

IN THE SUPREME COURT OF THE STATE OF OREGON

THE STATE OF OREGON,
Plaintiff-Adverse Party,

v.

JOSHUA ADAM HEMION, aka Josh Adam Hemion,
Defendant,

and

METROPOLITAN PUBLIC DEFENDER, INC.,
Relator.

Washington County Circuit Court

BRIEF ON THE MERITS
AND EXCERPT OF THE RECORD OF THE RELATOR,
METROPOLITAN PUBLIC DEFENDER, INC.,

From an order of the Circuit Court of Washington County,
Honorable Rebecca D. Gupill, Judge

24CR34660

MANDAMUS PROCEEDING

S072015

8/2025

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Question presented.

Can the trial court order MPD, the largest provider of indigent defense in the county, to turn over internal records, including records showing the caseloads of all the individual attorneys, to the District Attorney, so that the DA can use the records to determine if MPD lawyers are working at capacity?

Summary of argument.

The trial court ordered the relator, Metropolitan Public Defender, Inc. (MPD), which is the largest public defense provider in Washington County, to turn over to the Washington County District Attorney a number of MPD's internal documents, including all its lawyers' caseloads. The court's order was broader than the DA's request; neither the request nor the order were authorized by any law.

The DA did not cite any law to support its request. It argued that it was entitled to audit MPD's internal records to determine if MPD was accurate when it reported that its staff were working at capacity.

The trial court, on its own, cited the Open Courts Clause of Article I, section 10, of the Oregon Constitution, and the Public Records Law

(PRL)(ORS 192.010 *et seq*). The court was wrong for three main reasons.

First, Oregon law provides that MPD is overseen by the Oregon Public Defense Commission, not by the courts, and not by the District Attorney, MPD's forensic adversary.

Second, the Open Courts Clause applies only to court proceedings, not to law firms, such as the relator.

Third, the PRL does not apply to private law firms, such as MPD. MPD is not a public body which retains public records, as those terms are defined by the PRL. Nor is MPD a quasi-public body, such that the PRL applies to it. This court has set out guidance, with a six-part test. Under that test, MPD does not qualify as a quasi-public body.

In any event, at least one exception to the PRL would apply, either "information of a personal nature," or, in some cases, the exemption for records of a disciplinary process that did not lead to termination.

In addition to being unlawful, the court's order is bad public policy. It would be a violation of law, and damaging to MPD, to require MPD to turn over these internal records. Mandamus is the relator MPD's only remedy.

Statement of the facts

On March 21, 2025, the state, through a deputy District Attorney in Washington County, filed a “Motion to Address Actions of Unappointed Counsel” in *State v. Bregman* (case numbers 21CR21445 and 21CR33615). ER-3 (motion), ER-100, ER-104 (OECI). The state had learned that relator MPD [Metropolitan Public Defenders, Inc.] had requested discovery in Bregman's two cases, when MPD had not been appointed. The state explained that it had learned that MPD had elected to work on "inactive cases instead of any of the hundreds of active cases languishing without counsel in Washington County." The state sought an order "addressing these issues."

This motion never mentioned any authority for this request, and, specifically, never mentioned the Public Records Law (PRL), ORS 192.010 *et seq.*, or the Open Courts Clause, Oregon Constitution, Article I, section 10.

The state sought, first, to have a particular MPD staff attorney be removed from Bregman's cases, and be appointed "to comparable cases on the OPDC [Oregon Public Defense Commission]'s unrepresented list." It also sought an order "to disclose data on the MAC [Maximum

Attorney Caseload] utilization rate" for this particular staff attorney, and for "MPD as a whole."

On April 2, 2025, the state filed a Supplement to its Motion adding *State v. Hemion*, 24CR34660. ER-10. In this case, MPD had asked the Washington County court verifiers to appoint MPD, as Mr. Hemion was a current MPD client in the Multnomah County MPD office. Pursuant to the request, the court appointed MPD to represent him in Washington County. The Supplement mentioned three other cases where the DA thought MPD had improperly sought an appointment in an inactive case.

Again, the DA's rationale was the same: the state objected to MPD seeking appointments when there were many accused and indigent people on the unrepresented list. At this point the public dashboard reported that MPD was at maximum capacity.¹ The DA claimed the cases it cited showed that MPD had "untapped work capacity." MPD could, argued the DA, take more cases off the unrepresented list, rather

¹ The dashboard, which changes frequently, can be found at: <https://app.powerbigov.us/view?r=eyJrIjojNDQ2NmMwYWMTNzhiZi00MWJhLWE3MjgtMjg2ZTRhNmNmMjdmIiwidCI6IjYxMzNlYzg5LWU1MWItNGExYy04YjY4LTE1ZTg2ZGU3MwY4ZiJ9> (last viewed 7/31/25).

than using "up its contractual capacity without achieving any results." In sum, it argued: "In the present circumstances it imperative that the criminal justice system make efficient use of the available resources for indigent defense, and the actions of MPD impede the court from doing so. These additional examples [*Hemion* and the other cited cases] confirmed the presence of additional capacity at MPD, and warranted intervention by the court." ER-15.

Again, the PRL was not mentioned, nor was any other legal authority cited.

The hearing on the state's Motion was April 3, 2025. At the hearing (ER-16) MPD's executive director (ED) conceded that MPD should not have filed the discovery demand in *Bregman*. MPD agreed to destroy all discovery, and cease work on Bregman's two cases. The ED noted that the discovery demand in particular had been filed in error, as the underlying affidavit was clear that MPD had not been appointed. The court indicated it would grant this portion of the motion. (This was memorialized when the court signed an order granting the *Bregman* portion of the state's Motion on April 22, 2025. As MPD had agreed, it was not appointed on the *Bregman* case, MPD

would destroy any discovery it had, and MPD staff would not work on the case. The *Bregman*-related issue appeared to be resolved at this point.)

