

In Camera Reviews

Through the Eyes of a Child

August 7, 2017

1. Generally:

A. Statutory Authority.

- I. Criminal, delinquency and dependency cases: Upon request of a party, the court may permit a showing of good cause for an in camera review to deny or regulate what must be disclosed in discovery. A record shall be made of the proceeding. If the court enters an order granting relief following an in camera showing, the entire record of the showing shall be sealed and preserved in the records of the court, and made available to the appellate court in the event of an appeal. ORS 135.873(3) & (4) (criminal); 419C.270(6); 419B.881(7) & (8) (dependency).
- II. Civil cases: ORCP 36(C) provides the court with authority to prohibit or limit disclosure upon motion by a party or by the person from whom discovery is sought and upon a showing of good cause. The court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Among other measures, this may include that discovery be conducted with no one present except persons designated by the court.

B. Confidential files: Review must be conducted by judge, in private.

In situations where the files are confidential, the court must personally inspect the file *in camera* to determine whether discoverable material is present. *State v. Granville*, 304 Or 424, 746 P2d 715 (1987). Court can't delegate the duty to DA. *State ex rel Dugan v. Titkin*, 313 Or 607 (1992) or to defense counsel *State ex rel. Carlile v. Lewis*, 310 Or 541 (1990).

2. Proponent must show "good cause".

The proponent must show there is good cause for the court to conduct the in camera review. The cases below demonstrate how that requirement has been interpreted. Once the court decides the threshold good cause showing has been made, the court weighs the factors in *State v. Bray*, 281 Or App 584 (2016) to determine whether to conduct the review.

"State with particularity." *State v. Wixom*, 275 Or App 824, (2015); rev den 359 Or 166 (2016) (victim's juvenile dependency records). Trial court must examine requested material *in camera* upon a showing of good cause for disclosure. "Good cause" means "a substantial reason." *Id.* A defendant in a criminal case must state with particularity that the information is favorable and material to guilt or innocence. A trial court is not obligated to conduct an *in camera* review when the asserted materiality is "pure conjecture." *Id.*

“Might Yield.” *Frease v. Glazer*, 330 Or. 364, 373-374, (2000) (tort action seeking an attorney’s legal file from domestic relations case). Proponent must make a showing that would support a reasonable belief that an *in camera* review *might yield* relevant unprivileged evidence. *Id.*

Reasonable belief that something might be subject to disclosure. *State v. Lammi*, 278 Or App 690, (2016); clarified on reconsideration, 281 Or App 96 (2016), rev den 360 Or 697 (2016).

“To satisfy a ‘might yield’ standard, defendant needed to provide the court with the evidence that would support a reasonable belief that something in the records might be subject to disclosure.” Regarding review of a victim’s counseling records, the Court of Appeals held that the Defendant is entitled to an *in camera* review on demonstration that there is “a reasonable basis to think those records could contain any exculpatory evidence related to the abuse.” Held: trial court erred in finding the showing for *in camera* review was inadequate. On reconsideration, the Court of Appeals added that “...once a party has made a threshold showing sufficient to permit an *in camera* review, whether to conduct the review is a separate discretionary decision” using the factors listed below in *State v. Bray*.

3. Court must weigh factors in deciding whether to conduct the review.

If the material is privileged or otherwise protected, the court must weigh the following factors to determine whether to engage in the camera review:

- Facts and circumstances of the particular case;
- The volume of materials subject to review;
- The relative importance to the case of the alleged privileged information; and
- The likelihood that an exception to privilege will apply.

State v. Bray, 281 Or App 584 (2016).

Exceptions to privilege:

A. Criminal cases. Defendants have a right to compulsory process under Article I, Section 11 of the Oregon Constitution and the Sixth Amendment to the United States Constitution. The right to compulsory process will defeat a claim of privilege when the defendant demonstrates:

- The information sought is favorable to the defendant;
- The information sought is material to the issues in the case; and
- The defendant has identified an interest in the evidence that outweighs the legitimate interest in the privilege asserted.

State v. Bassine, 188 Or App 228, 234-235 (2003), *adh’d to on recons*, 189 Or App 228 (2003), *rev den*, 337 Or 182 (2004)

B. Proceedings after a report of child abuse under ORS 419B.010 to 419B.050. The following privileges shall not be grounds for excluding evidence regarding a child’s abuse:

- Psychotherapist - Patient
- Nurse - Patient

- School employee - Student
- Regulated social worker – Client
- Spousal

C. OEC Rules 503-511. The privileges provided in each rule also outline limits and exceptions. Consult the applicable rule for additional details.

4. Cartwright Case.

In *State v. Cartwright*, 336 Or 408 (2004), defendant attempted to access audio recordings made by an employer of a complaining witness. The Oregon Supreme Court discussed subpoena and discovery statutes pertaining to a third party witness.

ORS 136.580(1) grants parties to a criminal case the right to issue subpoenas duces tecum commanding recipients “to bring material with them *to the defendant’s trial or to a trial-related court proceeding at which the material may be called for as evidence.*” *Cartwright*, at 415 (emphasis in original).

ORS 136.580(2) provides that the subpoenas duces tecum may request early production of material that would ordinarily “be available for evidentiary use at the proceeding to which they already have been subpoenaed.” *Cartwright*, at 415. The decision to direct or deny early production is within the sound discretion of the trial court. *Id.*

In considering a motion to quash, the court must look at the potential uses of the subpoenaed material at trial. Unless it is clear that the material or testimony has no potential use at trial, the court must deny the motion to quash.