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February 21, 2012

Via Email and Regular Mail
Les Zaitz
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Re: Petition for Public Records Disclosure Order
Oregon Department of Corrections Records
DOJ Billing No. 291020-GA0015-12

Dear Mr. Zaitz:

On February 13, 2012, we received your petition asking the Attorney General to order the Oregon Department of Corrections (ODOC) to disclose to you records pertaining to ODOC's investigation of Mike W. Mathisen, former food service coordinator at Two Rivers Correctional Institution (TRCI), an ODOC facility. Specifically, you requested:

a. Records of any interviews completed as part of the investigation
b. Records of any of Mr. Mathisen's responses to ODOC, both regarding the investigation and the findings resulting from that investigation
c. Records of any investigation of Mr. Mathisen's supervisors, including Bob Martinez
d. Records of any approval of Mr. Mathisen's outside business interests.

As you state in your public records petition, ODOC denied your request for these documents. Although you assert that the agency did not provide you with any statutory basis for that denial, you are correct that ODOC withheld the documents based on ORS 192.501(3), which applies to "[i]nvestigatory information compiled for criminal law purposes."[1] Your petition followed.

[1] ODOC did not assert—and we do not believe—that the majority of the requested records would be exempt from disclosure under ORS 192.501(12), the personnel discipline exemption, because,

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 those 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 ORS 192.490(1).

In your petition, you appear to assert that the records withheld by ODOC do not meet ORS 192.502(3)'s requirements because the requested documents were originally generated as part of an ODOC administrative/personnel investigation rather than as part of a criminal investigation. You further argue that ODOC has not met its burden of demonstrating that the public interest currently favors nondisclosure of these records under the circumstances. For the reasons that follow, we reject those arguments.

1. The records are criminal investigatory materials, which are conditionally exempt from disclosure.

The Public Records Law conditionally exempts from disclosure "[i]nvestigatory information compiled for criminal law purposes." ORS 192.501(3). As the Oregon Court of Appeals has stated, that exemption may apply to information compiled in investigations relating to pending or contemplated criminal prosecution, because disclosure of such information likely would interfere with law enforcement proceedings. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2010) (MANUAL) at 36-37 (*citing Jensen v. Schiffman*, 24 Or App 11, 16, 544 P2d 1048 (1976)).

To the extent that you argue that the records at issue here do not qualify for exemption from disclosure under ORS 192.501(3) because, initially, they may have been created for use in an administrative or personnel investigation, we disagree. We believe that the dispositive factor in determining whether materials may be exempt from disclosure under the criminal investigatory material exemption is the status of the requested materials—here, ODOC records regarding the investigation into Mr. Mathisen's conduct—at the time of the petitioner's request. *See John Doe Agency v. John Doe Corp.*, 493 US 146, 155, 110 S Ct 471, 107 LEd 2d 462 (1989) (construing nearly identical provision in the federal Freedom of Information Act, and concluding that "documents need only to have been compiled [for law enforcement purposes] when the response to the FOIA request must be made.").

But even assuming that, to qualify as exempt under ORS 192.501(3), requested records must have been initially created or generated at least in part for criminal investigatory purposes, the records at issue here meet that requirement. **We have confirmed with ODOC officials that the administrative investigation into Mr. Mathisen's conduct has always been viewed as one that would likely lead to a criminal investigation.**

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as you point out, Mr. Mathisen resigned from his position with ODOC, and no discipline was imposed. Even assuming the records relating strictly to interviews of Bob Martinez and Mr. Mathisen's other supervisors may not be exempt from disclosure under the personnel discipline exemption, those records—as explained further below—are exempt as criminal investigatory information under ORS 192.501(3).

As you know, at the time of your request, ODOC had already provided the Mathisen records to the Oregon State Police (OSP). As we explained to you in response to your recent request for ODOC documents relating to the death of ODOC inmate Christopher Soren Lange, ODOC and OSP routinely work together to investigate potentially criminal occurrences at ODOC institutions. In addition—and as we explained in the Public Records Order pertaining to Mr. Lange—ODOC often performs traditional law enforcement agency functions in investigating potential criminal activities that occur at ODOC institutions. Public Records Order, October 25, 2011, Zaitz.

In this case, once ODOC provided its investigatory materials to OSP, OSP—without conducting an independent investigation—provided those records to the Umatilla County District Attorney's office. We have spoken with Jefrey Van Valkenburgh, a Senior Assistant Attorney General in the Department of Justice's General Counsel division, and Leonard Williamson, ODOC's Inspector General, about the requested records. Mr. Williamson confirms that the Umatilla County District Attorney's office is still reviewing those records and that the criminal investigation is still pending.

Given ODOC's role in investigating Mr. Mathisen's conduct, and the traditional law enforcement functions the agency often performs with respect to activities that occur at ODOC facilities, the documents at issue here are records created for a "criminal law purpose." To be sure, the investigation—and the documents generated—likely served an administrative purpose for ODOC as well. Nevertheless, we are persuaded that records documenting ODOC's investigation into Mr. Mathisen's conduct are records created for criminal investigatory purposes.[2]

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

As previously noted, in 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*, 24 Or App at 15-16.

Thus, the exemption under which ODOC has denied your request is typically of limited duration. Your petition identifies a number of valuable public interests that you assert will be served by disclosure—including "access to government information about possible public misconduct"—and we generally agree that disclosure may ultimately serve the public interest in many of the ways you describe. But, as you appear to acknowledge in your petition, the issue under this exemption usually is not *whether* information will be disclosed or withheld. Rather,

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[2] Again, we do not believe that, for ORS 192.501(3) to apply, there is any requirement that the records at issue must have been initially created or generated for criminal law purposes, as long as the records were subsequently gathered or compiled for criminal law enforcement purposes. Nevertheless, assuming for the sake of argument that such a requirement applies, that requirement is met here.

the question in most cases involving a claim of exemption under ORS 192.501(3) is whether the requested criminal investigatory information will be disclosed *immediately*, or disclosed after the criminal justice process has had an opportunity to work. You argue for immediate disclosure, asserting that "[e]specially when possible public corruption is at stake, disclosure sooner than later ought to be the order of the day." In addition, you assert that "[t]elling the public to mind its own business while government tends secretly to its own is not in the public interest."

With all due respect, we are not persuaded that the public interest requires disclosure of the requested records *at this time*. Mike Mathisen no longer occupies an office from which he could potentially damage the public interest. Moreover, the public interest is not served if immediate release of the requested information would interfere with potential criminal prosecution of Mr. Mathisen. As we have previously observed, the governmental 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; Public Records Order, July 17, 2006, Hostetter.

While we understand your concern about the length of time that the Mathisen investigation has been pending, at this point the materials have only been with the Umatilla County District Attorney's office since September or October 2011, a matter of a few months. We might balance the public interests differently if we perceived that the criminal investigation was proceeding unusually slowly. But, given that, at this time, only a few months have elapsed—and also that Mr. Mathisen only recently resigned from his employment—the public interest does not favor immediate disclosure.

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

Conclusion

Based on the foregoing reasons, your petition is respectfully denied.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

MHW:smg/3236812-v1
cc: Jennifer Black, ODOC