At the April 3 hearing, the ED argued that MPD is a private law firm, not a public body, and its records are private. Further, the MAC utilization rate for OPDC contractors (including MPD) is on a public dashboard. The DA is not entitled to more specific information. The ED asserted that there was no legal authority for the DA's request.

The ED described why cases take public defense staff so many hours of work, particularly in Washington County, which has many trials, has body-worn camera recordings the attorney has to watch, and has jail access issues, which can make visiting clients difficult. Tr 11-14, at ER-26 - ER-29.

The court orally ruled in the *Bregman* cases (as described above), and denied the request for an order to appoint the specific staff attorney to additional cases.

The court took under advisement the DA's request for an order to disclose data on MPD's MAC utilization, and to disclose an active case list for the specific staff attorney. During discussion of the court's

ruling, the state supplemented its request by asking the court to provide OJD [Oregon Judicial Department] dashboard information regarding the same caseload data.

At the conclusion of the April 3 hearing, the court invited the parties to file supplemental material revealing “any case law or statutory language” giving “authority of the Court to grant such an order.”

The state filed its Second Supplemental Motion to Address Actions of Unappointed Counsel on April 18, 2025. ER-47. The state provided anonymized data from OECD which it had "audited." The DA claimed that the "audit" supported its hypothesis that MPD's caseloads are inaccurate, and too low. The state claimed that it had established a pattern of MPD misusing the system:

[The state has] documented a pattern of MPD attorneys making discretionary use of their surplus work capacity while simultaneously claiming to be at their caseload limit. These actions included repeatedly soliciting appointment to inactive cases on warrant status, consultations between attorneys and nonclients, legal work and motions filed on cases to which they had not been appointed, and the unlawful demand [for discovery.]

ER-47.

Thus the DA sought the MPD records to be able to further audit

the caseloads of MPD lawyer, to determine if the assertion that MPD was at capacity was accurate. The deputy claimed that the District Attorney of Washington County had standing to audit the caseloads of the largest public defender organization in the county, apparently because the rights of defendants and victims were endangered, and public safety was at risk. The state claimed that once the DA performed the audit with the provided data, it would "provide a clue as to why MPD wishes to keep their data a secret." (ER-53.) In sum, the DA asked for detailed information on MPD caseloads, as a whole and for all individual attorneys in the MPD offices.

Once again, the state cited no legal authority of any kind.

MPD did not file a memo, believing -- as the ED stated during the April 3 hearing -- that there was no legal authority for the proposed order, so it could not cite any authority.

The court ruled on April 23, which is the focus of relator's petition. The court granted the DA's request, and expanded it. ER-55.

The court found that on the day it ruled there were 767 unrepresented indigent defendants in the county. It found "highly concerning" that MPD/Washington was taking on work on cases that

were outside its contractual obligations, such as filing requests for former (but not current) clients to turn themselves in on a particular day. While arranging a time for people to turn themselves in avoids them having to spend multiple days in jail, the court characterized this work as "well-meaning but misguided * * * given the [indigent defense] crisis at hand."

The court ruled that the "open courts" provision of the Oregon Constitution (Article I, section 10), and the public records law (ORS chapter 192), apply. It concluded that the District Attorney of Washington County, "in its capacity as a representative of the people of the State of Oregon" is entitled to non-exempt public records relating to the public defense crisis.

It observed that OPDC is a "state agency" and a "public body."

It required MPD to produce:

1. Data from November 1, 2024 through present on MPD caseloads and MAC utilization rates for [the staff attorney representing Hemion] and all other individual MPD attorneys (both subject to MAC and not subject to MAC);
2. Data from November 1, 2024 through present on open cases for MPD as a whole and for each individual attorney within MPD,
3. List of criminal cases reported to OPDC for the months of

January, February, and March of 2025 to include "appointed cases," "closed cases," and "open cases."

4. A copy of MPD's current contract for services with OPDC.

ER-58. MPD was to produce this information within the timelines outlined in ORS chapter 192, and without a fee.

MPD filed a motion to reconsider (ER-64), which was heard May 23, 2025. The transcript was not available when the petition was filed that same day before this court. The transcript is at ER-78.

The ED made essentially the same points at the hearing as he made to this court in an affidavit filed on June 3, 2025. In the affidavit, the ED asserted the following five points:

The state's hypothesis and analysis are flawed and false.

First, OECI is well-known to be inaccurate regarding appointed defense counsel on cases, and often does not list the correct attorney.

Second, the state appeared to have included "open" cases from which MPD lawyers had withdrawn, which distorted the data, and inflated the overall number so that the state could then arrive at a lower percentage of "active" cases.

Third, the "audit" is inaccurate. The state knew, or should have

known, that its method for determining open caseloads left out active cases. There are two main components to this: first, any case that is at any point in the fitness-to-proceed system will not show as either "open" or "closed" in OEI. It has a separate designation of "pending fitness to proceed." The second is that probation violation cases always show as "closed" in OEI, even if they are active as probation violations.

Further, the state claimed to have excluded attorneys assigned to specialty courts from the "audit," but the state knows, or should have known, that specialty-court attorneys are not the only attorneys handling probation violations. MPD has felony attorneys who handle downward departure probation violation cases, which would have been excluded from this "audit." Thus a felony attorney handling the DVPV [domestic violence probation violation] rotation could easily have dozens or more cases excluded from this "audit," between fitness-to-proceed cases, and PV's.

