

Enrolled
House Bill 2502

Sponsored by Representative OLSON, Senator PROZANSKI; Representatives BARKER, BARTON, BERGER, BOONE, BRUUN, BUCKLEY, CLEM, ESQUIVEL, FREEMAN, GARRARD, HUFFMAN, JENSON, KOMP, MATTHEWS, SCHAUFLEER, SPRENGER, WHISNANT, WINGARD, Senators ATKINSON, BOQUIST, DEVLIN, FERRIOLI, GEORGE, METSGER, WALKER, WINTERS

CHAPTER

AN ACT

Relating to criminal procedure; creating new provisions; amending ORS 131.588, 133.575 and 136.595; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) Notwithstanding ORS 136.557, 136.563, 136.565 or 136.567 and subject to ORS 136.580 (2), criminal process authorizing or commanding the seizure or production of papers, documents, records or other things may be issued to a recipient, regardless of whether the recipient or the papers, documents, records or things are located within this state, if:

- (a) The criminal matter is triable in Oregon under ORS 131.205 to 131.235; and
- (b) The exercise of jurisdiction over the recipient is not inconsistent with the Constitution of this state or the Constitution of the United States.

(2) Criminal process that authorizes or commands the seizure or production of papers, documents, records or other things from a recipient may be served by:

- (a) Delivering a copy to the recipient personally; or
- (b) Sending a copy by:
 - (A) Certified or registered mail, return receipt requested;
 - (B) Express mail; or
 - (C) Facsimile or electronic transmission, if the copy is sent in a manner that provides proof of delivery.

(3) When criminal process is served under subsection (2) of this section, the recipient shall provide the applicant, or if the process is described in ORS 136.447 or 136.580 (2), the court, with all of the papers, documents, records or other things described in the criminal process within 20 business days from the date the criminal process is received, unless:

- (a) The court, for good cause shown, includes in the process a requirement for production within a period of time that is less than 20 business days;
- (b) The court, for good cause shown, extends the time for production to a period of time that is more than 20 business days; or
- (c) The applicant consents to a request from the recipient for additional time to comply with the process.

(4) A recipient who seeks to quash or otherwise challenge the criminal process must seek relief from the court that issued the process within the time required for production. The court shall hear and decide the issue as soon as practicable. The consent of the applicant to additional time to comply with the process under subsection (3)(c) of this section does not extend the date by which a recipient must seek relief under this subsection.

(5) Criminal process issued under this section must contain a notice on the first page of the document that indicates:

(a) That the process was issued under this section;

(b) The date before which the recipient must respond to the process; and

(c) That the deadline for seeking relief is not altered by the applicant's consent to additional time to respond to the process.

(6) Upon order of the court or the written request of the applicant, the recipient of the process shall verify the authenticity of the papers, documents, records or other things that the recipient produces in response to the criminal process by providing an affidavit or declaration that includes contact information for the custodian or other qualified person completing the document and attests to the nature of the papers, documents, records or other things. An affidavit or declaration that complies with this subsection may fulfill the requirements of ORS 40.460 (6), 40.505 and 132.320.

(7) A party that intends to offer a paper, document, record or other thing into evidence under this section must file written notice of that intention with the court and must disclose the affidavit or declaration sufficiently in advance of offering the paper, document, record or other thing into evidence to provide the adverse party with an opportunity to challenge the affidavit or declaration and to have that challenge determined without prejudice to the ability of the moving party to produce the custodian or other qualified person at trial. A motion opposing admission of the paper, document, record or other thing into evidence must be filed and determined by the court before trial and with sufficient time to allow the party offering the paper, document, record or other thing, if the motion is granted, to produce the custodian of the record or other qualified person at trial, without creating a hardship on the party or the custodian or other qualified person.

(8) Failure by a party that receives notice under subsection (7) of this section to timely file a motion opposing admission of the paper, document, record or other thing constitutes a waiver of objection to the admission of the evidence on the basis of the insufficiency of the affidavit or declaration unless the court finds good cause to grant relief from the waiver. If the court grants relief from the waiver, the court shall order the trial continued upon the request of the proponent of the evidence and allow the proponent sufficient time to arrange for the necessary witness to appear.

(9) A recipient of criminal process under this section or any individual that responds to the process is immune from civil and criminal liability for complying with the process and for any failure to provide notice of any disclosure to a person who is the subject of, or identified in, the disclosure.

(10) Nothing in this section limits the authority of a court to issue criminal process under any other provision of law or prohibits a party from calling the custodian of the evidence or other qualified person to testify regarding the evidence.

(11) As used in this section:

(a) "Applicant" means:

(A) A police officer or district attorney who applies for a search warrant or other court order or seeks to issue a subpoena under this section; or

(B) A defense attorney who applies for a court order or seeks to issue a subpoena under this section.

