

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

KA'ILA FARRELL-SMITH; ROWENA JACKSON; SARAH WESTOVER; and ROSEMARY FRANCIS EATHERINGTON,

Plaintiffs,

and

ROGUE CLIMATE; and 350EUG ("350 EUGENE"),

Intervenor-Plaintiffs,

vs.

THE OREGON DEPARTMENT OF JUSTICE; ELLEN ROSENBLUM, in her official capacity as the Attorney General of the State of Oregon; and MICHAEL SLAUSON, in his official capacity as Chief Counsel of the Criminal Justice Division of the Oregon Department of Justice,

Defendants.

Case No. 21CV47809

DEFENDANTS THE OREGON DEPARTMENT OF JUSTICE, ELLEN ROSENBLUM, AND MICHAEL SLAUSON'S MOTION FOR SUMMARY JUDGMENT REGARDING LEGISLATIVE AUTHORITY FOR FUNCTIONS OF OREGON TITAN FUSION CENTER

(Oral Argument Requested)

Judge: Audrey Broyles
Date: TBD
Time: TBD
Courtroom: 4C

ORS 20.140 – State Fees Deferred at filing

UTCR INFORMATION

Oral argument is requested. Official court reporting services are requested. The time required for oral argument is 45 minutes. Appearance by telephone is not requested.

MOTION

Pursuant to ORCP 47, defendants request summary judgment on plaintiffs' and intervenors' claim that the Oregon Department of Justice ("ODOJ") has no legislative authority to conduct the functions of the Oregon Titan Fusion Center ("OTFC"). Those functions fall within the broad express and implied powers granted to the ODOJ. This Court should issue a

1 declaration that the ODOJ's activities in performing the functions of the OTFC are not ultra
2 vires.

3 INTRODUCTION

4 Information-sharing is crucial to efforts to protect public safety. Frequently one public-
5 safety agency will have information about events or threats that could affect the work of another
6 agency, because it falls within either the latter's geographic scope or its specialized jurisdiction.
7 It is essential for on-the-ground public safety officials to have the most up-to-date information
8 about events or threats that may have been discovered by someone else. Sharing information does
9 not mean that an agency has determined that criminal activity is afoot or even that an
10 investigation should be opened; it is just part of the initial effort to determine whether there is any
11 matter of concern related to public safety.

12 The ODOJ has long participated in that sort of information-sharing with other public
13 safety agencies, including federal and local law-enforcement partners. Because of those
14 preexisting relationships, Oregon's Governor designated the ODOJ as the state's fusion center—
15 that is, as the point of contact for federal, state, tribal, and local agencies to share and receive
16 information about terrorism and criminal activity. The ODOJ thus performs the functions of the
17 OTFC as a clearinghouse for public-safety-related information for other government agencies in
18 Oregon and for the national network of fusion centers.

19 Contrary to plaintiffs' arguments, the ODOJ's activities in performing the functions of the
20 OTFC fall within the agency's express and implied powers under Oregon law. Oregon statutes
21 expressly authorize the ODOJ to—among other things—investigate alleged criminal violations,
22 ORS 180.090, participate in information-sharing with other criminal justice agencies, ORS
23 181A.265, and cooperate with federal and local agencies for any lawful purpose, ORS 190.110(1).
24 The legislature has appropriated funds to the ODOJ specifically for its OTFC work. The
25 legislature has placed limits on the kind of information that agencies like ODOJ may collect and
26 maintain about individuals' political views. But that does not prohibit the ODOJ from performing
27 the functions of the OTFC within those limits.

1 Although plaintiffs’ legal arguments are thus easily refuted, the stakes raised by this
2 lawsuit are high. Plaintiffs are asking this court to enjoin operation of the OTFC.¹ Because the
3 ODOJ performs the functions of the OTFC merely as an information-sharing clearinghouse, it is
4 not clear what exactly plaintiffs seek to enjoin. But an order prohibiting the ODOJ from receiving
5 information from or sharing information with other law-enforcement agencies would have a
6 profound and negative impact on public safety. A 2022 audit report by the Secretary of State on
7 the risks of domestic terrorism highlighted that “[f]ormal working agreements between
8 organizations and information clearing houses like the TITAN Fusion Center are essential for
9 facilitating the efficient flow of time-sensitive information relevant for reducing the risk of violent
10 extremist actions.”² The report emphasized the need for more, not less, “close collaboration
11 among multiple agencies at federal, state, Tribal, and local levels as the nature and extent of the
12 threat is decentralized and complex.”³ Plaintiffs’ claim, were it to be accepted by this Court,
13 would hamper the effort to prevent violent extremist attacks in Oregon.

14 For those reasons, defendants move for summary judgment on the merits of plaintiffs’
15 claim. Defendants may have additional defenses, such as standing, not addressed in this motion.
16 This motion addresses only the statutory authority for the activities carried out by the ODOJ.

17 **FACTUAL BACKGROUND**

18 **A. The ODOJ is a law enforcement agency with authority to investigate and prosecute** 19 **alleged criminal violations.**

20 The ODOJ is an executive department created by the Oregon Legislature, headed by the
21 Attorney General. ORS 180.210. The legislature gave it control of all legal proceedings in which
22 the state is interested and of all the legal business of the state. ORS 18.220(1)(a)–(b). It also
23

24 ¹ Complaint for Declaratory Judgment and Injunctive Relief (“Complaint”), p. 25 (filed on December 14, 2021).

