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May 2, 2013

Representative Jeff Barker
Chair, House Judiciary Committee
Oregon House of Representatives
900 Court St. NE
Salem, OR 97301

Re: SB 622: Juvenile court orders

Dear Chair Barker:

SB 622 is scheduled for public hearing and possible work session in your committee on May 7, 2013. I regret that I will be out of state on that day, but I respectfully request that the committee consider my written testimony, enclosed with this letter.

According to the Department of Human Services, 4,398 children were removed from the custody of their biological parents in 2011 and placed in foster care. The public has a strong interest in knowing how juvenile courts exercise the great power that they wield in these matters. Moreover, the Oregon Constitution prohibits Oregon courts from operating in secret. I hope that the committee will consider the amendments that I have proposed in the attachment to the enclosed memorandum.

Very truly yours,

Charles F. Hinkle

Charles F. Hinkle

cc(w/encl): Rep. Chris Garrett
Rep. Wayne Krieger
Rep. Brent Barton
Rep. Kevin Cameron
Rep. Wally Hicks
Rep. Andy Olson
Rep. Carolyn Tomei
Rep. Jennifer Williamson

STATEMENT ON SB 622

Submitted to House Committee on Judiciary

Charles F. Hinkle
Attorney at Law
900 SW Fifth Avenue
Portland, OR 97204
May 7, 2013

1. Introduction

1.1 My name is Charles Hinkle. I have represented *The Oregonian* and other media entities in Oregon for more than 35 years in matters relating to open government. I am submitting this testimony solely on my own behalf, and not on behalf of *The Oregonian* or any other media entity.

1.2 I am requesting the Committee to modify two parts of SB 622: (1) the provision relating to secrecy of juvenile court orders and judgments, and (2) the provision relating to access to transcripts and audio recordings of juvenile court hearings.

2. Secret court orders violate the constitutional prohibition on "secret" courts.

2.1. Article I, section 10, of the Oregon Constitution, provides that "No court shall be secret, but justice shall be administered, openly ***." In *State ex rel Oregonian Pub. Co. v. Deiz*, 289 Or 277, 613 P2d 23 (1980), the Oregon Supreme Court held that this prohibition on "secret" courts applies to juvenile court hearings. The Court said that the prohibition "does not recognize distinctions between various kinds of judicial proceedings; *it applies to all*." *Id.* at 283 (emphasis added).

2.2 ORS 419A.255(1) provides that the "record" in a juvenile court case, including court orders, "shall be withheld from public inspection." However, there is an exception for orders in delinquency cases. ORS 419A.255(5)(e) provides that the following portion of a juvenile court record is "not confidential and not exempt from disclosure": "That portion of the juvenile court order providing for the legal disposition of the youth or youth offender when jurisdiction is based on ORS 419C.005" (that is, an allegation of conduct that would be "criminal" if done by an adult).

2.3 Allowing public access to dispositional orders in delinquency cases is proper, and in my opinion it is required by Article I, section 10. The prohibition on "secret" courts would not mean much if courts could send juveniles to detention facilities in secret. Moreover, in the *Deiz* case (see Paragraph 2.1, above), the Supreme Court held that the public has a constitutional right to attend a juvenile court hearing, and to hear all the evidence relating to the juvenile. It would make no sense to say that the public can hear all the evidence, but that it can then be prevented from learning how the court rules on that evidence.

2.4 There is no evidence that allowing public access to dispositional orders in delinquency cases has had any adverse effect on any juvenile's right to have the record expunged, or on the juvenile's rehabilitation.

2.5 Just as Article I, section 10, requires that the public should have access to dispositional orders in delinquency cases, so does it require public access to dispositional orders in dependency cases. The Supreme Court's statements with respect to Article I, section 10, apply equally to both kinds of cases. The Court has recently stated that this section "require[s] the courts to conduct the business of administering justice in public—that is, in a manner that permits public scrutiny of the court's work in determining legal controversies." *Doe v. Corp. of Presiding Bishop*, 352 Or 77, 90, 280 P3d 377 (2012). It was aimed at "combating secrecy in the administration of justice and fostering judicial accountability through public scrutiny of court proceedings," *id.* at 93, and it protects the public's right "to see and hear the court's decision." *Id.* at 100.

2.5. The question of public access to dispositional orders in dependency cases is the subject of pending litigation. In May 2009, the Multnomah County Circuit Court entered a Shelter Hearing Order, which removed a two-day-old African-American infant from the custody of his biological parents and placed him in foster care with persons who are not African-American. *In the Matter of K.N.*, Mult. Co. Cir. Ct. No. 2006-80004. After being contacted by the child's father and other relatives, *The Oregonian* asked the juvenile court to disclose the Order. The Department of Human Services does not object to release of the Order, and the child's attorney submitted a letter to Judge Waller stating that the child had no objection. The child's father consented to release of information about the child. Nevertheless, Judge Waller refused to release the Order, relying on the secrecy provisions in ORS 419A.255(1), and *The Oregonian* then filed an action against her under the Public Records Law.

