

# Senate Bill 751

Sponsored by COMMITTEE ON JUDICIARY AND BALLOT MEASURE 110 IMPLEMENTATION (at the request of Oregon Criminal Defense Lawyers Association)

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Requires party in criminal case to provide hard copy or electronic copy of discovery material to adverse party unless copy cannot reasonably be provided.

Requires district attorney to disclose prior conviction record of all persons associated with investigation. Expands statutory obligation of district attorney to disclose exculpatory evidence and impeachment evidence. Modifies timing of disclosures.

Provides that remedy for violation of discovery obligation may be dismissal of charges, or dismissal of charges with prejudice if violation concerned exculpatory evidence or impeachment evidence.

Establishes procedures for taking of depositions in criminal cases.

## A BILL FOR AN ACT

1  
2 Relating to pretrial discovery; creating new provisions; and amending ORS 135.805, 135.815, 135.845  
3 and 135.865.

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

5 **SECTION 1.** ORS 135.805 is amended to read:

6 135.805. (1) The provisions of ORS 135.805 to 135.873 are applicable to all criminal prosecutions  
7 in which the charging instrument has been brought in a court of record.

8 (2) As used in ORS 135.805 to 135.873, "disclose" means to **provide a hard copy or an elec-**  
9 **tronic copy of discovery material to the adverse party or, if the nature of the material is**  
10 **such that a hard copy or electronic copy cannot reasonably be provided, to** afford the adverse  
11 party an opportunity to inspect or copy the material.

12 **SECTION 2.** ORS 135.815 is amended to read:

13 135.815. (1) Except as otherwise provided in ORS 135.855 and 135.873, the district attorney shall  
14 disclose to a represented defendant the following material and information within the possession or  
15 control of the district attorney:

16 (a) The names and addresses of persons whom the district attorney intends to call as witnesses  
17 at any stage of the trial, together with their relevant written or recorded statements or memoranda  
18 of any oral statements of such persons.

19 (b) Any written or recorded statements or memoranda of any oral statements made by the de-  
20 fendant, or made by a codefendant if the trial is to be a joint one.

21 (c) Any reports or statements of experts, made in connection with the particular case, including  
22 results of physical or mental examinations and of scientific tests, experiments or comparisons which  
23 the district attorney intends to offer in evidence at the trial.

24 (d) Any books, papers, documents, photographs or tangible objects:

25 (A) Which the district attorney intends to offer in evidence at the trial; or

26 (B) Which were obtained from or belong to the defendant.

27 (e) *[If actually known to the district attorney,]* Any record of prior criminal convictions of **all**

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 persons [*whom the district attorney intends to call as witnesses at the trial;*] **associated with the**  
 2 **investigation**, and the district attorney shall make a good faith effort to determine if such con-  
 3 victions have occurred.

4 (f) All prior convictions of the defendant known to the state that would affect the determination  
 5 of the defendant’s criminal history for sentencing under rules of the Oregon Criminal Justice Com-  
 6 mission.

7 (g) Any material or information that tends to:

8 (A) Exculpate the defendant, **including evidence tending to support an affirmative defense;**

9 (B) Negate or mitigate the defendant’s guilt or punishment; or

10 (C) Impeach a person the district attorney intends to call as a witness at the trial, **including**  
 11 **prior inconsistent statements of the witness, the failure of the witness to identify the de-**  
 12 **fendant, inducements or promises made to the witness in exchange for testimony, and any**  
 13 **other information tending to negatively affect the credibility of the witness.**

14 (2)(a) The disclosure required by subsection (1)(g) of this section shall occur without delay [*after*  
 15 *arraignment and prior to the entry of any guilty plea pursuant to an agreement with the state*], **and**  
 16 **no later than at the time of the initial appearance of the defendant.** If the existence of the  
 17 material or information is not known at that time, the disclosure shall be made upon discovery  
 18 without regard to whether the represented defendant has entered or agreed to enter a guilty plea.

