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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

DOE,

Plaintiff,

Case No. CV 0803 0693

v.

**WILLAMETTE WEEK'S RESPONSE
TO PLAINTIFF'S MOTION TO
COMPEL**

Individuals, whose true names are unknown,
using the following pseudonyms:
TS, RONALD, KRIS, and BILL

Defendants.

I. INTRODUCTION

Plaintiff seeks from Willamette Week documents and information which are protected from compelled disclosure under Oregon's Media Shield Law, ORS 44.510 *et seq.* ("Media Shield Law"). By its plain terms, the Media Shield Law protects from disclosure the source of any information obtained by the media in the course of receiving information for any medium of communication to the public. Plaintiff seeks documents identifying the source of a comment which Willamette Week received for posting on its website and which commented on a Willamette Week news story about Sho Dozono and the recent Portland mayoral race. Although plaintiff makes spirited policy arguments, he cannot overcome the plain language of the Media Shield Law. Plaintiff's motion should be denied because compelled disclosure of the requested information is statutorily prohibited.

II. FACTUAL BACKGROUND

Plaintiff asserts in the "Factual Background" section of the motion and the supporting declaration that "[n]one of the webhosts has produced any responsive documents."

cc: DHS / Client / [Signature]

1 Mot., p. 2; Skerritt Decl., ¶ 3.¹ Willamette Week notes that it agreed during the pre-filing
2 conferral process to produce documents to unobjectionable portions of the subpoena (Sections 1,
3 2, and 3(a), which seek general web policy information and materials actually appearing on
4 Willamette Week's website).² Willamette Week produced those documents to plaintiff's counsel
5 by mail on July 31, 2008. Accordingly, the only documents to which Willamette Week objects
6 are those requested in Sections 3(c) through 3(g) ("Requested Information"). Specifically, the
7 Requested Information consists of: (1) documents containing any information identifying any
8 blogger or other "individual content provider" referring to Terry Beard; (2) any communications
9 between Willamette Week and any such blogger or other "individual content provider"; (3) any
10 record of "any investigation or review" Willamette Week conducted regarding any posting
11 referring Terry Beard; (4) "any submissions of or concerning Terry Beard that were rejected for
12 posting" on Willamette Week's website; and (5) "any documents concerning the review of and
13 decision to reject" any such postings. Skerritt Decl., Ex. A.

14 Plaintiff also states in the "Factual Background" section of the motion that "no
15 objections have been filed with this Court." Mot., p.2. Willamette Week timely objected to the
16 subpoena in writing. Declaration of Rodney Lewis, ¶¶ 5-6, Ex. 1. There is no requirement that
17 objections be filed with the Court. See ORCP 55B.

18 III. ARGUMENT

19 A. Oregon's Media Shield Law protects the "Requested Information" from 20 disclosure.

21 The Media Shield Law protects the media from efforts to compel the disclosure of
22 the source of any published or unpublished information the media obtains in connection with
23 receiving information for communication to the public. Specifically, ORS 44.520(1)(a) provides

24 ¹ Willamette Week notes that the Declaration of Daniel H. Skerritt filed by plaintiff fails to comply with
ORCP 1E because it does not contain the language required under that rule.

25 ² Willamette Week does not require any registration for a user to post a comment on its website, and thus
26 has no documents responsive to Section 3(b) of the subpoena.

1 that “No person connected with, employed by or engaged in any medium of communication to
2 the public” shall be compelled to disclose “[t]he source of any published or unpublished
3 information obtained by the person in the course of gathering, receiving or processing
4 information for any medium of communication to the public[.]” (Emphasis added.) In his
5 motion, plaintiff accurately quotes ORS 44.520(1), but ignores the plain language of the statute.
6 Mot., p. 4.

7 The Requested Information is also protected under ORS 44.520(1)(b). ORS
8 44.520(1)(b) protects “[a]ny unpublished information obtained or prepared by the person in the
9 course of gathering, receiving or processing information for any medium of communication to
10 the public[.]” (Emphasis added.) “Unpublished information” includes “data of whatever sort
11 not themselves disseminated to the public through a medium of communication[.]” ORS
12 44.510(5).

13 There is no question that the documents plaintiff seeks are those identifying the
14 source of the comment posted on Willamette Week’s website. *See* Skerritt Decl., Ex. A; Mot., p.
15 2 (“Webhosts have failed to produce responsive documents providing [the] identity of the
16 bloggers.”). Under the statute’s plain language, the source of information received or processed
17 for any medium of communication to the public is protected. There can be no question that
18 Willamette Week received the information plaintiff seeks for a medium of communication to the
19 public (its website). Nothing more is required.

20 Plaintiff does not explain how the information he seeks somehow evades the plain
21 language of the statute because he cannot. Instead, plaintiff relies on *State of Oregon v. Pelham*,
22 136 Or App 336 (1995), for the proposition that the Media Shield Law “only allows the media to
23 assert that ‘certain types of information are privileged.’” Mot., p. 4 (quoting *Pelham*, 136 Or at
24 344). *Pelham* involved an attempt to compel production of video that was not broadcast. *Id.* at
25 343. *Pelham* did not involve an attempt to compel disclosure of the source of information
26 received by the media, as plaintiff seeks here. Moreover, plaintiff ignores the fact that the court

1 in *Pelham* recognized that the types of information that are privileged are precisely those types
2 identified in the statute. *Id.* at 344. It does not limit the statute in any way.