2.6 In April 2011, Senior Judge Bearden of the Multnomah County Circuit Court entered a General Judgment in Oregonian's case against Judge Waller, declaring that Article I, section 10, requires that the Shelter Hearing Order be made available for public review, and that ORS 419A.255(1) is unconstitutional to the extent that it prohibits public disclosure of court orders.[1]

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[1] The Court of Appeals reversed Judge Bearden's ruling, not on the merits, but on the ground that Oregonian used the wrong procedural device to try to obtain the Order. It held that instead of using the Public Records Law, Oregonian should have petitioned the Supreme Court for mandamus. It did not mention that in *State ex rel KOIN-TV v. Olsen*, 300 Or 392, 711 P2d 966 (1985), the Oregon Supreme Court had stated just the opposite: that the Public Records Law is the proper means for seeking a document from a circuit court judge and that mandamus is not available in such a case. Oregonian has asked the Supreme Court to review the Court of Appeals decision. *Oregonian Publishing Company LLC v. Waller*, 253 Or App 123, 293 P3d 1046 (2012), *petition for review pending*, SC No. S060914.

3. Why public access to juvenile court decisions matters

3.1 Juvenile courts have enormous power to affect the lives of the people who come before them.

> "Child placement involves administrative authority over one of the most intimate and cherished of human relations. The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts and courts of domestic relations. The latter may bring about a revolution as easily as did the former."[2]

3.2 The importance of public access to juvenile court orders is not an academic matter. It is illustrated by the legislature's reaction to *The Oregonian's* investigation into the murder of four-year-old Adrianna Cram-Romero by her aunt in Mexico. On December 10, 2003, the Washington County Circuit Court issued an Order providing that Adrianna was "continued in the legal custody and guardianship of DHS" and that DHS "has permission to transport child to placement in Mexico." The child was placed in her aunt's home in Mexico in July 2004, and she died in June 2005. The aunt was convicted of aggravated murder.

3.3 In an article published in *The Oregonian* on March 11, 2009, two reporters wrote that they were about "to publish an investigative report on Adrianna's case. Ten days earlier, they had interviewed the interim director of DHS's Children, Adults, and Families Division, on the topic of international adoptions. Within a few days after that interview, DHS adopted a new policy; in their article, the reporters stated that "Oregon will temporarily stop sending children from the state foster care system to be adopted by relatives in other countries."

3.4 On March 15 and 16, 2009, *The Oregonian* published a two-part article concerning Adrianna's case. The legislature promptly responded by adopting Or Laws 2009, ch 528. The new statute read, in part, as follows:

> "(3) To the extent consistent with the Convention and the Intercountry Adoption Act of 2000, the rules, policies and procedures adopted by the Department of Human Services under this section must provide that the Department of Human Services shall, in cooperation with a foreign authorized entity of another Convention country:
>
> "(a) Develop minimum requirements for the placement and supervision of a child who is the subject of an outgoing Convention adoption.

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[2] Roscoe Pound, "Foreword," in Pauline V. Young, *Social Treatment in Probation and Delinquency* xxvii (1937). The Oregon Supreme Court has referred to Pound as "that great legal scholar." *State v. Mains*, 295 Or 640, 657, 669 P2d 1112 (1983). He was dean of the Harvard Law School for twenty years, and one of the most influential legal scholars of the twentieth century.

> "(b) Require the exchange and provision of appropriate written reports, including but not limited to background and home studies, between the Department of Human Services and the foreign authorized entity as necessary to meet the requirements developed under paragraph (a) of this subsection."

ORS 417.265(3) (enacted by Or Laws 2009, ch 528, § 1).

3.5 Adrianna's case demonstrates that there is a strong public interest in knowing how Oregon's courts handle juvenile dependency cases. *The Oregonian's* investigation of that case, and its publication of the facts surrounding it, led both to changes in DHS's placement practices and to corrective legislation.