19 **(b) The disclosure required by subsection (1)(g) of this section shall occur regardless of**  
 20 **whether the material or information is written or recorded, and the district attorney has an**  
 21 **affirmative duty to determine whether such material or information exists.**

22 [(b)] (c) Nothing in subsection (1)(g) of this section[:]

23 [(A) *Expands any obligation under a statutory provision or the Oregon or United States Constitu-*  
 24 *tion to disclose, or right to disclosure of, personnel or internal affairs files of law enforcement*  
 25 *officers.*]

26 [(B)] imposes any obligation on the district attorney to provide material or information beyond  
 27 the obligation imposed by the Oregon and United States Constitutions.

28 (3) Except as otherwise provided in ORS 135.855 and 135.873, in prosecutions for violation of  
 29 ORS 813.010 in which an instrument was used to test a person’s breath, blood or urine to determine  
 30 the alcoholic content of the person’s blood the district attorney shall disclose to a represented de-  
 31 fendant at least the following material and information within the possession or control of the dis-  
 32 trict attorney:

33 (a) Any report prepared by a police officer relating to field tests, interviews, observations and  
 34 other information relating to the charged offense;

35 (b) Any report relating to the test results;

36 (c) A copy of the form provided to the defendant under ORS 813.100 (2)(b); and

37 (d) Any checklist prepared by the operator of the instrument for the test.

38 (4)(a) If a defendant is not represented by a lawyer, the district attorney shall disclose to the  
 39 defendant all of the information described in subsections (1) and (3) of this section except for the  
 40 personal identifiers of the victim and any witnesses.

41 (b) Notwithstanding paragraph (a) of this subsection, the district attorney shall disclose the  
 42 personal identifiers of the victim and any witnesses if the trial court orders the disclosure. A trial  
 43 court shall order the district attorney to disclose the personal identifiers of the victim and any  
 44 witnesses if the trial court finds that:

45 (A) The defendant has requested the information; and

1 (B)(i) The victim or witness is a business or institution and disclosure of the information would  
 2 not represent a risk of harm to the victim or witness; or

3 (ii) The need for the information cannot reasonably be met by other means.

4 (5)(a) Unless authorized by the trial court to disclose the information, a lawyer representing a  
 5 defendant, or a representative of the lawyer, may not disclose to the defendant personal identifiers  
 6 of a victim or witness obtained under subsections (1) and (3) of this section.

7 (b) The trial court shall order the lawyer, or representative of the lawyer, to disclose to the  
 8 defendant the personal identifiers of a victim or witness if the court finds that:

9 (A) The defendant’s lawyer has requested the district attorney to disclose the information to the  
 10 defendant;

11 (B) The district attorney has refused to disclose the information to the defendant; and

12 (C) The need for the information cannot reasonably be met by other means.

13 (6) As used in this section:

14 (a) “Personal identifiers” means:

15 (A) In relation to a witness, the witness’s address, telephone number, Social Security number  
 16 and date of birth and the identifying number of the witness’s depository account at a financial in-  
 17 stitution, as defined in ORS 706.008, or credit card account.

18 (B) In relation to a victim, the victim’s address, electronic mail address, telephone number, So-  
 19 cial Security number, date of birth, any user names or other identifying information associated with  
 20 the victim’s social media accounts and the identifying number of the victim’s depository account at  
 21 a financial institution, as defined in ORS 706.008, or credit card account.

22 (b) “Representative of the lawyer” has the meaning given that term in ORS 40.225.

23 (c) “Represented defendant” means a defendant who is represented by a lawyer in a criminal  
 24 action.

25 (d) “Social media” has the meaning given that term in ORS 659A.330.

