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February 11, 2003

Ms. Noelle Crombie
The Oregonian
Metro South News Bureau
PO Box 2500
Oregon City, OR 97045

Dear Ms. Crombie:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on February 4, 2003, asks the Attorney General to direct the Department of Human Services (DHS) to disclose "[t]he personnel review report in the matter of Darlene Walsh-Buntrock and Colin Fitzpatrick, in its entirety." For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. If a public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n8, 538 P2d 373 (1975).

From the materials enclosed with your petition we see that the DHS Chief Administrative Officer, Clyde Saiki, partially denied your request by disclosing to you a redacted copy of the DHS personnel report on January 23, 2003.[1] Mr. Saiki's letter to

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[1] The petition states that your request was denied by four individuals: three DHS employees and the Deputy Attorney General. However, contrary to the contents of your current petition, a January 7, 2002, petition that you submitted for disclosure of the DHS personnel report did not allege that any of the four had denied your request. Instead, it stated that DHS had not yet provided you with a copy of the report although the agency had "repeatedly promised" you access to it. The Deputy Attorney General did not, and is not in a position to, deny the request that you made to DHS. He issued an order denying your January petition, as provided under ORS 192.450.

you states that the redacted portions of the personnel report are exempt under the criminal investigatory exemption stated in ORS 192.502(3).

ORS 192.501(3) conditionally exempts from disclosure "[i]nvestigatory information compiled for criminal law purposes." Similar to the petition for which we issued a Public Records Order on December 18, 2002, with regard to other DHS records, the current petition makes several arguments as to why the criminal investigatory exemption does not apply to the redacted portions of the requested record. Primarily, the petition states that the exemption is inapplicable because the personnel report "was not 'compiled' for law enforcement purposes." As we explained in our previous Order, the scope of the exemption for criminal investigatory information "extends to prevent disclosure of documents not originally created for, but later gathered for, criminal law enforcement purposes." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2001) (AG'S MANUAL) 33.

As the petition recognizes, and as we discussed in our December 18 Order, the Clackamas County District Attorney's office has served a subpoena on DHS related to the criminal investigation of the murders of Ashley Pond and Miranda Gaddis. However, the petition asserts that the criminal investigatory exemption is not applicable because the DHS personnel report was compiled after the District Attorney served the subpoena on DHS. Moreover, the petition questions how disclosure of the redacted portions of the personnel report could interfere with the District Attorney's investigation or prosecution when the report pertains to a review of DHS actions.

In providing an assessment of the actions taken by DHS personnel, the DHS personnel report reviews information, including that about Ashley Pond and other individuals, that is drawn from, or duplicative of, the contents of records subpoenaed by the District Attorney. DHS has redacted those portions of the report. In other words, the redacted portions of the personnel report constitute information covered by the subpoena, information that, as we explained in our December 18 Order, was compiled in an investigation connected with a pending prosecution. Therefore, the redacted information constitutes criminal investigatory information.[2] Under ORS 192.501(3), those portions of the report "ordinarily will remain confidential because disclosure likely would interfere with law enforcement proceedings." AG'S MANUAL 32.

Contrary to the petition's apparent assertion, the Public Records Law does not require that DHS make a "'legally and factually justified' showing that [Ward] Weaver would not be successfully prosecuted if it released this document to *The Oregonian*." The Clackamas District Attorney's office is responsible for the criminal investigation and prosecution for the murders of Ashley Pond and Miranda Gaddis. Neither DHS nor this

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[2] ORS 419B.035, which in part protects the confidentiality of information identifying child abuse reporters, also exempts portions of the redacted information from disclosure. ORS 192.502(9).

office is in a position to second-guess the District Attorney's conclusion that there is a need to protect the confidentiality of records while prosecution is pending.

Application of the exemption for criminal investigatory information is conditional in that it applies "unless the public interest requires disclosure in the particular instance." The petition states that, as "the public's proxy," *The Oregonian's* purpose in seeking complete disclosure of the DHS personnel report is in providing people "an opportunity to determine how DHS has executed its duties." As stated in our December 18 Order, we agree that there is a public interest in knowing about DHS' performance of its duties. DHS addressed this public interest in providing you and other media outlets with a redacted copy of the personnel report, the nonredacted portions of which provide a substantial amount of the information contained in the report about the performance of DHS personnel. In light of this disclosure, we do not find the public interest in knowing about DHS' operations sufficient to require disclosure of the redacted portions of the DHS personnel report *at this time*, in light of the fact that a criminal prosecution is pending in relation to which the relevant District Attorney's office has requested that confidentiality of redacted information be maintained.

For these reasons, we deny your petition for an order of disclosure.[3]

Sincerely,

Peter D. Shepherd

PETER D. SHEPHERD
Deputy Attorney General

cc: Clyde Saiki, DHS Chief Administrative Officer
Dan Postrel, Administrator, DHS Office of Communications

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[3] Your petition raises several issues, *e.g.*, a perceived delay by DHS in disclosing its personnel report and the role of this office in advising DHS about the applicability of exemptions. Because your petition seeks an order to disclose the DHS report in its entirety, these and other issues are not germane to determining whether DHS acted in accord with the Public Records Law in releasing a redacted version of the report.