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November 23, 2009

Michelle Cole, Reporter
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

Re: Petition for Public Records Disclosure Order
State Medical Examiner Records

Dear Ms. Cole:

On November 4, 2009, we received your petition under the Oregon Public Records Law, ORS 192.410 to 192.505, seeking an order compelling the State Medical Examiner ("medical examiner") to disclose to you her reports concerning the death of Moises Perez.[1] You subsequently agreed to allow us up to ten additional days within which to respond to your petition.[2] We thank you for that courtesy. We now respectfully deny your petition, for the reasons that follow.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain express exemptions and limitations. *See* ORS 192.420. Any person who is 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 record and determine if it may be withheld. ORS 192.450(1).

Mr. Perez died on October 17, 2009 at the Oregon State Hospital. His death was widely reported in the media. You, for example, have written at least two stories about Mr. Perez's death, published in The Oregonian and on oregonlive.com. Media reports include allegations

[1] Although your request to the medical examiner sought a "report," singular, your petition refers to "autopsy reports and other records." In any event, the medical examiner's office provided us with several different reports that it regards as responsive to the spirit of your request. We consequently address all of those reports in this order. We refer to the reports collectively as "medical examiner's reports" or simply "reports."

[2] ORS 192.450(1) generally allows the Attorney General seven days to issue an order.

that the death went undiscovered for up to twelve hours, and allegations that "records concerning the monitoring and care of Perez may have been falsified or destroyed." "State hospital death receives second look," Statesman Journal, October 22, 2009, available online at http://www.statesmanjournal.com/apps/pbcs.dll/article?AID=2009910220347 (accessed November 19, 2009). Based on those allegations, Robert Joondeph, executive director of Disability Rights Oregon, has advocated for investigations into the death of Mr. Perez. We understand that the Oregon State Police have concluded their investigation, though other investigations may be ongoing or forthcoming.

On October 21, 2009, you requested that the medical examiner provide you with "a copy of the medical examiner's report on Moises Perez * * *." The medical examiner's office denied your request on October 22, 2009:

> Oregon medical examiner records and reports * * * are confidential and are not accessible for public inspection. ORS 146.035(5) specifies who may receive copies of our reports and reads as follows:
>
> > Any parent, spouse, child or personal representative of the deceased, or any person who may be criminally or civilly liable for the death, or their authorized representatives respectively, may examine and obtain copies of any medical examiner's report, autopsy report or laboratory test report ordered by a medical examiner. . . .
>
> Because you do not fall under any of the categories stated in the law, we are unable to release this information to you without written authorization from the decedent's legal next-of-kin. There is no evidence to sustain that there is a compelling public interest in this case.

Your petition asserts that "the medical examiner may release the records if she chooses" and argues that "there is a compelling public interest in this report because Mr. Perez died while in state custody and in a state facility." You later provided our office with a more detailed statement explaining why you believe that the public interest requires disclosure in this particular instance.

Before we address the competing public interests, we explain why we agree with your assertion that the October 22, 2009 letter from the medical examiner's office appears to misstate the applicable law. In ***Colby v. Gunson***, 224 Or App 666, 199 P3d 350 (2008), the Oregon Court of Appeals determined that ORS 146.035(5) does not preclude the disclosure of medical examiner reports to individuals who are not listed in the statute. Instead, ORS 146.035(5) requires disclosure of medical examiner reports to the individuals who *are* listed in the statute. "The legal effect of ORS 146.035(5) is to override any excuse not to disclose a medical examiner report to persons listed in the statute that might exist by ORS 192.501(3), ORS 192.502(2), or other parts of the Public Records Law." 224 Or App at 675. In light of ***Colby***, the statement that "Because you do not fall under any of the categories stated in the law, we are unable to release

this information to you without written authorization from the decedent's legal next-of-kin" is incorrect.

The actual status of medical examiner reports under the Public Records Law is that they are conditionally exempt from disclosure "unless the public interest requires disclosure in the particular instance." ORS 192.501. The basis for that conditional exemption is chapter 222, Oregon Laws 2009 ("SB 87"). SB 87 adds to ORS 192.501 an exemption for "A medical examiner's report, autopsy report or laboratory test report ordered by a medical examiner under ORS 146.117." By operation of an emergency clause, the exemption took effect on June 4, 2009, when SB 87 was signed into law by Governor Kulongoski. Or Laws 2009, ch 222, § 3.

As the Court of Appeals explains in ***Colby***, "An exemption from disclosure under the Public Records Law allows, but does not require, nondisclosure of the record." 224 Or App at 675. Thus you are generally correct that "the medical examiner may release the records if she chooses."[3] However, we believe that SB 87 indicates a legislative judgment that such records generally should be exempt from public disclosure.[4] Thus, although SB 87 would not appear to preclude the medical examiner from adopting a policy of generally disclosing reports simply because the medical examiner "chooses" to do so,[5] such a policy would be at odds with the apparent preferences of the legislature.

