IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, Plaintiff, v. JOSEPH OWAN GIBSON, Defendant.	Case No. 19CR53042 CITY OF PORTLAND'S MOTION TO QUASH SUBPOENAS *DUCES TECUM* AND MEMORANDUM OF LAW IN SUPPORT OF MOTION **Oral Argument Requested**

INTRODUCTION

The City of Portland (City) moves this Court for an Order to Quash the Subpoenas *Duces Tecum* served on the Custodian of Records for the Records Division of the Portland Police Bureau (PPB) and Mayor Wheeler. (Exhibits 1-2). This Motion is based on the exhibits to this Motion and the below Memorandum of Law.

MEMORANDUM OF LAW

I. Background

Defendant Joseph Gibson (defendant) served the City with two subpoenas *duces tecum* commanding appearances and production of records at his criminal trial scheduled to commence on July 15, 2022.

First, defendant served a subpoena *duces tecum* on the Custodian of Records of PPB on June 13, 2022 commanding the Record Custodian to appear and bring with her the following:

> (a) All communications between any representative of the Portland Police Bureau and any other public employee or official concerning the initiation of criminal charges against defendant Gibson;

PORTLAND CITY ATTORNEY'S OFFICE
1221 SW 4TH AVENUE, RM. 430
PORTLAND, OREGON 97204
TELEPHONE: (503) 823-4047
FAX: (503) 823-3089

(b) All communications between any representative of the Portland Police Bureau and any representative of the Multnomah County District Attorney's Office concerning investigation of the events at Cider Riot on May 1, 2019;

(c) All documents discussing or referencing the political content of defendant Gibson's activities or 'Patriot Prayer' activities within the City of Portland; and

(d) All communications between any representative of the Portland Police Bureau and any other public official concerning the lack of charges against those occupying the premises, including outdoor patio, of the Cider Riot Bar on May 1, 2019 (generally referred to as Antifa).

The subpoena *duces tecum* is limited to documents generated or received between May 1, 2019 and September 30, 2019. (Exhibit 1).

Second, defendant served a subpoena *duces tecum* on Ted Wheeler, the Mayor of Portland, on June 14, 2022, commanding the Mayor to appear at trial and bring with him all documents constituting:

(a) Communications between and among (i) you and or any representative of your office and (ii) any representative of the Office of the Multnomah County District Attorney and/or Police [*sic*] Police Bureau which relate to defendant Gibson or 'Patriot Prayer,'

(b) Documents referring to any decisions not to charge (or prosecute) those occupying the premises (including the outdoor patio) of the Cider Riot bar on May 1, 2019 (generally referred to as Antifa); and

(c) Any documents generated by you which refer to defendant Gibson or 'Patriot Prayer'

The subpoena *duces tecum* is limited to documents generated or received between May 1, 2019 and September 30, 2019. (Exhibit 2).

The City and defense counsel corresponded by email to discuss delivery of the records and the Mayor's personal appearance at trial. (Exhibit 3-4). Defense counsel confirmed that the Mayor need not personally appear because of rulings made by this court. (Exhibit 5). On July 8, 2022, the City provided a cover letter and a link to responsive records defendant's first and second subpoenas *duces tecum* (Exhibit 6).

/ / /

/ / /

PORTLAND CITY ATTORNEY'S OFFICE
1221 SW 4TH AVENUE, RM. 430
PORTLAND, OREGON 97204
TELEPHONE: (503) 823-4047
FAX: (503) 823-3089

On July 12th, defense counsel faxed a letter asking for cell phone communication records of specific personnel in the Mayor's Office and in PPB, and objecting to redactions made to records provided by the City. (Exhibit 7).

II. A Subpoena *Duces Tecum* May Not be Used to Seek General Discovery or as an Investigative Tool

Defendant is attempting to use his subpoenas d*uces tecum* to fish for information or seek general discovery, which are improper uses of the subpoena power. There is a distinct difference between a defendant's right to pretrial discovery or defendant's right to obtain public records in advance of trial, and a defendant's right to produce testimony or other evidence for use at trial. The discovery process is investigatory and informational in nature, driven by policy to avoid trials by ambush. Additionally, criminal defendants may conduct their own investigation by obtaining information through public records requests. However, ORS 136.580, which governs the subpoena *duces tecum* process, only entitles a defendant to require a witness to bring specified documentary materials with them to defendant's trial or trial-related proceeding at which the books, papers or documents are to be offered in evidence.

