

HONORING A VICTIM'S RIGHT TO BE INFORMED

Ability to seek a Grand Jury Recordation Protective Order

ORS 132.270

Oregon Department of Justice Crime Victim and Survivor Services Division

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The justice system is best served by full implementation of all crime victims' rights as embodied in Oregon Constitution and statute. Therefore, it is in the best interest of all that we create a comprehensive approach to ensuring that crime victims receive notice of rights consistently and effectively throughout the state. This document discusses the constitutional and statutory mandates along with common practices focused on proper notification of the right to seek a grand jury protective order.

What and How

Notice of rights are at the root of a crime victim's right to justice and to a meaningful role in the criminal and juvenile justice systems. The constitution makes it clear that a crime victim's rights shall be honored at each stage of the criminal justice system. Notice is most often provided by law enforcement or the district attorney's office.

Select Express Provisions of Law

ORS 132.270 (4a) (A) provides:

"The prosecuting attorney may file a motion for a protective order within 10 days after the defendant's arraignment on the indictment. The motion may be filed on behalf of a victim or a witness. The prosecuting attorney shall inform the victim of the ability to seek a protective order."

ORS 132.270 (2) (e) provides: (excerpt)

"When the defendant has been arraigned but is not represented by an attorney, the defendant may request by motion that the court issue an order allowing the defendant access to the audio recording... The prosecuting attorney may request a hearing on the motion within 10 days after receiving a copy... The court shall appoint counsel for the defendant for the limited purpose of reviewing the audio recording, notes, or report and may set reasonable conditions on the review...."

ORS 132.270 (c) & (A) provides: (excerpt)

"Unless a court orders otherwise for good cause shown, in consulting with the defendant the defense attorney may not disclose to the defendant: any personal identifiers of a victim, witness or grand juror obtained from the audio recording, report, notes or transcript...."

ORS 132.270 (4)(c)(d) provides: (excerpt)

"...In deciding whether to grant a protective order the court may consider the following: Protection of witnesses and others from physical harm, threats of harm, bribes, economic interference, reprisal and other forms of intimidation; Maintenance of secrecy regarding informants...; Confidential information recognized under the law, including the protection of confidential relationships and privileges and the contents of confidential records unrelated to the crime alleged in the indictment; and Any other relevant considerations."

ORS 132.320 (13) provides: (excerpt)

"A grand jury in a judicial district... the proceedings of which are recorded... may receive in evidence, through the testimony of a peace officer involved in the criminal investigation under grand jury inquiry, the statement of:

- (a) A person who cannot readily understand the proceedings, or who cannot communicate in the proceedings, because of a physical disability or developmental disability; or

(b) A victim under 18 years of age at the time of the proceedings.”

The Oregon Constitution defines a victim as:

“Victim” means any person determined by the prosecuting attorney or the court to have suffered direct financial, psychological or physical harm as a result of a crime and in the case of a victim who is a minor, the legal guardian of the minor.”

Frequently Asked Questions

Below we highlight a few questions that arose during the writing of this paper.

- **Who gets a copy of the recording?** The prosecutor may access a copy of the audio recording at any time; a copy must be provided to the defense attorney 10 days after arraignment on indictment; prosecution and defense may provide a copy to their agents for the limited purpose of case preparation. No personal identifiers of victim, witnesses, or grand jurors may be disclosed to the defendant. ORS 132.270(2)(d) says “The defense attorney may not provide a copy of the audio recording, notes or report, or a transcript prepared from the audio recording, notes or report, to the defendant.”
*If the defendant is not represented by an attorney (i.e. defendant is pro se), the defendant may request by motion that the court allow access to review the content of the audio. The prosecutor may request a hearing within 10 days of receiving defendant’s motion. The court may set reasonable conditions on the review of the audio.
- **Do children/vulnerable adults have to testify in grand jury?** No, ORS 132.320 provides for evidence to be received through the testimony of a peace officer involved in the criminal investigation under grand jury inquiry, if the person making that statement is:
 - A person who cannot readily understand the proceedings, or who cannot communicate in the proceedings, because of a physical disability or developmental disability; or
 - A victim under 18 years of age at the time of the proceedings.
- **Who can testify on behalf of a child/vulnerable adult?** A peace officer involved in the criminal investigation.
- **What does a grand jury recordation protective order cover?** It can restrict access to part or all the testimony of the witness
- **What if the DA won’t file but the victim wants a grand jury recordation protective order?** Only the prosecutor can file for this protective order.