The medical examiner is, however, *required* to disclose otherwise exempt reports if "the public interest requires disclosure in the particular instance." ORS 192.501. Because the reports you are seeking are clearly the kind of reports that are governed by the SB 87 exemption, the sole issue presented by your petition is whether the public interest in this case favors disclosure or nondisclosure of the information in the reports. For the reasons below, we conclude that the public interest generally favors non-disclosure.

As we mention above, you provided us with a detailed explanation of your belief that the public interest favors disclosure shortly after submitting your petition. In your explanatory letter, you observe that Mr. Perez "died while in state custody and in the state mental hospital." You state that "the public has a profound interest in how vulnerable people in our community are treated in a state facility." You also make note of "questions about the timing and cause of his death and whether he was neglected by hospital staff" raised by advocacy groups. You describe

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[3] We do not foreclose the possibility that some of the information in various reports covered by the SB 87 exemption may be governed by other laws that actually prohibit disclosure.

[4] The relevant portions of SB 87 were adopted directly in response to ***Colby***. Testimony before the Senate Committee on the Judiciary on March 17, 2009, both by Dr. Gunson and by a representative of ACLU, indicated that the materials should be generally exempt, with disclosure required only in rare circumstances where there would be a "high public interest." An example of these "very limited circumstances" given to the same committee on February 23, 2009 was a death related to state action where there are no family members eligible to receive (and potentially disseminate) the medical examiner's reports.

[5] Again, we do not foreclose the possibility that some of the information in various reports covered by the SB 87 exemption may be governed by other laws that actually prohibit disclosure.

conversations with patients and others, including some who "said Mr. Perez had complained of chest pains" and some who "speculated that his psychiatric medication could have somehow caused his demise." You report that "all have questions about the time between his death and the discovery of the body." And you note that the incident has been widely reported and has generated concern among citizens.[6]

Rather than evaluating your arguments *ad hoc*, we believe it is useful to articulate some principles that we think will be generally relevant to evaluating the balance of public interests for purposes of the SB 87 exemption.

First, we reject any suggestion that the public interest should require disclosure simply because a person dies in state custody. Deaths in state custody often are entirely expected. For example, prisoners sometimes die of cancer, old age, or other natural and expected causes. In the vast majority of these cases, we do not think that there will be an overriding public interest in disclosure of medical examiner reports relating to expected deaths.[7]

We acknowledge, however, that Mr. Perez's death was apparently unexpected. Whether the public interest requires disclosure medical examiner reports relating to unexpected deaths in state custody seems to us to depend on the content of the report. The public would seem to have a very strong interest in knowing whether the manner and cause of an unexpected death in state custody have been determined to be natural. We understand that the medical examiner routinely discloses that basic information. If any information in a report suggests possible wrongdoing or negligence, then the public interest may require disclosure of that information as well, particularly if the state may be responsible for wrongdoing or negligence that could have caused or contributed to the death. Even if the medical examiner has concluded that any particular information does not indicate wrongdoing or negligence, the public interest in disclosure might remain undiminished if another pathologist could reasonably argue a contrary position.

You assert a number of ways in which possible wrongdoing or negligence by the state may have caused or contributed to the death of Mr. Perez. You note that there have been allegations of neglect by staff. You also refer to questions about the "cause of death," and we are aware that concerns about possible abuse have been attributed to Mr. Joondeph. "Advocates want investigation into state hospital patient's death," The Oregonian, October 20, 2009, available at http://www.oregonlive.com/politics/index.ssf/2009/10/advocates_want_investigation_i.html (accessed November 19, 2009). You state that you were told by some interviewees that Mr. Perez complained of chest pains, a fact that might suggest inadequate attention by state hospital staff. And you relate that you have heard fears that medication given to Mr. Perez may have caused or contributed to his death.

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[6] You also observe that the public has an interest in knowing "how [the state hospital] is run and how our tax money is spent." Apart from the possibility that it could disclose evidence of inappropriate acts, which is separately addressed, we do not see how disclosure of medical examiners reports would significantly further these public interests.

[7] An exception might be if an autopsy in response to an expected death revealed that death actually occurred by unnatural means.

According to Dr. Gunson, the medical examiner who personally performed the autopsy, however, there is *no* evidence of abuse or neglect at autopsy, and her report reflects those findings. Dr. Gunson informs us that, in her professional opinion, another forensic pathologist reading her autopsy report could not reasonably or plausibly argue for any contrary position. Of course, the lack of evidence at autopsy or in Dr. Gunson's report is not conclusive proof that abuse or neglect did not occur in some form. Even so, we cannot conclude that the public's interest in knowing about possible instances of wrongdoing or negligence by the state hospital compels disclosure of the medical examiner reports when the reports give no plausible support for such allegations.

