For the RECORD

A compilation of facts, large and small, about our community

•Nearly 25,000 African immigrants and refugees live in Oregon: Source, Coalition of Communities of Color

•About 24 percent of the Portland Metropolitan Region was made up of youth ages 0-17. Nearly 11 percent were residents 65 years of age and older: Source, Coalition for Livable Future

•Three quarters of Latinos in Multnomah County trace their roots to Mexico.

•More than 40 percent of the Latino population is under 19, compared to 18 percent of non-Latino whites.

•There are more than 3,200 licensed restaurants in Multnomah County and more than 710 food carts.

•In Multnomah County, African American men are 40 percent more likely than white men to be diagnosed with prostate cancer and more than two times as likely to die from it.

•There are 106 emergency shelter beds for women in Portland. There are currently 338 women on the waitlist at those beds. Source, City of Portland

•In 2012, 3,000 school children in Multnomah County were homeless.

- 11,773 same-sex couples are living in Oregon: 2010 U.S. Census

•Multnomah County, with approximately 5,120 same-sex couples, ranks 5th in the country for number of same-sex couples per 1,000 households (16.81 per 1000).

•Approximately 16 percent of same-sex couples are raising children.

•10,555 riders took part in the month long Bicycle Transportation Alliance's cycling challenge across Oregon. Residents took 114,984 trips and rode a collective 1,151,687 miles during the challenge this fall.

•A December 2012 poll found that 54 percent of people in Oregon would vote to approve the freedom to marry, while only 40 percent said they would oppose marriage for same-sex couples. Independents support marriage by a 64-33 margin, and voters younger than 45 support the freedom to marry by a margin of 68-30.

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Transition Projects

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So that means they will be submitting unilateral requests, administrative subpoenas, to the Oregon program and expect Oregon to send back people's confidential prescription records. It's our position that that is a violation of both Oregon law and the Fourth Amendment to the U.S. Constitution.

J.T.: *So they'd be getting these records through subpoenas rather than warrants. I was hoping you could explain the difference between the two and why that's important.*

N.W.: Under the Fourth Amendment to the U.S. Constitution, a warrant is required whenever the government wants to conduct a search of information or a place where a person has a reasonable expectation of privacy. For example, that would include a search of someone's house and, we think, a search of someone's medical records.

To get a warrant, the government has to go to a neutral judge and demonstrate that they have a probable cause that the subject of an investigation has committed or will commit a crime. And that's a high standard, and that's the gold standard under the Constitution.

A subpoena is much different. It's really trivially easy for the government to issue. Prosecutors or law enforcement can send off administrative subpoenas on their own authority without ever going to a judge and all they need to demonstrate is that the records that they seek are relevant to an ongoing investigation, which is a very low standard and far lower than the probable cause required for a warrant.

J.T.: *How do you respond to the DEA's argument that medical records aren't private, much like emails or other things subject to the third-party doctrine?*

N.W.: Well, I have two responses. The whole concept of the third-party doctrine is really outdated and doesn't match up with people's reasonable expectations of privacy in today's virtual world where virtually all of our communications through email or text messages and other means are digital. When we keep files on the cloud stored digitally, and when very sensitive information like our medical information is contained in digital files that are sent between doctors and pharmacists and pharmacists and state reporting programs, it no longer makes sense that because you've shared information with a particular third-party for a particular reason, like your doctor to get medical care, that all of a sudden you've consented to the government getting access to the same information.

But even if the third-party doctrine makes sense in some limited context, it still makes no sense when we're talking about the extraordinarily private category of information that is made up by people's medical records and their prescription records. Knowing what medications a person has been prescribed will reveal their underlying medical condition and their course of treatment, including really sensitive things like whether a person is HIV positive or has mental illness: issues related to their sexuality or chronic health conditions that are among some of the most private information that any of us have.

J.T.: *So you're saying that there are problems with the third-party doctrine?*

N.W.: The case that the Supreme Court decided back in the 70s, which the government relies on now and establishes the third-party doctrine, was decided in a very different era when there was very little or no digital information out there, and maybe then it did make sense that you disclosed some information into a third-party for some reason you had, in effect, recognized that it might be passed on to others.

I think even then it was a dubious proposition, but in today's world there is no way to participate in the economy or participate in modern life, to get health care, to communicate with friends and family and business partners without using third-party services like email providers. So it just doesn't comport with people's expectations of privacy. Just because they are participating in modern life we think that all their information should be accessible to police without a warrant.

