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Dr. Karen Gunson, Director
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Re: Petition for Public Records Disclosure Order
Oregon State Police Records
DOJ File No. 257001-GA0080-12

Dear Mr. Webb and Dr. Gunson,

This letter is the Attorney General's order under ORS 192.450 in response to Mr. Webb's petition of November 13, 2012. In that petition, Mr. Webb asks the Attorney General to direct the office of Dr. Gunson, the State Medical Examiner (ME) to disclose "the results of a toxicology test for Nolan Neal Benson, 27, of Long Beach, Wash." The petition explains that, while driving, Mr. Benson "crossed the centerline" resulting in a fatal crash:

> Benson was the driver of a vehicle on the Astoria-Megler Bridge May 2nd, when he collided with a truck, and died on the scene. The recovery of the man whose vehicle was struck, Chris Levno, 57, of Long Beach, Wash., has been extensively covered in The Daily Astorian. Suffering a broken back, broken bones, and a three-month hospital stay, Levno is still working towards recovery, while his story has generated public interest, support and speculation as to the reasons of the early morning crash.

For the reasons that follow, we grant Mr. Webb's petition and order the State Medical Examiner to disclose the requested toxicology results.

Oregon's Public Records Law, ORS 192.410 to 192.505, confers on "[e]very person * * * a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). In general, public records must be disclosed on request. Exemptions must be express in statute, and they are construed narrowly, meaning that "if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails." *Colby v. Gunson*, 224 Or App 666, 676 (2008).

Exemptions from the law's disclosure requirements are catalogued in ORS 192.501 and 192.502. The disclosure exemptions of ORS 192.501 apply "unless the public interest requires disclosure in the particular instance[.]" These are commonly known as "conditional" exemptions. In assessing conditional exemptions, the Oregon Court of Appeals has repeatedly instructed that "disclosure decisions should be based on balancing those public interests that favor disclosure of governmental records against those public interests that favor governmental confidentiality, *with the presumption always being in favor of disclosure*." *Turner v. Reed*, 22 Or App 177, 187 (1975) (emphasis added); *see also*, *Bay Area Health Dist. v. Griffin*, 73 Or App 294, 301 (1985); *Coos County v. Oregon Dept. of Fish and Wildlife*, 86 Or App 168, 173 (1987); *Oregonian Pub. Co. v. Portland School Dist. No. 1J*, 144 Or App 180, 187 (1996); *In Defense of Animals v OHSU*, 199 Or App 160, 176 (2005) (all noting the presumption in favor of disclosure); ATTORNEY GENERAL'S PUBLIC RECORDS & MEETINGS MANUAL (2010) (MANUAL) at 25 (quoting *Turner v. Reed, supra*).

We have explained that the ORS 192.501 exemptions "require public bodies to conduct a careful balancing of confidentiality interests against public disclosure interests," and that "[p]ublic interest [in disclosure] means the value to the public at large, not to a particular person at a particular time." MANUAL at 25, 27. But by its very nature, the inquiry under ORS 192.501 into whether "the public interest requires disclosure *in the particular instance*" (emphasis added) requires an individualized assessment of both the specific public interest being served and the manner in which the specific disclosure requested will serve that interest. For the following reasons, we conclude that in this case the particular public interest in disclosure, when balanced against somewhat attenuated confidentiality interests, requires disclosure of the specific information requested.

In denying the underlying request for these toxicology results, the ME relied on ORS 192.501(36), which conditionally exempts "A medical examiner's report, autopsy report or laboratory test report ordered by a medical examiner under ORS 146.117." The requested toxicology report was requested by the ME under ORS 146.117.[1] As Mr. Webb's petition implicitly accepts, the report therefore falls within the scope of this exemption. But we must still consider whether the public interest requires disclosure, mindful of the presumption favoring

[1] ORS 146.117 permits the ME to order autopsies and tests in connections with "in any death requiring investigation. ORS 146.090(1)(d) requires investigation of any death "[a]pparently accidental or following an injury.

disclosure of public records. Under the circumstances, we conclude that the public interest requires disclosure.

The basis for our decision is Mr. Benson's significant role in the crash that was fatal to him and severely injured another person. Such a serious accident is a significant event in a community, and undeniably the subject of a legitimate and compelling public interest. When an event like this occurs in a community, people typically and understandably want to understand why, and to understand what if anything might be done to prevent its recurrence. Indeed, Mr. Webb's petition demonstrates that people in the community where this particular accident occurred want to be fully informed of the causes, or potential causes, of the accident. Because the ME's toxicology report will reveal whether or not chemicals in Mr. Benson's blood may have contributed to the accident, disclosure will further that public interest.

