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November 8, 2013

Les Zaitz
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Re: Petition for Public Records Disclosure Order
Oregon Department of Corrections
DOJ File Nos. 291020-GA0103-13 & 291020-GA0109-13

Dear Mr. Zaitz,

This letter is the Attorney General's order in response to two related petitions you filed with our office. In those petitions, you ask that we order the Oregon Department of Corrections (ODOC) to provide you with certain information about a number of murders of inmates while incarcerated in ODOC facilities. Specifically, you are seeking the following:

1. With respect to eight homicides, inmate conflict reports showing conflicts between inmates that had been reported to ODOC by staff or by inmates. You sought such reports for each inmate victim and for each inmate perpetrator or suspected perpetrator.
2. With respect to the two most recent homicides, both of which remain under investigation, institution reports from security and other staff on events leading to the homicides.[1]
3. With respect to the two most recent homicides, SIU/IG reports into each episode.

[1] Some documents that might arguably fall within this category were the subject of a separate request you made to ODOC. ODOC denied that request citing the lawyer-client privilege and ORS 192.502(9)(a). Given that you did not appeal that denial, we do not believe this aspect of your petition, or of your underlying request, is directed at the materials ODOC withheld based on the privilege. Instead this request appears to seek the reports that may be created as a matter of routine by ODOC staff responding to unusual, potentially criminal incidents in prisons. Hence your petition observes that the information you are seeking here "is clearly material 'compiled' for criminal investigatory purposes."

4. With respect to the two most recent homicides, memos or other communication from agency administrators to staff regarding these episodes, any changes/lapses identified, and any instructions to staff.

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

The Oregon Public Records Law provides that "[e]very person has a 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." Exemptions from the general disclosure requirement must be express in the law. Even express exemptions are construed narrowly, meaning that "if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails." *Colby v. Gunson*, 224 Or App 666, 676 (2008). A public body that asserts a statutory exemption from disclosure has the burden of demonstrating that the law permits the material in question to be withheld from public disclosure. ORS 192.450(1); ORS 192.490(1).

ODOC informs us that, after diligent review of its files, ODOC has determined that records responsive to the fourth of the requests listed above do not exist. In addition, ODOC states that it has no reports of inmate conflicts for one of the open homicide matters – the murder of Joseph Akins. And with respect to the second category of documents, ODOC has no responsive records pertaining to the most recent inmate homicide. We deny your petition with respect to those items because we cannot order ODOC to disclose what does not exist.

With respect to the first, second and third of the items listed above, ODOC states that it is in possession of some records that are responsive to your requests. ODOC asserts, however, that some of the records are exempt from disclosure pursuant to ORS 192.501(3). ODOC has agreed to provide other records responsive to the first numbered item, but states that it will redact those records pursuant to ORS 192.502(5).

ORS 192.501(3), the criminal investigatory exemption, conditionally exempts from disclosure "[i]nvestigatory information compiled for criminal law purposes." The exemption is conditional in that it applies "unless the public interest requires disclosure in the particular instance." The Oregon Court of Appeals has indicated that, pursuant to this exemption, "investigations connected with pending or contemplated proceedings *will ordinarily remain secret because disclosure would likely interfere* with enforcement proceedings * * * but * * * investigations not connected with pending or contemplated proceedings will remain secret only if the government establishes that disclosure would produce one of the consequences" the exemption is intended to avoid. *Jensen v. Schiffman*, 24 Or App 11, 16 (1976) (emphasis added; citations and quotations omitted).

ORS 192.502(5) exempts from disclosure "Information or records of the Department of Corrections* * * to the extent that disclosure would interfere with the rehabilitation of a person in custody of the department or substantially prejudice or prevent the carrying out of the functions of the department, if the public interest in confidentiality clearly outweighs the public interest in disclosure."

ODOC asserts that the criminal investigatory exemption applies to the inmate conflict reports associated with three homicides in which criminal proceedings are still underway, and to the materials that ODOC has identified as responsive to your request for "institution reports from security and other staff on events leading to the homicides" and SIU/IG reports pertaining to the two most recent homicides. For the reasons that follow, we conclude that those materials are presently exempt from disclosure, and respectfully deny your petition. With regard to the inmate conflict reports for the homicides that are no longer open criminal matters, we respectfully deny your petition as moot.

ODOC's Assertion of the Criminal Investigatory Exemption

As to each of the materials for which ODOC asserts the criminal investigatory exemption, ODOC informs us that the information was gathered by law enforcement in connection with the relevant investigations. By itself, that fact brings the material within the textual scope of the exemption for "[i]nvestigatory material compiled for criminal law purposes." Acknowledging that may be the case, your petitions make arguments about the extent to which disclosure of the information you request would harm pending criminal proceedings and about other public interests that would favor disclosure.