The state also presented information on cases either in warrant status, or on "cases do not have court again for months, including trials late in 2025," as similarly positioned in that they both don't have any "active" need for work. This is clearly inaccurate, especially for cases

with a trial date, as defense attorneys are ethically obligated to prepare their cases for trial.

The ED noted that a defense lawyer's caseload is not comparable to a prosecutor's. The state does not have clients, so the state not have ethical obligations to: review all discovery -- including all body camera footage; conduct an independent factual investigation; communicate diligently with clients on factual and legal issues; visit clients at the jail; interview witnesses; consult with experts; and many other tasks. In addition, the ED noted that the state has immunity, but the defense does not. A public defender is ethically obligated to provide all components of representation for each and every client, or risk sanctions from the Oregon State Bar. *See* OSB Formal Opinion 2007-178. Thus, in sum, the state's "audit" is inaccurate and misleading, and does not provide a proper basis for the Circuit Court's April 23 order at issue before this court.

Fourth, the ED asserted that the state opined that MPD wants to keep its data "secret," and "the state seeks only publicly available information." MPD is a non-profit law firm that is not subject to public records law. OJD, WCDAO, and OPDC are all public agencies subject

to public records law. Pursuant to its contract, MPD provides open caseload, closed caseload, and new assignments to OPDC every month. OPDC is in control of the publicly available information that the state seeks in this overreaching request. By contract, MPD is an independent contractor with the State of Oregon, not a public body.

Fifth, the state complained that MPD attorney filed a pleading in Beaverton Municipal Court for a then-current MPD client. However, this action was permitted. MPD's contract with OPDC requires MPD make reasonable efforts to provide vertical representation. The contract specifically allows attorney discretion to handle collateral, yet related, proceedings, *pro bono*, on behalf of an appointed client.

In total, the state referenced, and apparently the court relied upon, four instances where MPD filed a pleading in a case for which MPD was not appointed. In each, MPD indicated it had not been appointed, and the representation was not included as a new or open case, thereby having no impact on the MAC utilization rate with OPDC. Through April 2025, MPD has accepted 9,210 cases in Washington County Adult Court. MPD's MAC utilization rate was 99.75%.

The ED's affidavit, filed in this court, made additional points,

which will be described in the argument.

As noted, during the hearing in Circuit Court on May 23, the ED made generally the same points he made in the June 3 affidavit to this court. The ED was at a conference back east, and he appeared remotely.

The ED argued that after the court directed MPD to destroy the discovery in the two *Bregman* cases, it had no more authority to direct MPD to do anything on those cases. MPD has no relationship with Mr. Bregman. ER-78 (unofficial transcript).

The ED argued that the state had never provided authority to obtain MPD records, and there was no authority. ER-79 Neither the Open Courts provision, nor the PRL, both cited in the court's April 23 order, apply to MPD. ER-80. In addition, the order is overbroad, applying to all the lawyers in both MPD offices, including 30 members of the staff who are funded by one of the grants MPD receives for work outside the contract with OPDC. For example, some MPD staff do eviction defense, and those lawyers are included in the court's April 23 order. ER-81.

The state reiterated its position that it was entitled to the

documents. It also argued that MPD was out of compliance with the court's April 23 order, and therefore, as the court analogized to the PRL, MPD had 15 days to comply. The DA did not object to limiting the order to MPD's Washington County lawyers, who are subject to the OPDC contract. ER-85.

The court re-affirmed its order. It acknowledged that the state never cited the PRL. It emphasized that its ruling was supported by the Open Courts Clause, and it believed that the PRL stemmed from that. ER-86. It noted the importance of transparency:

* * * MPD is the manager and the custodian of those public records that are being brought up as necessary to be provided for purposes of essentially transparency to the public at this critical stage of our public safety or public * * * defense crisis. So to me, whether or not our contract firms are fully up to their contractual obligations is something of both public interest * * * It's the public's business inherently at this point in time.

ER-88.

The ED asked the court -- given its ruling -- to vacate the April 23 order, and to issue a new order with the limitations the DA agreed to (only Washington County staff, and only staff working on the OPDC contract). He noted that doing that would also reset the clock on the mandamus petition, which, otherwise, would be due that day. ER-89.

The court declined to vacate the April 23 order, so the original terms remain in place: "I will just maintain my prior order of the court so that you can go ahead and file your mandamus today." ER-90.

The court also declined to issue a stay. ER-91.

In addition, the court stated that MPD was out of compliance with the April 23 order to produce the records in 15 days. ER-90.

The court issued a written order denying the motion to reconsider. ER-92.

MPD filed the petition for a writ of mandamus that day, May 23, 2025, the 30th day after the April 23 ruling at issue.

On May 27, relator requested a stay from this court, seeking to stay only the order to produce documents, but not seeking a stay for the underlying criminal proceedings.

On May 29, 2025, the state moved for an order in the Circuit Court that MPD be held in contempt, for not producing its internal records as the state had requested in the *Bergman* cases, 15 days from the April 23 order. ER-93. The motion acknowledged that MPD had a pending petition for a writ of mandamus in the *Hemion* case, and a motion for a stay before this court, but noted that MPD had not

included the *Bregman* case in the petition for a writ.

To argue that the *Bregman* case was still in play in Circuit Court, and a stay in *Bregman* had not been sought in this court, the state (selectively) quoted the relator/MPD's reason for the stay in its motion for a stay before this court. The relator had mentioned the proceedings below in the *Bregman* case, but indicated that case has been resolved. The relator stated that it had never represented Mr. Bregman, and the trial court did not have the power to order MPD to turn over documents in that case.

