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February 27, 2007

Les Zaitz
Senior Investigative Reporter
The Oregonian
900 Court St. NE, #41
Salem, OR 97301

Re: Petition for Public Records Disclosure Order:
Oregon Department of Corrections Records

Dear Mr. Zaitz:

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.[1] Your petition, which we received on February 15, 2007, asks the Attorney General to direct the Oregon Department of Corrections (ODOC) to make available to you copies of the following records:

1. The log of the state e-mail account for Fred Monem for the 60 days immediately prior to Jan. 10, 2007. The log is the record of incoming and outgoing e-mail traffic, not the e-mails themselves.

2. Monthly telephone invoices for the state telephone number used by Fred Monem in his office and his state-issued or state-paid cell phone for the two years immediately preceding Jan. 10, 2007.

3. Contracting/purchasing files from vendors Michael Levin Trading (aka Levin & Lawrence Inc.), 21st Century Supply, and MRB. These files include the records of price quotes, purchase requisitions, purchase orders, and any documentation required by the State of Oregon special procurement rules relating to why the Oregon Department of Corrections was not utilizing normal bidding procedures for these purchases.

[1] Thank you for the courtesy of granting an extension for our reply.

4. A spreadsheet generated by the State Department of Corrections that summarizes all purchases made on the "spot market" by the DOC for its food services program, summarized by vendor. The total number of vendors recorded on this spreadsheet is approximately 15.

For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Any person who is denied the right to inspect or to receive a copy of a 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). The Attorney General may order a state agency to disclose records only when the agency has denied a request for the records. *See* ORS 192.450(1).

The petition states that you requested the above documents by e-mail and by phone from Perrin Damon, a communications director for ODOC, but, that Ms. Damon denied your request for the records under the "criminal investigatory records exemption" in the Public Records Law. Ms. Damon confirmed to us that ODOC denied your request for each of the four items listed in your petition under this statutory disclosure exemption.[2] Thus, we turn to an analysis of the exemption for criminal investigatory materials, ORS 192.501(3), and its application to your request for ODOC records.

Exemption for Criminal Investigatory Information

The Public Records Law conditionally exempts from disclosure "[i]nvestigatory information compiled for criminal law purposes." ORS 192.501(3). The Oregon Court of Appeals has interpreted the criminal investigatory information exemption to apply to information compiled in investigations connected with pending or contemplated prosecutions because disclosure likely would interfere with law enforcement proceedings. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2005) (MANUAL) at 34, (*citing Jensen v. Schiffman*, 24 Or App 11, 16, 544 P2d 1048 (1976)).

a. Records Covered by the Exemption

The petition makes several arguments as to why the criminal investigatory exemption should not apply to the requested records. The petition argues that the exemption is inapplicable because the ODOC records identified in the petition had not been requested or subpoenaed by

[2] Ms. Damon denied your request for the first three items listed in your petition by letter dated February 1, 2007, a copy of which is attached. She told us that she also denied your request for the spreadsheet described as the fourth item in your petition by a subsequent e-mail communication. In her letter Ms. Damon advised you that the records you requested had been compiled or were in the process of being compiled by ODOC for federal investigators at their request as part of an ongoing federal criminal investigation into possible corruption and unlawful activities by ODOC's food services administrator. And, further, that federal authorities had requested that ODOC maintain the records as confidential because public disclosure of the records would interfere with the pending federal criminal investigation.

federal law enforcement authorities at the time of the Oregonian's request for the records. The petition suggests further that because ODOC officials have consulted with FBI investigators regarding whether the requested records should be disclosed the records have not been compiled by ODOC for criminal law purposes within the meaning of the statute. These statements, however, misconstrue the scope of the criminal investigatory exemption.

We have concluded that the scope of the exemption for criminal investigatory information extends to permit withholding of records not originally created for, but later gathered for, criminal law enforcement purposes, and that a public body may apply the exemption in reliance on a law enforcement agency's representation that disclosure of the records would interfere with a pending or contemplated criminal prosecution. MANUAL at 35-36; Public Records Order, August 4, 1998, Lawson (exempting for disclosure ODOC records requested by the Oregon State Police as part of a criminal investigation); Public Records Order, December 18, 2002, Crombie (exempting from disclosure records of Department of Human Services (DHS) based on prosecutor's representation that public disclosure would interfere with pending criminal prosecution); Public Records Order, July 8, 2004, Meyer (exempting from disclosure records of Board of Accountancy provided to Portland Police Bureau).

The United States Attorney's Office is the agency responsible for the potential criminal prosecution of persons arising from the federal criminal investigation into the conduct of ODOC's former food services administrator. We consulted Assistant United States Attorney Kent Robinson about your petition. AUSA Robinson told us that his office requested that ODOC officials first check with his office or with designated federal investigators before disclosing specific records that may be relevant to the ongoing federal criminal investigation so as not to jeopardize the investigation and contemplated prosecutions. AUSA Robinson confirmed that his office asked that ODOC officials provide federal investigators with the records you requested. He also confirmed the United States Attorney's Office request that ODOC officials keep confidential the records because their public disclosure at this time would interfere with the pending investigation and possible prosecutions to follow.

By an email you sent us during our consideration of your petition, you asked for the opportunity to review and rebut "third party statements or information" that we considered in ruling on the petition. In this case, the relevant "third party statements or information" consist of the statements by federal law enforcement officials about the likely effect on the pending investigation and possible prosecutions of disclosure of the requested information. ODOC's letter to you of February 1, 2007 contained substantially the same description of the "third party statements or information" relevant to ODOC's decision to deny your request as we set forth above as relevant to our denial of your petition. ODOC's letter states: "In this instance, federal authorities have confirmed with us that public disclosure of the records would interfere with their pending criminal investigation." The "third party statements or information" relevant to this order were previously disclosed to you in ODOC's February 1, 2007 letter.

ODOC may rely on the representations from federal law enforcement authorities in applying the exemption. Public Records Order, December 18, 2002, Crombie; Public Records

Order, July 8, 2004, Meyer. Therefore, the criminal investigatory exemption in ORS 192.501(3) may be claimed by ODOC.

b. Public Interest in Disclosure

Because ORS 192.501(3) is a conditional exemption, the requested records are exempt "unless the public interest requires disclosure in the particular instance." The exemption advances the public interest in preventing interference with ongoing law enforcement proceedings, including pending or contemplated criminal prosecutions. *Jensen v. Schiffman*, supra, 24 Or App at 16. We have previously observed that the governmental interest favoring nondisclosure in these situations "is the general public's interest in having persons who have violated the law successfully prosecuted." Public Records Order, August 30, 1995, Heinz; Public Records Order, July 17, 2006, Hostetter.

The petition's contention that the public interest requires disclosure of the requested records largely focuses on questions and concerns about ODOC's performance. We agree that there is a legitimate public interest in the performance of government in general, and with the ODOC's performance of its duties in this particular case. However, we are not persuaded that the public interest requires disclosure of the requested records *at this time.* Fred Monem no longer occupies an office from which he could damage the public interest. Publicly available information confirms that the federal criminal investigation remains active. A federal judge issued search warrants for evidence of crimes Mr. Monem may have committed. Thus, we need not speculate to determine that a federal criminal investigation is pending and that criminal charges may be brought by the United States against Mr. Monem. The United States Attorney's office has requested that the pertinent records be maintained as confidential on grounds that disclosure of the records could interfere with the investigation and possible prosecution.

For these reasons, we deny your petition for an order of disclosure.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS19352
cc: Perrin Damon, Communication Manager, ODOC