25 ² Advisory Report: Oregon Can Do More to Mitigate the Alarming Risk of Domestic Terrorism and Violent
26 Extremist Attacks, at p. 14 (March 2022), Report No. 2022-12, Oregon Secretary of State, Oregon Audits Division,
attached as Exhibit 1 to Declaration of George S. Pitcher (“*Pitcher Dec.*”), also available at
<https://sos.oregon.gov/audits/Documents/2022-12.pdf> (last accessed 4/25/2023).

27 ³ *Id.* at p. 8.

1 conferred on the Attorney General “all the power and authority usually appertaining to such
2 office” and more specifically, on both the Attorney General and ODOJ, the “powers and
3 prerogatives” of a district attorney. ORS 180.060(7); ORS 180.240. The latter includes “duties
4 pertaining to the administration of Law, and general police.” Or Const, Art. VII (Original), § 17
5 (defining the duties of prosecuting attorneys); *see also* ORS 8.630 (assigning to district attorneys
6 the powers “provided by the Constitution for prosecuting attorneys”).

7 Among its other responsibilities, the ODOJ serves as a criminal justice agency that
8 investigates and prosecutes “violations or alleged violations of the criminal laws of the state.”
9 ORS 180.090. The legislature expressly authorized the ODOJ to “employ special investigators”
10 for the purpose of “making investigations” of those alleged violations. *Id.* The legislature
11 specifically recognized the ODOJ’s authority to collect, store, and disseminate information
12 relating to criminal activities. *See, e.g.*, ORS 180.610(2) (directing the ODOJ to “[e]stablish a
13 coordinated system of collecting, storing and disseminating information relating to organized
14 crime”); ORS 181A.265(3)(b) (designating “[t]he Attorney General” as a “criminal justice
15 agency” that participates in an information-sharing program with other state criminal justice
16 agencies). And it authorized the ODOJ to cooperate with federal and local agencies “for any
17 lawful purpose, by agreement or otherwise.” ORS 190.110(1) (so providing for any state
18 agency); *see also* ORS 180.610(3) (specifically directing the ODOJ to cooperate with “local,
19 state and federal law enforcement agencies in Oregon” on issues related to organized crime).

20 The ODOJ has created administrative units within the department to carry out those
21 responsibilities with respect to specific topics.⁴ The Criminal Justice Division is one of nine
22 divisions within the ODOJ.⁵ It is further subdivided into sections, including the Analytical and
23 Criminal Investigative Support Section.⁶ That section carries out several programs that facilitate
24 gathering, analysis, and sharing of public-safety-related information with local, state, tribal, and

25 _____
26 ⁴ Declaration of Michael J. Slauson (“*Slauson Dec.*”), ¶¶ 3–4.

27 ⁵ *Id.*, ¶¶ 3-4.

⁶ *Id.*

1 national law-enforcement agencies.⁷ For example, the section coordinates the Regional
2 Automated Information Network, an intergovernmental agency that allows users to query
3 criminal-justice records across multiple platforms and jurisdictions.⁸ It also coordinates the
4 Oregon Watch Center, which enhances officer safety through deconfliction by notifying one law-
5 enforcement agency that another may be conducting operations in the same area at the same
6 time.⁹ In addition, the Criminal Justice Division administers programs like the Oregon Internet
7 Crimes Against Children Task Force (“ICAC”), which is part of a nationwide network engaged
8 in investigating the online sexual exploitation of children and refers cases to local prosecutors.¹⁰
9 Although no statute expressly created those units, the ODOJ operates them under its general
10 authority as a criminal justice agency to investigate and prosecute alleged crimes.

11 **B. The Governor designated ODOJ to carry out the functions of a fusion center.**

12 In the aftermath of the September 11th terrorist attacks, Congress enacted the Intelligence
13 Reform and Terrorism Prevention Act of 2004, Pub L No 108-458, § 1016(b), 118 Stat 3638,
14 3665-66 (codified at 6 USC 485(b) (2012)). The 9/11 Commission had concluded that a lack of
15 communication, information sharing, and collaboration between federal, state and local agencies
16 resulted in “missed opportunities to thwart the 9/11 plot” and it recommended a new system for
17 agencies to share information “horizontally” with other agencies.¹¹ The 2004 federal law
18 established an Information Sharing Environment (ISE) to improve and facilitate a two-way flow
19 of information sharing among “Federal, State, local, and tribal entities, and the private sector.” 6
20 USC 485(b)(2); *see also* 6 USC 481(c) (“It is the sense of Congress that Federal, State, and local
21 entities should share homeland security information to the maximum extent practicable, with
22

23 ⁷ *Id.*

24 ⁸ *Id.*

25 ⁹ *Id.*

¹⁰ *Id.*

26 ¹¹ The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks Upon the United
27 States 353, 417 (2004), attached as Exhibit 2 to *Pitcher Dec.*, *also available at*
<https://www.govinfo.gov/app/details/GPO-911REPORT/context> (last accessed 4/25/2023).