With regard to the extent to which disclosure would harm pending enforcement proceedings, ODOC informs us that the prosecutors who are handling those investigations have specifically requested that ODOC not disclose the materials because disclosing them would be harmful to the criminal proceedings. You ask our office to demand a greater showing than this, arguing that prosecutors' concerns may be overstated and speculating that some materials may even have been provided, without restriction on dissemination, to criminal defendants through discovery.

We have spoken to Malheur County District Attorney Dan Norris concerning your position. Mr. Norris explains that the concerns of his office primarily concern the dangers of tainting the jury pool by disclosing evidentiary material prior to trial. This is one of the consequences the exemption of ORS 192.501(3) is intended to help avoid. See *Jensen*, 24 Or App at 17 (noting that preserving the right of fair trial is one of few reasons why the criminal investigatory exemption may even survive the conclusion of a matter). We decline to second-guess Mr. Norris with respect to this issue. Moreover, we think reliance on Mr. Norris's explanation is consistent with the above-quoted suggestion by the Oregon Court of Appeals that "investigations connected with pending or contemplated proceedings *will ordinarily remain secret* because disclosure *would likely interfere* with enforcement proceedings" (emphasis added).

Your remaining public interest arguments differ slightly with respect to the various categories of records. As to the inmate conflict reports, you argue that inmate violence in general, and inmate homicides in particular, are matters of significant public interest, and that the inmate conflict reports may shed some light on whether the Department is adequately performing its duty to protect inmates. To the extent that the inmate conflict reports may reveal the extent to which ODOC was aware of conflicts between the inmates who were murdered and those accused

of committing the murders, we readily acknowledge that public interest. As to the eighteen pages of SIU reports, you further argue that the public has an interest in knowing and evaluating ODOC's response to the homicides.

But, with respect to both categories of records, the public interest balancing required by the criminal investigatory exemption essentially pits the public interest in immediate disclosure against the public interest in protecting criminal justice proceedings by permitting the exemption to be asserted until those proceedings have run their course. That is because, as noted above, the criminal investigatory exemption generally does not survive the conclusion of criminal proceedings. Disclosure before the conclusion of criminal proceedings puts the various interests protected by the exemption at risk. And, because of the generally temporary nature of the exemption, the only direct public benefit is that information that would be disclosed anyway is disclosed a little bit sooner. In most cases, and in this case, we think that earlier disclosure is a marginal public benefit.

You also argue that disclosure may prompt ODOC to take more decisive and effective action to prevent future inmate homicides. We are dubious that ODOC would effectively be forced by public disclosure of this information into making changes that it would not otherwise make. Moreover, ODOC officials are aware that the criminal investigatory exemption is generally limited in duration. To the extent that the records may contain information that could suggest to ODOC officials that the agency change its operations, we will not assume that ODOC officials would wait to consider and implement such changes until after the expiration of this temporary exemption.

Although we generally recognize significant public interests in the matters you inquire about, we do not think those interests will suffer from delaying disclosure while the related criminal matters proceed.

Records Unrelated to Ongoing Criminal Matters

With respect to the inmate conflict reports related to closed cases, ODOC informs us that it will provide you with copies of the materials. To that extent, your petition is denied as moot.

In doing so, ODOC intends to redact the records to protect the identities of inmates other than the victims and their convicted murderers. ODOC asserts that the redactions are justified by ORS 192.502(5). Your correspondence with our office suggests that you may understand the need for such redactions. ODOC explains that the existence of these conflicts, if disclosed, would put inmates at risk for a number of reasons. Other inmates could assume, correctly or incorrectly, that the inmates had provided information. Inmates who are affiliated with either the deceased inmate or the inmate convicted of the murder could decide to continue the conflict documented in the records. Or inmates could use the information to identify other inmates who may be either willing to engage in misconduct on behalf of other inmates, or susceptible to being

coerced into misconduct. In general, we agree with ODOC's contentions.[2] But without those redactions before us and without knowing whether you feel that some of them may be unjustified, it would be premature to approve or disapprove the final disclosure. Consequently, if you feel that some redactions made by ODOC are not justified, or that a public interest in disclosure of this information outweighs the significant public interest we perceive in protecting this information about inmates who are not the victim or perpetrator of the homicide, you are free to petition this office to review those redactions. Likewise if ODOC determines that other redactions are warranted you may petition for review of those.

Conclusion

For the reasons given above, your petition is respectfully denied.

Sincerely,

Mary H Williams

MARY H. WILLIAMS
Deputy Attorney General

MCK:tmt/4764939/4764943
cc: Elizabeth Craig

[2] You argue that ODOC policies entail interviewing both inmates involved in a conflict, citing ODOC Policy 40.1.12 III.C.2.b ("The conflict investigator will interview the inmate and the conflicting inmate party to see if a conflict exists based upon the conflict criteria.") ODOC informs us, however, that such interviews are not actually required in all cases and that ODOC avoids such interviews if possible. ODOC acknowledges that the language you cite suggests a requirement, but points out that section III.b.4 of the policy specifies that interviews are to be conducted "if necessary," which is consistent with ODOC practice.