

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

PEOPLE FOR THE ETHICAL
TREATMENT OF ANIMALS, INC., a non-
profit public benefit corporation,

Plaintiff,

v.

OREGON HEALTH & SCIENCE
UNIVERSITY, a public corporation,

Defendant.

Case No.

**COMPLAINT FOR VIOLATIONS OF
OREGON PUBLIC RECORDS LAW
AND DECLARATORY AND
INJUNCTIVE RELIEF**

**NOT SUBJECT TO MANDATORY
ARBITRATION**

ORS 21.135(2)(a): \$265

Plaintiff People for the Ethical Treatment of Animals, Inc. (“PETA”) brings this
Complaint for declaratory and injunctive relief against Defendant Oregon Health & Science
University (“OHSU”) for violations of the Oregon Public Records Law (“OPRL”), ORS 192.311
et seq. PETA alleges as follows:

INTRODUCTION

1.

OHSU is home to The Oregon National Primate Research Center (“ONPRC”), one of
seven federally funded “National Primate Research Centers” in the United States. OHSU houses
approximately 5,000 non-human primates to support its research activities. Since the beginning

1 of 2017, OHSU has received 12 documented violations of the federal Animal Welfare Act,
2 including six “critical” violations, more than any other university in the United States. OHSU’s
3 violations have included, *inter alia*, failure to clean and/or sanitize its facilities, causing injury to
4 monkeys from faulty equipment, and failure to provide adequate veterinary care to the animals.

5
6 2.

7 This is a civil action brought pursuant to ORS 192.415(1)(b) to compel the production of
8 public records, most of which relate to maternal nutrition experiments conducted on mother-
9 infant or mother-juvenile pairs of monkeys, and experiments relating to self-injurious behavior, a
10 behavior that is common in monkeys in laboratories who are typically confined to small cages
11 that restrict their natural behaviors and social structures. In particular, Plaintiff seeks
12 videographic records of monkeys subjected to these experiments conducted at ONPRC under
13 two publicly-funded National Institutes of Health (“NIH”) grants.

14
15 **PARTIES**

16
17 3.

18 Plaintiff PETA is a not-for-profit public interest corporation formed under the laws of
19 Virginia and registered with the State of Oregon to conduct business as a foreign non-profit
20 corporation. PETA is dedicated to protecting animals, including those used in experimentation,
21 from abuse, neglect, and cruelty. PETA undertakes these efforts through, *inter alia*, news
22 dissemination campaigns, cruelty investigations, animal rescue, legislation, public education
23 efforts, and protest campaigns.

24 //

25 //

26
PAGE 2 – COMPLAINT FOR VIOLATIONS OF OREGON PUBLIC RECORDS LAW AND
DECLARATORY AND INJUNCTIVE RELIEF

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

4.

Defendant OHSU is a public corporation located in Multnomah County, Oregon.
Defendant is subject to the OPRL pursuant to ORS 353.100(1).

JURISDICTION AND VENUE

5.

The Court has subject matter jurisdiction pursuant to ORS 192.411, ORS 192.415, and
ORS 192.431.

6.

Venue is proper in the Multnomah County Circuit Court pursuant to ORS 192.415(1)(b)
because Defendant is located in Multnomah County.

OREGON'S PUBLIC RECORDS LAW

7.

Under the OPRL's statutory scheme, "disclosure is the rule." *Guard Pub. Co. v. Lane
County School Dist. No. 4J*, 310 Or 32, 37 (1990). The OPRL embodies Oregon's "strong and
enduring policy that public records and governmental activities be open to the public." *Jordan v.
Motor Vehicles Div., State of Or.*, 308 Or 433, 438 (1989).

8.

Under this framework, "[e]very person has a right to inspect any public record of a public
body in this state," to the extent that the records are not otherwise exempt pursuant to other
provisions of the OPRL. ORS 192.314(1). The OPRL defines "public record" as "any writing
that contains information relating to the conduct of the public's business . . . prepared, owned,
used or retained by a public body regardless of physical form or characteristics." ORS

1 192.311(5)(a). “Writing” is defined to include, in relevant part, “photographing and every means
2 of recording letters, words, pictures, sounds, or symbols, or combination thereof, and all papers,
3 maps, files, facsimiles or electronic recordings.” ORS 192.311(7).

