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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

**OREGON PSYCHIATRIC SECURITY
REVIEW BOARD,**

Plaintiff,

vs.

**MALHEUR MEDIA, LLC, an Oregon
limited liability company, and LES
ZAITZ, an individual,**

Defendants.

Case No.

**COMPLAINT
Declaratory Relief/Public Records**

**(FEES: Ch. 595, § 8(2)(g), Oregon
Laws (2011))**

**Not Subject to Mandatory
Arbitration**

Plaintiff, Oregon Psychiatric Security Review Board (“PSRB”), alleges:

PARTIES

1.

PSRB is a “public body” pursuant to ORS 192.410(3).

2.

Under ORS 161.327, PSRB is one of the state agencies charged with supervising the release of certain individuals found guilty except for insanity. It protects the public by working with other agencies to ensure persons under its jurisdiction receive the necessary services and support to reduce the risk of future dangerous behavior.

3.

ORS chapter 161 provides PSRB with authority to conduct a hearing to determine whether an individual under its jurisdiction “[i]s no longer affected by mental disease or defect” and, if not, order the individual released from PSRB jurisdiction. ORS 161.341; ORS 161.346; ORS 161.351.

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4.

Defendant Malheur Media, LLC, is an Oregon limited liability company. Its principal place of business is located in Vale, Oregon.

5.

The Malheur Enterprise is a weekly news publication and an assumed business name of Defendant Malheur Media, LLC.

6.

Defendant Les Zaitz is the editor and publisher of the Malheur Enterprise.

JURISDICTION AND VENUE

7.

The Circuit Court for Marion County has subject matter jurisdiction pursuant to ORS 192.450, ORS 192.490, and ORS 28.010.

8.

Venue is proper in the Circuit Court for Marion County pursuant to ORS 192.450(2).

HISTORICAL BACKGROUND

9.

At the request of the Oregon State Hospital under ORS 161.341(1), on December 7, 2016, PSRB conducted a hearing, pursuant to ORS 161.346, to determine if it should order Anthony Montwheeler, a patient committed to the state hospital administered by the Oregon Health Authority (“OHA”), released.

10.

On December 7, 2016, PSRB announced its findings on the record and directed OHA to release Anthony Montwheeler as a patient from the state hospital. A written order was subsequently signed on December 15, 2016.

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11.

OHA complied with PSRB's order and released Montwheeler.

12.

After his release, Montwheeler was arrested and charged with murder, kidnapping, and assault.

MATERIAL FACTS

13.

On January 17, 2016, Defendant Les Zaitz submitted a public records disclosure request to PSRB. The request contained the Malheur Enterprise letterhead and was signed by Zaitz in his capacity as the editor and publisher of the Enterprise. In the request, Zaitz stated, "I ask for an electronic copy of records in the possession and control of the Oregon Psychiatric Review Board regarding ANTHONY MONTWHEELER."

14.

On January 24, 2016, Zaitz made a supplemental request for additional "records in the possession and control of the Oregon Psychiatric Review Board regarding ANTHONY MONTWHEELER."

For the purposes of this Complaint, both the first request and the supplemental request collectively are referred to as "the Enterprise's Request" and records responsive to the Enterprise's Request as "Requested Records."

15.

On January 20, 2017, PSRB responded in writing only to Zaitz's original public records disclosure request. On February 6, 2017, PSRB responded in writing to the entirety of the Enterprise's Request. In those responses, PSRB granted in part and denied in part the Enterprise's Request. Pursuant to its response, PSRB provided defendants with a complete audio record of PSRB's December 7, 2016, hearing concerning Anthony Montwheeler; as well as Exhibits 3, 19, 24, 29, 39, 43, 49, 54, 61, 65, 84, 86, 93, 125

1 (redacted), 136, 179, and 221 from that hearing. PSRB declined to release certain records
2 such as Oregon State Hospital patient records and clinical records by private physicians.

3 16.

