a circuit judge’s denial of a request for disclosure of a court order was to do what DOJ had suggested: file an action against the judge under the PRL.

Later in 2009, *The Oregonian* did just that, in a case against Judge Waller of Multnomah County Circuit Court, who had denied the newspaper’s request for disclosure of a court order in a different case. That case was assigned to Senior Circuit Judge Bearden, who entered a judgment requiring Judge Waller to disclose the order. Judge Waller appealed, and the Court of Appeals held (in the decision cited above) that it was improper for Oregonian to file an action under the PRL against a circuit court judge. The court said that Oregonian should have sought mandamus review of Judge Waller’s decision in the Oregon Supreme Court (253 Or App at 136), despite the fact that the Supreme Court had recently declined to issue a writ of mandamus in an identical proceeding in which Oregonian sought review of Judge Fun’s refusal to disclose a court order. It reversed the judgment in Oregonian’s favor, and instructed the trial court to dismiss the action. I subsequently filed a mandamus petition against Judge Waller in the Supreme Court, and it denied the petition, just as it had in the case against Judge Fun.

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Thus, despite the fact that the 1989 legislature specifically included "courts" and "court records" within the coverage of the PRL, and despite the fact that DOJ had strenuously argued that an action under the PRL was the proper method of seeking review of a trial judge's refusal to disclose a court order, it is now the law of Oregon, under the Court of Appeals decision in the *Waller* case, that it is improper to use the PRL to seek review of a judge's refusal to disclose a court order.

I believe that the Court of Appeals decision is contrary to the legislature's intent in amending the PRL to include "courts" and "court records." Its decision in the *Waller* case leaves members of the public with no prescribed procedural vehicle for obtaining review of a trial judge's refusal to disclose a court order.

I am therefore asking the Task Force to include an amendment to ORS 192.480 to accomplish what I believe the 1989 legislature intended to accomplish: namely, to provide a procedural means, under the Public Records Law, both to request the opportunity to inspect a court record, and to obtain judicial review of a judge's denial of such a request. I believe that this can be accomplished by the addition of just a few words to ORS 192.480, and I am enclosing a copy of that statute with my suggested amendments in red print. I request that you add it to your draft legislation as Section 7.

I would be happy to come to your next meeting in Bend to answer any questions about my proposal.

Thank you for your consideration.

Very truly yours,



Charles F. Hinkle

Enclosure

SECTION 7. ORS 192.480 is amended to read as follows:

In any case in which a person is denied the right to inspect or to receive a copy of a public record in the custody of an elected official, including a judge of a court, or in the custody of any other person but as to which an elected official, including a judge of a court, claims the right to withhold disclosure, no petition to require disclosure may be filed with the Attorney General or district attorney, or if a petition is filed it shall not be considered by the Attorney General or district attorney after a claim of right to withhold disclosure by an elected official. In such case a person denied the right to inspect or to receive a copy of a public record may institute proceedings for injunctive or declaratory relief against the elected official, including a judge of a court, in the appropriate circuit court, as specified in ORS 192.450 or 192.460, and the Attorney General or district attorney may upon request serve or decline to serve, in the discretion of the Attorney General or district attorney, as counsel in such suit for an elected official for which the Attorney General or district attorney ordinarily serves as counsel. Nothing in this section shall preclude an elected official from requesting advice from the Attorney General or a district attorney as to whether a public record should be disclosed.

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