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October 25, 2011

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Les Zaitz
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The Oregonian
PO Box 837
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Re: Petition for Public Records Order
Department or Corrections Records
DOJ File No.: 291-011-GA0095-11

Dear Mr. Zaitz,

On October 4, we received your petition asking the Attorney General to order the Oregon Department of Corrections (ODOC) to disclose to you records pertaining to the death of inmate Christopher Soren Lange, as the result of an assault while in ODOC custody. Specifically, you asked for:

a. Copy of preliminary review report done under OAR 291-013-0140
b. Copy of internal administrative investigation
c. Copy of Unusual Incident Report (CD115)

ODOC denied your request for these documents, asserting that they are exempt from disclosure under ORS 192.501(3), which applies to "[i]nvestigatory information compiled for criminal law purposes." Your petition followed.

The Oregon Public Records Law gives any person the right to inspect public records in the custody of any Oregon public body, subject to express statutory exemptions. Oregon Courts construe exemptions narrowly. *Guard Publishing Co. v. Lane County School District*, 310 Or 32, 37 (1990). A public body bears the burden of sustaining its denial of access to public records. ORS 192.450(1) and 192.490(1).

In your petition, you assert that the records withheld by ODOC do not meet the requirements of ORS 192.502(3) because, in your view, these documents were generated as part of an ODOC administrative investigation rather than a criminal investigation. In the alternative,

you argue that ODOC has not met its burden of showing that the public interest favors nondisclosure of these records under the circumstances. We reject those arguments, for the reasons that follow.

1. **The records are criminal investigatory materials.**

We spoke with ODOC officials about the issues raised by your petition. They explained that ODOC and the Oregon State Police (OSP) work closely together to investigate potentially criminal occurrences at ODOC institutions. The relationship between ODOC and OSP is formalized through an interagency agreement between the two agencies. A copy is attached for your convenience. Based on our conversations with ODOC officials, the terms of the interagency agreement, and our review of the documents at issue, we conclude that ODOC investigation materials like the ones you requested are, from their inception, prepared "for criminal law purposes."

ODOC investigators are routinely aware of the potentially criminal nature of these types of investigations. ODOC maintains an evidence locker and access to evidence is limited and tracked. ODOC investigators issue Miranda warnings when speaking with potential criminal suspects. The interagency agreement provides that, in some cases, ODOC will "[p]repare and submit reports to the appropriate District Attorney for review and consideration of possible criminal prosecution." In some categories of criminal cases, ODOC, rather than OSP, conducts full criminal investigations. More generally, the interagency agreement requires ODOC to "store and submit relevant evidence" and to "[p]reserve the scene of an alleged crime pending notification and arrival of OSP." The agencies agree to "cooperate in carrying out the functions specified [in the agreement]," and the interagency agreement acknowledges some "overlap" regarding responsibilities.

The records at issue relate directly to ODOC's responsibilities under this interagency agreement. They document ODOC's preliminary work as the first agency at the scene. In form and content, the reports are largely similar to what we would expect in similar prepared by a traditional law enforcement agency. We assume that these investigations generally will serve an administrative function for ODOC as well. But in the context of the interagency agreement between OSP and ODOC, we are persuaded that records documenting ODOC's preliminary steps are records generated for a "criminal law purpose." We respectfully disagree with your suggestion that these records are created for administrative, and not criminal, purposes.[1]

2. **On balance, the public interest does not demand immediate disclosure.**

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[1] This resolution of these aspects of your petition makes it unnecessary to consider your argument that our office has previously construed this exemption too broadly, or your argument that prosecutors should be required to make a more specific showing that particular materials are compiled for criminal law purposes. As to the former, we would uphold ODOC's claim of exemption here even if we agreed that our prior orders gave ORS 192.501(3) an overly broad applications. As to the latter, our determination that these materials are criminal investigatory materials is not based on a prosecutor's conclusory assertion, but on our own review of the records and the context in which they were generated.

Construing ORS 192.501(3), the Oregon Court of Appeals has suggested that "(1) investigations connected with pending or contemplated proceedings will ordinarily remain secret because disclosure would likely interfere with enforcement proceedings * * *; but (2) investigations not connected with pending or contemplated proceedings will remain secret only if the government establishes that disclosure would produce [one of the negative consequences the exemption is designed to avoid]." *Jensen v. Schiffman*, 24 Or App 11, (1976).

Thus, the exemption under which ODOC has denied your request is typically of limited duration. Your petition identifies a number of salutary public interests that you assert will be served by disclosure, and we generally agree that disclosure will serve the public interest in many of the ways you describe. But, as you acknowledge, the question under this exemption usually isn't whether information will be disclosed or withheld. The question, in most cases, is whether information will be disclosed immediately, or disclosed after the criminal justice process has had an opportunity to work. You argue for immediate disclosure, observing that "With the passage of time, public interest and attention fades, other events demand attention, and the prudent public oversight that could prove so beneficial never comes to pass." With all due respect, we are unwilling to assume that the media or the citizenry are unable to maintain their attention to matters of important public policy across the typically short time between the commencement of an investigation and the conclusion of a criminal prosecution. We might balance the public interests differently if we perceived that the criminal justice proceedings were proceeding unusually slowly. But at this point, only a few months have elapsed since Mr. Lange's death.

In sum, if the question were whether the prosecutor's concerns about disclosure justify permanently withholding these particular records, we would likely side with you as to most or all of them. But it is a very different question whether those same concerns justify a temporary exemption that allows criminal justice proceedings to run their course.

Conclusion

For the foregoing reasons, your petition is respectfully denied.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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c: Mike Gower, Assistant Director of Operations