4 On February 8, 2017, Zaitz petitioned the Oregon Attorney General (the
5 “Enterprise’s Petition”), pursuant to ORS 192.450(1), seeking a review of PSRB’s denial
6 of the Enterprise’s Request and an order directing PSRB to disclose Exhibits 10, 13, 38,
7 105, 113, 125, 139, 146, 184, 192, 197, 207, 212, 220, and 225, from the December 7,
8 2016, hearing.

9 17.

10 On March 15, 2017, the Attorney General issued a Public Records Order (the
11 “Order”) granting the Enterprise’s Petition, in part, and denying the petition, in part. The
12 Order stated that certain records are not exempt from disclosure and ordered PSRB to
13 disclose those records within seven days (“Undisclosed Records”).

14 18.

15 On March 21, 2017, the Attorney General issued a letter supplementing the Order.
16 In the letter, the Attorney General described its reasoning for requiring disclosure of the
17 Undisclosed Records.

18 19.

19 On March 22, 2017, and pursuant to 192.450(2), PSRB gave timely and proper
20 written notice to the Attorney General, Defendant Malheur Media, LLC, and Defendant
21 Les Zaitz, of PSRB’s intention to institute proceedings in the Circuit Court for Marion
22 County seeking relief from the Attorney General’s Order.

23 **JUSTICIABLE CONTROVERSY**

24 20.

25 Defendant Zaitz asserts that “there is a substantial public interest in learning how
26 the [S]tate of Oregon discharged its duty to public safety in managing Mr. Montwheeler”

1 and that immediate disclosure of the Undisclosed Records would serve that public
2 interest. PSRB asserts that disclosure of the Undisclosed Records immediately and
3 unreasonably will invade the privacy of Anthony Montwheeler as a patient of the state
4 hospital.

5 21.

6 PSRB also asserts that various federal and state laws safeguard the privacy of
7 medical patients, because non-consensual invasions of patients' privacy, as that required
8 by the Attorney General's Order, injures patients by reducing the quality of health care
9 for patients whose privacy is invaded; by undermining their confidence that their health-
10 care providers will keep confidential all aspects of the patients' diagnoses and treatment;
11 and by making them vulnerable to the potential loss of a job, alienation of family and
12 friends, loss of health insurance, or public humiliation. The Oregon Public Records
13 Law protects against such harms by exempting patient records from disclosure.

14 22.

15 This Complaint presents a justiciable controversy in that defendants contend they
16 are entitled under the Public Records Law to disclosure of the Undisclosed Records, and
17 PSRB contends that the Undisclosed Records are exempt from disclosure.

18 CLAIMS OF EXEMPTIONS

19 FIRST CLAIM OF EXEMPTION - ORS 192.502(10)

20 TRANSFERRED OREGON HEALTH AUTHORITY CONFIDENTIAL PATIENT RECORDS

21 23.

22 The allegations of paragraphs 1 - 22 of this Complaint are incorporated by
23 reference herein.

24 24.

25 ORS 192.502(10) exempts from compelled disclosure information "furnished by
26 the public body originally compiling, preparing, or receiving them to any other public

1 body * * * if the considerations originally giving rise to the confidential or exempt nature
2 of the public records or information remain applicable.”

3 25.

4 The Undisclosed Records were compiled and prepared by OHA.

5 26.

6 The Undisclosed Records are confidential and exempt in the hands of OHA due to
7 considerations related to medical patient privacy and the physician-patient privilege.

8 27.

9 The needs to protect medical patient privacy and to protect the physician-patient
10 privilege remain applicable when a patient is brought before PSRB.

11 28.

12 ORS 192.502(10) exempts the Requested Records from compulsory public
13 disclosure.

14 **SECOND CLAIM OF EXEMPTION - ORS 192.502(9) AND ORS 179.505(14)**

15 **CONFIDENTIAL PATIENT RECORDS**

16 29.

17 The allegations of paragraphs 1 - 22 of this Complaint are incorporated by
18 reference herein.

19 30.

20 ORS 192.502(9) exempts from compelled disclosure “[p]ublic records or
21 information the disclosure of which is prohibited or restricted or otherwise made
22 confidential * * * under Oregon law.”

23 31.

