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December 18, 2002

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 December 11, 2002, asks the Attorney General to direct the Department of Human Services (DHS) to disclose:

> [The] agency's records concerning its care for and supervision of Miranda Gaddis and Ashley Pond and its records concerning all internal reviews, reports and investigations which were conducted by or on behalf of the agency concerning the discharge of its responsibilities to Miranda and Ashley and which have not previously been made public.

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. Under ORS 192.450, the Attorney General may order a state agency to disclose public records when that agency has denied any person the right to inspect or receive a copy of the records.

1. DHS' Denial of *The Oregonian's* Request

You and other members of *The Oregonian's* staff have made five requests to DHS for records during the past four months. DHS, through its Director Bobby Mink, sent a letter dated November 29, 2002, to *Oregonian* Executive Editor Peter Bhatia denying a

request for records "associated with the Clackamas County child-welfare case." As explained below, this denial was directed toward requests made by *The Oregonian* on September 5 and August 30. For the sake of clarity, we briefly review the status of each of the newspaper's five requests, beginning with the most recent.

First, on December 4, 2002, you requested "a copy of the Oregon Department of Human Services review of its handling of the Ashley Pond abuse allegations." You requested a copy of "the entire report, not a summary of the department's findings." Sue Nelson, DHS Office of Human Resources, states that the agency understands this to be a request for a personnel review report. DHS is consulting with legal counsel about disclosure of this report. This request was made after the November 29, 2002, letter sent by Director Mink to Mr. Bhatia, and, therefore, was not included within that denial. The records requested on December 4 are not addressed in this order.

Second, on September 20, 2002, Julie Sullivan from *The Oregonian* requested disclosure of notices of tort claims regarding child protective services and lawsuits filed against and settlements involving the State Office for Services to Families and Children,[1] from January 1, 1995 to the present. According to Dan Postrel, Administrator, DHS Office of Communications, he responded to Ms. Sullivan's request by telling her that the Risk Management Division of the Oregon Department of Administrative Services maintains the requested records. Mr. Postrel told Ms. Sullivan that Claims Manager Mike Baird at Risk Management was the appropriate person to whom to address her request. The records requested on September 20 are not addressed in this order.

Third, on September 13, 2002, you requested that the Department of Human Services provide you "immediate access to the agency's report or findings related to its handling of reports about Ashley Pond's sexual abuse allegations against Ward Weaver III." From the contents of your request, it appears that you were seeking release of a specific report, which, as you noted, DHS intended to release on September 16, 2002. Jim Sellers, DHS Media and Editorial Manager, told us that DHS responded to your request by providing the requested report to *The Oregonian* at a news conference and by fax on September 13, 2002. Mr. Sellers also told us that on September 30, 2002, DHS provided *The Oregonian* additional information through a news release detailing how DHS was following through on commitments made by DHS Director Mink regarding the handling of the case involving Ashley Pond. The records requested on September 13 are not addressed in this order.

Fourth, on September 5, 2002, you requested that DHS disclose "any and all documents relating to child abuse, neglect, sexual assault or other statutory crimes involving Ward Weaver and members of his family," including Tammi Weaver. The petition states that *The Oregonian* is "voluntarily narrowing the scope of its request." Because the petition states that you are seeking an order for disclosure of records about

[1] In 2001 the Oregon Legislature reorganized the Department of Human Services and abolished the State Office for Services to Children and Families.

DHS' "care for and supervision of Miranda Gaddis and Ashley Pond," we surmise that you are no longer seeking disclosure of the records described in the September 5 request. The records requested on September 5 are not addressed in this order.

Fifth, on August 30, 2002, you requested "immediate access to the contents of the Department of Human Services records" on Ashley Pond and Miranda Gaddis. Specifically, you requested "all records, including but not limited to: computerized and hard copies of reports, investigative summaries, e-mail, correspondence and any and all documents that pertain" to Ashley Pond and Miranda Gaddis. We have confirmed with Mr. Sellers at DHS that Director Mink's November 29 denial was directed to the September 5 and August 30 requests. Because *The Oregonian* no longer seeks disclosure of the records requested on September 5, *this order addresses only DHS' denial of the records requested on August 30.*

2. Exemption for Criminal Investigatory Materials

Director Mink denied the August 30 request on the basis of the records being exempt under ORS 192.501(3) as criminal investigatory materials. This statute exempts from disclosure "[i]nvestigatory information compiled for criminal law purposes."[2]

a. Records Covered by the Exemption

The petition on Mr. Mink's denial makes several arguments as to why the criminal investigatory exemption does not apply to the requested records. The petition states that the exemption is inapplicable because the records were not originally compiled or "held by" a law enforcement agency. This statement, however, misconstrues the scope of the criminal investigatory exemption.