1 special emphasis on hard-to-reach urban and rural communities.”). To implement that federal
2 law, the federal Secretary of Homeland Security and Attorney General sent a letter to Governors
3 requesting that Governors “designate a single fusion center to serve as the statewide or regional
4 hub to interface with the federal government and through which to coordinate the gathering,
5 processing, analysis, and dissemination of terrorism, law enforcement, and homeland security
6 information in an all crimes approach.”¹²

7 The Governor designated ODOJ’s TITAN Center as the statewide hub that would serve
8 as Oregon’s fusion center within the larger national network of fusions centers.¹³ But that
9 designation did not convey any additional authority to the ODOJ; it merely identified a unit
10 within the ODOJ as the program with which the federal government will coordinate.¹⁴ ODOJ
11 personnel in the Criminal Justice Division’s Analytical and Criminal Investigative Support
12 Section perform the duties as the designated fusion center for the state, including serving “as the
13 single point for the collection, analysis, and dissemination of terrorism, law enforcement and all-
14 crimes/all-hazards homeland security information.”¹⁵ In this role, the ODOJ “produces threat
15 assessments, officer safety bulletins, general crime bulletins and terrorism related bulletins.”¹⁶
16 The ODOJ receives and maintains information “provided on a voluntary basis” by “participating
17 agencies” or obtained “from other sources such as other law enforcement agencies, ‘open’ media
18 sources, commercial databases, public records and unclassified government material.”¹⁷

19 ¹² Jason Miller, “States Must Designate Fusion Center to Work with Feds,” FCW, Dec. 11, 2007 (quoting letter),
20 <https://fcw.com/workforce/2007/12/states-must-designate-fusion-center-to-work-with-feds/229736/> (last accessed
4/25/2023).

21 ¹³ See, e.g., Letter from John A. Kitzhaber, MD, Governor to The Honorable Eric H. Holder, Jr. (Attorney General,
22 United States Department of Justice) and The Honorable Janet Napolitano (Secretary, United States Department of
Homeland Security), April 4, 2011, attached as Exhibit 1 to *Slauson Dec.*

23 ¹⁴ See *id.*

24 ¹⁵ *Id.*

25 ¹⁶ Oregon Department of Justice, 2021 – 23 Agency Request Budget, Criminal Justice Division, p. 9, attached as
Exhibit 3 to *Slauson Dec.*, also available at [https://www.doj.state.or.us/wp-content/uploads/2020/09/21-
23_doj_arb_criminal_justice_division.pdf](https://www.doj.state.or.us/wp-content/uploads/2020/09/21-23_doj_arb_criminal_justice_division.pdf) (last accessed 4/25/2023).

26 ¹⁷ Privacy Policy, Oregon Titan Fusion Center, (“OTFC Privacy Policy”), Section 1.0, p. 1, attached as Exhibit 2 to
27 *Slauson Dec.*, also available at <https://justice.oregon.gov/ortitan/documents/OTFCPrivacyPolicy.pdf> (last accessed
4/25/2023).

1 Hundreds of agencies participate in the information network. Among them are federal agencies
2 such as the Federal Bureau of Investigation, U.S. Fish and Wildlife Service, United States
3 Department of Homeland Security, Drug Enforcement Administration, United States Department
4 of Justice, United States Secret Service, United States Coast Guard, and Transportation Security
5 Administration.¹⁸ The network also includes Oregon agencies such as the Oregon State Police,
6 Oregon National Guard, Oregon Judicial Department – Marshal’s Office, and many police
7 departments and sheriff’s offices in Oregon.¹⁹

8 In essence, then, the OTFC is an information clearinghouse operated by ODOJ personnel.
9 As the state’s designated fusion center, the ODOJ receives and transmits information potentially
10 related to public safety, including terrorist and criminal investigations from and to other law
11 enforcement and criminal justice agencies. It reviews that information and shares it with other
12 partners as its staff deem appropriate. Employees performing related duties do not support
13 investigations other than through collecting information that is already publicly available or in
14 governmental files.

15 For example, in 2022, the OTFC received an attempt-to-locate bulletin involving the
16 disappearance of a five-year-old boy and his mother in Sandy.²⁰ OTFC distributed the bulletin to
17 other law-enforcement agencies to help coordinate a response.²¹ As another example, the OTFC
18 issued a bulletin in February 2023 requesting information relating to the identity of a theft
19 suspect.²² An analyst from another jurisdiction recognized the suspect, and employees within the
20 OTFC were able to facilitate further coordination by connecting that analyst with the agency
21 requesting the information.²³

23 ¹⁸ *Slauson Dec.*, ¶ 6.

24 ¹⁹ *Id.*

25 ²⁰ *Id.*, ¶ 7.

