IN THE COURT OF APPEALS OF THE STATE OF OREGON

GREGORY A. CHAIMOV, Plaintiff-Respondent, v. STATE OF OREGON, by and through the Oregon Department of Administrative Services, Defendant-Appellant.	Marion County Circuit Court No. 17CV05043 A169203

RESPONDENT'S MEMORANDUM IN OPPOSITION TO APPELLANT'S EMERGENCY MOTION UNDER ORAP 7.35

Appeal from the Judgment of the Circuit Court for Marion County;
Honorable Audrey J. Broyles, Judge

Ellen F. Rosenblum, OSB #753239
Attorney General
Benjamin Gutman, OSB #160599
Solicitor General
Jona J. Maukonen, OSB #043540
Assistant Attorney-In-Charge
DOJ Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
jona.j.maukonen@doj.state.or.us
Telephone: (503) 378-4402

Attorneys for Plaintiff-Appellant

John DiLorenzo, Jr., OSB #802040
Duane Bosworth, OSB #
Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2400
Portland, Oregon 97201
johndilorenzo@dwt.com
duanebosworth@dwt.com
Telephone: (503) 241-2300

Attorneys for Defendant-Respondent

October 2018

INTRODUCTION

Appellant has filed an Emergency Motion Under ORAP 7.35 seeking an emergency order from this Court (1) reversing the Circuit Court's Order and Judgment Denying a Stay; and (2) issuing an order granting a stay, premised upon factors outlined in ORS 19.350(1), that plainly will have the effect of keeping the Records away from public scrutiny until after the last ballots are cast in the upcoming general election.

ARGUMENT

A. Background

Respondent accepts the facts noted in Appellant's description of the background of the case and adds the following additional facts which were either admitted by Appellant or unrebutted in the trial court. Respondent, Gregory Chaimov, is an attorney who is a member of the Government Relations Practice for the law firm of Davis Wright Tremaine LLP. Since 2010, Mr. Chaimov and his firm have made requests to the Office of the Governor under the public records law to provide copies of Legislative Concept Approval Forms so that they can, in turn, supply the forms to their clients and other interested parties. Their interest in doing so is to assure that their clients, friends and the public at large know how and why their government wishes to change the law.

Since 2010, the Governor's office has provided the Legislative Concept Approval forms pursuant to Mr. Chaimov's request. The forms are numerous and include a large number of proposed legislative changes.

Mr. Chaimov was informed by the Office of the Attorney General that in May of 2018 DAS informed all state agencies that Legislative Concepts "will be temporarily exempt from disclosure [under the public records and law] until Legislative Counsel has submitted Bill drafts to the Governor's Office for final approval (this should be done by November 30, 2018)." That date is well after the November general election.

Unlike the forms used in previous years, the new form states in part: "Although it is expected that agencies will have discussed legislative concept ideas with stakeholders, agencies are directed to treat this document as confidential and privileged and, accordingly, not to share the text of this form outside of state government before legislation is drafted and finalized."

B. This Court should deny Appellant's Motion for Stay pending resolution of the Appeal[1]

This Court should deny Appellant's motion because DAS is not likely to prevail on appeal, and complying with the Circuit Court's Order will not deprive DAS of any attorney client privilege it, in its own words, "believes" it may have in the documents. Moreover, requiring DAS to comply with the Circuit Court's Order will do no harm whatsoever to DAS or the State of Oregon, especially in light of the Attorney General's representation that these very documents will be available for public inspection under the Public Records Law when legislative counsel has completed its Bill drafting services, which date is likely to be November 30, 2018. Finally, although DAS is unable to articulate any particular harm it could possibly incur by complying with the Court's order, a stay of the order, would severely impact the public. DAS does not mention in its motion that the voters of this state will elect a governor on

[1] In its motion, Appellant states: "DAS ***believes that a 14 day temporary stay is in place by virtue of ORS 19.360(1)." That is incorrect. ORS 19.360(1) states that a motion to the Court of Appeals to review a trial court's final order automatically stays entry of judgment for 14 days, "unless the trial court orders otherwise." Here, the trial court went beyond a final order to entry of a judgment and denied a stay. To resolve any uncertainty posed by Appellant's suggestion, counsel addressed a letter to the trial court on October 25, 2018, seeking to confirm that the trial court intended, in denying Defendant's Motion for Stay of Judgment Pending Appeal, to have "ordered otherwise" as referenced in ORS 19.360(1). App-1. This morning, the trial court responded that it expected its denial of Defendant's motion "would fall under the 'unless orders otherwise' language of ORS 19.360. The trial court further clarified that "my intent is that the stay is denied, that the state comply with the 5PM deadline as ordered unless other action is taken by the Court of Appeals." App-2.