J.T.: *So what's the solution? It was established by the Supreme Court. Is the solution a legislative fix?*

N.W.: I think that legislative fixes can be appropriate, but there is a limitation in the case that we're talking about where the state of Oregon tried to make the legislative fix. But now the DEA is coming in and saying, that's just a matter of state law and we think that federal law preempts that and we can get the records without a warrant.

So if Congress steps in that would be a fix across the country. Courts really have an opportunity to make sure that our understanding of the Fourth Amendment takes account of how people actually live their lives and understand their privacy rights today. So whether it's in this case or other cases dealing with similar issues, the time has really come for courts to recognize that this notion of the third-party doctrine no longer makes sense and in fact members of the Supreme Court in a case last year involving warrantless GPS tracking by police recognized as much and said that maybe there needs to be a reevaluation of the whole concept now that technology is coming so fast and people need to use the technology to participate in modern life.

J.T.: *I read one of the government's briefs that claimed that even if the DEA finds out about medications being taken by patients it won't really effect them "adversely, if at all." It also notes that it has safeguards to protect their names from becoming public. How do you respond?*

N.W.: Well, the Fourth Amendment was written into the Bill of Rights by the framers of the Constitution, specifically, to limit the ability of police and law enforcement to rifle through people's private information and private papers. So disclosure to the public of people's information once the DEA gets it is a concern. It's crucial that there are safeguards, but the primary concerns of the

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Oregon vs. the DEA

BY JAKE THOMAS
STAFF WRITER

Under both the U.S. and Oregon constitutions, law enforcement needs a warrant to come into your home to search for evidence of unscrupulous activity. However, the U.S. Drug Enforcement Agency doesn't think that the same standard applies for your medical records.

In November, the state of Oregon went to court to challenge the DEA's contention that it doesn't need a court warrant access a database administered by the Oregon Prescription Drug Monitoring Program (OPDMP), which was established by state lawmakers in 2009 to help health care providers better manage patients' prescriptions while also preventing overdoses and abuse of drugs.

When lawmakers created the program, they built in a privacy safeguard by making it illegal for law enforcement to access the database without first obtaining a court warrant that demonstrated that there was a probable cause that the snooping would turn up evidence of wrong-doing.

However, the DEA has argued that it can bypass this requirement under the third-party doctrine, an idea developed by the U.S. Supreme Court in the 1970s that reasons that once citizens hand over information to a third party, such as emails sent over a company's server or electric bills sent to a utility provider, they then have no reasonable expectation that the information will remain private. The DEA argues that prescription records fall under this category and can be obtained by a subpoena rather than a warrant, which requires scrutiny from a judge.

"When we collect data, it's that much more easy for the government to access it," says Becky Straus, legislative director the ACLU's Oregon affiliate. "But it doesn't mean that we don't have the same constitutional protections."

In January, the ACLU joined the case representing four patients and one physician residing in Oregon who have privacy concerns about the DEA accessing records contained in the database without a warrant because they contain such deeply personal information. According to a brief filed by the ACLU, two individuals the organization is representing are transgendered men taking testosterone as part of their transitions from females to males. Another takes medication to treat anxiety and post-traumatic stress disorder.

A brief filed by the U.S. District Attorney argues that while patients and physicians represented by the ACLU may have privacy concerns about the DEA accessing the database, "there is no evidence that this practice has or will effect (them) adversely, if at all." The brief, filed on behalf of the DEA, also argues that it has the law on its side.

"The Supreme Court has held that a person does not have a constitutionally protected interest in prescription information," reads the brief, which cites court cases backing up this claim.

According to the most recent report from the OPDMP, which runs from January 2013 through August 2013, 4.8 million prescriptions are contained in the database.

The Oregon Health Authority, which oversees the program, did not have numbers on how many subpoenas it has received from the DEA and how many it has complied with as of press time.

Straus also has other concerns about the OPDMP. In the last legislative session, lawmakers passed a bill that modified the program to collect more information about patients, while also allowing doctors or pharmacists to allow their staff to access the database. Straus worries that the new law will give the program "mission creep," while also creating new privacy concerns.

"Lower level staff are less likely to have professional licenses or certifications that would hold them accountable to any kind of abuse of the system," she says.

Knowing what medications a person has been prescribed will reveal their underlying medical condition and their course of treatment, including really sensitive things like whether a person is HIV positive or has mental illness: issues related to their sexuality or chronic health conditions that are among some of the most private information that any of us have.