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July 29, 2015

SENT VIA EMAIL ONLY
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Nick Budnick, Reporter
The Oregonian
1320 SW Broadway
Portland OR 97201

Re: Petition for Public Records Disclosure Order
Oregon Liquor Control Commission
DOJ File No. 845400-GA0115-15

Dear Mr. Budnick:

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 July 17, 2015, asks the Attorney General to order the Oregon Liquor Control Commission (OLCC) to provide you with a copy of the written statements made by OLCC Inspectors David Luster and Jeff Bell to OLCC Director Steven Marks and Deputy Director Merle Lindsey. These statements were mentioned in a tort claim notice that Mr. Luster and Mr. Bell have served on the state. You agreed to extend the deadline for issuance of this order to July 29, 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 Christie Scott, Public Affairs Specialist at OLCC. Ms. Scott explained that OLCC withheld the statements on the basis of ORS 192.501(3), the criminal investigatory material exemption, at the request of the U.S. Attorney's Office for the District of Oregon. 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. If, as part of a criminal investigation, a law enforcement agency has collected or gathered records from another public body, that public body may apply the exemption in reliance on the law enforcement agency's representation that public disclosure of records would interfere with the pending or contemplated criminal prosecution. *Id.*

We contacted Assistant U.S. Attorney Michelle Holman Kerin. Ms. Kerin advised us that these statements have been gathered in connection with a pending federal criminal investigation. She further advised that disclosure of these statements would be detrimental to that investigation and requested that the statements not be disclosed. Because the statements have been gathered for use in a pending criminal investigation, and because the U.S. Attorney's office has requested that the statements not be disclosed at this time, 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.

You contend that the public interest requires disclosure in this particular instance. You note that Mr. Luster and Mr. Bell's tort claim notice concerns their investigation of Club Rouge, an OLCC-licensed premises, and that two former principals of Club Rouge are currently under federal investigation. You further note that the tort claims notice asserts that OLCC Public Safety Director John Eckhardt is connected to one of the principals of Club Rouge. You contend that it is reasonable to anticipate that the statements will shed light on whether OLCC appropriately handled issues raised within OLCC by Mr. Luster and Mr. Bell. You further observe that, as Public Safety Director, Mr. Eckhardt has a high level of influence over enforcement policy, as well as individual cases and licensees. You contend that the public interest here is heightened by the impending legal sale of marijuana in Oregon, over which OLCC will have regulatory and enforcement authority. You further suggest that the timing of when the U.S. Attorney gathered these statements has bearing on the public interest analysis. In your view, if the U.S. Attorney gathered these statements before your request, that suggests that Eckhardt is a subject of the federal investigation, adding urgency to the public interest in immediate disclosure of the statements. Alternatively, if the U.S. Attorney gathered these statements after your request, in your view that suggests that the U.S. Attorney may have been

motivated by a desire to avoid scrutiny rather than by a need for the statements in connection with its investigation, and that such a motivation undermines the public interest in nondisclosure.

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*).

Your contentions about the public interest in disclosure focus on questions and concerns about the performance of OLCC and of its Public Safety Director.[1] We agree that there is a legitimate interest in the performance of government in general, and with the performance of duties of OLCC and Mr. Eckhardt in this particular case. However, we are not persuaded that the public interest requires disclosure of these statements at this time. The U.S. Attorney is engaged in an active criminal investigation and has indicated that disclosing these statements at this time would be detrimental to that investigation. We believe that the public interest in nondisclosure that you have identified does not presently require the disclosure of information that would be detrimental to a pending investigation.

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

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

LEK:tmt/6687339
cc via email only:
Steven Marks, OLCC
Christie; Scott, OLCC

[1] As to your contentions about the timing of the U.S. Attorney's gathering of these statements, we do not find it necessary to determine exactly when the statements were gathered in order to resolve your petition. Assuming for the sake of argument that the statements were gathered before your request, that fact would not alter our assessment of the relative public interests at stake. Assuming for the sake of argument that the statements were gathered after your request, we do not accept your suggestion that that timing would suggest that the U.S. Attorney was motivated by something other than a concern with conducting the ongoing investigation, because that suggestion is speculative.