We have concluded that the scope of the exemption for criminal investigatory material "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. For example, we denied a petition for records maintained by the Oregon Department of Corrections when the Oregon State Police had requested those records as part of a criminal investigation that it was conducting. Public Records Order, August 4, 1998, Lawson. Similarly, we denied a petition for records of an investigation of a former county caseworker made by the Mental Health and Developmental Disability Services Commission because the relevant District Attorney's office stated its intention to prosecute. Public Records Order, November 21, 2000, Aleccia.

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[2] ORS 192.501(3) states that "[t]he record of an arrest or the report of a crime shall be disclosed unless and only so long as there is a clear need to delay disclosure in the course of a specific investigation [.]" The records that you requested from DHS do not contain the record of an arrest or the report of a crime, making this portion of the statute extraneous for purposes of addressing your petition.

The Clackamas County District Attorney's office has served a subpoena on DHS that encompasses all of the records covered by your request. We have confirmed with Deputy District Attorney Alfred J. French III that the subpoena is related to the criminal investigation of the murders of Ashley Pond and Miranda Gaddis. The context of *The Oregonian's* request for records is parallel to those cited above in that records originally compiled by DHS are now being requested by a law enforcement agency for criminal investigatory purposes. Thus, the criminal investigatory exemption in ORS 192.501(3) is applicable.

The petition also states that the requested records are exempt under ORS 192.501(3) only if DHS can prove that disclosure would result in "some particular harm." In support of this assertion, the petition cites to *Jensen v. Schiffman*, 24 Or App 11, 16 544 P2d 1048 (1976) with regard to the court's reference to the terms of the federal Freedom of Information Act in interpreting the Public Record Law's criminal investigatory exemption:

> [I]t appears that the current federal law in this area is: (1) investigations connected with pending or contemplated proceedings will ordinarily remain secret because disclosure would likely 'interfere with enforcement proceedings,' 5 U.S.C. s552(b)(7)(A); but (2) investigations not connected with pending or contemplated proceedings will remain secret only if the government establishes that disclosure would produce one of the consequences listed in 5 U.S.C. s552(b)(7)(B) through 5 U.S.C. s552(b)(7)(F).

The petition states that "[t]he agency's response implies the Court of Appeals adopted both views, when in fact it adopted only the latter explanation of the criminal investigatory exemption under FOIA." The quoted portion of the court's opinion does not express two "views"; it is differentiating between the standards that apply to use of the criminal investigatory exemption under FOIA depending upon whether the requested records relate to "pending or contemplated proceedings." *Jensen* states that the same differentiation applies to the use of ORS 192.501(3). AG'S MANUAL 32.

The records you have requested from DHS have been subpoenaed by the Clackamas District Attorney's office, and therefore compiled in an investigation connected with a pending prosecution. Under the standard set in *Jensen*, the records "ordinarily will remain confidential because disclosure likely would interfere with law enforcement proceedings." AG'S MANUAL 32. Deputy District Attorney French has requested that DHS assert the criminal investigatory exemption in relation to the requested records. The Clackamas District Attorney's office is responsible for the criminal investigation and prosecutions for the murders for Ashley Pond and Miranda Gaddis. The Public Records Law does not require that we conduct an inquiry to test the accuracy of this representation. Instead, we accept the prosecutor's representations that public disclosure of these records would interfere with the pending criminal prosecution.

b. Public Interest in Disclosure

While the requested records are of the type exempt from disclosure as criminal investigatory material, application of the exemption is conditional. The exemption applies "unless the public interest requires disclosure in the particular instance." The petition states that there is a public interest in disclosure of the requested records, largely focused on questions and concerns about DHS' performance. We agree that there is a public interest in the performance of government in general, including the performance of duties by DHS. As noted in the petition, this public interest is being addressed, for example, by Governor Kitzhaber's ordering of a review of agency procedures.[3] We find nothing in the petition that justifies ordering DHS to disclose the requested records *at this time*, when a criminal prosecution is pending in relation to which the relevant District Attorney's office has requested that confidentiality of the records be maintained.

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

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS11513
c: Dan Postrel, Administrator, DHS Office of Communications
Jim Sellers, DHS Media and Editorial Manager

[3] In recognition of this public interest in the performance of government, ORS 409.225 provides that "**unless exempt from disclosure under ORS chapter 192**, the [Department of Human Services] shall disclose information related to the department's activities and responsibilities in a case where child abuse or neglect has resulted in a child fatality or near fatality or where an adult has been charged with a crime related to child abuse or neglect." ORS 409.225(6)(emphasis added). This provision incorporates by reference all of the exemptions contained in the public record law, including the criminal investigatory exemption. In addition, ORS 409.225(7) explicitly provides that notwithstanding ORS 409.226(6), ORS 192.501(3) [the criminal investigatory exemption] shall apply to investigatory information compiled for criminal law purposes that may be in the possession of the [Department of Human Services].