HARDY MYERS
ATTORNEY GENERAL

PETER D. SHEPHERD
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400
TTY: (503) 378-5938

April 12, 2007

Ms. Elizabeth Giordano
Deputy County Attorney
Maricopa County Attorney's Office
Southeast Regional Public Service Facility
222 East Javeline Drive, Suite 2400
Mesa, Arizona 85210

Re: Petition for Public Records Disclosure Order
Oregon State Police
Oregon State Police Report No. 99-091526

Dear Ms. Giordano:

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 April 5, 2007, asks the Attorney General to direct the Oregon State Police to make available "* * * an unredacted copy of the Oregon State Police Report #99-091526 for defendant Jeffrey Collins." 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. If a public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt materials 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).

We have been informed that on March 23, 2007, Cecily R. Brown, OSP Support Services Supervisor II, copied and mailed to you the requested material, with the exception of material that she redacted as confidential and exempt from disclosure under ORS 192.502(9) and ORS 419B.035. The Attorney General does not have authority to order an agency to disclose records unless there has been a denial of your request for those records. *See* ORS 192.450(1). Consequently, as to the material already provided to you by OSP, we deny your petition as moot.

The remainder of this order addresses only the material that we understand was redacted and not released to you.

ORS 192.502(9) exempts from disclosure "records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." This exemption incorporates into the Public Records Law other state statutes that make records confidential, such as ORS 419B.035.[1] ORS 419B.035(1) provides that "reports and records

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[1] ORS 419B.035 provides, in pertinent part:

(1) Notwithstanding the provisions of ORS 192.001 to 192.170, 192.210 to 192.505 and 192.610 to 192.990 relating to confidentiality and accessibility for public inspection of public records and public documents, reports and records complied under the provisions of ORS 419B.010 to 419B.050 are confidential and may not be disclosed except as provided in this section. The Department of Human Services shall make the records available to:

(a) Any law enforcement agency or a child abuse registry in any other state for the purpose of subsequent investigation of child abuse;

(b) Any physician, at the request of the physician, regarding any child brought to the physician or coming before the physician for examination, care or treatment;

(c) Attorneys of record for the child or child's parent or guardian in any juvenile court proceeding;

(d) Citizen review boards established by the Judicial Department for the purpose of periodically reviewing the status of children, youths and youth offenders under the jurisdiction of the juvenile court under ORS 419B.100 and 419C.005. Citizen review boards may make such records available to participants in case reviews;

(e) A court appointed special advocate in any juvenile court proceeding in which it is alleged that a child has been subjected to child abuse or neglect;

(f) The Child Care Division for certifying, registering or otherwise regulating child care facilities;

(g) The Office of Children's Advocate; and

(h) Any person, upon request to the Department of Human Services, if the reports or records requested regard an incident in which a child, as the result of abuse, died or suffered serious physical injury as defined in ORS 161.015. Reports or records disclosed under this paragraph must be disclosed in accordance with ORS 192.410 to 192.505.

(2)(a) When disclosing reports and records pursuant to subsection (1)(h) of this section, the Department of Human Services may exempt from disclosure the names, addresses and other identifying information about other children, witnesses, victims or other persons named in the report or record if the department determines, in written findings, that the safety or well-being of a person named in the report or record may be jeopardized by disclosure of the names, addresses or other identifying information, and if that concern outweighs the public's interest in the disclosure of that information.

(b) If the Department of Human Services does not have a report or record of abuse regarding a child who, as the result of abuse, died or suffered serious physical injury as defined in ORS 161.015, the department may disclose that information.

(3) The Department of Human Services may make reports and records compiled under the provisions of ORS 419B.010 to 419B.050 available to any person, administrative hearings officer, court, agency, organization or other entity when the department determines that such disclosure is necessary to administer its child welfare services and

compiled under the provisions of ORS 419B.010 to 419B.050 are confidential and *may not be disclosed except as provided in this section.*" (Emphasis added.) ORS 419B.035(9) provides that the unauthorized disclosure of such records is a Class A violation. One exception to the strict confidentiality the statute imposes is set out in ORS 419B.035(4), which authorizes an Oregon law enforcement agency to make child abuse reports and investigations available *inter alia* to "* * * district attorneys, city attorneys with criminal prosecutorial functions and the Attorney General when the law enforcement agency determines that disclosure is necessary for the investigation or enforcement of laws related to child abuse and neglect." Because you and your office have criminal prosecutorial functions, you are one of the entities to whom OSP is *allowed* to disclose such information *if* OSP makes the necessary determination under ORS 419B.035(4).

In other words, ORS 419B.035(4) permits, but does not require, OSP to disclose child abuse reports and records when OSP determines that disclosure is necessary for the investigation or enforcement of laws relating to child abuse and neglect. The statute places the decision to disclose the records in the discretion of OSP and, absent a decision by OSP to disclosure the records, their disclosure is prohibited under ORS 419B.035(1). OSP has declined to disclose the redacted portions of the records to which your petition applies. Given that refusal and your petition, this office must now determine whether the Public Records Law requires disclosure. We conclude that it does not, for two independent reasons.

