JOHN R. KROGER
ATTORNEY GENERAL

MARY H. WILLIAMS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

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

November 22, 2010

Anita Burke
Mail Tribune
111 N Fir Street
P.O. Box 1108
Medford, OR 97501

Re: Petition for Public-Records Disclosure Order
Oregon State Department of Police

Ms. Burke:

This letter is the Attorney General's order regarding your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on October 26, 2010, asks the Attorney General to direct the Oregon State Department of Police ("OSP") to make the following records available to you:

> The redacted names of two Jackson County Sheriff's deputies who shot and killed 20-year-old Mexican national Itali Arellano-Vargas on Aug. 11 in a remote marijuana growing operation on Salt Creek. The names should be included in Oregon State Police case 10-307460, a report which was provided to the Mail Tribune on Oct. 22.

OSP denied your request for the names of the deputies on October 22, 2010, stating that the names were exempt from disclosure. Your petition followed. You explain that the Mail Tribune appreciates "the security needs of officers who serve on sensitive and potentially dangerous tactical teams." However, you maintain that the names of the deputies are not exempt from disclosure, and that the "conduct of law enforcement officers carrying out their duties to protect the public is of vital importance to all residents of the state."

On October 29, 2010, OSP responded to our request for further information regarding its position. OSP indicates that it believes that the deputies' names are exempt from disclosure under both ORS 192.501(3) and ORS 192.501(18).

The 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. If a public record contains both exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975). If a public body denies a request for public records, the requester may petition the Attorney General to determine whether the agency's denial comports with the Public Records Law. ORS 192.450. For the reasons that follow, we deny your request under ORS 192.501(3).

Factual Background

While approaching the site of a suspected organized-crime marijuana grow, two Jackson County deputy sheriffs fatally shot an armed man who guarding the site when the man prepared to shoot at them. A grand jury investigation of the officer-involved shooting ensued, resulting in no true bill. The cooperative law enforcement investigation of the particular organized-crime marijuana operations continues.

Analysis

A public body that declines to disclose public records bears the burden of establishing that the records are exempt from disclosure. ORS 192.450(1); ORS 192.490(1). The Oregon Court of Appeals has made it clear that there is an overall presumption in favor of disclosure and that the exemptions from disclosure are to be narrowly construed. *See Hood Technology Corp. v. Oregon Occupational Safety & Health Div.*, 168 Or App 293, 301, 7 P3d 564 (2000) ("[e]xemptions are to be narrowly construed, in a manner that promotes simple, quick, and largely uniform application and that furthers the general rule favoring disclosure"); *Oregon AFSCME Council 75 v. State of Oregon, Dept. of Administrative Services*, 150 Or App 87, 93, 945 P2d 102 (1997) (exemptions are to be narrowly construed). In addition, in order for an exemption to apply to specific information, it must do so "unequivocally." *Id.* Put another way, "[a]ny exemption from disclosure under the Public Records Law must be explicitly stated by statute and not merely implied by the law." *Colby v. Gunson*, 224 Or App 666, 675, 199 P3d 350 (2008).

We conclude that the deputies' names are exempt from disclosure under ORS 192.501(3) because of an articulated and specific threat to the safety of the deputies while they participate in an ongoing investigation related to the shooting on August 11, 2010.

ORS 192.501(3) provides that the following public records are exempt from disclosure:

> Investigatory information compiled for criminal law purposes. The record of an arrest or the report of a crime shall be disclosed unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim. Nothing in this

> subsection shall limit any right constitutionally guaranteed, or granted by statute, to disclosure or discovery in criminal cases[.]

The Oregon Court of Appeals examined the former version of that exemption in *Jensen v. Schiffman*, 24 Or App 11, 544 P2d 1048 (1976). In that case, the court held that the exemption "requires identification and balancing of the various purposes for secrecy[.]" *Id.* at 16. The court provided a nonexclusive list of those potential purposes. *Id.* at 15. The court held that disclosure could be delayed if production of the records would:

> (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

Here, we conclude that the deputies' names are exempt from disclosure in furtherance of purposes (A) and (F).

In response to our inquiry, OSP provided a letter setting out its position. A copy of that letter is attached. In it, OSP indicates that the report detailing its investigation of the August 11, 2010 shooting is related to an ongoing Jackson County Sheriff's Office investigation into a drug trafficking organization operating additional marijuana grows. OSP also states that the deputies involved in the shooting are involved in that ongoing investigation.

OSP's letter also relates information from the Jackson County Sheriff's Office. Several identified suspects involved with the marijuana investigation remain at large. There is reason to believe that those suspects have access to firearms, and three of the suspects are related to the deceased. Given those facts, OSP and the Jackson County Sheriff's Office both contend that disclosure of the deputies' names would endanger both the physical safety of the deputies and the integrity of the ongoing investigation. At this time, we agree.

While we note that OSP has concluded its investigation, we reach our conclusion because the investigation into the drug trafficking organization and its marijuana grows is ongoing; because the deputies involved in the shooting continue to be involved in the ongoing investigation; and because several identified suspects, who OSP and the Jackson County Sheriff's Office believe to be armed and dangerous to the deputies, are still at large.[1]

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[1] ORS 192.501(3) provides for the disclosure of biographical facts associated with an arrested person. Of course, that provision has no application here, as to OSP's investigation of the shooting. The deputies were not "arrested," the investigation was not based on any suspicion of wrongdoing, and in fact the grand jury found no wrongdoing.

In addition to our conclusion that ORS 192.501(3) applies to the deputies' names, we also conclude that the public interest in avoiding the risks associated with disclosure outweighs the public interest in publishing the names of the deputies. We acknowledge the strong public interest in monitoring law enforcement's use of force, particularly the use of deadly force. However, the specific dangers to law enforcement in this situation presently outweigh that general public interest. Withholding the deputies' names at this time will preserve the integrity of an ongoing criminal investigation involving armed suspects and a drug trafficking organization and—most importantly—it will protect the deputies' personal safety against the threat of retaliation.

Conclusion

For the reasons discussed above, we conclude that the names you request are not subject to disclosure at this time. Because release of the deputies' names would endanger the deputies while they participate in an ongoing investigation, we conclude that the names are exempt from disclosure under ORS 192.501(3), at least during the time that the investigation into the marijuana grows operated by the drug trafficking organization is ongoing. We do not decide whether other bases might also exist for withholding release of the deputies' names, after the investigation concludes, but while the threat to their safety persists. But we recognize that the threat to officer safety may dissipate with time, and nothing in this order prevents you from requesting the information again in the future. Under the particular facts of this case at the present time, we respectfully deny your petition.

Sincerely,

DAVID E. LEITH
Associate Attorney General

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