November 6 of this year. The withheld documents include 240 legislative concepts, which have been generated by state agencies, and which have been approved by the Governor ("after the Governor's Office review process, the request forms that had been approved by the Governor were transmitted to legislative counsel to begin the drafting process." Emergency Motion 3). Should this Court grant even a temporary stay, it will deprive the voting public of information and insights which could be essential to some in making their electoral choices. If this Court denies the stay, the State will have lost nothing more than approximately 30 days of secrecy.

1. It is unlikely that the State will Prevail on Appeal

ORS 19.350(3)(a) requires this court to consider the likelihood of the appellant prevailing on appeal. As the Court weighs this issue, it should keep in the following rules of construction are applicable:

(a) The exemptions contained within ORS 192.355 are to be construed narrowly because it is well established that the Public Records Law favors disclosure. *Jordan v. Motor Vehicles Division* 308 Or 433, 436-39 (1989); (ii) ORS 192.355 (a), the attorney-client privilege, is itself to be construed narrowly, *State v. Moore* 45 Or App 837, 841-42 (1980); (iii) The State bears the burden of establishing that a record is exempt from disclosure, ORS 192.411; and (iv) "if there is a plausible construction of a statute favoring

disclosure of public records, that is the construction that prevails." *Colby v Gunson* 224 Or App 666, 676 (2008).

If the exception in ORS 192.355(9)(a) (the lawyer client privilege) is not applicable here, the appellant cannot as a matter of law, prevail. There are a number of reasons why the Legislative Concept Forms in the case are not subject to the lawyer-client privilege.

a) There is no Lawyer Client Privilege between Legislative Counsel and Executive Branch Agencies.

First, to be privileged, there must be an intention to keep a document confidential. *State v. Howell*, 56 Or App 6, 10 (1982). That is not the intention here. The Legislative Concepts were expressly intended to be and are acknowledged by the state to have already been shared with certain outside stakeholders. In addition, the forms are ultimately destined for disclosure. This is not a case where a client hands a document to a lawyer, intends it to be kept confidential, and thereafter changes his mind, thereby waiving the privilege. At the time of submission, the agencies which have submitted the forms to the Governor knew that the documents would ultimately be disclosed. *See* acknowledgment in State's Response and Cross Motion, pg. 3 lines 18-21 attached as Appendix 3. ("* * * Plaintiff argues that the forms were only intended to be held exempt from disclosure temporarily—that is, until draft legislation was released publicly. But even assuming, (**as the State does for**

purposes for this motion) that is true; the forms are nevertheless privileged under the circumstance of this case.") (emphasis added).

In addition, review of the forms make clear that all they contain are description of problems identified by agencies and proposed solutions—in other words, the substance of the Legislative Concepts which they are permitted to share with outside stakeholders.

Second, to be privileged there must have been a communication between one of the parties described in OEC 503. In other words, these executive branch agencies must be Legislative Counsel's "client". Only the Attorney General may represent the executive branch agencies unless the statute expressly provides otherwise. *Frohnmayer v. SAIF* 294 Or 570, 577-78 (1983). ORS 173.230 does not expressly authorize legislative counsel to serve as a lawyer to executive branch agencies. Instead, the State argues that the statute by negative implication permits legislative counsel to provide legal representation. But the trial court noted that when the legislature authorizes executive branch agencies to be represented by lawyers other than the Attorney General, the legislature makes that power express.

Although, ORS 173.230(1) imposes a general rule of confidentiality on the Office of Legislative Counsel, the statute has nothing to do with lawyer-client privilege. ORS 173.230 protects any document that is handed to Legislative Counsel in the performance of their duties whenever the party

providing the document deems the document confidential. Because Legislative Counsel obtains information from many sources, but is only the lawyer for the legislature, it is careful not to mislead others into thinking that it is their lawyer. That is why it's disclaimer on every opinion it issues reads:

> The opinions written by the Legislative Counsel * * * are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. ***In performing their duties, the Legislative Counsel * * * ha[s] no authority to provide legal advice to any other person, group or entity.*** For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. ***Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General,*** district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Because Respondent's construction of the exemption is at least plausible, *Colby* requires it be the construction that must prevail because it favors disclosure.

b) The Common Interest is Privilege Can Not Attach Either.