I.
OSP Did Not Abuse Its Discretion

When a statute prohibits disclosure of records except in the discretion of a state agency, this office reviews a decision to deny a request for those records to determine if that decision was an abuse of discretion. *See* Public Records Order, March 2, 1993 (McMinimee). In her March 23, 2007 letter, Ms. Brown stated:

> Under ORS 419B.035 reports of child abuse are confidential and not to be disclosed. However, ORS 419B.035(4) allows law enforcement the discretion to make records available for the purpose of investigation or enforcement of laws relating to child abuse and neglect. Per your request we have determined that release of this report would serve this stated goal by assisting in the prosecution of Jeffrey Collins within your state.

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is in the best interests of the affected child, or that such disclosure is necessary to investigate, prevent or treat child abuse and neglect, to protect children from abuse and neglect or for research when the Director of Human Services gives prior written approval. The Department of Human Services shall adopt rules setting forth the procedures by which it will make the disclosures authorized under this subsection or subsection (1) or (2) of this section. The name, address and other identifying information about the person who made the report may not be disclosed pursuant to this subsection and subsection (1) of this section.

(4) A law enforcement agency may make reports and records compiled under the provisions of ORS 419B.010 to 419B.050 available to other law enforcement agencies, district attorneys, city attorneys with criminal prosecutorial functions and the Attorney General when the law enforcement agency determines that disclosure is necessary for the investigation or enforcement of laws relating to child abuse and neglect.

> This Oregon statute, however, is intended to protect the identity of the child victim(s) and release of their identity must be in their best interest or to prevent the abuse of other children. Based on your stated need for this report to "... show prior bad acts under Arizona law." we deem release of a redacted copy protecting the identity of the child victim(s) will meet this stated need adequately. Therefore, your request for an unredacted copy is denied.

You state in your petition that you need the names of the victims in order to contact and subpoena them to testify at Mr. Collins's trial. Additionally, we understand from OSP in its conversations with your office that if you were required to disclose the report to Mr. Conner's defense, your office would not redact information in the same manner as OSP; instead, your office would leave the child names unredacted. In order to determine that disclosure of the unredacted records is "necessary" for prosecution of the charges against Mr. Collins, OSP could reasonably take into consideration whether the redacted information would be admissible in evidence at the trial.

We understand that under Arizona Rules of Evidence, when a defendant is charged with a sexual offense, evidence of other crimes, wrongs, or acts may be admitted by the court *if* such evidence is relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. Ariz. R. Evid. 404(c). However, such evidence may only be admitted by the court only if (a) the evidence is sufficient to permit the trier of fact to find that the defendant committed the other act, (b) the commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged, and (c) the evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. Ariz. R. Evid. 404(c)(1).

The requirement of the court to make findings under Ariz. R. Evid. 404(c) is mandatory and not only helps focus the trial court's discretion so that only truly relevant other acts are admitted, but also enables an appellate court to effectively examine the basis for the trial judge's decision to admit other act evidence under Rule 404(c). *State v. Aguilar*, 209 Ariz. 40, 97 P3d 865 (2004). Neither the information available to OSP nor the information provided in your petition suggests that a court has made – or probably *will* make - the required findings concerning each of the factors under Ariz. R. Evid. 404(c). Absent such findings, the evidence is inadmissible in Mr. Collins's trial. The predicate determination OSP must make under ORS 419B.035(4) is that the information is *necessary* to the enforcement of pertinent laws, not merely that it might be helpful to that enforcement. Therefore, we cannot conclude in this instance that OSP's refusal to disclose the names of the child abuse victims to you is an abuse of discretion.[2]

[2] Nor have you suggested that the information you have already been provided; that is, the entirety of the requested records with only the victim's names redacted, is insufficient to permit the court to make the required findings.

Accordingly, because the redacted information you seek is confidential under ORS 419B.035(1) and exempt from disclosure under ORS 192.502(9), we respectfully deny your petition.

II.
Political Subdivisions Of Another State Are Not "Persons" Authorized To Petition For An Order Under The Public Records Law

The Public Records Law confers on "every person" a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. ORS 192.420. The Public Records Law further defines "person" as including "any natural person, corporation, partnership, firm, association or member or committee of the Legislative Assembly." ORS 192.410(2). The right conferred under the Public Records Law does not, however, extend to public bodies, and we have concluded that a public body may not use the Public Records Law to obtain public records from another public body. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL at 1 (2005); Letter of Advice dated June 26, 1987, to Wanda Clinton, Department of Revenue (OP-6049) at 8; Public Records Order, October 7, 2002, Snow.

Although our earlier opinions and orders regarding this issue have addressed requests made public bodies constituted under Oregon law, we believe the essential reasoning applies equally to governmental entities of other states. That is, political subdivisions of other states – such as Maricopa County, Arizona – are not "persons" within the meaning of ORS 192.410(2). Consequently, the remedial provisions of Oregon's Public Records Law are not available to Maricopa County to test OSP's decision not to disclose to the County information made confidential by ORS 419B.035.

For these reasons, the Attorney General lacks jurisdiction to consider your petition, which we therefore respectfully deny.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS19560
c: Cecily R. Brown, Criminal Division Investigative Reports Section, Oregon State Police