4 9.

5 A public body must respond to written public records requests “as soon as practicable and
6 without unreasonable delay.” ORS 192.329(2)(a). The public body must also “separate the
7 exempt and nonexempt material and make the nonexempt material available for examination.”
8 ORS 192.338.
9

10 10.

11 The OPRL incorporates a number of exemptions, which are narrowly construed. The
12 public body asserting an exemption bears the burden of sustaining the exemption’s applicability
13 on appeal.
14

15 11.

16 ORS 192.345 codifies a series of conditional exemptions that protect certain public
17 records from disclosure, “unless the public interest requires disclosure in the particular instance.”

18 12.

19 One such conditional exemption covers “[w]ritings prepared by or under the direction of
20 faculty of public educational institutions, in connection with research, until publicly released,
21 copyrighted or patented.” ORS 192.345(14). This exemption is “designed primarily to protect
22 public educational institutions from piracy of research ideas and data collected by faculty
23 members.” Oregon Department of Justice, *Attorney General’s Public Records and Meetings*
24 *Manual* at 53 (Nov. 2014) (internal quotation marks omitted).
25

1 **FACTUAL BACKGROUND**

2 **I. OHSU’s Violations of the Federal Animal Welfare Act**

3 13.

4 OHSU has a lengthy history of violations of the federal Animal Welfare Act (“AWA”),
5 which imposes minimal standards of care on research facilities and requires annual inspections
6 by the U.S. Department of Agriculture’s Animal and Plant Health Inspection Service. According
7 to federal inspection records, in 2018 OHSU had more violations of the AWA than any other
8 university in the United States.
9

10 14.

11 OHSU’s violations of the AWA include, *inter alia*:

- 12 • Failure to properly secure a non-human primate enclosure that resulted in the
13 euthanasia of the animal after he became tangled in the PVC pipes of a resting
14 perch.
- 15 • Failure to properly secure a non-human primate enclosure that resulted in a
16 juvenile becoming trapped behind wall-hung cages, resulting in the animal’s
17 death.
- 18 • Negligent administration of an incorrect dose of insulin to two non-human
19 primates that resulted in the death of one animal.
- 20 • Failure to maintain or construct primary enclosures to protect non-human
21 primates that resulted in the death of a monkey when he became tangled in a
22 chain attached to an enrichment device. This violation resulted in the USDA
23 issuing an Official Warning to OHSU.
- 24 • Failure to abide by the approved Institutional Animal Care and Use Committee
25 (“IACUC”) protocol in giving a macaque six subcutaneous injections of an
26 experimental substance where only one intramuscular injection was called for in
the protocol, resulting in the development of “necrotic lesions” on the animal.
- Failure to maintain programs of adequate veterinary care that resulted in multiple
deaths and serious health issues as follows: (1) a female Japanese macaque
monkey died while under anesthesia because the machine was not operated

1 properly; (2) twenty-one rhesus macaques were hospitalized and six animals died
2 or were euthanized as a result of injuries sustained through fighting; and (3) more
3 than 50% of rhesus macaques at OHSU were determined to have “significant,
4 non-pruritic hair loss”. These violations resulted in the USDA issuing an Official
5 Warning to OHSU.

- 6 • Use of electric heating pads on two non-human primates outside of an approved
7 IACUC protocol, resulting in burns to the two animals.
- 8 • Failing to secure and maintain non-human primate enclosures, resulting in the
9 escape of nine monkeys; failing to review and approve proposed significant
10 changes regarding care and use of animals, resulting in the death of two macaques
11 following the administration of unapproved compounds; failing to ensure that all
12 personnel involved in animal care or use were qualified to perform their duties,
13 resulting in the death of a macaque following improper sedation and monitoring;
14 and failing to provide sufficient water, resulting in the deaths of two macaques.
15 USDA assessed OHSU a penalty of \$11,679 for these violations, a type of
16 enforcement action reserved by the agency for the most egregious Animal
17 Welfare Act violations.