The State maintains that even if Legislative Counsel is not the lawyer for executive agencies, a common interest privilege exists between the legislative branch and the executive branch pursuant to Oregon Evidence Code 503(2)(c) "by the client or the client's lawyer to a lawyer representing another in a manner of common interest."

ORS 173.240 expressly prohibits the Office of Legislative Counsel from assuming an advocacy role with respect to the legislation it authors. It therefore cannot have a common interest with the executive proposer in the legislation itself. And so, the State suggests that the common interest is "in seeing well drafted bills." This cannot be a cognizable common interest. The interest in seeing well drafted bills is an interest that is arguably shared by everyone. *See In re: Primara BlueCross Customer Data Security Breach Litigation* 296 F. Supp. 3d 1230, 1247 (D Or 2017) (requiring reasonable bounds in defining common interests).

C. Even if there were to be a lawyer-client privilege protecting the documents, once invoked, if the holder of the privilege "voluntarily discloses or consents to disclosure of any significant part of the matter or the communication, the privilege is waived."

"Upon disclosure, the privilege is waived as to other communications on the same subject with the same person, and communications on the same subject with other persons." *See* OEC 511. Assuming the Legislative Concept Forms were privileged, permitting state agencies to discuss the concepts with outside stakeholders, has let the cat out of the bag. The State cannot inoculate a waiver of privilege by attaching a stamp or disclaimer on documents which it thereupon sends to a lawyer. This waiver has occurred repeatedly over the years as the Legislative Concept Forms have been disclosed to Mr. Chaimov by the Governor's office, all with the exception of this year.

2. The appeal must be taken in good faith and not for reasons of delay.

DAS has made this motion knowing that, if it prevails, it will deprive the voting public of their right to know what legislative changes the current administration has planned for them. Were there not a pending election, the equities might be slightly different. But in this case, withholding the documents means that any eventual disclosure will be of much less benefit to the public; the voters will be unable to act upon them.

3. The balance of harm weighs in favor of denial of the stay.

The State makes much of its claim that "disclosure of the documents cannot be undone. Emergency Motion 12. DAS speaks as if it is harmed by letting the public know what the government intends to advocate in the upcoming legislative assembly. These legislative concepts are not trade secrets, they are legislative proposals approved by the governor, which DAS seeks to withhold from the people. Other than it's conclusory suggestions, DAS articulates no specific harm associated with adherence to the Circuit Court's order other than (1) the potential for mooting its appeal; and (2) constraining its ability to "capture policy ideas of the agencies." [2]

(1) Compliance with the court order will not moot the appeal.

[2] The argument must be that if the Records are disclosed before November 30, 2018, the agencies will be so constrained. There was no evidence of this in the trial court record.

Oregon law does not require that records released pursuant to the state public records law, lose their privilege in subsequent actions merely because they were disclosed. ORS 192.335(2); *see also* ORS 40.225(7). Should the State be forced to disclose records which it claims are privileged, and should that claim later be vindicated on appeal, those documents will remain privileged regardless of their disclosure. *Id.*

Defendant claims that, unless a stay is issued in this matter, it will be denied its appellate rights because the case will be moot once the records are released. That simply is not true. While the records will be publicly available, they will not pose any legal risk to the State because, that privilege will endure throughout the appellate process and prevent those records from becoming evidence in any subsequent proceeding. Thus, the State will incur no legal harm.

(2) DAS's plan to make the Legislative Concept Forms available to the public after November 30, 2018 completely negates the need for a stay. The state's request for a stay is pointless because, according to the Attorney General, the "temporary exemption" only lasts until draft legislation is completed. That is likely to be November 30, 2018.

"* * *DAS informed all state agencies that legislative concepts "will be temporally exempt from disclosure until Legislative Counsel has submitted bill drafts to the Governor's Office for final approval (this should be done by

November 30, 2018).” Letter from Frederick M. Boss to Gregory Chaimov, August 28, 2018, pg.3, Motion, Att-10.

Because the “temporary exemption” only lasts till November 30, there seems little harm that DAS could possibly incur over the next month caused by its compliance with the trial court’s order.