26 ²¹ *Id.*

27 ²² *Id.*

²³ *Id.*

1 The Oregon Legislature has recognized the role that the OTFC plays in protecting
2 Oregonians from terrorism and other significant threats. ODOJ regularly makes budget
3 presentations to the legislature pertaining to the OTFC, and the legislature has repeatedly granted
4 funding for the ODOJ to perform the OTFC's functions. Every Legislatively Adopted Budget
5 ("LAB") from 2007 through 2021 contains specific references to funding for the OTFC.²⁴ And
6 in 2021, House Bill 2927 (codified at ORS 401.109) directed that the state's Homeland Security
7 Council include "[a] representative of the Oregon TITAN Fusion Center with the ability to
8 organize and explain mission critical information, appointed by the Attorney General."²⁵

9 **C. Plaintiffs allege that the ODOJ is acting ultra vires in performing the functions of**
10 **the OTFC.**

11 Plaintiffs and intervenors seek a declaratory judgment that the OTFC "exceeds the
12 statutory authority of the Oregon Department of Justice, is not otherwise authorized by law, and
13 therefore is operating ultra vires."²⁶ They request an order enjoining defendants from operating
14 the OTFC and compelling the OTFC to destroy any records it has related to plaintiffs.²⁷

15 Much of plaintiffs' complaint addresses a specific incident that does not directly bear on
16 the question whether the ODOJ is acting ultra vires in performing the functions of the OFTC at
17 all. That incident relates to plaintiffs' activities as organizers of the community opposition to the
18 Jordan Cove LNG, a large pipeline project that had been proposed across southern Oregon.²⁸

19 ///

20 ///

21
22 ²⁴ See, e.g., 2017-19 Legislatively Adopted Budget, Criminal Justice Division, at CJ Page 9, attached as Exhibit 3 to
23 *Pitcher Dec.*; Section 12, Senate Bill 5556 (2008), attached as Exhibit 4 to *Pitcher Dec.* as reflected in section 12,
24 chapter 16, Oregon Laws 2008 (Special Session); House Bill 5201 (2014), attached as Exhibit 5 to *Pitcher Dec.* as
25 reflected in section 14, chapter 118, Oregon Laws 2014 (Regular Session); Section 20, Senate Bill 5701 (2016),
26 attached as Exhibit 6 to *Pitcher Dec.* as reflected in section 20, chapter 81, Oregon Laws 2016 (Regular Session).
27 The chart attached as Exhibit 7 to *Pitcher Dec.* contains a summary of the Budget Analysis by year.

²⁵ HB 2927 (2021); Section 147, Chapter 539, Oregon Laws 2021, attached as Exhibit 15 to *Pitcher Dec.*

²⁶ Complaint, p. 25:8-10.

²⁷ *Id.* at p. 25:11-17.

²⁸ Complaint, ¶ 16.

1 Plaintiffs allege that the emails obtained by a journalist with *The Guardian* “reveal that TITAN
2 analysts have been monitoring ‘groups involved’ with Jordan Cove LNG.”²⁹

3 The ODOJ maintains no records regarding plaintiffs and has issued no intelligence
4 briefings, bulletins, or suspicious activity reports regarding plaintiffs or intervenors.³⁰ The ODOJ
5 has fewer than 100 pages of OTFC-related records that mention or involve intervenors, mostly
6 information that was provided to the OTFC from Coos County that came from publicly available
7 sources such as intervenors’ posts on Facebook. Defendants have produced to plaintiffs in this
8 litigation all documents that the ODOJ could find regarding intervenors. Exhibit 16 to the
9 Declaration of George Pitcher contains a brief summary of those documents, and defendants can
10 provide copies of those documents for the Court’s review upon request. As explained below,
11 defendants are willing to destroy and expunge those documents as requested by intervenors
12 pursuant to OTFC’s publicly available privacy policy.

13 The conduct reported by *The Guardian* involves one ODOJ analyst who received
14 information from, and communicated with, contacts in the Coos County Sheriff’s Office
15 regarding lawful and protected Jordan Cove protest activity.³¹ That information was sourced
16 from publicly available social media sites, as posted by participating groups, or from publicly
17 available open source outlets.³² The same ODOJ analyst received information from and
18 communicated with contacts at Teneo, a private security provider on behalf of Pembina Pipeline
19 Corporation, regarding Jordan Cove protest activity.³³ During the relevant time period, groups
20 opposed to the Jordan Cove Project frequently utilized social media to advance their overall
21 message and mission.³⁴ These activities were also occasionally recounted by print and web news
22 sources.³⁵

23 ²⁹ Complaint, ¶ 85.

24 ³⁰ *Id.*

25 ³¹ Declaration of Richard Austria (“*Austria Dec.*”), ¶¶ 3-4.

26 ³² *Id.* at ¶ 3.

27 ³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

1 Following the publication of the *Guardian* article, the ODOJ launched an internal
2 investigation of the allegations.³⁶ Based on the results of that investigation, and in part on
3 founded violations of the OTFC Privacy Policy regarding the collection and dissemination of
4 information regarding protected group protest activity, the analyst was put on Administrative
5 Leave on September 26, 2019 and was issued a Pre-Dismissal notice on June 11, 2020.³⁷ The
6 analyst subsequently resigned.³⁸

7 Since those events, the Jordan Cove project has ended. On December 1, 2021, the
8 sponsor of the project notified the Federal Energy Regulatory Commission (FERC) that it was
9 withdrawing its application and asked FERC to vacate any issued authorizations.³⁹
10 Subsequently, FERC issued an order vacating its former authorizations for the project.⁴⁰

11 POINTS AND AUTHORITIES

12 A. Summary Judgment Standard

13 Summary judgment must be granted when there is no genuine issue as to any material fact
14 and the moving party is entitled to judgment as a matter of law. ORCP 47C; *Leach v. Scottsdale*
15 *Indem. Co.*, 261 Or App 234, 239, 323 P3d 337 (2014). The initial burden is on the moving party
16 to point out the absence of genuine issues of material fact. *McKee v. Gilbert*, 62 Or App 310,
17 321, 661 P2d 97 (1983). In response, an opposing party cannot rest upon its allegations, but must
18 present specific evidence to demonstrate a genuine issue of fact. ORCP 47D; *Northwest Admin.*
19 *v. Woodburn Truck Line, Inc.*, 61 Or App 299, 303, 657 P2d 714 (1983). No genuine fact dispute
20

21 ³⁶ *Id.* at ¶ 4.