On June 3, 2025, this court issued an alternative writ, and granted the stay. The relator's request for a stay was for the April 23 order to turn over documents in the *Hemion* case (the case before this court) "or in any other case, including the *Bregman* cases." (This language in the request for a stay was omitted by the DA in its May 29 motion for an order to show cause in the Circuit Court.)

This court's stay was "granted as to the trial court's order dated April 23, 2025, requiring relator * * * to provide certain identified data and records. Proceedings in the criminal cases referenced by that order are not stayed. * * *."

Notwithstanding the broad language of this court's stay, the hearing in the *Bregman* case in Circuit Court was not postponed. The first show cause hearing was June 16, 2025. MPD -- not being attorney of record -- did not receive notice, and did not appear. The hearing was reset for July 14, 2025, and MPD was notified. MPD retained counsel. Counsel filed a memorandum, arguing that this court has stayed all document-production orders issued April 23, 2025, including the one in *Bregman*. ER-95. In addition, counsel noted that the trial court did not have the authority to order MPD to do anything in the *Bregman* case, as MPD had no relationship with Mr. Bregman. The court cannot order third parties to act.

On July 14, 2025, the parties assembled in Judge Guptill's courtroom. Although OECI indicates a hearing was "held," the judge ruled from chambers that the matter would be postponed until the ruling from this court on the pending mandamus case. ER-100, ER-104. We expect a minute order is forthcoming. (It is not on OECI as of August 8, 2025.)

Argument.

The trial court's order is not lawful and should be rescinded.

The state does not have legal authority to demand that a particular public defender office provide information about individual lawyers' caseloads and additional internal documents. This is true for many reasons.

The state never cited the Public Records Law, ORS 192.010, *et seq.* Indeed, the state never cited to *any* authority: not a constitutional provision, not a statutory enactment, not an administrative regulation, and not case law. There is no legal authority for the state's request, or for the trial court's order.

The state's argument, in sum, was that the crisis caused by the lack of available lawyers to represent the indigent accused gave the District Attorney of Washington County the power to audit one, albeit the largest, public defender office in Washington County. The state claimed that this audit would show that MPD's statement that it was at maximum capacity was inaccurate, and its resistance to providing its records was to cover up the inaccuracy. In only slightly veiled terms,

the state questioned that its largest zealous adversary was working at capacity.

It is not the District Attorney's role to audit its forensic rival, and when that rival resists, to seek to have it held in contempt. If MPD is not fulfilling its contract with OPDC, the state agency that funds portions of MPD, investigating that would be the role of OPDC.

The state in this case misunderstood its role in the criminal justice system, and the court improperly adopted the state's flawed view. Discovery rules control the flow of information in criminal cases. ORS 135.835. Discovery rules do not authorize the overreach of the state and the court in this matter.

A. OPDC oversees public defense, not the state, not the court.

The Oregon Public Defense Commission (OPDC) creates policy for public defense, and enters contracts with providers as independent contractors, not state employees. The prosecution has no authority over public defense, nor does it have authority over a non-profit law firm. The court does not supervise OPDC, nor the contractors who contract with OPDC to provide public defense legal services. This is the current policy of the State of Oregon.

It has not always been the policy of this state. Prior to 2001, the Oregon judiciary did have responsibility for administering the public defense system. *See, e.g.*, ORS 135.320 (1955); ORS 135.045 (1983). Eventually, it became clear that this structure created an inherent conflict. In 1999, the Oregon Legislature commissioned a study to evaluate the public defense system. Based on the study, the legislature created the Public Defense Services Commission, (then PDSC, now OPDC), to oversee public defense. One purpose was to remove judges from “appoint[ing], evaluat[ing], and approv[ing] the compensation and expenses for attorneys.” Testimony of Barnes Ellis Before the Senate Judiciary Committee on SB 145 and the Proposed -1 Amendments, April 16, 2001, at 4. Creating the PDSC was intended to “consolidate all decisions on expense requests in administrative rather than judicial hands, which should provide greater consistency, control and accountability, and avoid some of the conflicts felt by judges.” *Id.* at 5. PDSC would “assume the current judicial responsibilities and all of the current administrative responsibilities” that were spread among the courts. *See* Testimony of Ann Christian Before the Senate Judiciary Committee on SB 145 and the Proposed -1 Amendments, April 16, 2001,

at 1. The State Court Administrator supported the proposal “because it would eliminate the inherent conflict that presently exists in having the Judicial Department and judges intimately involved in the defense function,” including administrative and budget decisions. *Id.* at 2. The Legislature created the PDSC/OPDC, and its functions and duties.

In sum, the courts used to oversee public defense, but that changed, as a matter of public policy. To spell out the obvious, under the former practice, a public defender might be arguing a motion to suppress in the morning, and that afternoon might be submitting a bill to the same judge for approval. That situation created a conflict for both the judge and the defender. It could cause the defender to be less zealous in the defense, for fear that the bill would be cut by an annoyed judge.

To avoid this difficult, perhaps even unconstitutional, situation, Oregon statutes make it clear that OPDC, not any other entity, oversees public defense and providers. The operative statute, ORS 151.216(6), provides:

“Policies, procedures, standards and guidelines adopted by the commission supersede any conflicting rules, policies or procedures of the Public Defender Committee, State Court Administrator, circuit courts, the Court of Appeals, the Supreme Court and the

Psychiatric Security Review Board, related to the exercise of the commission’s administrative responsibilities under this section and transferred duties, functions and powers as they occur.”

Under Oregon statutes, OPDC has sole authority over the administration of public defense and the providers, who in this state are mostly independent contractors, as is MPD. ORS 151.216(1)(a) provides:

“The Oregon Public Defense Commission shall: Establish and maintain a public defense system that ensures the provision of public defense services consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.”