3.6 It is a fact of life that people in positions of trust and authority with respect to children can abuse that trust and authority. In recent years, this nation has seen many examples of such abuse, as well as many examples of other people enabling that abuse by keeping it secret. The examples have included some of the most trusted institutions in our society: churches, the Boy Scouts, public school teachers and coaches, and even juvenile courts. In 2008, two trial judges in Pennsylvania were accused of accepting money from private juvenile facilities, in return for imposing sentences on juveniles that would increase the number of inmates in the detention centers. The judges were indicted on racketeering, fraud, extortion, bribery, and other charges. In 2010, one of them pleaded guilty to a charge of racketeering conspiracy, and is serving a 17-year sentence in federal prison. In 2011, a jury convicted the other judge on twelve counts of the indictment, and he is serving a 28-year sentence in federal prison.[3]

3.7 The U.S. Supreme Court has aptly stated, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 US 555, 572, 100 S Ct 2814, 65 LEd2d 973 (1980).

3.8 The legislature should amend ORS 419A.255 to ensure that the public has a right of access to dispositional orders by which juvenile courts remove children from their biological parents and place them in foster care.

4. SB 622 should allow for public access to transcripts and audio recordings of juvenile court proceedings.

4.1 As noted above, Article I, section 10, guarantees that the public has a right to attend any juvenile court proceeding. The public should therefore also have a right to obtain a transcript or audio recording of any such proceeding.

4.2 The consequences of not allowing access to a transcript or recording are illustrated in a mandamus proceeding now pending in the Oregon Supreme Court. As part of its effort to obtain

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[3] http://en.wikipedia.org/wiki/Kids_for_cash_scandal (visited March 15, 2013).

access to the Shelter Hearing Order referred to in Paragraph 2.5, above, *The Oregonian* filed a motion to intervene directly in the juvenile court proceeding, seeking access to the Order. On February 12, 2013, Multnomah County Circuit Court Judge Maureen McKnight held a hearing on Oregonian's motion, and entered an Order stating that she would defer ruling on it "for reasons stated in the record" until the Supreme Court acts on Oregonian's petition for review in the *Waller* case.

4.3 Oregonian has filed a petition for mandamus with the Supreme Court to challenge Judge McKnight's decision to defer ruling on its intervention motion. Because of the prohibition on public disclosure of a transcript or recording of the hearing in ORS 419A.256, Oregonian has been unable to inform the Supreme Court of the exact content of Judge McKnight's "reasons stated in the record." (Oregonian filed a motion with Judge McKnight, asking for permission to obtain a copy of the transcript. On March 26, 2013, Judge McKnight entered an Order deferring a ruling on that motion, too, until the Supreme Court rules in the pending matters.)

4.4 The result is that members of the public can attend a juvenile court hearing, but they can thereafter only report their own memory of what was said and what the court ruled. The prohibition on access to a transcript or recording of the hearing creates a potential for inaccuracy and the dissemination of misinformation. **Release of a transcript or audio recording would not reveal anything that is not already subject to public knowledge**.

5. Proposed Amendments to A-Engrossed SB 622

5.1 I have attached proposed amendments to A-Engrossed SB 622. These amendments would do two things. First, they would provide public access to dispositive juvenile court orders in dependency cases by adding this subsection to ORS 419A.255(1):

> "Every person has a right to inspect any order or judgment of a court that changes the custody of a child or ward."

I do not propose amending the statute that governs access to orders in delinquency cases, because as noted in paragraph 2.2, above, ORS 419A.255(5)(e) already provides for public access to such orders.

5.3 Second, they would provide that the public has a right to obtain a transcript or recording of any juvenile court proceeding that the public has a constitutional right to attend. That amendment would not enlarge public access to any information to which the public does not already have access, by virtue of the *Deiz* case; it merely helps ensure that if the content of a proceeding does become a matter of public interest, an interested person will have access to an accurate account of what happened.

EXHIBIT A

77th OREGON LEGISLATIVE ASSEMBLY--2013 Regular Session

PROPOSED AMENDMENTS to A-Engrossed SENATE BILL 622

Submitted by Charles F. Hinkle to the House Committee on the Judiciary
May 7, 2013

On page 3 of the A-Engrossed bill, line 8, delete "The" and insert "Except as provided in subsection (1)(d) of this section, the".

On page 3 of the A-Engrossed bill, after line 36, insert: "(d) Every person has a right to inspect any order or judgment of a court that changes the custody of a child or ward."

On page 7 of the A-Engrossed bill, line 18, delete "Once" and insert: "Except as provided in subsection (c) of this subsection (1), once".

On page 7 of the A-Engrossed bill, after line 23, insert: "(c) If a transcript has been prepared of any juvenile court proceeding that is required to be open to the public by Article I, section 10, of the Oregon Constitution or that was in fact open to the public by court order, any person may obtain a copy of that transcript by paying the actual cost of preparation."

On page 7 of the A-Engrossed bill, line 34, after "(P)" insert: ", provided that any person may inspect and obtain a copy of an audio recording of any juvenile court proceeding that is required to be open to the public by Article I, section 10, of the Oregon Constitution, or that was in fact open to the public by court order."