To enforce defendant's subpoena *duces tecum*, defendant must demonstrate that the material sought has some *potential* use in trial. *State v. Bray,* 363 Or. 226 (2018). Defendant has not made any showing that the records sought are material and favorable as required to enforce disclosure. Additionally, defendant has not demonstrated any statutory or constitutional entitlement to the materials. A defendant has no constitutional entitlement to subpoenaed documents unless the documents sought are both material and favorable to defendant's case. *State v. West*, 250 Or. App. (2012); *State v. Guffey,* 291 Or App 729 (2018) (both *citing Brady v. Maryland*, 373 US 83 (1996)). As the Court noted in *State v. West,* "*Brady* is not authority for a defendant obtaining evidence of unknown import to test whether it helps or hurts his case."

PORTLAND CITY ATTORNEY'S OFFICE
1221 SW 4TH AVENUE, RM. 430
PORTLAND, OREGON 97204
TELEPHONE: (503) 823-4047
FAX: (503) 823-3089

West, supra, App. at 204. As further explained by the Court recently in *State v. Guffey, supra,* citing *State v. Spada,* 33 Or. App. 257, 259, (1978):

> "Oregon cases interpreting *Brady* have required defendant to make some showing, beyond mere speculation, that the evidence he seeks will be favorable to him and material to his guilt or innocence."

State v. Guffey, supra, at 735-736.

The courts have repeatedly held that the purpose of a subpoena *duces tecum* is to command production of evidence to be used at trial.

In *State v. Cartwright*, 336 Or 408 (2004), the Oregon Supreme Court addressed whether a defendant is entitled to inspect a nonparty's records for possible prior inconsistent statements. Defendant was accused of sexually harassing employees and, as part of an internal investigation, the employer interviewed several employees about the defendant's conduct. Those interviews were recorded on audiotape. After defendant was criminally charged for the same conduct, he sought production of the audiotapes, prior to and during trial, so that he could inspect them for possible inconsistent statements. The employer moved the court to quash three sets of subpoenas during trial and the trial court granted the motions, concluding that a criminal defendant has no statutory or constitutional right to compel "discovery" from nonparties and found the materials were privileged work product. Defendant was convicted and appealed the trial court's rulings to quash the subpoenas.

The Court of Appeals began its analysis by addressing whether defendant had a statutory right to obtain the audiotapes pursuant to subpoena procedures. 173 Or App at 66-67. The Court of Appeals stated:

> "[A] subpoena compels the production of evidence. It is not a means of informational discovery, nor does it serve as an investigatory tool to enable a party to examine information or to interview a witness prior to trial to ascertain the existence of relevant evidence or testimony. That observation is consistent with the traditional use of the subpoena power, *see Yee Guck*, 99 Or at 236, as well as the statutes that provide for subpoenas in criminal cases."

Id. at 67.

PORTLAND CITY ATTORNEY'S OFFICE
1221 SW 4TH AVENUE, RM. 430
PORTLAND, OREGON 97204
TELEPHONE: (503) 823-4047
FAX: (503) 823-3089

Though the relevant statute, ORS 136.580, was amended in 1993 to allow for discretionary pretrial inspection and copying of subpoenaed materials, the Court of Appeals called this a "departure with tradition" and clarified that this amendment "did not transform criminal subpoenas into general discovery devices. Rather, the essential character of the subpoena remains, as it traditionally has been, to produce 'evidence' to be offered in a court proceeding." *Id.* at 67.

On review, the Oregon Supreme Court agreed that the defendant's second subpoena, which commanded pretrial production, clearly "did not summon the audiotapes to a court proceeding so that they would be available as *evidence.*" 336 Or at 416. The Court continued, "defendant was attempting to use the subpoena as a discovery device to command the early production of the audiotapes, either to the court or to himself. However, as we have explained, the statute on which he relies does not appear to grant him such authority and absent such authority, the trial court acted properly in quashing the subpoena." *Id.* Here, as in *Cartwright*, defendant is attempting to improperly use his subpoenas as discovery tools to potentially acquire investigative information, rather than to command production of identified evidence to be offered at trial.

The Oregon Supreme Court reversed the Court of Appeals' *Cartwright* decision regarding the third subpoena, holding that the trial court should have enforced the subpoena that sought production of the audiotapes at trial for potential use on cross-examination. The facts in *Cartwright* differ significantly from the facts in this case. In *Cartwright*, the employer did not dispute defendant's contention that the audiotapes "contained the prior statements of probable witnesses about the very incidents that they would be addressing in their testimony." 336 Or at 419.

