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

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC, Plaintiff, v. OREGON HEALTH & SCIENCE UNIVERSITY, Defendant.	Case No. 20CV15874 RULINGS, VERDICTS, CONCLUSIONS OF LAW AND FINDINGS OF FACTS

This case having proceeded to trial, and the parties having presented their final written arguments, the court delivers the following VERDICTS and RULINGS:

1. **Plaintiff's First Claim for Relief—**The court finds, in part, for plaintiff. The court also finds, in part, for defendant. The court denies plaintiff's requests for declaratory and injunctive relief. However, defendant's belated disclosure of the vole videos at issue constitutes "undue delay" and, accordingly, ORS 192.407(3)(b) applies. Therefore, the court assesses against defendant a penalty pursuant to that statute in the amount of $200, payable to plaintiff. The court also awards costs, disbursements, and reasonable attorney fees to plaintiff pursuant to ORS 192.431(3). Plaintiff may submit a petition for costs and fees related to its first claim for relief.

   That same unreasonable delay in the disclosure of the videos extended into the duration of this case and was, therefore, also a failure on defendant's part to comply with its discovery obligations. Accordingly, there was a discovery violation with regard to plaintiff's first claim for relief. The court declines to direct a verdict in plaintiff's favor on that claim as a remedy. However, the court awards plaintiff reasonable attorney fees as a sanction for the violation. That sanction provides a separate and alternative basis from ORS 192.431(3) for the same award of fees that the court orders above. Plaintiff may submit a petition for costs and fees related to its first claim for relief.

2. **Plaintiff's Second Claim for Relief**—The court finds in favor of defendant. The court, therefore, declines to award the declaratory and injunctive relief that plaintiff requests.

3. **Plaintiff's Third Claim for Relief**—The court finds in favor of defendant. The court, therefore, declines to award the declaratory and injunctive relief that plaintiff requests.

4. **Plaintiff's Fourth Claim for Relief—**The court finds, in part, for plaintiff. The court also finds, in part, for defendant. The court denies plaintiff's requests for declaratory and injunctive relief. However, defendant's belated disclosure of the microscopic photos at issue constitutes "undue delay" and, accordingly, ORS 192.407(3)(b) applies. Therefore, the court assesses against defendant a penalty pursuant to that statute in the amount of $200, payable to plaintiff. The court also awards costs, disbursements, and reasonable attorney fees to plaintiff pursuant to ORS 192.431(3). Plaintiff may submit a petition for costs and fees related to its fourth claim for relief.

5. **Plaintiff's Fifth Claim for Relief—**The court finds, in part, for plaintiff. The court also finds, in part, for defendant. The court declares that defendant's "law enforcement agency" currently "maintains" information about plaintiff's "political" and "social views," as well as its "associations" and "activities" that does not "directly relate to an investigation of criminal activities" in violation of ORS 181A.250. The court, therefore, orders defendant to permanently delete from its electronic records information compiled by Information Network Associates, Inc. and Americans for Medical Progress—originally sent from those organizations to defendant by email—that relates to plaintiff's political and social views, as well as its associations and activities, and that does not directly relate to an investigation of criminal activities. The court denies plaintiff's requests for further declaratory and injunctive relief. The court declines to award plaintiff costs, disbursements, and reasonable attorney fees with regard to this claim.

The court directs counsel for plaintiff to prepare a judgment in accordance with the court's verdicts and rulings.

In support of the above verdicts and rulings, the court reaches the following CONCLUSIONS OF LAW:

1. With regard to the vole videos at issue in plaintiff's first claim for relief, the videos are public records subject to inspection under Oregon Public Records Law. No exemption applies to the videos.

2. Also with regard to those videos, neither declaratory nor injunctive relief are available to plaintiff. Under the Declaratory Judgments Act, a claim is justiciable only if it will prospectively address a legal injury that the plaintiff is suffering. The record shows that plaintiff is now in possession of the videos and plaintiff has failed to prove that defendant currently possesses additional responsive videos that it has not already disclosed to plaintiff. Therefore, any declaratory or injunctive relief would be improperly retrospective rather than having a practical effect on a present or ongoing harm.

