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

STATE OF OREGON,  
  
Plaintiff ,  
  
vs.  
  
,  
  
Defendant.

Case No.:  
  
**DEFENDANT’S RESPONSE TO  
MOTION TO QUASH SUBPOENA  
DUCES TECUM, OR IN THE  
ALTERNATIVE, FOR AN IN  
CAMERA REVIEW**

Defendant, by and through his attorneys, Arnold Law Office, LLC, asks the Court to deny The State’s Motion to Quash Subpoena Duces Tecum because it is not protected by the judicial privilege. In the alternative, Defendant asks that Court perform an in camera review for admissible and/or relevant evidence rather than quash the subpoena because Defendant is entitled to such a review pursuant to his constitutional due process rights.

**POINTS AND AUTHORITIES**

**A. Seeking records, kept in the normal course of business, by a Release Officer is NOT akin to seeking the private notes of a judge, nor requiring a judge to testify, subsequent to a hearing in open court.**

The thrust of the State’s argument is that a Release Officer’s decision on what bail amount to set is somehow protected by judicial privilege because the presiding judge has delegated release officers the authority to make such decisions. That argument is flawed.

A Release Officer is not a judge presiding over open court. A Release Officer, in filling out a standardized pre-trial form, is not a quasi judicial officer presiding over an open hearing. If

1 the Release Officer were indeed treated as such, then his private interview of a represented party,  
2 accused of criminal action, without counsel present, without the ability to call witnesses or  
3 confront his accusers would violate a host of both State and Federal Constitutional protections.  
4 *See e.g.* Oregon Const., Article I, sect. 11 and the US Constitution, Sixth Amendment (a person  
5 accused of criminal conduct has the right to obtain witnesses in his favor); Oregon Const.,  
6 Article I, sect. 10 (no court shall be secret, justice must be administered openly).

7  
8 The presiding judge’s delegation of authority to a release officer to make a pre-trial  
9 decision regarding bail amount is not enough alone to endow the release officer with a judicial  
10 role, such that a bail amount could be considered a “judicial deliberation” or that a standardized  
11 pre-trial form filled out by the State employee would be “tantamount to a judge’s private notes  
12 taken while hearing a case.” If that were true, then the release officer is presiding over a secret  
13 court, closed to potential witnesses and the accused’s counsel. Such a closed court would violate  
14 the Oregon Constitution, Article I, section 10 forbidding secret tribunals. Because we assume a  
15 constitutional basis for pre-trial services, the release officer cannot be considered to be presiding  
16 over a case, nor taking private notes during the course of a full and open hearing in which, as the  
17 State properly points out, is on the record, and provides the basis for the judge’s action.  
18 Because the release officer is not presiding over an open court or otherwise engaged in a  
19 constitutional judicial process, the judicial privilege does not apply.

20  
21 If the release officer and pre-trial services are exercising some type of judicial authority  
22 then the process should be “administered openly and without purchase, completely and without  
23 delay” (Or Const, Art I, section 10). If the record in open court provides the basis for the judge’s  
24 decision, then the filled out pre-trial services form, the only existing record for the “quasi-

1 judicial” pre-trial service, should be discoverable as the basis for the release officer’s decision.  
2 To provide it is the best means of ensuring that this extension of judicial authority adheres to the  
3 Constitutional tenant of an open judicial process.

4 Providing the filled out pre-trial form protects the officer from having to testify regarding  
5 his personal deliberations. Rather, assuming that there is a standardized process to determining  
6 bail amounts, as there should be, then the form should reflect facts as the officer knows them,  
7 based on his personal observations. Thus, as the State properly acknowledges, even if the release  
8 officer was somehow “a judge” for the purposes of his decision on setting bail, then factual  
9 matters personally observed are discoverable. *See e.g. Sansone v. Garvey, et al.*, 188 Or App 206  
10 (2003). In fact, the subpoena does not seek to cross examine the court’s records custodian, Liz  
11 Rambo, rather it seeks the production of this pre-trial form, the only record of the process of the  
12 decision making authority. The subpoena also, very clearly, does not seek to somehow cross  
13 examine Judge Bearden as is alluded to by the State.

15 **B. If the court disagrees with the above arguments, Defendant is still entitled to an in**  
16 **camera review of the pre-trial records prior to trial for evidence that is relevant**  
17 **and/or admissible.**

18 Upon the motion of the state or the defendant, the court may direct that the books, papers  
19 or documents described in the subpoena be produced before the court prior to the trial or prior to  
20 the time when the books, papers or documents are to be offered in evidence and may, upon  
21 production, permit the books, papers or documents to be inspected and copied by the state or the  
22 defendant and the state’s or the defendant’s attorneys. ORS 136.580(2).

23 A defendant can subpoena records which are not in the possession, custody or control of  
24 the State. In State vs. Cartwright, 336 Or 408, 410 (2004), an Oregon Supreme Court case, the

1 Supreme Court held specifically that the defendant case had the right to obtain audio tapes from  
2 a third party with a subpoena duces tecum. The Supreme Court also held that the defendant's  
3 right to the statements was superior to the work-product privilege claimed by the third party who  
4 possessed the audiotaped statements. Id.

5 The defendant has a due process right to prepare a defense under Article I, Section 11 of  
6 the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States  
7 Constitution. The Due Process Clause of the Fourteenth Amendment of the United States  
8 Constitution provides that "no State shall deprive any person of life, liberty or property without  
9 due process of law." Defendant's rights under the Due Process Clause trump. The Supremacy  
10 Clause, included in Article VI of the United States, provides:

11  
12 This Constitution, and the Laws of the United States which shall be made in Pursuance  
13 thereof; and all Treatises made, or which shall be made, under the Authority of the  
14 United States, shall be the supreme law of the land, and the judges in every state shall be  
15 bound thereby, and thing in the constitution or laws of any state to the contrary  
16 notwithstanding.

17 In this case, the State has objected to the defendant's subpoena duces tecum. At the heart  
18 of this matter are the defendant's rights, granted to him by the United States Constitution. He has  
19 a Constitutional due process right to review the requested records to determine if there is relevant  
20 and/or admissible evidence. At the very least, he is entitled to have the court review the records  
21 for relevant and/or admissible evidence.

### 22 **Conclusion**

23 The judicial privilege does not extend to a form filled out by a release officer, during the  
24 normal course of his duties, because a release officer is not akin to a judge presiding over an  
25 open court or other adversarial process. Because a release officer is not acting as a judge, the

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1 public policy reasoning behind the judicial process does not apply. The pre-trial services are  
2 acting as a type of extension of the judicial process, therefore steps should be taken to ensure that  
3 it is not closed in the administration of justice, but rather remains an open process. Permitting  
4 discovery of the standardized pre-trial form, filled out, is the only record of the release officer's  
5 "proceeding" and thus, should be admitted as the factual basis underlying his decision making  
6 process. Providing it does not require the records custodian to testify as to the basis of the  
7 decision, and it is relevant and dispositive as to why the bail amount was set to the level it was.  
8

9 This court should find that the pre-trial form is discoverable, relevant and probative and  
10 deny the State's motion to quash. In the alternative, it should permit an in-camera review to  
11 protect the defendant's due process rights.

12 RESPECTFULLY SUBMITTED this \_\_\_\_ day of November, 2010.

13 ARNOLD LAW OFFICE, LLC  
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