



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 26, 2018

Senator Floyd Prozanski
900 Court Street NE S413
Salem OR 97301

Re: A-engrossed House Bill 4094

Dear Senator Prozanski:

You asked whether section 1 of A-engrossed House Bill 4094 is unconstitutional under Article I, section 10, of the Oregon Constitution. The answer is no.

Section 1 of HB 4094-A provides for the confidentiality of affidavits submitted to a court in support of a petition for approval of settlement of a personal injury claim of an incapacitated person, a minor or a decedent. Opponents of section 1 of HB 4094-A assert that this provision violates Article I, section 10, of the Oregon Constitution, also known as the "open courts" provision of the Oregon Constitution.

Article I, section 10, provides:

Section 10. Administration of justice. No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation. —

The Oregon Supreme Court recently considered the application of Article I, section 10, in the case of *State v. Macbale*, finding that a hearing to determine the admissibility of evidence under the rape shield law may be closed to the public without violating the open courts provision.¹ The court thoroughly examined the text and history of Article I, section 10, and concluded that "the right of access that Article I, section 10, secures, although broad, is not absolute."²

At least two of the caveats recognized by the court in *Macbale* apply to HB 4094-A. First, the *Macbale* court notes that Article I, section 10, applies only to "adjudications" and "does not apply to all aspects of court proceedings."³ It is not clear that the submission of an affidavit in support of the approval of a settlement is an adjudication for purposes of Article I, section 10. Most of the cases addressing Article I, section 10, involve the closure to the public of a hearing or other in-person proceeding.⁴ The affidavit that is the subject of HB 4094-A is more

¹ 353 Or. 789 (2013).

² *Id.* at 117-118.

³ *Id.* at 117.

⁴ See *Jury Serv. Res. Ctr. v. Carson*, 199 Or. App. 106, 116 (2005), reversed on other grounds by *Jury Serv. Res. Ctr. v. De Muniz*, 340 Or. 423 (2006) ("the open courts guarantee of Article I, section 10, applies only to those

comparable to the evidence at issue in *Doe v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, in which the court found that Article I, section 10, did not create a public right to view evidence admitted during a proceeding.⁵

Also of particular relevance to HB 4094-A, which would make information about minors and incapacitated persons confidential, the court wrote:

notwithstanding strong textual and caselaw support for the principle of open court proceedings, judges have always enjoyed broad latitude to control their courtrooms, including taking such actions as may be necessary to protect vulnerable participants in judicial proceedings, including victims, from harassment or embarrassment.⁶

Thus, the court explicitly acknowledged that courts can make sensitive information confidential without violating Article I, section 10. In accordance with this principle, there are many existing statutes directing or allowing a court to seal sensitive information.⁷

Finally, note that HB 4094-A allows a court to make an affidavit subject to inspection upon a showing of good cause. Thus, if a court determines that making an affidavit confidential in a certain circumstance would violate Article I, section 10, the court has statutory authority to order the release of the affidavit.

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Very truly yours,

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Legislative Counsel



By
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proceedings, in court and before a judge, that are immediately related to the presentation of evidence and argument”).

⁵ 352 Or. 77, 100 (2012).

⁶ *State v. Macbale*, 353 Or. 789, 117-118 (2013).

⁷ See, e.g., ORS 33.420 (sealing record of name change or sex change in certain cases), ORS 40.210 (rape shield law), ORS 305.396 (allowing closing of proceedings dealing with confidential industrial property information), ORS 646.469 (allowing court to preserve secrecy of trade secrets).