ORS 151.216(1)(h)(B) provides that OPDC shall:

“adopt policies, procedures and standards and guidelines regarding: The appointment of counsel, including the appointment of counsel at state expense regardless of financial eligibility in juvenile delinquency matters.”

The legislature's desire to keep the public defense system away from the judiciary was reiterated in the 2023 session, with the passage of ORS 151.213(1) (effective in 2025): “The Oregon Public Defense Commission is established in the executive branch of state government.”

MPD is contractually required to submit open caseloads and new

appointments to OPDC by the 20th of every month. OPDC has a verification process for the data it receives from every contractor. Further, OPDC possesses, reviews and monitors this data. OPDC provides the resulting data to the public through their public dashboard. All public defense providers are held to the same standard of transparency and reporting. No other entity has supervisory authority over public defense, or public defense providers.

The state does not have the authority to "audit" the caseloads -- or anything else -- of the public defender. The potential for a judge/defender conflict pales in comparison to the DA/DPD conflict. Those two entities are intense adversaries. A public defender cannot be expected to worry, when the public defender is working for a client, that the DA will "audit" the public defender's actions. Might the public defender be called on the carpet, or even be held in contempt, for resolving a case, *pro bono*, which results in the client getting a better outcome? The DA simply has no authority over a public defender office, nor its employees.

The Oregon Legislature had a very good reason for having public defense be regulated by an entity created to do that very thing, and

nothing else. The trial court's order in this case is far beyond the law, and the underlying public policy, of this state.

B. The Open Courts Clause did not provide the court with legal authority for its April 23, 2025, order.

The trial court's order (although not the state's motion) relied on the Open Courts Clause. That clause has nothing to do with regulating law firms, and is not a valid basis for the order in this case.

Oregon Constitution Article 1, Section 10, commonly referred to as the Open Courts Clause, is within the Oregon Bill of Rights. This section is entitled “Administration of Justice” and reads as follows:

“No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.”

This court has analyzed the meaning and application of the Open Courts Clause in several opinions. In *Doe v. Corp. of Presiding Bishop*, 352 Or 77, 280 P3d 377 (2012), the Court explained: “The open courts clause of the Oregon Constitution thus protects both a litigant’s access to court to obtain legal redress, and the right of members of the public to scrutinize the court’s administration of justice by seeing and hearing the courts in operation.” 352 Or at 93. In analyzing this clause, this

court indicated that “the term ‘court’ in the Oregon Constitution refers to a legally established institution designed and authorized to administer justice.” 352 Or 89. Thus it is clear that a law firm is excluded from the definition of “court” within the Open Courts Clause.

The second component of the Clause requires that court proceedings be open to the public and not be held in “secret.” 352 Or 91. A law firm is not a “court,” and a law firm's client list, caseload information, and data are not within the purview of a “court proceeding.”

This court provided further analysis in *State v. Macbale*, 353 Or 789, 305 P3d 107 (2013). In *Macbale*, this court distilled four main points after a thorough review of the Constitution, case law, and historical legal principles.

First, the Open Courts Clause “does not apply to all aspects of court proceedings.” Second, the Clause “generally prohibits a judicial proceeding from being ‘secret’ (closed to the public).” Third, “open administration of justice” should not be balanced “against the secrecy interest of a particular witness in the case.” Fourth, “judges have always enjoyed broad latitude to control their courtrooms, including

taking such actions as may be necessary to protect vulnerable participants in judicial proceedings, including victims, from harassment or embarrassment.” 353 Or at 806.

Both the plain language of the Open Courts Clause, and the case law, make clear that the provision applies to court functions, and the rules about when the court can exclude the public from a court proceeding. Again, a law firm is not a “court” and a law firm's data, client lists, and caseloads are not “judicial proceedings.” The trial court's reliance on Article I, Section 10, was misplaced. The Open Courts Clause does not provide legal authority for the Court’s unprecedented and overreaching order.

Not only did the trial court lack jurisdiction and authority for its Order, the ruling violates the American Bar Association’s *Ten Principles of a Public Defense Delivery System* (2023), which are based on the Sixth Amendment Right to Counsel of the United States Constitution. Principle One, “Independence” states in part that: “Public Defense Providers and their lawyers should be independent of political influence and subject to judicial authority and review only in the same manner and to the same extent as retained counsel and the

prosecuting agency and its lawyers.” Principle Four, “Data Collection and Transparency” states in part: “To ensure proper funding and compliance with these Principles, states should, in a manner consistent with protecting client confidentiality, collect reliable data on public defense, regularly review such data, and implement necessary improvements.” By the Oregon legislature's design, this data collection task is within the role of OPDC, it is not the role of the courts. MPD provides caseload information to OPDC, not to the courts, and, for even stronger reasons, not to the prosecution.

C. MPD, a non-profit law firm and independent contractor, is not subject to the public records law.

In its order, the trial court analogized to the public records law. The court stated that, consistent with the Open Courts Clause of the Oregon Constitution, “Oregon public records laws provide for the public’s right to inspect public records.” ER-57.

ORS 192.314 provides that “Every person has the right to inspect any public record of a public body in this state * * *.”

ORS 192.311 defines "public body":

“Public body’ includes every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal

corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.”

ORS 192.311(5)(a) defines "public record."

“Public record’ includes any writing that contains information relating to the conduct of the public’s business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.”

MPD is not a public body, and, as a result, it does not prepare, own, use, or retain public records. By contrast, the Oregon Judicial Department, the Washington County DA's office, and OPDC are public bodies with public records. Oregon Public Records Law does not apply to MPD, and reference to the law in the court’s April 23 order is misplaced.

