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**SENT VIA EMAIL ONLY**
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Karen Gunson, M.D.
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Re: Petition for Public Records Disclosure Order
*Oregon State Police / Medical Examiner Division*
DOJ File No. 257001-GA0094-15

Dear Ms. Brosseau and Ms. Gunson:

This letter is the Attorney General's order on Ms. Brosseau's petition for public records disclosure under the Oregon Public Records Law, ORS 192.410, *et seq.* Ms. Brosseau's petition, which we received June 15, 2015, asks the Attorney General to order the Medical Examiner Division of the Oregon State Police (Medical Examiner) to provide an export of the Medical Examiner's database for all homicide victims, including the following information for each victim: name, age,[1] date of death, and cause of death, and to consider her fee waiver request. Ms. Brosseau has agreed to extend the deadline for issuance of this order from June 22 to July 1, and we appreciate her cooperation in that regard. For the reasons that follow, we deny Ms. Brosseau's petition as to an export of the Medical Examiner's database for all homicide victims, grant the petition as to data in the four enumerated fields, and deny the fee waiver petition.

On June 1, 2015, Ms. Brosseau submitted a formal public records request to the Medical Examiner.[2] She sought the following:

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[1] Ms. Brosseau originally specified month and year of birth, but later agreed that age would be acceptable.
[2] This petition followed several communications between Ms. Brosseau and the Medical Examiner. After those communications, on May 4, 2015, Ms. Brosseau petitioned the Attorney General for public records disclosure.

> "• An export of the State Medical Examiner's database that includes a record for each person whose manner of death was determined to be homicide. The export should include, but not be limited to, the following fields: name, month and year of birth, date of death and cause of death. I request this information include records going back as far as it is stored in electronic format. I ask that it be delivered in a machine-readable format, preferably a .csv file. I request that all fields in this table be included. If there are fields that are exempt from disclosure, please identify those fields and cite the applicable Oregon Revised Statute.
>
> "• A record layout of the office's case-tracking database and any related data dictionaries or code keys. This document should include, but not be limited to, the names of each field in the database and the corresponding data type."

In addition, Ms. Brosseau requested that the Medical Examiner waive any fees related to the cost of releasing those records. In Ms. Brosseau's view, making those records available would primarily benefit the public because homicide deaths are a significant public health concern and it is in the public interest "to have a full accounting of homicide deaths in the state to allow for full analysis of related trends." Ms. Brosseau observed that, without the requested records, she could not assess the integrity of the state's homicide data sets. She further noted that data sets she did possess did not match one another.

On June 9, 2015, the Medical Examiner denied Ms. Brosseau's request in part and granted it in part. As to the database export, the Medical Examiner denied the request. The Medical Examiner relied on ORS 192.501(36), stating:

> "[T]he requested information from Medical Examiner records is not for public disclosure under ORS 192.501(36), unless a public interest requires disclosure. This office does not consider this request [to satisfy] the required 'public interest' for disclosure. We consider cases such as significant communicable diseases or deaths relating to unsafe consumer product as 'Primary Benefits to the General Public'."

As to the remainder of the request, the Medical Examiner advised that it could provide a record layout of its database. The Medical Examiner further indicated that it did not understand the terms "data dictionaries or code keys" and requested clarification if she wished to proceed with that part of her request. The Medical Examiner estimated that its actual cost to make the database record layout available to Ms. Brosseau would be $75.84, reflecting 1.5 hours of staff time at $50.56 per hour. The Medical Examiner denied the request to waive fees.

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After we conferred with Ms. Brosseau and with Forensic Administrator Eugene Gray, Ms. Brosseau withdrew that petition and, subsequently, submitted this formal public records request to the Medical Examiner.

Ms. Brosseau now asks the Attorney General to order the Medical Examiner to provide the records sought in her petition, namely an export of the Medical Examiner's database as to homicide victims and specifically, as to each homicide victim, the name, age, date of death, and cause of death. To address the petition, we conferred with Karen Gunson, State Medical Examiner, and Eugene Gray, Forensic Administrator, and with Ms. Brosseau.