18 15.

19 Due to OHSU’s lengthy and continuing history of AWA violations, PETA and other
20 members of the public take particular interest in OHSU’s experiments on animals and in
21 monitoring OHSU’s non-compliance with federal law. PETA routinely disseminates information
22 about OHSU’s experiments and AWA violations to the general public and representatives of the
23 news media.

24 **II. PETA’s Public Records Request**

25 16.

26 On November 6, 2017, PETA submitted a public records request under the OPRL to
OHSU via e-mail to its Legal Counsel. PETA’s request sought the following:

- For the period of January 1, 2014 through November 6, 2017—all videographic records related to experiments carried out at OHSU’s Oregon National Primate Research Center by OHSU faculty member, Dr. Elinor Sullivan (Department of Human Physiology) and carried out by or for the following scientists based at other institutions: Dr. Ansgar

1 Brambrink (now at Columbia University), Dr. Melinda Novak (at the University of
2 Massachusetts-Amherst), and Dr. Jerrold Meyer (also at the University of Massachusetts-
3 Amherst); and funded by any of the following National Institutes of Health grants:
4 R01MH107508 (“Developmental exposure to maternal obesity-induced inflammation
5 impacts offspring brain and negative valence behaviors,” held by PI Elinor Sullivan) and
6 R24OD011180 (“Self-injurious behavior and primate well-being,” held by PI Melinda
7 Novak); and

- 8 • For the same time period, any and all inventories, indexes, or catalogues of photographic
9 and videographic records produced at and maintained by the Oregon National Primate
10 Research Center, including videos produced by its faculty and staff.

11 17.

12 OHSU’s Public Records Coordinator acknowledged receipt of PETA’s request on
13 November 6, 2017.

14 **III. OHSU’S Denial of PETA’s Request**

15 18.

16 On May 3, 2018, almost six months after PETA submitted its request, OHSU denied
17 PETA’s records request in full.

18 19.

19 With regard to NIH Grant R01MH107508, “Developmental exposure to maternal
20 obesity-induced inflammation impacts offspring brain and negative valence behaviors,” held by
21 Dr. Elinor Sullivan (“the 508 Grant”), OHSU withheld all requested videographic records
22 pursuant to ORS 192.345(14),¹ asserting that the videographic records “relate to proprietary and
23 unpublished research information.”

24 ¹ In its May 3, 2018 response, OHSU cited this provision as ORS 192.501(14). This
25 section was renumbered as ORS 192.345 in 2017. The language of this provision remained
26 unchanged following renumbering.

20.

1
2 With respect to the second NIH grant referenced in the request, NIH Grant
3 R24OD011180, “Self-injurious behavior and primate well-being,” held by Dr. Melinda Novak of
4 the University of Massachusetts-Amherst (“the 180 Grant”), OHSU maintained that it “does not
5 possess and is not the custodian of any videographic records related to this grant.”

6 **IV. The 508 Grant**

7
8 21.

9 On information and belief, the 508 Grant was first awarded to OHSU’s Dr. Sullivan in
10 2015, resulting in nearly \$4 million in funding since the date of the award.

11 22.

12 On information and belief, there are at least eight peer-reviewed studies that have been
13 published in publicly-available scientific journals that explicitly acknowledge that the studies
14 were supported, at least in part, with funding from the 508 Grant. Each of the published studies
15 was authored, at least in part, by Dr. Sullivan. In six of the eight publications, Dr. Sullivan is
16 listed as either the first or last author, indicating that she was a significant contributor.

17
18 23.

19 At least three of the eight publications co-authored by Dr. Sullivan and funded by the 508
20 Grant reference videos recorded at OHSU’s Oregon National Primate Research Center.
21 in connection with the experiments.

22 //

23 //

24

25

26

V. The 180 Grant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

24.

