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November 21, 2000

JoNel Aleccia
Mail Tribune
111 N. Fir Street
PO Box 1108
Medford, OR 97501

Re: *Petition for Public Records Disclosure Order: Mental Health and Developmental Disability Services Division Records*

Dear Ms. Aleccia:

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. Your petition, which we received on November 15, 2000, asks the Attorney General to direct the Mental Health and Developmental Disability Services Division (MHDDSD) to make available "the division's initial investigation of a case involving Robert Forrest Jackson, a former Jackson County caseworker."

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 n 8, 538 P2d 373 (1975).

Your request for MHDDSD investigatory materials triggers a public record exemption. ORS 192.501 provides, in relevant part:

> The following public records are exempt from disclosure under ORS 192.410 to 192.505 unless the public interest requires disclosure in the particular instance:
>
> * * * * *

> (3) Investigatory information compiled for criminal law purposes. The 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, including the need to protect the complaining party or the victim. * * *

We have been advised by Eva Kutas, Manager of the MHDDSD Office of Investigation and Training, that the report you have requested pertaining to Robert Jackson was conducted as part of an abuse investigation that was ultimately referred by MHDDSD to local law enforcement for additional investigation and consideration for potential criminal charges. In a letter to Assistant Attorney General Jeffrey Wahl dated November 14, 2000, Jackson County Deputy District Attorney Terry Smith stated that the Jackson County District Attorney's office intends to prosecute Mr. Jackson, with a trial likely to begin next year. Deputy District Attorney Smith informed this office that the MHDDSD "reports contain investigatory materials" which were subsequently "compiled for criminal law purposes" and that the public disclosure of these materials "would interfere and impede [the] criminal prosecution of Mr. Jackson."

Although the MHDDSD investigation report was not originally created for criminal law enforcement purposes, we have previously concluded that ORS 192.501(3) extends to documents that are subsequently gathered for criminal law enforcement purposes. Public Records Order, December 23, 1991 (Mayes); Public Records Order, October 10, 1996 (Reed). In reaching our conclusion, we noted that in *John Doe Agency v. John Doe Corp.*, 493 US 146, 110 S Ct 471, 107 L Ed2d 462 (1989), the United States Supreme Court construed the nearly identical provision in the federal Freedom of Information Act exempting "records or information compiled for law enforcement purposes" to extend to such documents. Because the state and federal disclosure exemptions are comparable, we believe the Oregon courts would reach the same conclusion. See *Jensen v. Schiffman*, 24 Or App 11, 16, 544 P2d 1048 (1976).

In *Jensen v. Schiffman*, the Court of Appeals stated its view that information compiled in "investigations connected with pending or contemplated prosecutions ordinarily will remain secret because disclosure would likely 'interfere with [law] enforcement proceedings.'" 24 Or App at 16 (quoting 5 USC § 552(b)(7)(A), which the court found analogous to Oregon statute). Because the MHDDSD report was referred to a local law enforcement agency for further investigation of potential criminal charges, and there is a pending criminal case which may be jeopardized by the disclosure of the MHDDSD records at this time, we find that the records have not only been compiled for criminal law enforcement purposes, but there also exists a need to delay disclosure of the requested information to avoid compromising a pending criminal prosecution.

Your petition does not set forth any reasons why the public interest requires disclosure at this time in this particular matter. The governmental interest that weighs against disclosure at this time is the general public's interest in having persons who have violated the law successfully prosecuted. We have no basis to question the conclusion of the District Attorney's Office that release of the report would interfere with and impede the criminal prosecution of Mr. Jackson. On balance, we conclude that, at this time, the public interest in the successful operation of the criminal justice system outweighs the public interest in disclosure of the requested records.

Accordingly, we conclude that the requested records are exempt from disclosure under the Public Records Law. ORS 192.501(3). Therefore, we deny your petition to compel disclosure.

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

AGS05937
c: Eva Kutas, MHDDSD
Terry Smith, Jackson County DDA