24 ORS 179.505(14) prohibits disclosure of patient records by persons other than the
25 patient “who are granted access [to those records] under this section.”
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32.

ORS 179.505(2) prohibits all disclosures of patient records, but grants access to those records “as provided in [certain subsections] of this section or * * * or by state or federal law or by order of the court.”

33.

PSRB is granted access to the Undisclosed Records as provided under ORS 161.346 and ORS 179.505(11).

34.

ORS 192.505(9) and ORS 179.505(14) exempt the Undisclosed Records from compulsory public disclosure.

THIRD CLAIM OF EXEMPTION - ORS 192.502(1)
COMMUNICATIONS BETWEEN PUBLIC BODIES

35.

The allegations of paragraphs 1 - 22 of this Complaint are incorporated by reference herein.

36.

ORS 192.502(1) exempts “[c]ommunications * * * between public bodies of an advisory nature to the extent they cover other than purely factual materials and are preliminary to any final agency * * * action.”

37.

The Undisclosed Records represent communications between PSRB and OHA.

38.

The Undisclosed Records contain advice from OHA concerning PSRB’s action related to Anthony Montwheeler.

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39.

The public interest in encouraging an uninhibited exchange of complete and accurate information between PSRB and OHA, about patients under PSRB's jurisdiction, far outweighs the public interest in disclosure of the Undisclosed Records.

FOURTH CLAIM OF EXEMPTION - ORS 192.502(9) AND ORS 40.235

PRIVILEGED RECORDS

40.

The allegations of paragraphs 1 - 22 of this Complaint are incorporated by reference herein.

41.

ORS 192.502(9) exempts from compelled disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made * * * privileged under Oregon law."

42.

ORS 40.235 makes confidential communications between a physician and patient privileged, and prohibits their disclosure.

43.

The Undisclosed Records contain confidential communications, or information directly attributable to confidential communications, between Anthony Montwheeler and various physicians.

44.

Montwheeler has not waived the physician-patient privilege.

45.

ORS 192.502(9) and ORS 40.235 exempt the Undisclosed Records from compulsory public disclosure.

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FIFTH CLAIM OF EXEMPTION - ORS 192.502(2)

PERSONAL PRIVACY

46.

The allegations of paragraphs 1 - 22 of this Complaint are incorporated by reference herein.

47.

ORS 192.502(2) exempts from compelled public disclosure:

“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.”

48.

The Undisclosed Records reveal, directly or by inference, medical information of a patient of the state hospital. Such information is “of a personal nature” for purposes of ORS 192.502(2).

49.

The compelled public disclosure by PSRB of information related to a patient who received medical care at the Oregon State Hospital constitutes an unreasonable invasion of the patient’s privacy, and no clear and convincing evidence requires disclosure of such personal medical information in this particular instance.

SIXTH CLAIM OF EXEMPTION - ORS 192.496

MEDICAL RECORDS

50.

The allegations of paragraphs 1 - 22 of this Complaint are incorporated by reference herein.

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51.

ORS 192.496 exempts from compelled public disclosure:

“Records less than 75 years old which contain information about the physical or mental health or psychiatric care or treatment of a living individual, if the public disclosure thereof would constitute an unreasonable invasion of privacy.”

52.

The Undisclosed Records are less than 75 years old and contain information about the physical or mental health or psychiatric care or treatment of a patient of the state hospital. Specifically, the Undisclosed Records disclose information concerning Anthony Montwheeler’s care or treatment for a health condition.

53.

The public disclosure by PSRB of information concerning medical care or treatment of a patient of the state hospital is an unreasonable invasion of the patient’s privacy. The public interest does not require disclosure of personal medical information.

PRAYER FOR RELIEF

WHEREFORE, PSRB prays for judgment as follows:

- A. Declaring that the Requested Records are exempt from disclosure as detailed in the First, Second, Third, Fourth, Fifth, and Sixth Claims of Exemption;
- B. For its costs and disbursements authorized by law; and

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C. For such further and additional relief as this court deems just and proper.

DATED this 29th day of March, 2017.

HARRANG LONG GARY RUDNICK P.C.

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