We acknowledge that the toxicology report may or may not be definitive. A report indicating the absence of potentially contributing substances would seem to provide a concrete answer. A report indicating the presence of such substances, however, may not reveal whether they actually contributed to the accident. But the possibility that the ME's report may rule out one possible contributing factor is, in itself, a significant public benefit to requiring disclosure under the circumstances. And even if the report is unable to explain whether substances in Mr. Benson's blood contributed to the serious crash, we believe that informed speculation based on the ME's report furthers the public interest far more than the uninformed speculation that inevitably will occur as the public struggles to understand a serious accident in the absence of disclosure. We think informing the public discussion is particularly important in the context of ongoing public concern about the safety of this particular bridge.

We emphasize that the circumstances of Mr. Benson's death are far different than many deaths investigated by the ME. *See* ORS 146.090 (describing circumstances in which ME investigations are required). For example, the family of a suicide victim whose suicide risked no other lives may have a profound interest in avoiding public disclosure of the fact that the deceased person was a recreational drug user, with no corresponding public interest in the disclosure of that information.[2] But that is not the situation here. When a driver crosses the centerline resulting in a serious accident that kills one person and seriously injures another, we conclude that the public interest favors disclosure of information in the ME's toxicology reports that may shed light on possible causes of the accident.

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[2] In *Colby v. Gunson*, the Court of Appeals noted the possibility that privacy interests could exempt ME reports in some circumstances, under the exemptions for criminal investigatory information, ORS 192.501(3), and for personal information the disclosure of which could constitute an unreasonable invasion of privacy, ORS 192.502(2). 224 Or App at 674-75. Concurring in the decision, Judge Wolheim of the Court of Appeals, joined by Judge Edmonds, expressed the view that "[w]hen I die, and if there is an autopsy, the last thing I want is for a perfect stranger to review my autopsy report." 224 Or App at 681. Similarly, in *National Records and Archives Administration v. Favish*, 541 U.S. 157 (2004), the United States Supreme Court recognized strong privacy interests for surviving family members of the deceased that justified the withholding of photographs graphically depicting a suicide victim. We readily conclude that the purpose of the conditional exemption of ORS 192.501(36) is to protect these kinds of interests when there is no countervailing public interest requiring disclosure.

Indeed, the privacy-like interests that may generally attach to the contents of an individual's bloodstream are significantly diminished when an individual is operating a motor vehicle – an activity with inherent dangers that can be significantly aggravated by intoxicants:

> Any person who operates a motor vehicle upon premises open to the public or the highways of this state shall be deemed to have given consent * * * to a chemical test of the person's breath, or of the person's blood if the person is receiving medical care in a health care facility immediately after a motor vehicle accident, for the purpose of determining the alcoholic content of the person's blood if the person is arrested for driving a motor vehicle while under the influence of intoxicants * * *.

ORS 813.100(1).[3]

In sum, our opinion is that the privacy-type interests that ORS 192.501(36) is generally designed to protect are significantly diminished under these particular circumstances. The fact that Mr. Benson's vehicle that crossed the centerline significantly diminishes the privacy-type interests that we believe this exemption is generally designed to protect. Moreover, drivers privacy interests in the information found on a toxicology report – as opposed to a full autopsy report – are always significantly diminished in light of the inherent risks posed by driving in general and driving under the influence of intoxicants in particular. Meanwhile, the seriousness of the accident creates a significant public interest in a disclosure that would contribute to informed public discussion of the causes – even if the only concrete benefit will be to permit informed speculation rather than fully uninformed speculation. The public interest is made all the more compelling by the community's ongoing concerns about the safety of the bridge on which the accident occurred. Weighing diminished privacy-like interest served by disclosure against the public interests served by disclosure, our opinion is that the public interests favoring disclosure must prevail in this case. We consequently grant Mr. Webb's petition, and order the ME to disclose the requested report. ORS 192.450 gives the ME seven days within which to comply with this order or announce its intention to instigate judicial proceedings.

Sincerely,

Mary H. Williams
Deputy Attorney General

MHW:nog/Justice #3793671

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[3] We recognize that this statute is not directly applicable, as Mr. Benson died after crossing the centerline and colliding with another vehicle and consequently no decision was presented whether to charge Mr. Benson and give him a breath or blood test. But we think that this statute illustrates the principle that a driver who crosses the centerline leading to a serious accident has significantly diminished privacy interests in his or her bloodstream.