On information and belief, the 180 Grant was first awarded to Dr. Melinda Novak, now at the University of Massachusetts-Amherst, in 1996. This grant received funding for 17 years, with a combined total of over \$7.8 million in federal funding since the date of the award.

25.

On information and belief, there are at least 42 peer-reviewed studies that have been published based on experiments conducted with funding from the 180 Grant. Seven of these publications were also authored, at least in part, by OHSU’s Dr. Kristine Coleman, and carried out, at least in part, at ONPRC.

26.

At least 2 of the publications reference videos recorded at OHSU’s Oregon National Primate Research Center in connection with the experiments.

VI. PETA’s Petition to the Multnomah County District Attorney

27.

On February 5, 2019 PETA filed a petition to review OHSU’s May 3, 2018 denial with the District Attorney for Multnomah County pursuant to ORS 192.411 and ORS 192.415(1)(a) (“PETA’s Petition” or “Petition”).²

//

² PETA’s February 5, 2019 Petition consolidated, for the purposes of appeal, two distinct records disputes: “Request #1,” involving the November 6, 2017 request at issue in this Complaint; and “Request #2” concerning a July 10, 2017 request submitted to OHSU. Here PETA does not challenge any aspect of “Request #2” detailed in its Petition.

28.

1
2 In pertinent part, PETA’s Petition sought from the Multnomah County District Attorney
3 “an order requiring OHSU to produce the videographic records pertaining to” the 508 Grant and
4 the 180 Grant. PETA did not challenge OHSU’s response with respect to the “inventories,
5 indexes, or catalogues of photographic and videographic records” produced or maintained at the
6 ONPRC.

29.

8
9 On February 13, 2019, OHSU sent a letter to the District Attorney replying to the points
10 raised in PETA’s Petition (“OHSU’s Reply”).

30.

12 In its Reply, OHSU asserted that 250 videos pertaining to the 508 Grant were created but
13 were exempt in their entirety under ORS 192.345(14), despite the existence of the five published
14 studies identified by PETA in its Petition, because “only two of those publications contain data
15 obtained from videography.” OHSU further argued that these two studies which did contain data
16 obtained from videography were not responsive to PETA’s request because “no research data
17 supported by videography funded by [the 508 Grant] was included” in those two studies.

31.

20 With regard to the 180 Grant, OHSU confirmed in its Reply that research was conducted
21 at OHSU “under a subaward with [University of Massachusetts-Amherst’s] Dr. [Melinda]
22 Novak.” According to OHSU, fourteen videos were created pursuant to this subaward, and these
23 fourteen videos were sent by OHSU to Dr. Novak’s laboratory on an unidentified date or dates,
24 prior to PETA’s request, after which OHSU claims that it deleted all of the videos from its files.

32.

On February 21, 2019, the District Attorney for Multnomah County issued a written decision denying PETA’s Petition.

33.

The District Attorney’s decision was based in large part on assertions made by OHSU in its Reply to PETA’s Petition. The District Attorney’s decision did not address the fact that Dr. Sullivan provided only a conclusory statement in her affidavit attached to OHSU’s Reply as to why or how the release of the videos and the alleged unpublished data would harm research efforts under the 508 Grant.

34.

The District Attorney’s decision did not address the apparent inconsistencies between statements contained in OHSU’s Reply and statements in Dr. Sullivan’s affidavit that was relied on by OHSU to support the application of ORS 192.345(14) with respect to the 508 Grant videos. Specifically, in some places OHSU refers to the lack of publication of the *videos* and in some places OHSU refers to the lack of publication of the *data* contained in those videos. However, an assertion that the videos themselves have not been published cannot by itself sustain the application of the exemption.

35.

The District Attorney’s decision was also based on a review of a “representative sample” of the videos created under the 508 Grant and identified by OHSU as “representative,” rather than a more comprehensive review of the videos.

36.

The District Attorney’s decision did not address OHSU’s obligation under the OPRL to produce those parts of the 508 Grant videos that do not contain any data at all or any unpublished data. *See* ORS 192.338.