The Oregon 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. The law requires generally that the custodian of public records furnish proper and reasonable opportunities for inspection and/or copying of the record in the office of the custodian. ORS 192.430. Any person denied the right to inspect or receive a copy of 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).

The database under discussion is the "Medical Examiner Reporting (MER) system." We have examined the database and discussed it with Dr. Gunson and Mr. Gray. The MER system is an electronic repository including medical examiner reports that are submitted by district medical examiners and are completed by the State Medical Examiner. *See* ORS 146.095(3); ORS 146.045(3)(b). Information is entered into the MER system in the form of those medical examiner reports. Each of the more than 300 fields in the database corresponds to a blank in the medical examiner report form.[3] The MER system is used almost exclusively for preparing the "reports on all deaths requiring [medical examiner] investigation" that the Medical Examiner must keep on file. *See* ORS 146.035(4)(a) (State Medical Examiner's office shall file and maintain reports on all deaths requiring investigation). Once a completed report has been entered into the MER system, the report is printed and filed in the paper file for that death investigation. The printed medical examiner report that is placed in the file is simply a direct print-out from the MER system. Once the report is completed and filed, the Medical Examiner may use the database to locate a paper file. The Medical Examiner does not use the MER system for any other purpose. In particular, the Medical Examiner does not use the MER system to run any reports other than medical examiner reports; put another way, the Medical Examiner does not run preconfigured or custom reports that include a smaller subset of information than the complete medical examiner report.

ORS 192.501(36) conditionally exempts from disclosure:

> "A medical examiner's report, autopsy report or laboratory test ordered by a medical examiner under ORS 146.117."

[3] Fields include intimate medical details surrounding the death and findings revealed by autopsy.

Ms. Brosseau contends that ORS 192.501(36) does not apply here because she does not seek medical examiners' reports but rather information stored in the Medical Examiner's database. She contends that data in the fields requested are routinely released to the public and that, in most cases, the information is already in the public domain. We understand Ms. Brosseau to be intent on ensuring that homicide data that are not in the public domain be disclosed to her. The Medical Examiner contends that these records are exempt from disclosure under ORS 192.501(36). According to the Medical Examiner, its database comprises only medical examiner reports. Accordingly, in the view of the Medical Examiner, to disclose the database is to disclose medical examiner reports, which are exempt from disclosure under ORS 192.501(36). As to that point, we agree with the Medical Examiner.

The question presented here is whether material in the MER system is "[a] medical examiner's report" as that term is used in ORS 192.501(36). To answer that question, we examine the text of ORS 192.501(36) in context, which includes related statutes, and in light of pertinent legislative history. *See State v. Gaines*, 346 Or 160, 171, 176-77, 206 P3d 2042 (2009) (setting out and applying statutory construction methodology); s*ee also Oregonian Publishing v. Portland School Dist. No. IJ*, 329 Or 393, 399, 987 P2d 480 (1999) (when the legislature has adopted an exemption to disclosure of public records, courts determine and declare the legislature's meaning using usual methodology of statutory construction). The Public Records Law does not define "a medical examiner's report," nor have we found any other statute that defines the term. However, Chapter 146 of the Oregon Revised Statutes provides useful context.

Chapter 146 of the Oregon Revised Statutes establishes the State Medical Examiner's office "for the purpose of directing and supporting the state death investigation program," ORS 146.035(1), and sets out the authorities and duties of the State Medical Examiner and district and deputy medical examiners. ORS 146.090(1)(a) requires medical examiner investigation of, among other human deaths, all apparently homicidal deaths. A district medical examiner for the county in which any such death occurs must investigate and must make a "report of death investigation" to the State Medical Examiner. ORS 146.095(1), (3). ORS 146.035(4) requires the State Medical Examiner's office to "[f]ile and maintain appropriate reports on all deaths requiring investigation." This statutory context strongly suggests that "a medical examiner's report" includes the "report of death investigation" that a medical examiner must make and that the State Medical Examiner must maintain.