3. The delay between when plaintiff originally requested the videos and the time that defendant finally disclosed them was both "undue" as that term is used in ORS 192.407(3)(b) and

"unreasonable" as that term is used in ORS 192.329(1). Under ORS 192.329(2)(a), defendant did not "complete its response" to plaintiff with regard to the videos until it had finally provided "access to or copies of all requested" vole videos.

4. The court rejects defendant's argument that it is not subject to ORS 192.407.

5. The court also rejects defendant's retroactivity argument. Although ORS 192.407 was not in effect at the time of plaintiff's initial request for the vole videos, that statute took effect before defendant finished responding to plaintiff's request for the videos. Accordingly, a significant portion of the "undue delay" occurred after the statute took effect.

6. A plaintiff who prevails under ORS 192.407 is—by the express terms of subsection (4) of that statute—entitled to costs, disbursements, and reasonable attorney fees pursuant to ORS 192.431(3). Plaintiff is a prevailing party on its first claim for relief and is, therefore, entitled to costs, disbursements, and fees on that claim.

7. The delay between plaintiff's request for production and defendant's eventual disclosure of the vole videos extended into the duration of this case and, therefore, resulted in defendant's failure to satisfy its discovery obligations. Accordingly, defendant committed a discovery violation with regard to the videos.

8. With regard to what sanction is appropriate, plaintiff has failed to establish that a verdict directed on its behalf on its first claim for relief is warranted. Such a sanction would be extreme and the court is obligated to first consider less extreme sanctions. An award of attorney fees to plaintiff on its first claim for relief is appropriate under ORCP 46 D: defendant's failure in its discovery obligations was not "substantially justified" nor do the "circumstances make an award of expenses unjust."

9. Neither declaratory nor injunctive relief is available to plaintiff on its second claim for relief. The record shows that plaintiff is now in possession of the vole videos and microscopic photos at issue and plaintiff has failed to prove that defendant is in possession of any additional responsive videos or photos that it has not already disclosed to plaintiff. Therefore, any declaratory or injunctive relief would be improperly retrospective rather than having a practical effect on a present or ongoing harm.

10. Furthermore, plaintiff has failed to prove the merits of its second claim for relief. Although defendant's response to plaintiff's public-records request was far from ideal, to the degree that the response was improper, plaintiff has not proved that the impropriety was intended to (nor did it actually) stifle plaintiff's speech, was motivated by a desire of defendant to suppress plaintiff's viewpoints or social-political agenda, or was the result of defendant's desire to retaliate against plaintiff.

11. Neither declaratory nor injunctive relief is available to plaintiff on its third claim for relief. The record shows that plaintiff is now in possession of the vole videos and microscopic photos at issue and plaintiff has failed to prove that defendant is in possession of any additional responsive videos or photos that it has not already disclosed to plaintiff. Therefore, any declaratory or injunctive relief would be improperly retrospective rather than having a practical effect on a present or ongoing harm.

12. Furthermore, plaintiff has failed to prove the merits of its third claim for relief. Although defendant's response to plaintiff's public-records request was far from ideal, to the degree that response was improper, plaintiff has not proved that the impropriety was the result of discrimination against plaintiff because of plaintiff's viewpoints and social-political agenda. Plaintiff has failed to prove that defendant treated it any differently than similarly situated requesters of public records.

13. In any event, plaintiff is not a citizen of this state entitled to protection under Article I, section 20, of the Oregon Constitution.

14. With regard to the microscopic photos at issue in plaintiff's fourth claim for relief, the photos are public records subject to inspection under Oregon Public Records Law. No exemption applies to the photos.

15. Also with regard to those photos, neither declaratory nor injunctive relief are available to plaintiff. The record shows that plaintiff is now in possession of those photos and plaintiff has failed to prove that defendant currently possesses additional responsive photos that it has not already disclosed to plaintiff. Therefore, any declaratory or injunctive relief would be improperly retrospective rather than having a practical effect on a present or ongoing harm.