(3) The Equities Favor Disclosure

The trial court’s order in this case is equivalent to a mandatory injunction. It was issued out of great necessity because, as the court explained, the records are of “significant public interest.” Paris Achen, *Judge orders release of secret legislative proposals*, PORTLAND TRIBUNE (Oct. 24, 2018), https://portlandtribune.com/pt/9-news/410169-309978-judge-orders-release-of-secret-legislative-proposals. Indeed, the public’s interest in transparency from this government is manifest, especially concerning availability of information in advance of an election. *See* Betsy Hammond, *Oregon schools chief reverses: School performance ratings released on time*, The Oregonian (Oct. 24, 2018), https://www.oregonlive.com/education/index.ssf/2018/10/oregon_schools_chief_reverses.html. There should be no doubt, as there was not for the trial court, that the public’s interest in seeing these records disclosed is significant.

When weighing the equities in this case, the court’s balancing should also be informed by the statutory and case law explaining that when the public interest in disclosure is balanced with the government’s interest in

confidentiality, the public interest should control. *Jordan v. Motor Vehicles Division*, 308 Or 433 (1989); *see also Colby v. Gunson*, 224 Or App 666, 676 (2008). The Public Records Law is a disclosure law, not a confidentiality law. Indeed, the entire statutory system for public records requests is substantially concerned with the public interest. *Turner v. Reed*, 22 Or App 177, 187 (1975) (citing examples). Thus, when considering the balance of equities in this case, the court should undoubtedly favor the public interest.

CONCLUSION

For the foregoing reasons, the court should deny Defendant's Emergency Motion for Temporary Stay or Permanent Stay.

Dated this 26th day of October, 2018.

DAVIS WRIGHT TREMAINE LLP

By: s/ John DiLorenzo, Jr.
John DiLorenzo, Jr., OSB #802040
Duane Bosworth, OSB #023528

Attorneys for Defendant-Respondent

INDEX OF APPENDIX

10/25/2018 4:30 PM
18CV39159

Davis Wright Tremaine LLP

Suite 2400
1300 SW 5th Avenue
Portland, Oregon 97201

John A. DiLorenzo, Jr.
503.778.5216 tel
503.276.5716 fax

johndilorenzo@dwt.com

Admitted in Oregon,
New York & Washington D.C.

October 25, 2018

Via Facsimile (503) 589-3266 &
Email - megan.e.curry@ojd.state.or.us

Honorable Audrey J. Broyles
Marion County Courthouse
100 High St. NE, Courtroom 4C
Salem, Oregon 97309

Re: *Chaimov v. State of Oregon*; Case No. 18CV39159

Dear Judge Broyles:

This morning, you entered an order and a judgment requiring the defendant in this case to deliver the Public Records at issue to counsel for the plaintiff on or before Friday, October 26 at 5pm. The Defendant has filed a Notice Of Appeal and an Emergency Motion for Stay under ORAP 7.35. In the motion, the defendant suggests that a 14 day temporary stay of judgment is automatically in effect upon filing of the Notice of Appeal.

ORS 19.360(1) provides, in part, that any party aggrieved by *** the trial court's grant or denial of a stay or the terms and conditions imposed by the trial court on the granting of a stay may seek review of the trial court's decision by filing a motion in the appellate court to which the appeal is made. The motion must be filed within 14 days after the entry of the trial court's order. During the 14-day period after the entry of the trial court's order, the judgment shall automatically be stayed unless the trial court orders otherwise. The trial court may impose terms or conditions on the stay or take such other action as may be necessary to prevent prejudice to the parties.

ORS 19.360(1) states that a motion to the Court of Appeals to review a trial court's final ORDER automatically stays entry of judgment for 14 days, "unless the trial court orders otherwise." Plaintiff understands that you went beyond a final order to entry of a judgment and denied a stay.

Plaintiff writes to confirm that you have intended, in denying Defendant's Motion for Stay of Judgment Pending Appeal, already "ordered otherwise" as referenced in ORS 19.360(1).

We would appreciate hearing back from you at your earliest convenience to help clarify this matter.

Very truly yours,

Davis Wright Tremaine LLP

John DiLorenzo, Jr.

JAD/mq

cc: Sarah Weston
Carla Scott
Benjamin Gutman
Denise G. Fjordbeck
James W. Nass

DiLorenzo, John

From: Megan.E.CURRY@ojd.state.or.us
Sent: Friday, October 26, 2018 8:42 AM
To: DiLorenzo, John
Cc: Scott Carla A (carla.a.scott@doj.state.or.us); Weston Sarah
Subject: Re: Chaimov v. DAS

Good morning all,

Here is a message from Judge Broyles regarding Mr. DiLorenzo's letter to the court.