22 ³⁷ *Id.*

23 ³⁸ *Id.*

24 ³⁹ See Jordan Cove Energy Project L.P. & Pacific Connector Gas Pipeline, LP, F.E.R.C., Docket Nos. CP17-495-
25 004, *Initial Brief of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP*, Document Accession
#: 20211201-5196 (Filed Dec. 1, 2021), attached as Exhibit 17 to *Pitcher Dec.*, also available at https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20211201-5196&optimized=false (last accessed 4/25/2023).

26 ⁴⁰ Jordan Cove Energy Project L.P. & Pacific Connector Gas Pipeline, LP, F.E.R.C., Docket Nos. CP17-495-004,
27 *Order Vacating Authorizations*, Document Accession #: 20211216-3046 (Filed Dec. 16, 2022), attached as Exhibit
18 to *Pitcher Dec.*, also available at https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20211216-3046&optimized=false (last accessed 4/25/2023).

exists when “no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion.” *Leach, supra*, at 239, quoting *Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 20 P3d 180 (2001).

B. The Oregon Legislature authorized the ODOJ to administer an information-sharing clearinghouse for public safety agencies.

The Oregon Legislature has expressly authorized the ODOJ to collect and share information related to criminal activity and public safety with federal, tribal, state, and local agencies. When then-Governor Kitzhaber designated the ODOJ as Oregon’s fusion center in 2011, nothing changed about the ODOJ’s authority to perform those functions. The Governor merely ensured that those functions would be carried out more efficiently by identifying the ODOJ as the point of contact for other agencies.

1. ODOJ has express authority to collect and communicate relevant information to local, state, and federal agencies.

The scope of an agency’s authority depends on the overall statutory framework governing the agency, including the assumptions on which those statutes rest. *See, e.g., Smith v. Washington County*, 180 Or App 505, 524 n 12, 43 P3d 1171, *rev den*, 334 Or 491 (2002) (identifying authority from the assumptions on which various statutes governing the Oregon Judicial Department rest); *see also Unger v. Rosenblum*, 362 Or 210, 221, 407 P3d 817 (2017) (reasoning that multiple relevant statutes controlling a particular process or governmental entity should be “interpreted as a coherent, workable whole”).

As explained above, the Attorney General has “all the power and authority usually appertaining to such office” including the “powers and prerogatives” of a district attorney. ORS 180.060(7); ORS 180.240. Those powers include the investigation and prosecution of “violations or alleged violations of the criminal laws of the state.” ORS 180.090. The authority to investigate naturally comprises the authority to collect and analyze information about potential crimes or other activities related to public safety. *See, e.g.,* ORS 131.615 (authorizing peace officers to make stops and reasonable inquires of people); ORS 133.033 (authorizing “peace

1 officers” to carry out community caretaking functions) ORS 131.605(3)(d) (defining “peace
2 officers” to include ODOJ investigators for purposes of ORS 131.615); ORS 133.005(3)(d) (same
3 for purposes of ORS 133.033).

4 The ODOJ likewise has broad authority to inform both the public and other law-
5 enforcement agencies about ongoing investigations and to pass along relevant information
6 received from other law-enforcement agencies to local, state, and federal agencies. *See, e.g.*, ORS
7 180.610(2) (directing the ODOJ to “[e]stablish a coordinated system of collecting, storing and
8 disseminating information relating to organized crime”); ORS 181A.265(3)(b) (designating “[t]he
9 Attorney General” as a “criminal justice agency” that participates in an information-sharing
10 program with other state criminal justice agencies). Similarly, the ODOJ has authority to
11 cooperate with federal and local agencies “for any lawful purpose, by agreement or otherwise.”
12 ORS 190.110(1) (so providing for any state agency); *see also* ORS 180.610(3) (specifically
13 directing the ODOJ to cooperate with “local, state and federal law enforcement agencies in
14 Oregon” on issues related to organized crime). The authority to cooperate with other agencies
15 encompasses the authority to share information with those agencies.

16 The ODOJ thus has express authority to investigate crimes, collect and analyze
17 information about crimes or other public-safety issues, and share that information with other law-
18 enforcement agencies, including those of other states and the federal government. That power
19 plainly includes the authority to collect and analyze terrorism, criminal activity, and homeland-
20 security information from other agencies and share that information when appropriate with other
21 state and federal agencies, as contemplated by ORS 181A.265(3)(b) and permitted by ORS
22 190.110(1). Put simply, whichever employees or units within the ODOJ are assigned those
23 functions, the ODOJ has express authority to carry them out.