16. The delay between when plaintiff originally requested the photos and the time that defendant finally disclosed them was both "undue" as that term is used in ORS 192.407(3)(b) and "unreasonable" as that term is used in ORS 192.329(1). Under ORS 192.329(2)(a), defendant did not "complete its response" to plaintiff with regard to the photos until it had finally provided "access to or copies of all requested" photos.

17. Just as it did with regard to the vole videos, the court also rejects defendant's retroactivity argument with regard to microscopic photos. Although ORS 192.407 was not in effect at the time of plaintiff's initial request for the photos, that statute took effect before defendant finished responding to plaintiff's request for the photos. Accordingly, a significant portion of the "undue delay" occurred after the statute took effect.

18. The court also rejects defendant's jurisdictional argument. Exhibit 223 reveals that plaintiff's request for review directed to the District Attorney includes within its scope the microscopic photos at issue.

19. Plaintiff is a prevailing party on its fourth claim for relief and is, therefore, entitled to costs, disbursements, and reasonable attorney fees under ORS 192.431(3) on that claim.

20. With regard to plaintiff's fifth claim for relief, defendant's police department is a "law enforcement agency" as defined by ORS 181A.010.

21. The email updates that defendant's police department received from Information Network Associates, Inc. (INA) and Americans for Medical Progress (AMP) contain "information" about plaintiff's "political * * * or social views" and "associations or activities" that does not "directly relate to an investigation of criminal activities" as ORS 181A.250 uses those phrases.

22. Defendant's police department presently "maintains" that "information," as those terms are used in ORS 181A.250, by retaining in its electronic storage the email updates from INA and AMP.

23. Accordingly, both declaratory and injunctive relief are appropriate to address that ongoing violation of plaintiff's statutory rights under ORS 181A.250 with regard to the maintenance of that information.

24. Because defendant's police department no longer receives those email updates, it no longer "collects" that same "information"—as ORS 181A.250 uses those terms—no matter which of the parties' interpretations of "collect" the court adopts. Accordingly, neither declaratory nor injunctive relief is available to plaintiff regarding the defendant's police department's past receipt of those emails. Such declaratory or injunctive relief would be improperly retrospective rather than having a practical effect on a present or ongoing harm.

25. To the extent that defendant "collects or maintains" any "information" about plaintiff's "political * * * or social views" and "associations or activities," as ORS 181A.250 uses those phrases, in its threat-assessment files, the "information directly relates to an investigation of criminal activities," and there are "reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct." Moreover, it is defendant in general that maintains those files rather than defendant's police department specifically. For each of those reasons, plaintiff has failed to prove that defendant's police department collects or maintains information about plaintiff in those threat-assessment files that violates ORS 181A.250.

26. Although plaintiff is a prevailing party on its fifth claim for relief, it is not entitled to an award of attorney fees on that claim. No statute authorizes such an award for a claim brought under ORS 181A.250. Moreover, the Public Benefit Doctrine does not apply because the relief that this court grants plaintiff is insufficiently broad to benefit the public at large.

The court FINDS THE FACTS as follows in support of its above verdicts, rulings, and conclusions of law:

1. In November 2017, Dr. Andrey Ryabinin and Dr. Andre Walcott published an article titled "Alcohol's Effects on Pair-Bond Maintenance in Male Prairie Voles" in *Frontiers of Psychology* (the "Vole Article").

2. In connection with the Vole Article, Drs. Ryabinin and Walcott collected and analyzed video recordings of prairie voles (the "Vole Videos").

3. The Vole Videos were recorded at the Veteran Affairs Medical Center ("VAMC") pursuant to a VAMC protocol issued to Dr. Ryabinin and a colleague, Dr. Loftis.

4. Dr. Walcott created 124 Vole Videos.

5. The Vole Article describes the Partner Preference Test being conducted 23 times and the Resident Intruder Test being conducted 27 times. Dr. Walcott explained that there are more videos than experiments because there were several videos per experiment that needed to be stitched together.