37.

With regard to the 180 Grant, it appears that the District Attorney did not review the terms of the subaward agreement between OHSU’s Dr. Coleman and University of Massachusetts-Amherst’s Dr. Novak to determine if the agreement grants OHSU constructive control over the videos, permits access upon request by OHSU to records created by its employees and/or in its facilities, or whether the subaward agreement, state or institutional records retention policies, or NIH grant policies required the retention by OHSU of the fourteen 180 Grant videos.

OHSU’s WITHHOLDINGS VIOLATE THE OPRL

I. Withholding of 205 Videos Pertaining to the 508 Grant Under ORS 192.345(14)

38.

OHSU bears the burden of sustaining the applicability of ORS 192.345(14) in this action. ORS. 192.431(1); *Mail Tribune, Inc. v. Winters*, 236 Or. App. 91, 95 (Or. Ct. App. 2010) (“When a public body withholds public records from disclosure, that body carries the burden of proving an exemption upon judicial review.”).

39.

The 250 videos pertaining to the 508 Grant are not categorically exempt under ORS

1 192.345(14). OHSU has represented that the individual videos are anywhere from 30 minutes to
2 150 hours in length. It defies logic that *all* portions of such a massive amount of recordings
3 depict unpublished data, or any data at all. Video recordings of that length must contain at least
4 some images that are subject to disclosure and OHSU has a duty to disclose those portions, at a
5 minimum, pursuant to ORS 192.338.

6
7 40.

8 Even if a portion of the 250 videos pertaining to the 508 Grant fall within the scope of
9 ORS 192.345(14), they are nevertheless subject to disclosure if “the public interest requires
10 disclosure in the particular instance.” ORS 192.345. Here, there exists substantial public interest
11 in the treatment of animals used for experimentation, and particularly for the treatment of non-
12 human primates used for experimentation. Set against the backdrop of OHSU’s lengthy track
13 record of serious violations of the federal Animal Welfare Act, the public’s interest in the
14 videographic records at issue is particularly strong. Disclosure of the requested information will
15 facilitate the public’s understanding of how the public’s business—i.e., publicly-funded
16 experiments on animals carried out at a public institution—is being conducted. This strong
17 public interest outweighs OHSU’s alleged interest in confidentiality, and the 250 videos
18 pertaining to the 508 Grant cannot be withheld in their entirety pursuant to ORS 192.345(14).

19
20 **II. Withholding of Fourteen Videos Pertaining to the 180 Grant**

21 41.

22 OHSU disclaims any legal obligation to search for, request, and produce the fourteen
23 videographic records pertaining to the 180 Grant on the grounds that it “does not have the
24

1 requirement to produce a record it no longer maintains nor possesses.” Again, OHSU bears the
2 burden of sustaining this withholding. ORS 192.431(1).

3 42.

4 The fourteen videos pertaining to the 180 Grant are public records under the OPRL
5 because they “contain[] information relating to the conduct of the public’s business”—i.e.,
6 publicly-funded experiments on animals carried out at a public institution—and were “prepared,
7 owned, used or retained” by OHSU. ORS 192.311(5)(a). The OPRL’s use of the disjunctive “or”
8 in the definition of “public record”—“prepared, owned, used or retained”—indicates that a
9 public body need not be in actual possession of the requested record in order for it to be subject
10 to disclosure. *Id.* (emphasis added).

12 43.

13 OHSU’s Reply to PETA’s petition is silent on the terms of its subaward with Dr. Novak
14 under the 180 Grant. The District Attorney also did not address the terms of OHSU’s subaward
15 under the 180 Grant. On information and belief, OHSU’s subaward or other arrangements with
16 Dr. Novak may give OHSU constructive control over the 180 Grant videos or the ability to
17 request or otherwise obtain the videos from Dr. Novak and/or the University of Massachusetts-
18 Amherst.

20 **III. OHSU Has Failed to Separate Exempt and Nonexempt Material**

21 44.