24 That authority is sufficient for the ODOJ to perform the functions of the OTFC. As
25 explained above, the OTFC is merely a clearinghouse for information related to terrorism and
26 criminal activity. Information-sharing falls within the ODOJ’s express authority to cooperate
27 with other public safety agencies. The legislature can, of course, restrict those otherwise broad

1 conferrals of authority to collect and share information. But the only statute plaintiffs cite as such
2 a restriction is ORS 181A.250, which bans any law-enforcement agency from collecting or
3 maintaining information about the “political, religious or social views, associations or activities”
4 of any person or entity except as related to criminal investigations. That statute restricts the type
5 of information that the ODOJ can collect or maintain through the OTFC. But it does not prohibit
6 the ODOJ from performing the functions of the OTFC in compliance with its restrictions.

7 The ODOJ employees performing OTFC-related duties do not perform any direct
8 surveillance such as wiretaps or other forms of real-time monitoring. Plaintiffs allege to the
9 contrary (*see* Complaint, ¶ 46), but they have offered and will not be able to offer any admissible
10 evidence that creates a genuine issue of fact as to the OTFC unit’s authorized activities. But even
11 if there were a genuine issue of fact on that question, that would not be sufficient to defeat
12 defendants’ motion for summary judgment. As noted, the ODOJ has express authority to
13 investigate alleged crimes. ORS 180.090. Lawful surveillance activities would not exceed the
14 ODOJ’s authority.

15 Corroborating the ODOJ’s authority to collect, analyze, and share information with other
16 agencies is the Oregon Legislature’s repeated approval of budgets funding the OTFC and the
17 legislature’s express recognition of the unit’s importance to law enforcement. For instance, both
18 before and after the Governor’s designation of the ODOJ as the state’s fusion center, the Oregon
19 Legislature has consistently approved funding for specific positions within the OTFC, and in
20 2017, provided permanent funding.⁴¹ As part of the budgeting process, the ODOJ makes a
21 presentation to the Oregon Legislature at least every two years to explain its functions and
22 operations, presentations which are open to the public.⁴² The Oregon Legislature has also

23
24 ⁴¹ 2017-19 Legislatively Adopted Budget, Criminal Justice Division, at CJ Page 1. Between 2007 and 2021, the
Oregon Legislature has increased funding for the functions that ODOJ performs within the fusion center. *See, e.g.*,
Section 12, Senate Bill 5556 (2008); House Bill 5201 (2014); Section 20, Senate Bill 5701 (2016).

25 ⁴² *Slauson Dec.*, ¶ 4. These presentations are open to the public, and video recordings of recent presentations are
26 available online. *See* Public Hearing, Joint Subcommittee On Public Safety, 3/11/2019 at 3:00 PM, SB 5515, 2019
Regular Session, *available at* <https://olis.oregonlegislature.gov/liz/2019R1/Measures/Overview/SB5515> (last
27 accessed 4/25/2023). ODOJ’s presentations include written materials such as PowerPoints, which detail the

1 repeatedly approved the use of federal grants to fund positions and support functions assigned to
2 the OTFC.⁴³ Similarly, the Oregon Legislature recognized the importance of the OTFC by
3 requiring that a representative from the unit, appointed by the Attorney General, join Oregon's
4 Homeland Security Council. ORS 401.109(3)(p). If a unit within the ODOJ were performing
5 acts beyond the ODOJ's authority, the legislature would not have repeatedly funded that unit,
6 participated in presentations about that unit's operations, or required that one of the unit's
7 members join the Oregon Homeland Security Council. The history of legislative funding for, and
8 recognition of, the OTFC confirms that the unit is an authorized part of the ODOJ's functions.

9 **2. The Governor's designation of the ODOJ as Oregon's fusion center did not**
10 **change the ODOJ's underlying authority to perform information-sharing**
11 **functions.**

12 Not surprisingly, in 2011, the Governor designated ODOJ as Oregon's fusion center to
13 continue coordinating and sharing vital information with relevant agencies in a national network
14 of fusion centers. Plaintiffs do not allege that the Governor lacked authority to make that
15 designation. Regardless, the Governor's designation did not change the ODOJ's underlying
16 authority to perform the functions that it had assigned to the OTFC or create a need for specific
17 legislative authority to continue the OTFC. If anything, the Governor's designation recognized
18 that the ODOJ already had the relevant authority to collect, analyze, and share information with
19 other agencies within a separate unit dedicated to those functions. In that respect, the OTFC is on
20 the same footing as any other unit within ODOJ's Criminal Division, such as the Oregon Internet

