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June 22, 2009

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Re: Renewal of Petition for Public Records Disclosure Order:
Oregon Medical Examiner Records

Dear Ms. Olson:

This letter is the Attorney General's order on your renewed petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. On March 3, 2009, we denied your original petition based on pending litigation in ***Colby v. Gunson***, 224 Or App 666, 199 P3d 350 (2008). Your renewed petition, which we received on June 15, 2009, again asks the Attorney General to direct the Oregon State Police, State Medical Examiner's Office ("Medical Examiner") to make available "investigative and autopsy reports * * * pertaining to the deaths by suicide" of listed individuals. For the reasons that follow, we respectfully deny your renewed petition.

The Public Records Law confers upon "any person" the "right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). The Public Records Law reflects a "strong and enduring policy that public records and governmental activities be open to the public," ***Jordan v. MVD***, 308 Ore. 433, 438, 781 P.2d 1203 (1989). As a consequence, exemptions from disclosure not only must be "express," ORS 192.420(1), but express exemptions "are to be narrowly construed." ***City of Portland v. Oregonian Publishing Co.***, 200 Or App 120, 124, 112 P3d 457 (2005).

Although ***Colby*** holds that medical examiner's reports are not exempt from disclosure under ORS 192.502(9), we previously denied your public records petition for such reports because we anticipated further litigation in ***Colby***. Specifically, our prior Order indicated that the Medical Examiner intended to petition the Oregon Supreme Court for review of the ***Colby*** decision. We were concerned that resolving petitions in conformity with the Court of Appeals

decision could effectively circumvent possible review by the Oregon Supreme Court. As your present petition notes, however, litigation in the ***Colby*** case has now concluded because the state has decided not to seek review of the Court of Appeals decision.[1]

The fact that the litigation in ***Colby*** has concluded does not mean that the records you seek are subject to disclosure under the Public Records Law. As previously mentioned, the ***Colby*** court found that the records were not exempt under ORS 192.502(9); however, the court remanded for a determination whether the records were otherwise exempt from disclosure. 224 Or App at 681. In assessing whether the records are exempt from disclosure, we think that Senate Bill 87 (2009), enacted during the current session of the Legislative Assembly, must be considered. Among other things, SB 87 amends ORS 192.501 to conditionally exempt from disclosure under the public records law "[a] medical examiner's report, autopsy report or laboratory test report ordered by a medical examiner under ORS 146.117." Or. Laws 2009, ch. 222 §2. Like all exemptions under ORS 192.501, this new exemption is "conditional" in that it applies "unless the public interest requires disclosure in the particular instance."

The Medical Examiner's position is that the records you are seeking are exempt from disclosure by virtue of this new provision. We agree.

It is indisputable that your request seeks records that fall within the scope of this newly-enacted exemption. In addition, the exemption is presently effective; Governor Kulongoski signed SB 87 into law on June 4, 2009, and section 7 of SB 87 provides that the law generally "takes effect on its passage."[2] Thus the records you seek are exempt from disclosure unless the public interest requires disclosure in the particular instance.

The Public Records Law embodies a long-standing policy in favor of access to government records, and consequently there is a presumption favoring disclosure. ***Turner v. Reed***, 22 Or App 177, 187, 538 P2d 373 (1975) ("presumption always * * * in favor of disclosure" when evaluating public records issues). However, we cannot conclude that the public interest requires disclosure of the requested medical examiner's reports under the circumstances.

We believe that the nature of medical examiner's reports is such that there will generally be a strong interest in their confidentiality. As the concurrence in ***Colby*** indicates, there are likely to be many people who believe that public disclosure of medical examiner's reports is offensive. *See* 224 Or App at 681 (Opinion of Wolheim, concurring) ("Here a perfect stranger to decedent, plaintiff, requested a copy of the autopsy report from the medical examiner. That is wrong.") In general, we believe there is a public interest in nondisclosure of medical examiner's reports to individuals other than those explicitly permitted to request such reports, see ORS 146.035(5), as amended by SB 87 (2009).

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[1] Although the state ultimately decided not to seek review of ***Colby***, the state did intend to seek such review at the time of our previous Order.

[2] One section of SB 87 takes effect on January 2, 2010, but that section is not relevant to the issues raised by your petition.

Nor are we able to discern any significant public interest that would favor disclosure of these records to you under the circumstances. In a letter dated February 2, 2009, you informed Assistant Attorney General James Smith that your public records request to the Medical Examiner relates to the private litigation of ***Beagle, Burke & Associates v. State of Oregon*** (Estate of Nathan Bashaw), Malheur County Circuit Court Case No. 08-08-6824-L, and ***Gary Beagle v. State of Oregon***, Malheur County Circuit Court Case No. CV08-1402. "An interest in private litigation does not qualify as a 'public' interest requiring disclosure." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) at 32 (discussing ORS 192.501(1)).

Because we conclude that the records you seek are exempt from disclosure under the recently-enacted exemption for medical examiner's reports, we must respectfully deny your petition.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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