Megan, please forward this to counsel.

My ruling on Wednesday was both a denial of the state's motion for summary judgment and a denial of their motion to stay pending appeal. I thought that was clear given the nature of this proceeding. I expect this ruling would fall under the 'unless orders otherwise' language of ORS 19.360. If there are any additional findings this court needs to formally make to support my intent then I'll ask counsel to provide that. If not, my intent is that the stay is denied, that the state comply with the 5PM deadline as ordered unless other action is taken by the Court of Appeals. Thank you.

Audrey J. Broyles
Marion County Circuit Court Judge

Megan Curry
Judicial Assistant
Hon. Audrey J. Broyles
PO Box 12869
Salem OR 97309
(503) 588-5492

"DiLorenzo, John" ---10/25/2018 04:30:09 PM---Hello Megan, Would you be so kind as to show this to Judge Broyles at your earliest convenience? Th

From: "DiLorenzo, John" <johndilorenzo@dwt.com>
To: "Megan.E.CURRY@ojd.state.or.us" <Megan.E.CURRY@ojd.state.or.us>
Cc: Weston Sarah <Sarah.Weston@doj.state.or.us>, "Scott Carla A (carla.a.scott@doj.state.or.us)" <carla.a.scott@doj.state.or.us>
Date: 10/25/2018 04:30 PM
Subject: Chaimov v. DAS

Hello Megan,
Would you be so kind as to show this to Judge Broyles at your earliest convenience? Thanks.

John DiLorenzo | Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2400 | Portland, OR 97201
Tel: (503) 778-5216 | Fax: (503) 276-5716 | Mobile: (503) 704-5162
Email: johndilorenzo@dwt.com | Website: www.dwt.com
Bio: www.dwt.com/people/JohnADiLorenzoJr

Anchorage | Bellevue | Los Angeles | New York | Portland | San Francisco | Seattle | Washington, D.C.
[attachment "1509_001.pdf" deleted by Megan E CURRY/MAR/OJD]

other records pertinent to agency legislative concepts, such as internal agency emails about "whether to pursue a particular legislative change" or why a change might or might not be desirable. *See* Compl. Ex. 10 at 4.

Upholding the privilege in this case thus does not deprive the public of the ability to learn about policy proposals in general. Indeed, any member of the public — including plaintiff and members of the media — are free to discover Executive Branch policy proposals through *nonprivileged* communications, like emails about policy topics between policy staff, or by simply calling agencies' public information officers and asking. Further, any actual bill that the Executive Branch files with the legislature for consideration will of course be public, and indeed, readily available on the internet.

In brief, the Court should uphold DAS's claim of exemption in this case because the Request Forms at issue in this case are confidential communications, to facilitate the provision of legal services, between the Executive Branch and the lawyers of the office of Legislative Counsel. They thus satisfy the definition of privileged communications. Plaintiff's arguments to the contrary are unavailing. The Court should reject plaintiff's efforts to transform this straightforward inquiry into a wide-ranging exploration of other statutory and constitutional questions that are not necessary to the privilege determination the Court needs to make.

First, plaintiff argues that the forms were only intended to be held exempt from disclosure temporarily – that is, until draft legislation was released publically. But even assuming (as the State does for purposes of this motion) that is true, the forms are nevertheless privileged under the circumstances of this case. Oregon law allows agencies to disclose materials in response to public records requests without waiving privilege. In that context, the fact that the agencies contemplated potentially providing the Request Forms in response to a public records request, if one was received, after the corresponding draft legislation prepared by Legislative Counsel had been released does not vitiate the privilege.

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on the 26th day of October, 2018, I filed the foregoing **RESPONDENT'S MEMORANDUM IN OPPOSITION TO APPELLANT'S EMERGENCY MOTION UNDER ORAP 7.35** with the State Court Administrator by using the Court's electronic filing system, to be served on the following electronically:

Ellen F. Rosenblum, OSB #753239
Attorney General
Benjamin Gutman, OSB #160599
Solicitor General
Jona J. Maukonen, OSB #043540
Assistant Attorney-In-Charge
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Jona.j.maukonen@doj.state.or.us
Telephone: (503) 378-4402

Attorneys for Plaintiff-Appellant

By: s/ John DiLorenzo, Jr.
John DiLorenzo, Jr., OSB #802040
Duane Bosworth, OSB #023528

Attorneys for Defendant-Respondent