Pertinent legislative history supports that interpretation. In *Colby v. Gunson*, 224 Or App 666, 199 P3d 350 (2008), the Court of Appeals held that a medical examiner's report that included the results of an autopsy and laboratory tests was not exempt from disclosure under the Public Records Law. In reaching that conclusion, the court rejected the Medical Examiner's argument that ORS 146.035(5)(a) —which allows persons with specified relationships to a deceased person to obtain "any medical examiner's report, autopsy report or laboratory test report ordered by a medical examiner under ORS 146.177" —impliedly prohibited disclosure of those records to anyone else. In response, the 2009 Legislative Assembly adopted ORS 192.501(36), which employs the same wording as ORS 146.035(5)(a) to identify the records it

makes conditionally exempt from disclosure. *See* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2014) (MANUAL) at 65.

Testifying in favor of the bill that became ORS 192.501(36), Dr. Gunson expressed her understanding that the exemption would apply to all of the Medical Examiner's "death investigation records." She also observed that those records include intimate medical details about deceased persons and autopsy reports. She expressed concern that families would be less likely to consent to autopsies if they knew that the results would be public records that could be publicly disclosed.

We draw two things from that legislative history. First, as noted, the wording of ORS 192.501(36) and ORS 146.035(5)(a) is identical. This suggests that the legislature intended that the term "medical examiner reports" in ORS 192.501(36) would be understood in light of ORS chapter 146. Second, the legislature was aware that the Medical Examiner understood that ORS 192.501(36) would protect all its death investigation records. And, as our examination of ORS Chapter 146 reveals, medical death investigation records include the reports that medical examiners are required to complete and submit to the State Medical Examiner's office, and which that office must file and maintain.

In sum, "medical examiner reports" includes the death investigation reports that medical examiners are required to submit to the State Medical Examiner's office and that that office is required to file and maintain. The Medical Examiner has established the MER system to allow medical examiners to create and submit those reports electronically, and it uses the MER system exclusively to receive those reports and facilitate its own duty to file and maintain them. We conclude that material in the MER system is "[a] medical examiner's report" as that term is used in ORS 192.501(36). Thus, the material in the MER system is conditionally exempt from disclosure. To the extent that Ms. Brosseau asks us to order the Medical Examiner to disclose the entire contents of the MER system with respect to homicide victims, we respectfully deny the petition.

However, Ms. Brosseau also seeks disclosure of a limited subset of the information in the MER system related to homicide victims. Namely, she seeks the information in the following four fields: name, age, date of death, and cause of death. For the reasons that follow, we conclude that, in the context of this request, those records are not exempt from disclosure under ORS 192.501(36).

Under ORS 192.501, records are exempt from disclosure "unless the public interest in disclosure requires disclosure in the particular instance[.]" Determining whether the public interest requires disclosure requires us to balance the public's interest in disclosure against the public's interest in nondisclosure, with the presumption in favor of disclosure. *E.g.*, *American Civil Liberties Union v. City of Eugene*, 271 Or App 276, 288, ___ P3d ___ (2015). Public interest means the interest to the public at large, not a particular person at a particular time. MANUAL at 30. The "public interest" in disclosure is the interest that the public has in knowing how public business is conducted and what state officials are doing on the job. *Guard*

*Publishing Co. v. Lane County School Dist.*, 96 Or App 463, 469, 774 P2d 494 (1988), *rev'd on other grounds*, 310 Or 32, 791 P2d 854 (1990); *Jensen v. Schiffman*, 24 Or App 11, 17, 544 P2d 1048 (1976). This includes the public interest in knowing how public bodies are administering particular programs. On the other hand, if disclosure would prejudice or prevent the public body in carrying out its functions, that is relevant to the public's interest in nondisclosure. *See* MANUAL at 31; *see also American Civil Liberties Union*, 271 Or App at 288 (trial court correctly considered public interest in having a police force that could effectively review its own actions through confidential investigations as part of public interest in nondisclosure); *Port of Portland v. Ore. Center for Environ. Health*, 238 Or App 404, 409, 243 P3d 102 (2010), *rev den*, 350 Or 230 (2011).