21 functions and activities of the OTFC, and are available online. *See 2017 Joint Committee on Ways & Means Public*
22 *Safety Subcommittee Presentation – Phase 1*, April 3 – 6, 2017, Oregon Department of Justice, Ellen F. Rosenblum,
23 Attorney General, attached as Exhibit 4 to *Slauson Dec.*, also available at [https://olis.oregonlegislature.gov/liz/](https://olis.oregonlegislature.gov/liz/2017R1/Downloads/CommitteeMeetingDocument/113905)
24 [2017R1/Downloads/CommitteeMeetingDocument/113905](https://olis.oregonlegislature.gov/liz/2017R1/Downloads/CommitteeMeetingDocument/113905) (last accessed 4/24/2023); *2019 Joint Committee on*
25 *Ways & Means Public Safety Subcommittee Presentation – Phase 1*, March 11-14, 2019, Oregon Department of
26 Justice, Ellen F. Rosenblum, Attorney General, attached as Exhibit 5 to *Slauson Dec.*, also available at
27 <https://olis.oregonlegislature.gov/liz/2019R1/Downloads/CommitteeMeetingDocument/170172> (last accessed
4/25/2023); *2021 Joint Committee on Ways & Means Public Safety Subcommittee Presentation*, March 29, 2021
Oregon Department of Justice, Ellen F. Rosenblum, Attorney General, attached as Exhibit 6 to *Slauson Dec.*, also
available at <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/236824> (last
accessed 4/25/2023); *see Exhibit 7 to Pitcher Dec.* (chart summarizing references to OTFC operations by year).

⁴³ 2017-19 Legislatively Adopted Budget, Criminal Justice Division, at CJ Page 14, 17. *See infra*, Exhibit 7 to
Pitcher Dec., including the table laying out Budget Analyses from 2007 to 2019, with specific approvals of federal
grants. *See also* ORS 180.630 (permitting the ODOJ to “submit applications for federal grant[.]”).

1 Crimes Against Children Task Force. It is one of many examples of how ODOJ has organized
2 itself to function more effectively by assigning authorized functions to a particular section.

3 Indeed, plaintiffs do not even address ODOJ’s authority to perform the underlying tasks
4 that have been assigned to OTFC. Instead, they allege that the ODOJ lacks authority to operate
5 the center itself. In other words, plaintiffs argue that, because no statutory enactment specifically
6 created the OTFC, the ODOJ lacks authority to create the unit and assign to it particular functions
7 of the ODOJ. But the ODOJ has implicit authority to organize a unit within one of its sections to
8 carry out the functions that the legislature has authorized it to perform. *Ochoco Constr., Inc. v.*
9 *Department of Land Conservation & Dev.*, 295 Or 422, 426 (1983) (noting that although “[a]n
10 agency is a creature of statute”, an agency’s power “includes that expressly conferred by statute as
11 well as such implied power as is necessary to carry out the power expressly granted”); *see also*
12 *Pacific Northwest Bell Tel. Co. v. Katz*, 116 Or App 302, 309-310 (1992) (“It is well settled that
13 an agency has such implied powers as are necessary to enable the agency to carry out the powers
14 expressly granted to it.”). An agency’s broad discretion to perform its assigned functions includes
15 the implied power to assign those functions to particular employees or units within the agency.
16 *Nelson v. Lane County*, 304 Or 97, 103, 743 P2d 692 (1987) (observing that it “falls to the agency
17 head” or “that official’s designee” to “sub-delegate” the agency’s assigned responsibilities to
18 subordinate employees); *see also Serv. Employees Int’l Union Local 503 v. State, Dep’t of Admin.*
19 *Servs.*, 183 Or App 594, 607, 54 P3d 1043 (2002) (determining from governing statutes that DAS
20 had implied authority to contract for services even if it lacked specific legislative authority to
21 contract for them); *Warren v. Marion County*, 222 Or 307, 320 (1960) (“The authority to
22 subdelegate need not be expressed in the statute and may be implied if there is a reasonable basis
23 for such implication.”).

24 Indeed, for decades, the ODOJ has organized itself into various divisions with individual
25 units specializing in particular areas of law—for example, creating the Civil Enforcement
26 Division, which itself has a consumer protection section focused on the enforcement of consumer-

27 ///

1 protection laws.⁴⁴ Those organizational choices reflect the practical needs of any agency
2 legislatively authorized to perform a broad range of functions. The OTFC arose from the same
3 type of organizational need. When the Governor designated the ODOJ as a fusion center in 2011,
4 it simply gave a new name to a unit that was already performing legislatively authorized ODOJ
5 functions.

6 **3. The fact that an analyst assigned to the OTFC unit may have acted**
7 **improperly does not demonstrate that the unit is *ultra vires*.**

8 As already noted, plaintiffs’ and intervenors’ complaints focus heavily on the actions of an
9 analyst assigned to the OTFC with respect to Jordan Cover protests. And, as already noted, the
10 ODOJ agrees that those actions were inappropriate. The ODOJ initiated discipline as a result, and
11 the investigator ultimately resigned.

12 If plaintiffs were seeking a remedy specifically for harms alleged as a result of the
13 analyst’s conduct, those facts would be highly relevant. But plaintiffs are not seeking a remedy
14 tailored to that conduct. Instead, they ask this court to conclude that ODOJ has no authority to
15 operate the OTFC at all. The remedy they seek is an order enjoining ODOJ from continuing to
16 perform the functions of the OTFC.

17 The fact that an analyst assigned to the OTFC may have acted inappropriately does not
18 support such a sweeping remedy. The ODOJ has ample authority to receive information relevant
19 to its police function from other agencies, review that information, and disseminate it in
20 furtherance of law enforcement objectives. Misuse of that authority in a particular instance could
21 warrant a remedy to redress any resulting harm suffered by a plaintiff. *Cf. Doyle v. City of*
22 *Medford*, 356 Or 336, 338-39 (2014) (explaining circumstances in which courts will create a
23 private right of action for statutes that do not expressly create one). But it cannot justify an order
24 of this court enjoining the ODOJ from performing the functions of the OTFC. The actions of an
25 individual cannot change the scope of authority legally conferred on an agency.