Where Do We Go from Here?

Successfully crafting and incorporating a new process into current procedures takes time and resources. This document offers guidance on best practice in asserting and enforcing victim rights. Included:

- sample script to describe this right
- current contact information for District Attorney Victim Assistance Programs
- endorsement to use these solutions statewide

The guidance and sample documents supplied here will allow agencies to follow the law, respond with speed and consistency and minimize the potential for re-victimization and exposure to victims' rights violations. We encourage you to share this information with others who may benefit.

Guidance and Sample Forms

General Process – The District Attorney's Office will explain this right before the witness testifies before the grand jury.

Best Practice – Post a sign in a visible location clearly stating that grand jury testimony will be recorded. (Recordation in Progress).

Verbally explain the ability to seek a grand jury recordation protective order.

DDA – Confirm that the victim received notice of the right to seek a grand jury recordation protective order.

When deciding whether to have children or vulnerable people testify at grand jury remember you can exercise the exception that allows the grand jury to receive testimony through a peace officer if the victim is

- A person who cannot readily understand the proceedings, or who cannot communicate in the proceedings, because of a physical disability or developmental disability; or
- A victim under 18 years of age at the time of the proceedings.

When making your decision you may wish to:

- Seek help to determine appropriateness and potential impact on the victim. Forensic interviewers, therapists, doctors may be helpful in determining the level of trauma vs empowerment the victim might experience.
- Exercise decision making on a case by case basis rather than implementing a bright line policy as each victim and situation is unique.
- Weigh the pros & cons of potential discrepancy in testimony; direct testimony may provide additional detail not previously disclosed.
- Consider the effect that testifying at length and with detail will have on a child or vulnerable person; consider developmental level in addition to age.
- Utilize your advocate when preparing a victim to appear before the grand jury to ensure that trauma informed approaches are used.
- Further educate yourself and your colleagues on trauma informed practices and, working with children and persons with disabilities.

Advocates – When developing a practice for explaining the right to be informed of the ability to request a grand jury protective order consider using the following sample script:

Your testimony at grand jury assists us in determining whether we can proceed with criminal charges against the defendant and what those charges will be. All grand jury testimony is recorded. If you have concerns about your safety because your recorded testimony will be released to the defense attorney, we can talk to the DDA about those concerns. In some situations, the DDA has the ability to seek a protective order that can restrict part or all of your testimony from being shared with the defendant.

Also:

- Communicate with assigned prosecutor any concerns raised by the victim related to the need for a grand jury recordation protective order.
- Use trauma informed practices when preparing victims for grand jury.
- Consider referring victims to a victims' rights attorney, such as the Oregon Crime Victim Law Center (OCVLC) for a full explanation of rights.

Training

In order to provide the best services to victims and to manage cases most effectively, it is incumbent upon agencies to ensure personnel are regularly and appropriately trained in crime victims' rights.

If you think a victims' right has been violated

Be sure to follow your office procedure, which should include referring to a victim's rights lawyer or agency for consultation and/or to the Oregon Department of Justice crime victims' rights enforcement page for further information.

Prosecutor determines witness list

Considers need for direct testimony

Victim to testify at grand jury

Advocate verbally explains the prosecutors
ability to seek a grand jury recordation
protective order

If victim requests this protective order

Statements can be
viewed by the court
only

Determine format victim
will use to express need
for protective order
(verbal or written)

Notify victim of
prosecutor/court
decisions

Victim is informed of the prosecutors ability to seek
a grand jury recordation protective order and
outcome