As for the reports that Mr. Perez complained about chest pains, the information in the medical examiner's reports neither strengthens nor undercuts those witness claims. Dr. Gunson determined that the cause of Mr. Perez's death was coronary artery disease (atherosclerotic heart disease). Again, Dr. Gunson states that, in her professional opinion, another forensic pathologist reading her autopsy report could not reasonably or plausibly argue any contrary position. Dr. Gunson further states that sudden death is the first symptom for approximately half of the people affected by this disease. Thus the medical evidence does not contribute one way or another to the public's evaluation of the witness statements regarding complaints by Mr. Perez about symptoms that would be consistent with the cause of his death.

With respect to the fears that Mr. Perez's medications may have caused his death, Dr. Gunson is not yet in possession of the toxicology report. She states, however, that an argument in favor of such a connection would not be medically plausible.

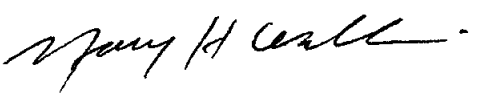
You also present arguments suggesting that the state did not appropriately handle the matter of Mr. Perez's death. Specifically, you point to allegations that a significant amount of time may have elapsed between death and the discovery that Mr. Perez had died. And you mention "public concern that an autopsy wasn't promptly ordered in this case." We understand, however, that Dr. Gunson has already informed you that Mr. Perez likely died 6 to 8 hours before his death was discovered. Consistent with what Dr. Gunson has told you, the Medical Examiner Narrative notes that full rigor mortis was present, and the body was slightly warm to the touch, when Mr. Perez's body was first examined approximately two hours after his death was discovered. The same report also notes that Mr. Perez had not left his room for lunch or dinner on the day of his death; that is also consistent with reported accounts. Contrary to suggestions attributed to Mr. Joondeph, however, the Medical Examiner Narrative indicates that it apparently was not unusual for Mr. Perez to stay in bed during meal times. *Compare* "Advocates want investigation into state hospital patient's death," Oregonian, October 20, 2009 (attributing to Mr. Joondeph the statement that "when [Mr. Perez] didn't show up for lunch something was up and if he didn't eat his dinner something was really up"). Other than those details, there is nothing in the report that we can perceive that would contribute meaningfully to a discussion about whether the state was unduly slow in discovering that Mr. Perez had died. Dr. Gunson confirms that the other facts in the reports, including the other medical facts, do not shed any different or additional light on whatever questions the public may have regarding this issue.

As the foregoing discussion describes, the public interest has been served by the disclosure of a number of pieces of information found within the documents that you have requested. As to the additional information not disclosed to you, we do not perceive any concrete ways in which disclosure would serve the public interest. The remaining information simply would not contribute meaningfully to the resolution of various questions that have been raised concerning Mr. Perez's death and the state hospital's response. On the other hand, disclosure of the additional information would likely be upsetting to Mr. Perez's family. To the extent that his family favors disclosure of the records, it has the ability to obtain and disclose them. Compelled disclosure by the medical examiner would also present the concerns raised by Judge Wolheim's concurring opinion in ***Colby***, 224 Or App at 681 (characterizing as "wrong" the fact that a complete stranger could obtain autopsy reports under the law then in effect). In enacting SB 87, the legislature intended to exempt this information from disclosure in the absence of an overriding public interest that would require its dissemination.

We emphasize that our decision is based on the specific facts of this case. We think it is possible that the public interest may require disclosure of some information whenever there is an unexpected death in state custody. That principle may well extend to any information that could arguably suggest some negligence or wrongdoing potentially attributable to the state. In this case, our review of the records and our conversations with Dr. Gunson satisfy us that the public interest has been fully served by the disclosures discussed above.

Those disclosures have occurred either orally or during the course of this order. If you wish, you are entitled to receive copies of any medical examiner reports in which the various statements occur.[8] ***Coos County v. Oregon Dept. of Fish & Wildlife***, 86 Or App 168, 739 P2d 47 (1987) (providing a summary of a public record does not satisfy the public interest in disclosure). The medical examiner is willing to provide you with such copies. However, the medical examiner may redact additional facts from the reports disclosed to you, and may charge you the reasonable actual cost of making such redactions. ORS 192.505; ORS 192.440(4)(a). You should contact the medical examiner if you would like to pursue this option. For the reasons described above, the Public Records Law does not require disclosure of any information the medical examiner is unwilling to disclose. Consequently, your petition is respectfully denied.

Sincerely,



MARY H. WILLIAMS
Deputy Attorney General

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c: Dr. Karen Gunson, State Medical Examiner

[8] Not everything discussed in this order appears in the reports of the medical examiner. Most significantly, Dr. Gunson's views about what other pathologists could conclude based on the reports are not found in any report.