As to the public's interest in disclosure, Ms. Brosseau observes that homicides are a significant public health and safety concern for Oregonians. Homicide data trends help inform policy decisions about public health, public safety, and the criminal justice system, areas in which there is substantial expenditure of public resources. She seeks to create a "definitive record of killing in Oregon." She has sought data from other sources, and her research has revealed that that data is incomplete:

> "Official sources in the justice system, such as the FBI's Uniform Crime Reports and data provided by local police agencies, have proved incomplete. We note that FBI homicide data state by state consistently diverge from data gathered by the U.S. Centers for Disease Control and Prevention. We believe that verifying the data used to inform public policy decisions is squarely in the public interest. Accounting for how Oregon prosecutors and police respond to every killing of a human being is essential to the public's judgment of how effectively justice is served in this state."

In addition, at our request, Ms. Brosseau provided an explanation of how data in the four particular fields would contribute to her investigation:

> "The name field, clearly, makes a victim identifiable and allows a reporter to compare the list provided by the Medical Examiner's Office with the names provided by local law enforcement authorities. It is much easier to track omissions based on names than on a collection of demographic identifiers.
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> "[Age] allows the reporter to ensure that two people of the same name or similar names not be confused. There is a clear public interest in minimizing the confusion of a person's identity.
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> "The date a person died is important for the purpose of aggregation and comparing the list against aggregated data sources. Many other sources list the month and year of death. This information would ensure the data is put in the correct "bucket" for comparison. It also allows for time series analysis.

> "Cause of death is another field important for the purpose of aggregate analysis and comparison with aggregated data sources. Homicide is widely considered a public health problem, and the mechanism informs the public health response to this problem. Responding to an upward trend in gun deaths might look quite different from an uptick in arsons. The same may be true for the law enforcement response. Different causes of death may also lead to different consequences for offenders in the court system, another channel of our analysis. Lastly, there is occasionally confusion about the mechanism that caused a person's death, or disagreement between the medical examiner and law enforcement authorities. We seek to identify cases in which such a disagreement may exist."

On the other hand, the public has an interest in nondisclosure of the contents of the MER system. The MER system contains intimate medical details of deceased persons, including details of autopsy reports. There is a common human interest in assuring that those kinds of details are protected from merely prurient curiosity. Moreover, there is a public interest, as Dr. Gunson noted in testifying in favor of the bill that became ORS 192.501(36), in encouraging families to cooperate with medical examiner investigations by allowing autopsies, and that cooperation could decrease if medical examiner records are broadly revealed. Dr. Gunson and Mr. Gray have reiterated that concern in response to the request for data in the four enumerated fields. Moreover, in their view, Medical Examiner records are medical records. They observe that health care facilities treat medical information very protectively and argue that, in the absence of careful limits on disclosure of information from the MER system, the Medical Examiner risks being unable to gather information necessary for the Medical Examiner's key function from health care facilities. Finally, Dr. Gunson and Mr. Gray express concerns that disclosure of sensitive information by the medical examiner could expose witnesses or family members to unwanted contact and could facilitate identity theft. Dr. Gunson agrees, however, that the information in the particular fields Ms. Brosseau seeks is often publicly available with respect to any particular case; as a consequence, it is much more difficult to identify a particular interest that would be served by withholding this information.

On balance of the public interests under ORS 192.501(36), we conclude that the public interest does not require disclosure of the entire MER system database as to homicide victims but that the public interest does require disclosure of only the four fields of data Ms. Brosseau identifies in her request. We recognize that, generally speaking, there is a strong public interest in nondisclosure—for the reasons articulated by Dr. Gunson and Mr. Gray—of the MER system. By enacting ORS 192.501(36), the legislature has recognized the importance of protecting sensitive medical information and the privacy of the deceased and their families, and also the role that the confidentiality of information in the MER system plays in assuring that the Medical Examiner is able to gather the information that it needs to do its important work.