As a practical matter, the statute provides that public records can be obtained by sending a specific written request to the public body. ORS 192.324. In our case, the DA never sent a PRL request to MPD, nor did it mention the PRL in its pleadings.

In addition, the court's order is unlawful even under the PRL. The court's order waives the document production fee. However, the PRL provides that every public body is entitled to charge a fee for producing public records. The public body, in its own discretion, can

decide to reduce the fee if it serves the public interest to do so. ORS 192.324(4), (5). If the requester thinks the denial of a fee waiver is unreasonable, they can petition the AG. ORS 192.324(6). The court has no role to play regarding the document production fee.

In sum, this case was never presented as a PRL case, and the PRL was not followed. The PRL was brought up by the trial judge, without a request by the DA. The court jury-rigged a remedy, because the court was frustrated that there were not enough lawyers available to represent the indigent accused. The court did not follow or rely on any applicable law. It did not appear to consider that its ruling, putting additional stress on the largest provider of public defense in the county, added to the crisis.

i. Some of the requested items are available to the public (including the DA) through a public records request to OPDC.

The trial court ordered the production of four categories of material. It can, almost certainly, obtain categories 3 and 4 from OPDC, a public body. These are:

3. List of criminal cases reported to OPDC for the months of January, February, and March of 2025 to include "appointed cases," "closed cases," and "open cases."

4. A copy of MPD's current contract for services with OPDC.

However, these documents are not subject to disclosure by MPD, because it is not a public body.

D. MPD is not a quasi-public body, such that the PRL could apply.

Some entities are deemed quasi-public agencies, under certain limited circumstance. A public body cannot contract away its obligation to be transparent by delegating its duties to a private entity. However, that is not the situation in our case.

This court has set out a test to determine when an apparently-private entity is quasi-public, and could be subject to the PRL. MPD is not quasi-public under this test. *Marks v. McKenzie High Sch Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994) involved a private fact-finding team to which a school board delegated the power to investigate and report on a high school's operations. A plaintiff seeking records argued that the fact-finding team was a public body because it was commissioned by a school district.

This court concluded that there is no single definition of "public body," and it provided a six-part test. In the *Marks* case, because the team's ultimate report was subject to the PRL through the school board,

and the report was the subject of public interest, the team was not a quasi-public body subject to the PRL.

The relevant factors are these:

(1) The entity's origin (e.g., whether the entity was created by government or had some origin independent of government).

(2) The nature of the function assigned to and performed by the entity (e.g., whether that function is one traditionally associated with government, or is one commonly performed by private entities).

(3) The scope of the authority granted to and exercised by the entity (e.g., does the entity have the authority to make binding governmental decisions, or is it limited to making nonbinding recommendations).

(4) The nature and level of government and financial involvement with the entity. (Financial support may include payment of the entity's members or fees as well as provision of facilities, supplies, and other nonmonetary support.)

(5) The nature and scope of government control over the entity's operation.

(6) The status of the entity's officers and employees (*e.g.*, whether the officers and employees are government officials or government employees).

319 Or at 463 - 64.

This court clarified, however, that “no single factor is either indispensable or dispositive,” and that the “foregoing list is not intended to be exclusive.” 319 Or at 463, n 9. Indeed, “[a]ny factor bearing on the character of the entity and the entity’s relationship with government may be relevant in determining whether that entity is a ‘public body’ subject to the Inspection of Public Records Law.” 319 Or at n 9.

Applying this court's *Marks* test, the Oregon Court of Appeal has instructed that when an entity is functionally a part of a public body, such as a fire department to the city government, it is quasi-public, and is subject to the PRL. *See e.g., Laine v. City of Rockaway Beach*, 134 Or App 655, 896 P2d 1219 (1995). At this other end of the spectrum, entities not found to be quasi-public include the Citizens' Utility Board, Oregon Public Broadcasting, the Oregon Historical Society, and the Oregon Law Foundation. Attorney General's Public Record and

Meetings Manual (2024) (AG Manual) at 4.²

In our case, it is clear that MPD is not a quasi-public body when applying the court's six *Marks* factors.

First, (the entity's origin) MPD is a non-profit law office, with a Board of Directors, which was founded by the private Multnomah County Bar Association, not by the government.

Second, (the entity's function) public defense in Oregon is performed by consortia (private attorneys and sometimes law firms), non-profit law firms, individual private attorneys, and roughly twenty attorneys who work for the state in the OPDC Trial Division that was created within the last few years. Over 90% of public defense is handled by consortia, non-profit law firms, and individual attorneys. Some states have primary models of state or county public defense offices, but Oregon does not. We expect an amicus brief will provide the details about the mechanism used to provide public defense in Oregon.

Third, (authority to make governmental decisions) MPD does not make binding governmental decisions nor recommendations. By

² The AG Manual is available at: <https://www.doj.state.or.us/oregon-department-of-justice/public-records/attorney-generals-public-records-and-meetings-manual/> (last viewed 7/20/25).

contract, MPD is expressly an independent contractor.

Fourth, (the nature and level of government and financial involvement) while OPDC criminal defense work is funded by the government, OPDC's involvement with contractors is limited and specified by contract. OPDC pays MPD, and all contractors, for attorneys, staff investigators, and supervision and training personnel. OPDC further pays a modest administrative fee. In return, MPD and providers agree to represent public defense clients. MPD and providers are required to provide ethical representation, and to adhere to ORPC's requirements. Providers utilize OPDC revenue in the representation of public defense clients. However, providers are not limited to only providing public defense services through OPDC. MPD, like other providers, provide legal services outside of the contract that are not funded by OPDC, as the ED mentioned in his argument to the trial court.

