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October 22, 2015

SENT VIA EMAIL ONLY
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Claire Withycombe
The Bulletin
1777 SW Chandler Avenue
Bend OR 97701

Re: Petition for Public Records Disclosure Order
Oregon State Police
DOJ File No. 257001-GA0129-15

Dear Ms. Withycombe:

This letter is the Attorney General's order on your petition for public records disclosure under the Oregon Public Records Law, ORS 192.410, *et seq.* Your petition, which we received on October 6, 2015, asks the Attorney General to order the Oregon State Police (OSP) to provide you with the following records:

> A list of any and all cases, including police case number, circuit court case number and name of defendant, that forensic analyst Nika Larsen analyzed evidence for, from Deschutes, Crook, and Jefferson Counties, since Jan. 1, 2012.

You agreed to extend the deadline for issuance of this order to October 22, 2015, and we appreciate your cooperation in that regard. 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 have discussed your petition with Captain Eric Davenport at OSP and with Darin Tweedt, Chief Counsel of the Criminal Justice Division of the Oregon Department of Justice (DOJ). Captain Davenport explained that OSP withheld the statements on the basis of ORS 192.501(3), the criminal investigatory material exemption, after consulting with investigators in his office. Under that exemption, "investigatory material compiled for criminal law purposes" is exempt from disclosure under the Public Records Law "unless the public interest requires disclosure in the particular instance." The Court of Appeals has interpreted the criminal investigatory information exemption to apply, in part, to information compiled in investigations connected with pending or contemplated prosecutions, because disclosure would likely interfere with law enforcement proceedings. *Jensen v. Schiffman*, 24 Or App 11, 16, 544 P2d 1048 (1976); *see also* OREGON ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 43 (2014) (MANUAL); Public Records Order, February 27, 2007 (Zaitz). The scope of this exemption extends to prevent the disclosure of records not originally created, but later collected or gathered, for criminal law enforcement purposes. MANUAL at 45.

Captain Davenport advised us that OSP has compiled the information that you seek in the course of investigating possible criminal conduct of Ms. Larsen. Mr. Tweedt advised us that DOJ is now in the process of assuming the investigation from OSP. He also advised us that he has conferred with OSP, the United States Attorney's Office, and the District Attorneys of Deschutes and Umatilla Counties, and all concerned agree that disclosure of this information would be detrimental both to the ongoing investigation of Ms. Larsen.

You contend that the criminal investigation exemption should not apply to the information you seek. First, you contend that "this list would exist prior to any criminal investigation that involves Nika Larsen." However, this exemption extends to prevent the disclosure of records not originally created, but later collected or gathered, for criminal law enforcement purposes. MANUAL at 45. As explained above, this information has been gathered for use in an ongoing investigation of Ms. Larsen. Accordingly, that the information might have existed before any investigation of Ms. Larsen began does not mean that it is not exempt from disclosure as information compiled in connection with that investigation. *See* Public Records Order, October 24, 2005 (Iboshi and Williams) (observing that, under ORS 192.501(3), it is not necessary that a public record have originated as part of a criminal investigation to qualify for exemption from disclosure).

Second, you contend that the information that you seek, particularly case numbers, "and what could be gleaned from the public record in connection with those case numbers, would not impede the prosecution of Ms. Larsen. It would merely provide some much-needed context to the potential impact of the investigation." Captain Davenport advised us that disclosure of this information could interfere with the investigation and therefore jeopardize any eventual prosecution. That is so because the public record of these cases would include information about witnesses and other individuals whom OSP or DOJ may need to interview in connection with the

investigation. Until OSP and/or DOJ has interviewed these persons, or decided not to interview them, there is a real risk that disclosing information that could lead to their identification could undermine the ongoing investigation of Ms. Larsen, as well as ensuing prosecutions.

Because the information that you seek has been gathered for use in a pending criminal investigation, the statements are investigatory materials compiled for criminal law purposes and are exempt from disclosure unless the public interest requires disclosure in this particular instance.

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. We have previously observed that 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). Similarly, we have observed that the purposes of this exemption include 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*).

We are not persuaded that the public interest requires disclosure of this information at this time. There is an ongoing active criminal investigation, and the involved law enforcement officials have indicated that disclosing these statements at this time would be detrimental to that investigation. In addition, Captain Davenport advised us (and reports that he has advised you) that OSP will release the information you seek as soon as its release would not jeopardize the investigation of Ms. Larsen. We do not perceive that the public interest in disclosure requires the immediate disclosure of information that would be detrimental to a pending criminal investigation.

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

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

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cc via email only:
Eric Davenport, OSP
Erin Redding, OSP
Darin Tweedt, DOJ