ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDERICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

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

November 13, 2015

SENT VIA EMAIL ONLY
mberstein@oregonian.com

Maxine Bernstein
The Oregonian
1500 SW First Avenue Suite 400
Portland OR 97201

Re: Petition for Public Records Disclosure Order
Oregon State Police, Medical Examiner Division
DOJ File No. 257001-GH1485-15

Dear Ms. Bernstein:

This letter is the Attorney General's order on your petition for public records disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505. On October 13, 2015, you filed a petition asking the Attorney General to order the Oregon State Police Medical Examiner's Division to provide you with the autopsy report for Christopher Harper-Mercer. You withdrew your petition upon being informed that the autopsy report had not been completed at that time. You filed a new petition, which we received on November 2, 2015, asking the Attorney General to order the Medical Examiner's Division to provide you with the following records:

> Documents in the possession of the Medical Examiner's Division regarding the autopsy of Christopher Harper-Mercer.

For the following reasons, we respectfully deny your petition.

The Public Records Law confers a right to inspect or copy any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420; ORS 192.430. Any person denied the right to inspect or copy any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection. ORS 192.450(1). The Public Records Law is primarily a disclosure law, not a confidentiality law. The public body has the burden of demonstrating that withholding a requested public record from inspection is permitted by the Public Records Law. ORS 192.450(1).

We state the following facts as set out in your petition. On October 1, 2015, a professor and eight students were shot to death at Umpqua Community College. Another nine students

were also shot. The Douglas County District Attorney has stated that the shooter, Mr. Harper-Mercer, was shot once by police and then "shot and killed himself."

On October 28, 2015, you requested the Medical Examiner's Division to provide you with documents regarding Harper-Mercer's autopsy. On October 30, 2015, Eugene Gray, Forensic Administrator, denied your request, stating the following:

> Under ORS 192.501(36) Medical Examiner records are exempt from disclosure unless the public interest requires disclosure in the particular instance. Since the other deaths that involve law enforcement officers have been deemed "Public Interest," we agree that the incident meets those same criteria.
>
> We also have an obligation under ORS 192.501(3) to make sure release of the record does not conflict with a current criminal law investigation. In this particular instance, the death and circumstances of the death is still under criminal investigation. We have been assured by law enforcement that release [of] Medical Examiner records will hinder [an] on-going criminal investigation.
>
> We therefor deny your request until we are advised by law enforcement and [the] appropriate [p]rosecutor that the criminal investigation is complete and ORS 192.501(3) is no longer applicable.
>
> Once th[ese] criteria [are] satisfied we will make a copy available to you [with certain personal and private contact information redacted.]

Mr. Gray also told you that he will contact you for further instructions once he has been informed that the criminal investigation has been completed. In short, the Medical Examiner's Division intends to withhold the requested records only for so long as the criminal investigation is being conducted. Once the investigation is complete, the Medical Examiner's Division intends to provide you with the requested records with certain redactions as stated above.

Under ORS 192.501(3), the criminal investigatory materials exemption, "investigatory material compiled for criminal law purposes" may be withheld from mandatory disclosure unless the public interest requires disclosure in the particular instance. The exemption does not expire when law enforcement officials have closed an investigation or decided not to prosecute, however, the government interest in maintaining confidentiality of the records is diminished in those circumstances. OREGON ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL at 43 (2014) (MANUAL); Public Records Order, July 3, 1995 (Garrettson).

The Court of Appeals has opined that information compiled in investigations connected with pending or contemplated prosecutions ordinarily will remain confidential, because disclosure likely would interfere with law enforcement proceedings. *Jensen v. Schiffman,* 24 Or App 11, 16, 544 P2d 1048 (1976); *see also,* MANUAL at 43; Public Records Order, February 27, 2007 (Zaitz). The exemption may apply when the information is not connected with a pending or contemplated prosecution if the public body establishes that disclosing the information would result in specific harms. *Jensen v. Schiffman,* 24 Or App at 16; MANUAL at 43.

The Medical Examiner's Division informed you that there is an on-going criminal investigation into the mass shooting at Umpqua Community College and that law enforcement officers had assured the Division that release of the Medical Examiner's records would hinder that investigation. We, too, have been informed by law enforcement officers that the criminal

investigation is ongoing and connected with contemplated prosecution. *See* Public Records Order, November 4, 2015 (Iboshi)(attached). The medical examiner's records relating to the autopsy of the shooter were compiled as part of that investigation. We understand that the records you are seeking are potentially relevant to the investigations that remain ongoing. Therefore, we conclude that the records may be withheld during the pendency of the investigation unless the public interest in this circumstance requires immediate disclosure.

The criminal investigatory information exemption advances the public interest in preventing interference with ongoing law enforcement proceedings, including pending or contemplated criminal prosecutions. *Jensen,* 24 Or App at 16. The exemption serves the purposes of protecting the integrity of criminal investigations and avoiding any compromise of a potential criminal prosecution that might result from such investigations. Public Records Order, October 10, 1996 (Reed). The 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, February 27, 2007 (Zaitz) (internal quotation marks omitted). Ordinarily, if an investigation is ongoing, with prosecution pending or contemplated, compiled information will remain confidential. MANUAL at 43.

We agree with your arguments that the public has a strong interest in obtaining the information you seek. Indeed, the Medical Examiner's Division intends to provide you with that information as soon as the investigation has been completed. We are not persuaded, however, that the public interest in this circumstance requires *immediate* disclosure of these records before the investigation has been completed. We conclude that the public interest in protecting the integrity of the criminal investigation and any potential criminal prosecution in this circumstance outweighs the public's interest in immediate disclosure.

For the reasons expressed above, we respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

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Enclosure
cc via email only:
Dr. Eugene Gray, ME
Eric Davenport, OSP