However, as to the four enumerated fields, it does not appear that disclosing those fields will significantly interfere with the public interest in nondisclosure, particularly as that data is sometimes released on a case-by-case basis. Moreover, Ms. Brosseau articulates a substantial

public interest that will be served by release of the data in the four fields. Homicide is a significant public health, public safety, and criminal justice issue. The public has a strong interest in proper and adequate investment of public resources into the fields of public health, public safety, and criminal justice. Reliable data is a cornerstone of policy development, which in turn drives the appropriate allocation of public resources.[4] For those reasons, we conclude that the public interest requires the disclosure to Ms. Brosseau, as to homicide victims, of data in the enumerated fields of the MER system (name, age, date of death, and cause of death) notwithstanding the general exemption for medical examiner reports in ORS 192.501(36).

In addition, the Medical Examiner has expressed to us that that ORS 192.501(3) may apply to the data that Ms. Brosseau seeks. ORS 192.501(3) conditionally exempts from disclosure "information compiled for criminal law investigation purposes." As to "the report of a crime"—which includes biographical information about the victim—information is exempt from disclosure only as long as there is a "clear need to delay disclosure in the course of a specific investigation[.]" ORS 192.501(3). Once an investigation is completed or abandoned, the public interest in confidentiality under this exemption is diminished. MANUAL at 43. We conclude that the public interest does not require disclosure of the data in the four enumerated fields to the extent that the Medical Examiner is advised by pertinent law enforcement that a pending investigation is underway and requires that information be withheld from release at this time.

To facilitate the implementation of this order, we provide the following guidance. In Ms. Brosseau's public records request, she asked for records "going back as far as is stored in an electronic format." The MER system currently contains records related to homicides for approximately the last four to five years. Older records have been archived by exporting the MER system to CDs, generally with a year's worth of data on each CD. The CDs include data going back through about the year 2000. Although the Public Records Law does not require public bodies to create new records, we believe that the law requires public bodies to use existing software, acquired and developed at public expense, to retrieve and make available electronically stored information through the software or program in used by the public body. MANUAL at 7. We conclude that the Medical Examiner can use its existing MER system, created on the commercially available FileMaker Pro platform, to retrieve existing information by creating a custom report, and that this is the kind of retrieving of information (as opposed to creating new records) that public bodies are required to do under the Public Records Law. We distinguish that work—using the custom report feature of a commercially available database platform—from creating new programming by coding or acquiring new software. We similarly conclude that restoring the archived database from CDs to the MER system—while time-consuming—is retrieving information and not creating a new record. Accordingly, this order requires the Medical Examiner to restore its archived database and to create a custom report. To the extent

[4] As to identity theft concerns, we observe that Ms. Brosseau is a reporter for a major news organization. Our order is limited to the circumstances presented here. We express no opinion about public interest balancing or the application of ORS 192.501(36) in the context of other public records requests. *See* MANUAL at 1 (the identity or motive of the person seeking disclosure may be relevant in determining whether a record is exempt from disclosure under a conditional exemption).

that the Medical Examiner incurs expense to respond to this request, the Medical Examiner may establish a fee that is reasonably calculated to reimburse it for that expense. *See* ORS 192.440(4)(a). Of course, Ms. Brosseau is free to limit her request to a smaller time period if she so chooses.

Finally, Ms. Brosseau asks that we "again consider our fee waiver request." Insofar as she seeks a waiver of fees in connection with the information in the fields of the MER system enumerated in this order, the Medical Examiner denied her request for those records and so it has not acted on that request to waive fees. The Medical Examiner will provide Ms. Brosseau with an estimate for providing the information covered by this order. She may then, if she chooses, ask the Medical Examiner to waive or reduce fees. Should the Medical Examiner deny any renewed request for fee waiver or reduction, Ms. Brosseau may petition the Attorney General to review that denial. ORS 192.440(6).