/ / /

/ / /

/ / /

PORTLAND CITY ATTORNEY'S OFFICE
1221 SW 4TH AVENUE, RM. 430
PORTLAND, OREGON 97204
TELEPHONE: (503) 823-4047
FAX: (503) 823-3089

The defendant argued that such statements likely contained material that would be relevant and admissible to impeach those witnesses upon cross-examination. Because defendant "demonstrated that there was likely evidentiary use" for the audiotapes at trial, the Supreme Court determined that the decision to quash that subpoena was an error. *Id.*

Here, defendant seeks cell phone communications for City employees who are not factual witnesses in the criminal trial. Both the Court of Appeals and Supreme Court *Cartwright* opinions repeatedly address that the purpose and proper use of a subpoena *duces tecum* is to obtain evidence. Defendant has failed to demonstrate that the materials sought have evidentiary value. Without satisfying this threshold requirement, defendant is not entitled to the subpoenaed materials. Therefore, defendant's subpoenas should be quashed.

III. Defendant's Subpoenas Duces Tecum are Overbroad and Seek to Avoid the Public Records Act

In addition to utilizing subpoenas as investigative tools, the language used in defendant's subpoenas and subsequent letter regarding cell phone records is overbroad and vague. The City is incapable of searching cell phone records by subject, keyword, or case number. To comply with defendant's most recent request, the City would be required to review all text messages sent and received between May 1, 2019 and September 30, 2019 by everyone named in Mr. Buchal's July 12th letter, for communications that may or may not exist, may or may not be favorable and material to defendant, and may or may not be admissible evidence at trial. Defendant has not met the threshold required to compel the City to undergo such an expensive and resource intensive investigative exercise. This subpoena request far exceeds the limitations of the subpoena statute and relevant case law.

However, defendant is not without recourse. Cell phone communications and email correspondence of City employees are public records and available to defendant through the public records request process. PPB has a public records response process in place and works diligently to address requests in a fair and timely fashion.

PORTLAND CITY ATTORNEY'S OFFICE
1221 SW 4TH AVENUE, RM. 430
PORTLAND, OREGON 97204
TELEPHONE: (503) 823-4047
FAX: (503) 823-3089

Additionally, when a public records request is made, PPB provides an estimate and does not embark on searches for requested materials until the estimate has been approved and satisfied by the requestor. The improper use of a subpoena to circumvent the public records process requires PPB to perform the work without receiving statutorily required compensation and it seeks to avoid exceptions to disclosure and the appellate processes normally afforded to public bodies when records are sought. The City requests this court not allow defendant to issue a subpoena as a subterfuge to avoid the public records act.

IV. Conclusion

The City respectfully requests that the Court quash both subpoenas served on the City because defendant has failed to make the required showing to meet the standard for production of the subpoenaed materials.

DATED: July 12, 2022.

Respectfully submitted,

/s/ Laura Rowan

Laura Maurer Rowan, OSB No. 114534
Deputy City Attorney
Email: laura.rowan@portlandoregon.gov

PORTLAND CITY ATTORNEY'S OFFICE
1221 SW 4TH AVENUE, RM. 430
PORTLAND, OREGON 97204
TELEPHONE: (503) 823-4047
FAX: (503) 823-3089

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing CITY OF PORTLAND'S MOTION TO QUASH SUBPOENAS DUCES TECUM AND MEMORANDUM OF LAW IN SUPPORT OF MOTION on:

James Buchal
Murphy & Buchal LLP
P.O. Box 86620
Portland, OR 97286
jbuchal@mbllp.com
Attorney for Defendant

Brad Kalbaugh
Multnomah County District Atty Office
Multnomah County Central Courthouse
1200 SW First Ave, Suite 2500
Portland, OR 97204
Email: brad.kalbaugh@mcda.us
Attorney for Plaintiff

on July 12, 2022 by causing a full, true and correct copy thereof to be sent by the following method(s):

☐ by **mail** in a sealed envelope, with postage paid, and deposited with the U.S. Postal Service in Portland, Oregon.

☒ by **electronic service** – UTCR 21.100 (1)(a)

☐ by **hand delivery.**

☐ by **facsimile transmission.**

☒ by courtesy copy via **email.**

DATED: July 12, 2022.

Respectfully submitted,

/s/ Laura Rowan
Laura Maurer Rowan, OSB No. 114534
Deputy City Attorney
Email: laura.rowan@portlandoregon.gov

PORTLAND CITY ATTORNEY'S OFFICE
1221 SW 4TH AVENUE, RM. 430
PORTLAND, OREGON 97204
TELEPHONE: (503) 823-4047
FAX: (503) 823-3089