6. Dr. Walcott recorded the Vole Videos on SD Cards, downloaded the videos to a lab computer, and erased the SD cards. He erased the SD cards because the cards were small and needed to be used to record more videos.

7. Dr. Walcott used only one lab computer in connection with his research because that computer had the requisite software to conduct the analysis underlying the Vole Article. Dr. Walcott testified that, other than that lab computer, there was no reason to believe that additional Vole Videos existed elsewhere.

8. Drs. Ryabinin and Walcott then analyzed the Vole Videos at OHSU.

9. PETA issued a press release criticizing Dr. Ryabinin's research in November 2017, which led to a journalist's inquiry that OHSU answered.

10. PETA also sent a letter to the chair of OHSU's Institutional Animal Care and Use Committee ("IACUC") complaining about the research.

11. PETA's November 2017 statements were not the first time PETA had criticized OHSU. PETA had issued public statements criticizing OHSU's research involving animals since at least 2009 and continues to do so today.

12. Prior to the issuance of PETA's press release, Dr. Ryabinin received media requests from *National Geographic* and *Frontiers Science News* asking whether he could provide them with photographs of the voles for use in their articles discussing the Vole Article.

13. Dr. Ryabinin asked the VAMC whether he could provide the media outlets with photographs.

14. The VAMC did not respond to Dr. Ryabinin's request until December 1, 2017. The VAMC response stated: "Please inform Dr. Ryabinin that at this time no photography nor filming of the voles can be undertaken or used. This is due to security issues."

15. Following the VAMC's response, Dr. Ryabinin instructed Dr. Walcott to delete the videos in December 2017.

16. Dr. Walcott took steps in December 2017 that he believed would result in the deletion of the Vole Videos from the computer that he used in the research lab to analyze the Vole Videos.

17. After Dr. Walcott took those steps, both he and Dr. Ryabinin believed that the Vole Videos had been deleted from that computer.

18. Dr. Ryabinin did not instruct Dr. Walcott to delete the microscopic tissue photographs of the voles.

19. On January 22, 2018, PETA submitted a public records request to OHSU for, among other things, photographs and videos associated with OHSU's IACUC protocols for which Dr. Ryabinin was the principal investigator or co-principal investigator ("January Request").

20. On January 23, 2018, OHSU's public record coordinator, Reba Kuske, acknowledged receipt of PETA's January Request.

21. When Reba Kuske receives a public records request that involves OHSU research, she relies on the primary OHSU researcher to locate and provide responsive records. She does not herself search for the records nor does she generally direct anyone else to do so.

22. Dr. Ryabinin informed Ms. Kuske that his research in connection with the Vole Article was conducted pursuant to a VAMC protocol. He reported that he did not have responsive photographs or videos.

23. On February 16, 2018, OHSU provided PETA with a prepayment estimate for the records that it identified as being responsive to PETA's January Request.

24. Upon learning that OHSU did not locate photos or videos, PETA retracted its request.

25. On July 16, 2018, PETA submitted a public records request to OHSU for "photographs and videos captured as part of studies involving nonhuman animals for which Andrey E. Ryabinin was the Principal Investigator (PI) or co-PI."

26. On July 17, 2018, Ms. Kuske acknowledged receipt of PETA's July 2018 request.

27. Dr. Ryabinin reported to Ms. Kuske that he did not have any videos of voles.

28. Dr. Ryabinin did not conduct a search for any such videos at that time nor did he instruct anyone else to conduct such a search.

29. On August 13, 2018, in response to PETA's July 2018 request, OHSU disclosed 92 videos of mice.

30. On August 15, 2018, PETA submitted a public records request to OHSU for, among other things, copies of photographs and videos captured as part of the research reported in the Vole Article (August Request).

31. On August 15, 2018, Ms. Kuske acknowledged PETA's August Request.

32. When Ms. Kuske asked Dr. Ryabinin about the Vole Videos, he responded: "OHSU has no responsive records. The records were generated at the VA and they are not kept after the paper is published."