(b) "Criminal process" means a subpoena, search warrant or other court order.

(c) "Declaration" has the meaning given that term in ORCP 1 E.

(d) **“Defense attorney” means an attorney of record for a person charged with a crime who is seeking the issuance of criminal process for the defense of the criminal case.**

(e) **“Recipient” means a business entity or nonprofit entity that has conducted business or engaged in transactions occurring at least in part in this state.**

SECTION 2. ORS 133.575 is amended to read:

133.575. (1) **Except as provided in section 1 of this 2009 Act**, a search warrant may be executed only within the period and at the times authorized by the warrant and only by a police officer. A police officer charged with its execution may be accompanied by such other persons as may be reasonably necessary for the successful execution of the warrant with all practicable safety.

(2) The executing officer shall, before entering the premises, give appropriate notice of the identity, authority and purpose of the officer to the person to be searched, or to the person in apparent control of the premises to be searched, as the case may be.

(3) Except as provided in ORS 133.619, before undertaking any search or seizure pursuant to the warrant, the executing officer shall read and give a copy of the warrant to the person to be searched, or to the person in apparent control of the premises to be searched. If the premises are unoccupied or there is no one in apparent control, the officer shall leave a copy of the warrant suitably affixed to the premises.

SECTION 3. ORS 136.595 is amended to read:

136.595. (1) Except as provided in ORS 136.447 **and section 1 of this 2009 Act** and [subsections (2) and (3)] **subsection (2)** of this section, a subpoena is served by delivering a copy to the witness personally. Proof of the service is made in the same manner as in the service of a summons.

(2)(a) Every law enforcement agency shall designate an individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

(b) If a peace officer’s attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on the peace officer by delivering a copy personally to the officer or to one of the individuals designated by the agency that employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to actually notify the officer whose attendance is sought of the date, time and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall contact the court and a continuance may be granted to allow the officer to be personally served.

(d) As used in this subsection, “law enforcement agency” means the Oregon State Police, a county sheriff’s department or a municipal police department.

[3] *A subpoena for the production of papers, documents, records and other tangible things may be served on a corporation or limited partnership in the manner provided by ORCP 7 D(3) for the service of a summons.*

[4] (3) When a subpoena has been served as provided in **section 1 of this 2009 Act** or subsection (1)[,] **or (2) [or (3)]** of this section and, subsequent to service, the date on, or the time at, which the person subpoenaed is to appear has changed, a new subpoena is not required to be served if:

(a) The subpoena is continued orally in open court in the presence of the person subpoenaed;
or

(b) The party who issued the original subpoena notifies the person subpoenaed of the change by first class mail and by:

(A) Certified or registered mail, return receipt requested; or

(B) Express mail.

SECTION 4. ORS 131.588 is amended to read:

131.588. (1) If no financial institution has filed the affidavit described in ORS 131.579 (1), and if the court has failed to uphold the claim or affidavit of any other person claiming an interest in the property, the effect of the judgment is that:

(a) Title to the property passes to the seizing agency free of any interest or encumbrance thereon in favor of any person who has been given notice;

(b) The seizing agency may transfer good and sufficient title to any subsequent purchaser or transferee, and all courts, the state and the departments and agencies of this state, and any political subdivision shall recognize the title. In the case of real property, the seizing agency shall warrant the title against constitutional defect. A warranty under this paragraph is limited to the purchase price of the real property; and

(c) Any department, agency or officer of this state or any political subdivision whose official functions include the issuance of certificates or other evidence of title is immune from civil or criminal liability when such issuance is pursuant to a judgment of criminal forfeiture.

(2) If an affidavit is filed by a financial institution under ORS 131.579 (1), or if a person files an affidavit under ORS 131.579 (2):

(a) The court shall foreclose all security interests, liens and vendor's interests of financial institutions and claimants as to which the court determines that there is a legal or equitable basis for foreclosure; and

(b) All other interests applicable to the property that are not foreclosed or otherwise eliminated through a judgment of foreclosure, if and to the extent that they are valid and subsisting, remain in effect and the property remains subject to them upon completion of the criminal forfeiture proceeding.

(3) Notwithstanding any other provision of law, if a financial institution or other person has filed an affidavit described in ORS 131.579, or if the court has upheld the claim of any claimant, then as to each item of property seized:

(a) If the court has determined that the property should not be forfeited and has not foreclosed the security interests, liens or other interests covering the property, the court shall render judgment in favor of the owner of the property, the property must be returned to the owner and all security interests, liens and other interests applicable to the property remain in effect as though the property had never been seized. Upon the return of the property to the owner, the seizing agency shall pay all costs and expenses relating to towing and storage of the property and shall cause to be discharged any possessory chattel liens on the property arising under ORS 87.152 to 87.162 that have attached to the property since the seizure.