Fifth, (the nature and scope of government control) MPD is independent, and is subject to limited government control. Its lawyers are controlled by the requirements of the Oregon State Bar. OPDC enters into independent contracts to ensure that public defense clients

receive representation. OPDC has no authority or control over MPD's hiring and firing decisions, allocation of resources, rates or methods of payment of salaries and benefits, daily operations, facilities, organizational decision-making, and so on. OPDC has no control over staffing beyond the quantified number of FTE attorneys and investigators, and requirement for support staff.

Sixth, (the status of the entity's officers and employees) MPD officers and employees are not government officials, nor government employees. MPD's Board of Directors are members of the community, and are unpaid. MPD's employees are employed by the non-profit law firm. They receive MPD wages and benefits, not state salaries, not state benefits, and not PERS retirement.

MPD is clearly not a quasi-public body and therefore is not subject to the PRL.

E. In any case, at least one exemption would apply.

ORS 192.355(2) (formerly ORS 192.502(2)) provides an exemption for "information of a personal nature." Data that are eligible for this exemption are subject to a weighing of the public interest against document privacy. The statute provides:

The following public records are exempt from disclosure under ORS 192.311 to 192.478:

* * * * *

(2)(a) Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

ORS 192.355(2).

This exemption's purpose is protection of the privacy of individuals from unreasonable invasion. For example, in *Jordan v. Motor Vehicles Div.*, 308 Or 433, 443, 781 P2d 1203 (1989), this court upheld the MVD decision denying disclosure of an individual driver's home address. In this case, the requestor had been harassing the driver whose address he sought. She established that releasing her address would be an unreasonable invasion of her privacy. The MVD did not show, by clear and convincing evidence, that the public interest required the disclosure. The disclosure was denied.

In our case, disclosure of individual caseloads is very personal. A particular attorney may have a lower caseload for many reasons,

including protected family leave, protected medical leave, protected mental health leave, and personal issues that do not rise to the level of a need to take legally protected leave. Macpherson affidavit, at 7.

Workloads can also be affected by professional issues including but not limited to coaching, work improvement plans, supervision, and professional development. Disclosing a caseload would be an unreasonable invasion of the lawyer's privacy. As the party seeking disclosure, the DA's office has the burden to show that public disclosure of this personal information would not be an unreasonable invasion of privacy. ORS 192.355(2). It has not done so (nor has it even tried to do so).

The DA's request was very personal. The Motion proposed that a specific attorney who had briefly worked on Bregman's cases be removed from those cases (MPD did not object to that), and then, apparently to punish this specific attorney, that he be assigned two other cases on the unrepresented list. The DA's request was targeted, personal, and unreasonable. The court did not allow it, but that is not the point. The DA is seeking, and the court allowed, the DA's request for MPD lawyers' caseloads, and related, information; this request is an

unreasonable invasion of the lawyers' privacy. Other aspects will be described in the next section.

In addition, if an attorney is on a work-improvement plan, the law provides an absolute exemption for personnel discipline records if the discipline did not lead to termination. ORS 192.345(12).

F. The court's order is also bad public policy.

Under the PRL, initially the identity and motive of a person requesting documents is not relevant. However, when evaluating a PRL exemption, the identity and motive of the requestor is relevant when determining the weight of the public interest in disclosure. AG Manual at 1.

i. The prosecutor cannot fairly audit the public defender's workload.

The articulated reason the DA wants to "audit" the public defender is to determine if its lawyers are working to capacity.

We agree that all participants in the criminal justice system, notwithstanding their differing priorities and goals, have an interest in seeing that all participants work efficiently. However, the trial court order will interfere with that goal, not promote it. The trial court designated the DA to represent the public's interest in the efficient

workings of the public defender. There was no legal authority to do so, and the order is bad public policy.

The DA's job is to prosecute criminal accusations in the county; the public defender's job is to defend people against those accusations. The DA is the last entity who can objectively represent the public interest in the general goal of an efficient public defender. The two entities are adversaries. To put it cynically, the DA has a forensic interest in the public defenders doing a job that is constitutionally adequate, but no more. MPD strives to provide ethical and effective representation, and to do better than to achieve minimal competence to avoid a Post-Conviction Relief case. ORS 138.510 *et seq.* The State of Oregon and its citizens are better off with MPD's goal for itself than they would be with the DA's goal for public defense.

There is already an entity in place to oversee the efficiency of MPD: OPDC. It is a neutral agency, whose sole focus is public defense. It has the expertise to evaluate whether MPD is working to capacity. The DA, playing a very different role in the system, does not.

ii. The order implicates client privacy and privilege.

This order, beyond the effect it has on individual lawyers, and

MPD as a firm, implicates the lawyer-client relationship, client confidentiality, and legal ethics.

ORPC 1.6, Confidentiality of Information, provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) [involving information that the client intends to commit a crime, or if the lawyer needs to defend a PCR case, and the like].

While the name of the attorney of record is public in adult criminal cases after the client is charged and arrested, that is not the case with clients who are being represented before they are charged (as the contract permits). The names of the clients MPD represents on a pre-charging basis are often not publicly known, and revealing their name and representation could harm those clients. The privacy of other records could be compromised. The order requires revelation of juvenile clients, and civil clients, such as with eviction-defense representation. While ORPC 1.6 allows a lawyer to reveal a client's name pursuant to a court order, that does not alter the fact that the trial court's order violates privilege in some instances, and implicates confidentiality.

iii. Some of the work MPD does outside the MAC benefits the system.