33. Dr. Ryabinin did not conduct a search for any such videos or microscopic photographs at that time nor did he instruct anyone else to conduct such a search.

34. On October 1, 2018, Ms. Kuske informed PETA that no responsive records were identified in connection with its request for records prepared in connection with the Vole Article.

35. In connection with other portions of PETA's August Request, OHSU disclosed three videos of experiments on mice and an IACUC protocol.

36. After reviewing the records provided to it, PETA asked Ms. Kuske about the Vole Videos, noting that the Vole Article referred to the Partner Preference Test and the Resident Intruder Test being videotaped.

37. In response to PETA's inquiry, Dr. Ryabinin explained that he did not have the Vole Videos because "these experiments are performed at the VA hospital. They are property of the VA hospital, not OHSU. VA does not allow to distribute videos taken within the VA hospital. Therefore, these videos were destroyed after we published the paper."

38. Dr. Ryabinin did not conduct a search for any such videos at that time nor did he instruct anyone else to conduct such a search.

39. On October 28, 2018, Ms. Kuske informed PETA that "Dr. Andrey Ryabinin confirmed the [Vole Videos] are not available because these experiments were performed at the Veterans Administration Hospital. The videos are the property of the VA Hospital and the VA Hospital is the custodian of such videos, not OHSU. The VA Hospital does not allow distribution of videos taken within the VA Hospital."

40. On October 29, 2018, PETA submitted a public records request to the VAMC for photographs and videos captured as part of the research in the Vole Article.

41. On November 3, 2018, the VAMC responded to PETA's public records request. The VAMC's response provided, in pertinent part: "After conducting a reasonable search, we have concluded the VA Portland Health Care System, does not have records responsive to your request. * * *. Dr. Ryabinin responded that the data contained on the videotapes were converted to numerical data. It is this numerical data that were published in the article. After the video data were destroyed. * * * VA regulations do allow for data on the videos had been [sic] converted to numerical values, after which the videos were destroyed (36 CFR §1225.12)."

42. In April 2020 – eighteen months after OHSU responded to PETA's August 2018 public records request – PETA petitioned the Multnomah County District Attorney for an order requiring OHSU to turn over the materials that PETA identified in its August 2018 request, including: "Copies of photographs and videos captured as part of the experiments reported in the paper, 'Alcohol's effects on pair bond maintenance in male prairie voles.'"

43. The District Attorney did not issue an order within seven days of receiving PETA's petition. PETA initiated this action immediately after those seven days expired.

44. PETA deposed Dr. Ryabinin in June 2021.

45. During his deposition, Dr. Ryabinin testified that he had microscopic tissue photographs of voles from the Vole Article and of mice from other research.

46. The vole photographs were taken with a microscope to view the brain tissue of the voles that were involved in the experiments about which the Vole Article was written.

47. After Dr. Ryabinin's June 2021 deposition, OHSU provided PETA with the microscopic tissue photographs.

48. Those photographs were responsive to several of PETA's previous public records requests described above.

49. However, even without having those photographs, PETA was able to see some of them in the Vole Article and concluded that they would not be understandable to PETA's supporters.

50. Since receiving the tissue microphotographs in July and August 2021, PETA has not made the tissue microphotographs available to the public or made public statements about their contents and OHSU has not restricted PETA from doing so.

51. On October 22, 2021, PETA's counsel informed OHSU's counsel that it had located 402 videos that PETA believed to be responsive to its public records request, including the Vole Videos.

52. PETA's forensic analyst located those videos on the same lab computer from which Dr. Walcott attempted to delete the Vole Videos in December 2017.

53. On October 28, 2021, OHSU acknowledged that some of the videos were responsive to PETA's public records request and removed confidentiality protections attached to all the videos under the parties' Stipulated Protective Order so that PETA could use the videos as it wished.