(b) If the court has determined that the property should not be forfeited and has foreclosed one or more interests covering the property, including security interests or liens covering the property or contracts for the transfer or conveyance of the property, the seizing agency shall pay all costs and expenses relating to towing and storage of the property and shall cause to be discharged any possessory chattel liens on the property arising under ORS 87.152 to 87.162 that have attached to the property since the seizure, and the court shall order the property sold pursuant to a sheriff's sale or other sale authorized by the court within such time as may be prescribed by the court following entry of the judgment. If any interests covering the property have not been foreclosed, including any liens or security interests of a claimant whose claim has been upheld, or of a financial institution that has filed the affidavit described in ORS 131.579, the property must be sold subject to those interests. The judgment shall order the proceeds of the sale applied in the following order:

(A) To the payment of the costs of the sale;

(B) To the satisfaction of the foreclosed liens, security interests and contracts in order of their priority; and

(C) The excess, if any, to the owner of the property.

(c) If the court has determined that the property should be forfeited and has foreclosed one or more security interests, liens, contracts or other interests covering the property, the seizing agency shall pay all costs and expenses relating to towing and storage of the property and shall cause to be discharged any possessory chattel liens on the property arising under ORS 87.152 to 87.162 that

have attached to the property since the seizure, and the court shall order the property sold pursuant to a sheriff's sale or other sale authorized by the court. If any interest in the property was claimed by a financial institution or other claimant and the interest was upheld but not foreclosed, the property must be sold subject to the interest. The sale of the property must be held within such time as may be prescribed by the court following entry of the judgment. The judgment shall also order the proceeds of such sale applied in the following order:

(A) To the payment of the costs of the sale;

(B) To the satisfaction of the foreclosed liens, security interests and contracts in the order of their priority; and

(C) The excess, if any, to the seizing agency to be disposed of as provided in ORS 131.594 or 131.597.

(d) If the court has determined that the property should be forfeited and has not foreclosed the interests of any party in the property, the seizing agency shall pay all costs and expenses relating to towing and storage of the property and shall cause to be discharged any possessory chattel liens on the property arising under ORS 87.152 to 87.162 that have attached to the property since the seizure. The court shall enter a judgment awarding the property to the seizing agency, subject to the interests of any claimants whose claims or affidavits were upheld by the court, and subject to the interests of any financial institutions that filed affidavits under ORS 131.579 (1), that remain in full force and effect.

(4) **Upon motion of the state**, the court may include in the judgment of criminal forfeiture an order that directs the seizing agency to distribute to the victim of the crime of conviction a portion of any proceeds from property received by the seizing agency if[.]

[(a) The crime of conviction was a person felony or person Class A misdemeanor as those terms are defined by rule of the Oregon Criminal Justice Commission; and]

[(b)] the court included an order of restitution in the criminal judgment.

(5) The seizing agency is not liable to any person as a consequence of obedience to a judgment directing conveyance to a financial institution.

(6) The forfeiture counsel shall send a copy of the judgment to the Asset Forfeiture Oversight Advisory Committee.

(7)(a) On entry of judgment for a claimant in any proceeding to forfeit property under ORS 131.550 to 131.600, unless the court has foreclosed one or more security interests, liens or other interests covering the property, the property or interest in property must be returned or conveyed immediately to the claimant designated by the court.

(b) If it appears that there was reasonable suspicion that the property was subject to criminal forfeiture, the court shall cause a finding to be entered and no claimant or financial institution is entitled to damages nor is the person who made the seizure, the seizing agency or forfeiture counsel liable to suit or judgment on account of the seizure or action. An order directing seizure issued under ORS 131.561 constitutes a finding of reasonable suspicion that the property was subject to criminal forfeiture.

(8) Nothing in this section prevents a claimant or financial institution from obtaining any deficiency to which the claimant or financial institution would otherwise be entitled.

(9) Nothing in this section or in ORS 131.564 prevents a seizing agency from entering into an agreement with a claimant or other person for the reimbursement of the seizing agency for the costs and expenses relating to towing and storage of property or the cost of discharging any possessory chattel lien on the property arising under ORS 87.152 to 87.162 that attached to the property in the period between the seizure of the property and the release or criminal forfeiture of the property.

SECTION 5. This 2009 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2009 Act takes effect on its passage.

Passed by House May 1, 2009

Repassed by House June 10, 2009

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Chief Clerk of House

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Speaker of House

Passed by Senate June 9, 2009

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President of Senate

Received by Governor:

.....M,....., 2009

Approved:

.....M,....., 2009

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Governor

Filed in Office of Secretary of State:

.....M,....., 2009

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Secretary of State