26 **SECTION 3.** ORS 135.845 is amended to read:

27 135.845. (1)(a) The *[obligations to disclose]* **disclosures required by ORS 135.815** shall be per-  
 28 formed *[as soon as practicable following the filing of an indictment or information in the circuit court*  
 29 *or the filing of a complaint or information charging a misdemeanor or violation of a city ordinance]*  
 30 **immediately, and no later than at the time of the initial appearance of the defendant, for any**  
 31 **material and information in the possession or control of the district attorney at the time of**  
 32 **the appearance.**

33 **(b) After the initial disclosure by the district attorney under paragraph (a) of this sub-**  
 34 **section, all further disclosures required by ORS 135.805 to 135.873 shall be performed within**  
 35 **seven days of the material or information becoming known to a party.**

36 (c) The court may supervise the exercise of discovery to the extent necessary to *[insure]* **ensure**  
 37 that it proceeds properly and expeditiously.

38 (2) If, after complying with the provisions of ORS 135.805 to 135.873 and 135.970, a party finds,  
 39 either before or during trial, additional material or information which is subject to or covered by  
 40 these provisions, the party must promptly notify the other party of the additional material or infor-  
 41 mation.

42 **SECTION 4.** ORS 135.865 is amended to read:

43 135.865. (1) Upon being apprised of any breach of the duty imposed by the provisions of ORS  
 44 135.805 to 135.873 and 135.970, the court may order the violating party to permit inspection of the  
 45 material, or grant a continuance, or refuse to permit the witness to testify, or refuse to receive in

1 evidence the material not disclosed, or **order a dismissal of the charges, or** enter such other order  
 2 as it considers appropriate.

3 **(2) Notwithstanding subsection (1) of this section, if the breach is of the duty imposed**  
 4 **by ORS 135.815 (1)(g), the court shall grant the defendant’s motion for dismissal of the**  
 5 **charges with prejudice or, if the court is apprised of the breach of duty during trial, grant**  
 6 **the defendant’s motion for mistrial and order dismissal of the charges with prejudice.**

7 **(3) When a breach of the duty imposed by ORS 135.805 to 135.873 delays the trial of a**  
 8 **defendant in custody pending trial, upon the request of the defendant the court shall order**  
 9 **the release of the defendant.**

10 **SECTION 5. Section 6 of this 2021 Act is added to and made a part of ORS 135.805 to**  
 11 **135.873.**

12 **SECTION 6. (1)(a) The court may, at any time after arraignment, upon motion of a party**  
 13 **and notice to the adverse party, order a deposition when:**

14 **(A) The court finds that a prospective witness may be unable to attend or prevented from**  
 15 **attending a trial or hearing;**

16 **(B) A witness refuses to discuss the case with either the district attorney or defense**  
 17 **counsel, and the witness’s testimony is material and necessary; or**

18 **(C) There is good cause shown to take the deposition.**

19 **(b) The court may require that any witness subject to a deposition under this section**  
 20 **produce any designated books, papers, documents or tangible objects, not privileged, at the**  
 21 **same time and place as the deposition.**

22 **(c) A person named as a victim in the charging instrument may refuse to be deposed.**

23 **(2) The party at whose request the deposition is to be taken shall give to the adverse**  
 24 **party reasonable written notice of the time and place for taking the deposition. The notice**  
 25 **shall state the name and address of each person to be examined. On motion of a party upon**  
 26 **whom the notice is served, the court for cause shown may extend or shorten the time and**  
 27 **may change the place of taking.**

28 **(3) A deposition shall be taken in the manner provided in civil actions. A deposition may**  
 29 **not be used in evidence against any defendant who has not had notice of, and an opportunity**  
 30 **to participate in or be present at, the taking of the deposition.**

31 **(4) Any deposition may be used by any party for the purpose of contradicting or**  
 32 **impeaching the testimony of the deponent as witness, or as substantive evidence as permit-**  
 33 **ted under the Oregon Evidence Code.**

34 **(5) Objections to receiving in evidence a deposition or part thereof may be made as pro-**  
 35 **vided in civil actions.**

36 **SECTION 7. Sections 5 and 6 of this 2021 Act and the amendments to ORS 135.805,**  
 37 **135.815, 135.845 and 135.865 by sections 1 to 4 of this 2021 Act apply to offenses alleged to have**  
 38 **occurred on or after the effective date of this 2021 Act.**