To the extent that Ms. Brosseau asks us to review the Medical Examiner's denial of her request to waive fees in connection with the database record layout, we deny the petition for the following reasons.

Under the Oregon Public Records Law, a public body may reduce or waive fees "if the custodian [of the record] determines that the waiver or reduction is in the public interest because making the record available primarily benefits the general public." ORS 192.440(5). Public bodies considering a request for fee reduction or waiver must first determine whether making the record available primarily benefits the general public. If it does primarily benefit the public, the public body is not necessarily required to grant fee reduction or waiver. Rather, the public body has discretion whether to grant the fee reduction or waiver. A public body must exercise this discretion reasonably under all the circumstances.

"A matter or action is commonly understood to be 'in the public interest' when it affects the community or society as a whole, in contrast to a concern or interest of a private individual or entity." *In Defense of Animals v. OHSU*, 199 Or App 160, 187-88, 112 P3d 336 (2005). In the context of fee waiver requests, we have concluded that the public test is satisfied when furnishing the record has its greatest utility to the community or society as a whole. Pertinent factors include the requester's identity, the purpose for which the requester intends to use the information, the character of the information, whether the requested information is already in the public domain, and whether the requester can demonstrate the ability to disseminate the information to the public. *See* MANUAL at 22.

Here, the requester is a reporter for a major news organization and clearly has the ability to disseminate the information. She intends to use the information to investigate homicide trends in Oregon; her assertion that homicide trends are a matter of public health, public safety, and criminal justice concern is well-taken. The information that she seeks is relevant to the purpose she has expressed. If the information is already in the public domain, it is not available in an organized form. Accordingly, to the extent that the Medical Examiner concluded that the "public interest" test is not met here, we disagree.

However, as noted, once the public interest test is met, the public body is not necessarily required to grant fee reduction or waiver, but must exercise its discretion reasonably under all the circumstances and decide whether to waive or reduce fees. We have determined that the appropriate inquiry when reviewing a public body's exercise of discretion is "whether the public body's decision impedes the policies favoring disclosure of public records to the extent that the decision cannot be said to reflect a lawful option under the [OPRL]." Public Records Order, September 10, 2009 (*Rogers/Fletcher*). We have determined that, in exercising its discretion, a public body should consider (1) the character of the public interest in the particular disclosure, (2) the extent to which the fee impedes the public interest, and (3) the extent to which waiver or reduction would burden the public body. MANUAL at 23. Here, as we have explained, there is a substantial public interest in the accurate analysis of homicide trends. In considering the extent to which the fee impedes the public interest, the requester's ability to pay is relevant. Public Records Order, September 10, 2009 (*Rogers/Fletcher*). Here, Ms. Brosseau is a reporter for the Oregonian, a major news outlet with some resources to pay the reasonable fees incurred by public bodies in responding to its public records requests. As to the extent to which waiver or reduction would burden the public body, we are aware that "a waiver imposes on the public body whatever expense would otherwise be the requester's obligation." Public Records Order, September 10, 2009 (*Rogers/Fletcher*). In assessing the burden on the public body, we consider, among other things, the extent to which the request requires time and expense that interfere with the business of the public body. MANUAL at 23. Here, the Medical Examiner's office has a small staff, and no computer staff that support the MER system. Accordingly, Mr. Gray will have to handle the response to this request personally, interfering with his other high-level administrative duties. Overall, in light of the small fee, the requester's ability to pay, and the burden on the public body, we conclude that the Medical Examiner reasonably exercised its discretion to decline to waive or reduce fees in connection with the database record layout.

For the foregoing reasons, we deny Ms. Brosseau's petition as to an export of the Medical Examiner's database for all homicide victims, grant her petition as to data in the four enumerated fields (name, age, date of death, and cause of death), and deny the fee waiver petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

LEK:tmt/6582024
cc via email only:
Karen Gunson, M.D.
Eugene Gray, OSP