Legislative Testimony

Oregon Criminal Defense Lawyers Association

May 2, 2019

The Honorable Senator Floyd Prozanski, Chair
House Judiciary Committee, Members

Re: Testimony in Opposition to HB 2474

Dear Chair Prozanski and Members of the Committee:

Thank you for the opportunity to submit the following comments opposing HB 2474.

Process:
First, I do want to acknowledge that my organization missed this bill on the House side, and while I would normally not raise objections now, we do feel strongly about making our position known as we are not the only relevant stakeholder excluded from the discussion on this bill. DOJ and ACLU of Oregon expressed to me that they are interested but were not consulted. Those organizations also agree with me that this bill directly impacts an individual's constitutional and statutory privacy rights as well as implicates the issues of privacy, consumer protection, and criminal procedure subject to well established search and seizure law.

When I saw this bill set for hearing in the Senate, I immediately reached out to Tim Martinez with Oregon Bankers Association/Community Banks of Oregon to inquire about the genesis of this bill. He shared that it came from the banks in consultation with Oregon District Attorney Association, and he confirmed that no other relevant stakeholders were included in the discussion or drafting of their bill.

He shared that his client needs clarity in the statute to tell them that the statute at issue applies or doesn't apply to grand jury subpoenas so they can feel confident in the steps they must take when they receive grand jury subpoenas for their customer's records.

Current Law: Currently, ORS 192.596 sets out the process for when a state or local agency seeks to obtain records from a financial institution through a lawful subpoena of any type (including a grand jury subpoena). The state or local agency must serve the subpoena on the financial institutional and have a copy of the subpoena served on the financial institution's customer. The subpoena served on the financial institution must say when the copy of the subpoena was served on the customer. The financial institution must then wait ten days before providing the documents to the state or local agency in order to give the customer time to quash or object to the subpoena. If the customer objects within those ten days, then the financial institution cannot provide the records to the state or local agency unless the customer consents to the disclosure of the records or a court orders the disclosure of the records.

Notably, the law already currently allows the state or local agency to get permission from a judge to not comply with the service and ten-day timeline on the customer if they can make a showing of reasonable cause to believe that laws are or were being violated. This escape valve exists and puts the burden on the state to relieve themselves and the banks of the need to comply with the notice on the customer by getting a judge's permission (similar to getting a warrant, something that we already recognize under the 4th amendment is necessary when a person is going to be subject to a search or seizure of their papers without their permission).

What HB 2474 does: The bill seeks to completely remove the state or local agency's obligation to serve a copy of the subpoena on the client (give notice) and it also relieves the financial institutions from giving their customers ten days to object to the subpoena. The changes allow banks to provide their customers records to a DA or AG without any notice to the customer, without procedural due process currently codified, and without the otherwise necessary permission pursuant to search and seizure law from a judge saying the search is reasonable under the law and therefore the notice isn't required.

Our Concerns:

Bill Overbroad to Address Banks' Stated Goal: We understand that the banks are looking for clarity—they want to know if DA's must provide a copy of the subpoena to their customers (pursuant to current law) and they want to know if they must wait the ten days to give their customers time to object to the state's subpoena (current law). As Mr. Martinez stated to me, the banks are "in an uncomfortable position." I am assuming the district attorneys don't want to show cause to a judge why they are entitled to a customer's records, and they are putting pressure on banks to disregard their lack of notice to the customer and to disregard the ten day timeline and simply provide the records.

If this is the case, it is problematic because the current law is clear in what it requires AND it already gives DA's the ability to skip the notice/ten day requirement if they go through a judge. We emphasize that going through a judge is NOT too much of a burden to place on the state when the state is asking to conduct a search of an individual's papers (whether held through a third party or not) without their consent.

This bill is too broad as written if its stated intent is, in fact, to simply give banks clarity. There is no need to change the process or due process protections in place in statute to give the banks clarity (especially without a necessary and robust conversation among all of the relevant stakeholders which has NOT happened).

Suggested amendment to address Banks' Stated Goal:

- Page 1: Revises lines 6-9 to say "A financial institution may disclose financial records of a customer to a state or local agency, and a state or local agency may request and receive such records, pursuant to a lawful summons or subpoena **including a lawful summons or subpoena issued by a district attorney for a grand jury, or by the Attorney General under ORS 180.073**, served upon the financial institution, as provided in this section or ORS chapter 25."

For questions or comments contact:
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- Page 1: Delete changes on lines 10-11 and lines 15-16
- Page 2: Delete lines 10-14

These changes make it clear that the process outlined in ORS applies to grand jury subpoenas as well, so Banks and DAs/AGs know the law applies to grand jury subpoenas and they must follow it.

Robust Conversation about Privacy, Constitutional and Statutory Privacy Rights, and Criminal Procedure Needed: The legislature, when they originally codified this statute, thought it was appropriate to offer a process to protect people and to place a check on the great power of the state. Why are we changing this now without relevant stakeholders having a robust discussion?

Grand Jury Subpoena Power and Potential Abuse: Lastly, this bill implicates the subpoena power of the grand jury, and when the state is relieved from the burden of requiring a judicial check to balance this power, potential abuses can occur. Lawyers in my organization have shared stories with me regarding financial records being "subpoenaed to grand jury" and yet the client remains unindicted months later.

Conclusion:
This bill purports to make a small, seemingly innocuous change—but the body of law it impacts is not small nor innocuous, and a robust discussion centering around whether this is truly good policy should be had.

Thank you for your consideration.

Mary Sofia
Legislative Director

About OCDLA

The Oregon Criminal Defense Lawyers Association (OCDLA) is a private, non-partisan, non-profit bar association of attorneys who represent juveniles and adults in delinquency, dependency, criminal prosecutions, appeals, civil commitment, and post-conviction relief proceedings throughout the state of Oregon. The Oregon Criminal Defense Lawyers Association serves the defense and juvenile law communities through continuing legal education, public education, networking, and legislative action.

OCDLA promotes legislation beneficial to the criminal and juvenile justice systems that protects the constitutional and statutory rights of those accused of crime or otherwise involved in delinquency and dependency systems as well as to the lawyers and service providers who do this difficult work. We also advocate against issues that would harm our goals of reform within the criminal and juvenile justice systems.

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