3 Nor does *Pelham* purport to define “newsgathering” activities or limit
4 newsgathering to “work product, informants, and confidential sources.” Mot., p. 5. *Pelham*
5 addressed the discrete and unrelated issue of whether a cameraman’s personal observations, of
6 events occurring in public, made with the naked eye, fell within the scope of the Media Shield
7 Law. Eyewitness observations of live events are not even remotely analogous to the receipt of
8 information (including identifying information) submitted to Willamette Week via the internet.

9 Plaintiff’s discussion of *State ex rel. Meyers v. Howell*, 86 Or App 570 (1987),
10 and *Brown v. Gatti*, 95 Or 695 (2004), *rev’d on other grounds* 341 Or 452 (2006), is similarly
11 unavailing. Plaintiff argues that these cases show that the Media Shield Law protects Willamette
12 Week’s ability to gather news. Mot., p. 6. That is unquestionably true. But that proposition
13 does nothing to limit the language of the statute. That language protects Willamette Week from
14 being compelled to disclose the source of all information received for communication to the
15 public. Plaintiff’s policy arguments cannot circumvent the plain language of the Media Shield
16 Law. Nor can this Court rewrite the statute in the manner plaintiff suggests. *See* ORS 174.010
17 (“In the construction of a statute, the office of the judge is simply to ascertain and declare what
18 is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit
19 what has been inserted.”).

20 The final case upon which plaintiff relies, *Ranchero Publications v. Superior*
21 *Court*, 68 Cal App 4th 1538 (1999), actually supports Willamette Week. In *Ranchero*, the
22 California Court of Appeals chose not to apply California’s shield law to the identity of the
23 author of an advertorial. *Id.* at 1542. However, the court expressly declined to hold that the
24 “shield law is limited to ‘news’ or ‘newsgathering.’” *Id.* at 1546. Further, it based its ruling on
25 the lack of evidence that the advertorials were intended “to transmit news or commentary on
26 matters of public interest to the ... community.” *Id.* at 1546. Here, by contrast, the posting at

1 issue consisted of public commentary in response to a news article about Sho Dozono and
2 Portland's mayoral race and thus constitutes commentary on matters of public interest to the
3 community.

4 In short, plaintiff offers no law and no facts to support abrogating the plain
5 language of the Media Shield Law. Willamette Week therefore should not be compelled to
6 produce the information plaintiff seeks.

7 **B. The Communications Decency Act ("CDA")**

8 Plaintiff's argument that the CDA does not apply to discovery is a red herring.
9 Mot., p. 3. Willamette Week does not argue and has not argued that the CDA applies to
10 discovery. Instead, during the conferral process, plaintiff's counsel argued that if Willamette
11 Week claims that the author of the comment at issue is a "source" under the Media Shield Law,
12 then Willamette Week somehow waives its immunity under Section 230 of the CDA. As
13 Willamette Week understands plaintiff's argument, this is because under Section 230 Willamette
14 Week is not "treated" as the publisher of the posted comment. According to plaintiff, the
15 Media Shield Law applies to publishers, so that if Willamette Week asserts the protections of the
16 Media Shield Law it is admitting it is a publisher under Section 230.

17 Plaintiff's argument is unsupportable. Under 47 USC § 230(c), Willamette Week,
18 as a provider of an interactive computer service, has no liability for the posting by another
19 information content provider.³ It is true that Section 230(c)(1) provides that "[n]o provider or
20 user of an interactive computer service shall be treated as the publisher or speaker of any
21 information provided by another information content provider." However, Section 230(e)(3)
22 provides that "[n]othing in this section shall be construed to prevent any State from enforcing

23 ³ "Interactive computer service" means "any information service, system, or access software provider that
24 provides or enables computer access by multiple users to a computer server, including specifically a
25 service or system that provides access to the Internet and such systems operated or services offered by
26 libraries or educational institutions." 47 USC § 230(f)(2). "Information content provider" means "any
person or entity that is responsible, in whole or in part, for the creation or development of information
provided through the Internet or any other interactive computer service." 47 USC § 230(f)(3).

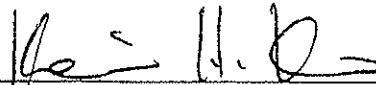
1 any State law that is consistent with this section....”

2 The Media Shield Law is entirely consistent with Section 230 and thus both
3 provisions apply.⁴ Section 230 provides that even if a media publisher provides a site for
4 information from an outside source to be made available to the public, including restricting or
5 editing it – which would be acts of a publisher – it will not be “treated” as a publisher for liability
6 purposes. That is not inconsistent with ORS 44.520, which does not directly address liability at
7 all. Instead, ORS 44.520 addresses compelled disclosure of information, and says that members
8 of the media are not required to disclose the source of published information “obtained by the
9 [media] in the course of ... receiving or processing information for any medium of
10 communication to the public.” ORS 44.520(1)(a). The comment section accompanying a news
11 article on Willamette Week constitutes a medium of communication to the public, and the
12 comment at issue was received by Willamette Week for purposes of communicating to the
13 public. The Media Shield Law applies by its plain terms, and that application is not inconsistent
14 with the immunity Section 230 grants.

15 **IV. CONCLUSION**

16 For the foregoing reasons, plaintiff’s motion to compel should be denied.

17 DATED this 13th day of August, 2008.

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19 _____
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26 _____
⁴ Further, if the provisions were not consistent, there would not be a waiver of immunity. Instead, the federal law would prevail. Section 230(e)(3) further provides that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”