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August 30, 1995

Spencer Heinz
Staff Writer
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

Re: *Petition for Public Records Disclosure Order: State Office for Services To Children and Families' Records*

Dear Mr. Heinz:

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 August 24, 1995, asks the Attorney General to direct the State Office for Services to Children and Families (SOSCF) to produce public records relating to a 1991 investigation of allegations of sexual misconduct that involved Roger Kerry Tweit, a child protective service worker. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to access any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. The law requires that the custodian of public records furnish proper and reasonable opportunities for inspection and/or copying of the records in the office of the custodian. ORS 192.430. Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the

public record to determine if it may be withheld from public inspection. ORS 192.450(1).[1/]

The investigation report you request is exempt from disclosure under the criminal investigatory material exemption of the Public Records Law. ORS 192.501(3) exempts from disclosure "investigatory information compiled for criminal law purposes" unless "the public interest requires disclosure in the particular instance."

We have been advised by District Attorney Gregory Baxter that he has compiled information that is contained in the report for criminal law enforcement purposes, that his office has a copy of the report, and that the report is being used for criminal law purposes. By letter dated August 24, 1995, to Kay Toran, the Administrator of SOSCF, the District Attorney has requested that the report not be disclosed until the completion of the criminal prosecution. In a letter to this office dated August 19, 1995, District Attorney Baxter reconfirmed that release of the report would jeopardize the prosecution of Mr. Tweit.

In a prior public records disclosure order, this office concluded that 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. Public Records Order dated December 23, 1991, (Mayes). In reaching that conclusion, the Order noted that in *John Doe Agency v. John Doe Corp.*, 493 US 146, 110 S Ct 471, 107 LEd2d 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

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[1/] We note that your Petition to the Attorney General was received by this office prior to your request for the record being denied by the state agency, notwithstanding the statement in your petition that your request "was denied by Ann Niederehe, the assistant administrator for the State Office for Services to Children and Families." Because the agency has now denied the request, we are, as a matter of courtesy, responding to your Petition on the merits even though it was not filed in accordance with ORS 192.450.

to such documents. Because the state and federal disclosure exemptions are comparable, we believe that the Oregon Courts would reach the same conclusion. *See Jensen v. Schiffman*, 24 Or App 11, 544 P2d 1048 (1976).

Because the requested report is within the scope of the exemption set forth in ORS 192.501(3), it is necessary to determine whether the public interest in disclosure requires disclosure in this particular instance. The policy underlying this requirement is that disclosure decisions should be based on balancing those public interests that favor disclosure of governmental records against those public interests that favor governmental confidentiality, with the presumption always being in favor of disclosure. *Turner v. Reed,* 22 Or App 177, 187, 538 P2d 373 (1975).

The Petition did not set forth any reasons why the public interest requires disclosure in this instance. Factors in favor of disclosure which we have identified include the general public's entitlement to information that will facilitate their understanding of how public business is conducted and their right to monitor what appointed officials are doing on the job. *See Guard Publishing Co. v. Lane County School Dist.*, 96 Or App 463, 468-469, 774 P2d 494 (1989), *rev'd on other grounds* 310 Or 32, 791 P2d 854 (1990), *Jensen v. Schiffman*, 24 Or App at 17. You have stated to us that your intent is to publish information from the report in the Oregonian, thereby disseminating the information to the general public.

The governmental interest which weighs against disclosure at this time is the general public's interest in having persons who have violated the law successfully prosecuted. The District Attorney has stated that any release of the information contained in the report could jeopardize the prosecution of the case.

On balance, we conclude that despite the presumption in favor of disclosure, the public's interest in successful operation of the criminal justice system outweighs the public's interest in publication of information from the report pending completion of the prosecution. We note that the Baker County Grand Jury indicted Mr. Tweit on August 23, 1995, and assume that the case will be promptly tried. If your request is

renewed at the conclusion of criminal proceedings against Mr. Tweit, it is very possible that the result of this balancing test would change, and the requested information would be disclosed.[2/]

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the
Attorney General

ESH:LRY:aml/LRY0571.LET

[2/] Because the ORS 192.501(3) exemption is dispositive of your request at this time, we do not address whether other exemptions might apply, including the personal privacy exemption, ORS 192.502(2), the confidential disclosures by citizens exemption, ORS 192.502(3), the federal law exemption, ORS 192.502(7), and other exemptions established by other Oregon statutes, ORS 192.502(8).