Some of the work that MPD was criticized for doing has an obvious benefit to the system as a whole. If a defense lawyer spends a short time arranging for an accused person to turn himself in at a particular time, that avoids the taxpayer expense of keeping the person in jail for a day or more. This result benefits not just the individual, but the system, and the taxpayers. It also ensures that the case continues, rather than remaining in limbo, with a active bench warrant.

The contract MPD has with OPDC authorizes limited *pro bono* work, and encourages vertical representation.

iv. The order makes being a public defender even more difficult.

The trial court's order may well exacerbate public defender attrition, and may exacerbate difficulty bringing new lawyers into the public defense system. Being a public defender is difficult work (as the court acknowledged. ER-86). Public defenders are not well paid. The court's order adds a layer of stress: scrutiny of their work-performance by their adversary, and by the court, with no lawful basis. Recruitment and retention are critical, particularly when OJD's data shows that

Washington County public defense-related case filings continue to increase at a rate that is one of the highest in our state.

v. The order goes beyond even its initial rationale.

The state's request is a clear overreach from the issues presented in the state's Motion: first, why did MPD obtain discovery in a case for which it was not appointed, and what is the proper remedy, and second, are MPD lawyers doing *pro bono* work such that it distorts the firm's MAC? The trial court's April 22 order addressed the first issue. The ED addressed the second issue, that is, the lawyers' very limited *pro bono* work benefits current clients, or (very rarely) only benefits the system generally. Most importantly, the *pro bono* work does not distort the lawyers' MAC.

The state is now on a fishing expedition, and the trial court's order improperly authorized this fishing expedition.

This court should note the overbroad scope of the trial court's order. The order requires “data * * * on MPD caseloads and MAC utilization rates for [one specific lawyer] and all other individual MPD attorneys (both subject to MAC and not subject to MAC).” During the motion to reconsider hearing on May 23, 2025, the DA agreed that its

request could be limited to lawyers in the Washington County office, and to those who work under the OPDC contract. After agreeing to the limitation, the court declined to accommodate the limitation by dismissing its April 23 order, and issuing a new order on that day. Thus all the terms of the April 23 order remain in place, including its broad scope.

MPD has six contracts with OPDC: (1) Washington County Adult Criminal; (2) Washington County Juvenile; (3) Multnomah County Adult Criminal; (4) Multnomah County PCRCP [Parent Child Representation Program]; (5) Multnomah County PCRCP Case Manager; and (6) Statewide Homicide contract. MPD has over 100 attorneys. Some MPD attorneys work on specialty court matters, and Early Court Resolution (ECR) cases, which do not count toward MAC. Some MPD attorneys are supervisors, and have reduced caseloads by contract. Some MPD attorneys are grant-funded and do not ever work on OPDC contract cases. The order is beyond the scope of the state's original motion, and it is beyond the trial court's authority.

As noted above, the order also requires two categories of items that the state (or anyone) can obtain through a public records request to

OPDC, a public body.

Mandamus is the only remedy.

The state's request for a non-profit law firm's data, clients, caseloads, and MAC utilization is without a legal basis. The trial court's order is not lawful, as the court did not have jurisdiction to issue the order, and does not have a proper legal basis for it.

A writ of mandamus is the only remedy that will provide complete relief from the relator having to produce data and material neither the state nor the court is entitled to. Oregon Constitution, Article VII (Am), section 2 (* * * the supreme court may, in its own discretion, take original jurisdiction in mandamus * * *), ORS 34.110-.250.

A trial court decision ordering the disclosure of non-disclosable information is subject to review in mandamus precisely because ordinary appeal after disclosure provides an inadequate remedy. *State v. Sacco*, 373 Or 63, 78, 559 P3d 416 (2024) (involving privileged information). Once a communication has been disclosed, the harm cannot be undone, making mandamus an appropriate remedy when a court order erroneously requires disclosure of non-disclosable information. *State ex rel. Or. Health Sci. Univ. v. Haas*, 325 Or 492,

497, 942 P2d 261 (1997).

Conclusion.

The State has made an unprecedented request for the personnel data from an independent contractor, non-profit law firm. The state has tried to leverage MPD's clerical error resulting in MPD receiving discovery for cases (Bregman's) for which it had not been appointed. MPD has no relationship with the *Bregman* cases, and they are not before this court.

What is before this court is the result of the next step the state took. First, the state asserted that MPD should not do any *pro bono* work (even if a little bit of work would be a big benefit to the system). Whether MPD can do this *de minimis* work was not resolved in the trial court. It is authorized by MPD's contract, and does not add to a lawyer's MAC. Second, the DA complained that MPD seeks to represent in Washington County clients who are represented by the Multnomah County office. The state articulated no specific objection to MPD's two offices representing the same client, the situation in the *Hemion* case before this court. That, too, is authorized by the contract.

The pretext of a complaint about MPD doing "unnecessary" work

in the midst of the indigent defense crisis led to the trial court issuing an order that is not based on law, and is bad public policy.

The trial court's order sets a disturbing precedent within our system. The state and the court have combined to overreach and interfere with the public defense function without lawful authority. The order violates principles of independence and separation of powers. Neither the court nor the state has authority to obtain and review individual lawyers and law firms' client lists or caseloads.

For these reasons, relator urges this court to issue a peremptory writ, ordering the trial court to rescind its order for production of documents, dated April 23, 2025.

Respectfully submitted,

s/Laura Graser

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CERTIFICATE OF COMPLIANCE with ORAP 5.05

I certify that this brief complies with the 14,000 word-count limitation in the Oregon Supreme Court, set out in ORAP 5.05 and the word count of this brief is approximately 8,996 words. The type in this brief is 14 point for both the text of the brief and the footnotes, in an approved font.

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