22 To the extent that any portions of the videos pertaining to the 508 Grant and 180 Grant
23 are, in fact, exempt from disclosure pursuant to ORS 192.345(14), OHSU has failed to comply
24

1 with its obligation to “separate the exempt and nonexempt material and make the nonexempt
2 material available for examination.” ORS 192.338.

3 **CLAIMS FOR RELIEF**

4 45.

5 A justiciable controversy presently exists between PETA and OHSU over: (1) whether
6 the 250 videos produced under the 508 Grant are exempt in their entirety under ORS
7 192.345(14); (2) whether the fourteen videos produced under the 180 Grant are no longer “public
8 records” subject to disclosure because OHSU has deleted and no longer retains them; and (3)
9 whether OHSU has complied with its obligation under ORS 192.338 to separate exempt and
10 non-exempt material and “make the nonexempt material available for examination.”

11 **FIRST CLAIM FOR RELIEF**
12 *Declaratory Relief*

13 46.

14 The above paragraphs are hereby re-alleged and incorporated by reference.

15 47.

16 Plaintiff seeks declaratory relief pursuant to ORS 192.415(1)(b).

17 48.

18 This Court has the authority to issue declaratory relief pursuant to ORS 28.010.

19 49.

20 The videographic records pertaining to the 508 Grant and 180 Grant are writings within
21 the meaning of ORS 192.311(7) and public records within the meaning of ORS 192.311(5)(a)
22 because they relate to the conduct of the public’s business, and because they were “prepared,
23 owned, used or retained” by OHSU. ORS 192.311(5)(a).
24

1 50.

2 The 250 videographic records pertaining to the 508 Grant have been improperly withheld
3 because OHSU has not met its burden to demonstrate that the entirety of the 250 videos are
4 exempt under ORS 192.345(14).

5 51.

6 The fourteen videographic records pertaining to the 180 Grant have been improperly
7 withheld because OPRL has not met its burden to demonstrate that the videos are no longer
8 subject to the OPRL. ORS 192.431(1).

9 52.

10 Plaintiff is entitled to an award of reasonable attorney fees and costs pursuant to ORS
11 192.431(3).

12
13 **SECOND CLAIM FOR RELIEF**
14 ***Injunctive Relief***

15 53.

16 The above paragraphs are hereby re-alleged and incorporated by reference.

17 54.

18 Money damages are inadequate to remedy Defendant's refusal to disclose these public
19 records. This court has jurisdiction to enjoin Defendant "from withholding records and to order
20 the production of any records improperly withheld from the person seeking disclosure." ORS
21 192.431(1).

22 55.

23 Plaintiff is entitled to an award of reasonable attorney fees and costs pursuant to ORS
24 192.431(3).

25
26 PAGE 16 – COMPLAINT FOR VIOLATIONS OF OREGON PUBLIC RECORDS LAW AND
DECLARATORY AND INJUNCTIVE RELIEF

1 **WHEREFORE**, Plaintiff prays for a judgment in favor of Plaintiff and against
2 Defendant as follows:

- 3 1. Declaring that OHSU has violated the OPRL by refusing to provide the records
4 requested by Plaintiff;
- 5 2. Declaring that the 250 videographic records relating to the 508 Grant are not
6 exempt in their entirety under ORS 192.345(14);
- 7 3. Declaring that the fourteen videographic records relating to the 180 Grant are
8 public records subject to disclosure;
- 9 4. Declaring that OHSU has not complied with ORS 192.338;
- 10 5. Enjoining OHSU from further withholding non-exempt videographic records and
11 requiring OHSU to produce such non-exempt videographic records;
- 12 6. Awarding PETA all costs and attorneys’ fees associated with this action pursuant
13 to ORS 192.431(3); and
- 14 7. Granting all other just and equitable relief the Court deems necessary and proper.

15 s/Colin H. Hunter
16 KRISTEN L. TRANETZKI, OSB #115730
17 kristen@angelilaw.com
18 COLIN H. HUNTER, OSB #131161
19 colin@angelilaw.com

20 Of Attorneys for Plaintiff
21
22
23
24
25
26