54. As of October 2021, PETA had all the Vole Videos.

55. OHSU has placed no limits on how PETA uses the Vole Videos since they were provided to PETA in October 2021.

56. OHSU subsequently de-designated all the videos that PETA located on the lab computer on November 3, 2021.

57. OHSU re-delivered a copy of the same videos to PETA on February 8, 2022.

58. After PETA located videos on the lab computer, Dr. Walcott reviewed the file path names and the videos themselves to determine that all the Vole Videos were accounted for.

59. Since receiving the Vole Videos in October 2021, PETA has not made the Vole Videos public. PETA has not yet decided what, if anything, it will do with the Vole Videos.

60. PETA's forensics analyst identified a portable hard drive that had once been connected to the lab computer on which the analyst had previously located the Vole Videos in October 2021.

61. After PETA identified the portable hard drive, Dr. Ryabinin searched for and located it. When he located the hard drive, he was unable to access any of its contents because they were encrypted. Dr. Ryabinin gave the hard drive to OHSU's counsel.

62. Dr. Ryabinin asked members of his lab whether they knew the password to the portable hard drive and he relayed their responses to OHSU's counsel.

63. On February 11, 2022, OHSU IT engineer Jacques Perolle successfully decrypted the portable hard drive.

64. The decryption key to and the contents of the portable hard drive were delivered to PETA on February 12, 2022.

65. The portable hard drive included copies of some of the Vole Videos from the lab computer. None of the "previously unseen videos" on the portable hard drive were Vole Videos.

66. No one other than PETA has requested or received the Vole Videos.

67. Since OHSU's processing of PETA's 2018 public records requests for the Vole Videos, PETA has continued to submit public records requests to OHSU. PETA has had no additional complaints about OHSU's processing of PETA's public records requests.

68. Some OHSU Police personnel used to be included on an email distribution list for updates compiled by the Oregon National Primate Research Center that included publicly available information about animal rights activism directed at National Primate Research Centers around the county ("INA emails").

69. Some OHSU Police used to be included on an email distribution list for updates compiled by Americans for Medical Progress that included publicly available information about animal rights activities ("AMP emails").

70. The publicly available information in the INA and AMP emails included PETA's public statements about OHSU.

71. The purpose for which OHSU Police subscribed to the INA and AMP emails was to keep abreast of potential impacts to OHSU operations and to make OHSU employees aware of potential threats and disruptions.

72. OHSU Police personnel no longer subscribe to the INA and AMP emails, nor any similar distribution lists.

73. OHSU Police do not intend to subscribe to such distribution lists in the future.

74. OHSU Police emails, including the previously received INA and AMP emails, are automatically archived by OHSU's email system.

75. OHSU Police do not have the ability to permanently delete emails, including the archived INA and AMP emails.

76. OHSU Police do not store the INA and AMP emails in an "animal rights" or "PETA" subject matter folder. Nor does OHSU Police have a centralized collection of information about PETA.

77. An OHSU Police officer used to be assigned to monitor publicly available information about animal-rights activities directed at OHSU for the purpose of anticipating events that required public-safety planning. As of October 2020, that officer no longer works for OHSU Police, his information-monitoring duties have not been reassigned, and OHSU Police do not intend to reassign those duties in the future.

78. Following PETA's release of videos obtained from OHSU, an OHSU researcher began receiving threats on social media and by email. The threats made against the OHSU researcher were compiled in a single document accessible to OHSU's Threat Assessment Team.

79. OHSU's Threat Assessment Team includes OHSU Police personnel. It also includes other OHSU employees, such as psychiatrists, healthcare advocates, academics, and lawyers.

80. The purpose of the Threat Assessment Team is to prevent violent incidents like the Virginia Tech shootings, where information had been siloed in different areas around the university. That is, the purpose of the Threat Assessment Team is to compile the information in one place to assess whether there is a threat and what should be done to address it.

SO ORDERED THIS 6th DAY OF JULY, 2022.

7/6/2022 3:54:00 PM

Andrew M. Lavin
Circuit Court Judge

Circuit Court Judge Andrew M. Lavin