26 ⁴⁴ See Oregon Department of Justice—Civil Enforcement, [https://www.doj.state.or.us/oregon-department-of-](https://www.doj.state.or.us/oregon-department-of-justice/divisions/civil-enforcement/)
27 justice/divisions/civil-enforcement/ (last accessed March 16, 2023) (explaining the functions and duties of various units and sections, including the consumer protection section).

1 To the extent that plaintiffs and intervenors want defendants to destroy all records
2 collected by the ODOJ regarding them, they did not need to file a lawsuit to make this request.
3 The ODOJ's publicly available privacy policy regarding the OTFC allows individuals to ask
4 whether it has gathered and retained any information pertaining to them, and to request
5 expungement.⁴⁵ Regardless, the ODOJ collected no records regarding plaintiffs and has no
6 records to destroy. As to intervenors, the ODOJ has identified fewer than 100 pages of records
7 that mention or involve intervenors. Defendants are willing to expunge those records under the
8 OTFC's privacy policy. A summary of those records is contained in Exhibit 16 to the
9 Declaration of George S. Pitcher, and defendants will provide copies of the records to the Court
10 upon request.

11 CONCLUSION

12 The ODOJ has express authority to collect and share information related to criminal
13 investigations and public safety. And it has the implicit authority to assign those duties and
14 functions to a unit within its Criminal Justice Division. The OTFC is that unit. The Oregon
15 Legislature is well aware that the ODOJ performs the functions of the OTFC and has
16 consistently funded the unit's operations. Accordingly, this Court should declare that the
17 ODOJ's operation of the OTFC is not ultra vires.

18 DATED this 27th day of April, 2023.

By: s/ George S. Pitcher

George S. Pitcher, OSB #963982
George.Pitcher@lewisbrisbois.com
Dmitriy S. Golosinskiy, OSB #173568
Dmitriy.Golosinskiy@lewisbrisbois.com
LEWIS BRISBOIS BISGAARD & SMITH LLP

Christopher A. Perdue, OSB #136166
Chris.Perdue@doj.state.or.us
Oregon Department of Justice

*Attorneys for Defendants The Oregon Department
of Justice; Ellen Rosenblum; and Michael Slauson*

26 ⁴⁵ OTFC Privacy Policy, Section 7.6.1, p. 14; Section 7.6.10, p. 16. Section 7.6.3 contains limited exceptions, which
27 among others includes situations where disclosure would interfere with a criminal investigation or endanger the
community or an individual.

CERTIFICATE OF SERVICE

I certify that I served the foregoing DEFENDANTS THE OREGON DEPARTMENT OF JUSTICE, ELLEN ROSENBLUM, AND MICHAEL SLAUSON'S MOTION FOR SUMMARY JUDGMENT REGARDING LEGISLATIVE AUTHORITY FOR FUNCTIONS OF OREGON TITAN FUSION CENTER on the following attorneys by the method indicated below on the 27th day of April, 2023:

Attorneys for Plaintiffs:

Tim Cunningham
Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201-5610
timcunningham@dwt.com

☒ Via First Class Mail
☐ Via Federal Express
☐ Via Facsimile
☐ Via Hand-Delivery
☒ Via E-Mail

Barry Friedman (*pro hac vice*)
Farhang Heydari (*pro hac vice*)
Annie Hudson-Price (*pro hac vice*)
The Policing Project Washington Square Legal Services, Inc.
40 Washington Square South
New York, NY 10012
barry.friedman@nyu.edu; farhang.heydari@nyu.edu
annie.hudsonprice@nyu.edu

☒ Via First Class Mail
☐ Via Federal Express
☐ Via Facsimile
☐ Via Hand-Delivery
☒ Via E-Mail

Jeffrey Rosenthal (*pro hac vice*)
Patrick Swiber (*pro hac vice*)
Cleary Gottlieb Steen & Hamilton, LLP
One Liberty Plaza
New York, NY 10006
jrosenthal@cgsh.com; pswiber@cgsh.com

☒ Via First Class Mail
☐ Via Federal Express
☐ Via Facsimile
☐ Via Hand-Delivery
☒ Via E-Mail

Attorneys for Intervenor-Plaintiffs:

Lauren Regan
Marianne Dugan
CIVIL LIBERTIES DEFENSE CENTER
1430 Willamette Street #359
Eugene, OR 97401
lregan@cldc.org; mdugan@cldc.org

☒ Via First Class Mail
☐ Via Federal Express
☐ Via Facsimile
☐ Via Hand-Delivery
☒ Via E-Mail

By: s/ George S. Pitcher

George S. Pitcher, OSB #963982
George.Pitcher@lewisbrisbois.com
Dmitriy S. Golosinskiy, OSB #173568
Dmitriy.Golosinskiy@lewisbrisbois.com
LEWIS BRISBOIS BISGAARD & SMITH LLP
Christopher A. Perdue, OSB #136166
c
Oregon Department of Justice

*Attorneys for Defendants The Oregon Department
of Justice; Ellen Rosenblum; and Michael Slauson*