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January 12, 2012

Laurie Bender
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Re: Public Records Disclosure Order
Oregon State Police Records
DOJ File No. 257-001-GA0130-11

Dear Ms. Bender:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. We received your petition on December 30, 2011.[1] Because it appears that your request is related to a pending criminal proceeding, we first provide a brief explanation concerning the distinctions between a request for discovery in a criminal proceeding and a request under the public records law.

The two types of requests require two different types of responses from public agencies. Broadly speaking, an agency's focus in responding to a discovery request generally will be on relevance and privilege. In the criminal context, there are additional statutory and constitutional overlays that govern what must be produced and under what circumstances. *See, e.g.*, ORS 135.815 (statutory discovery rights); *Brady v. Maryland*, 373 US 83, 83 S Ct 1194, 10 L Ed 2d 215 (1963) (exculpatory evidence). Determining whether a particular record is subject to disclosure in a criminal proceeding necessarily will be dependent on the particular facts of the case.

By contrast, a response to a public records request is not limited by questions of relevance to a specific dispute, the fact that hearing dates have been scheduled, or that a criminal defendant believes the information sought may be helpful in defending his case. Instead, the key questions are whether a given document fits within the scope of requested documents, and whether any statutory exemptions apply to it. The first of these questions is generally broader

[1] We appreciate your extending the time within which the law would have otherwise required us to issue an order to January 13, 2012.

than the question of relevance, and the second of these questions implicates a list of statutory exemptions that incorporates, but goes well beyond, evidentiary privileges.

Moreover, although we may take into account your pending court deadlines in assessing the reasonableness of the time needed to respond to a public records request, that factor is not determinative, as your petition seemingly suggests. Rather, the reasonableness of the amount of time needed to respond will depend upon the volume of records sought and the staff available to respond, among other factors.

Finally, it bears emphasis that we do not have authority to order discovery in a criminal case, nor do we have the authority to order a court-conducted *in camera* review, as you have suggested. In a similar vein, we lack the authority to issue protective orders or otherwise restrain the use of information once released as a public record. The criminal proceeding is subject to its own set of rules and processes, and, indeed, it is our understanding that you have availed yourself of a wealth of information through those channels. Nevertheless, it is with these distinctions in mind that we address each category of records sought.

A. Redaction of Genetic Profiles within PCR-Based Validation Studies

On September 27, 2011, you asked the Oregon State Police to allow you to inspect and/or copy the following records:

> "All copies (paper or electronic) of PCR-based validation studies performed in the Loretha Williams homicide case and all instrumentation validation studies performed by the OSP Forensic Lab, including the summary page and the underlying and supporting data."

You also requested copies of all maintenance and repair records for all equipment instrumentality utilized by the Oregon State Police Forensic Lab during its investigation of the Loretha Williams homicide.

On October 19, 2011, Lt. Hormann informed you the Oregon State Police Forensic Services Division would make those records available for inspection, but explained that, because of the volume of responsive documents (estimated at approximately 25,000 pages), it would be unable to make copies. Rather, on November 14-17, 2011, the State Police allowed you and your forensic expert, Laura Schile, to review the documents at the Portland Metro Forensic Laboratory. Because the records still contained information that the State Police believed to be exempt from disclosure, you were prohibited from taking notes. However, you were allowed to request copies of specific documents, which the State Police agreed to provide after any appropriate redaction was completed.

During that review, you designated approximately 7,450 pages, including entire validation studies. Because validation studies contain complete genetic profiles of both staff and volunteers, the State Police explained that it would redact all DNA profiles in accordance with the genetic privacy statutes.

In your petition for a public records order, you challenge the State Police's decision to redact that information. You assert that, because you are seeking the records on behalf of Michael Garrett, a defendant in a criminal proceeding, the genetic privacy statutes do not prohibit disclosure. You also assert that, for the reasons detailed in your Motion in Limine (which was filed in the criminal proceeding), Michael Garrett's state and federal rights to a fair trial require that the requested genetic information be disclosed pursuant to the Public Records Law. We disagree.

In adopting the genetic privacy statutes, the Legislative Assembly explained that, because genetic information contains highly personal medical information, it is "uniquely private and personal" and "generally should not be collected, retained or disclosed without the individual's authorization." ORS 192.533(1)(a), (1)(b). Accordingly, the legislature expressly delineated those circumstances under which a person's genetic information may be disclosed. ORS 192.533(1)(c). ORS 192.539 sets forth those limited instances in which disclose of genetic information is allowed.

In pertinent part, ORS 192.539 states that, regardless of the manner of receipt or source of the genetic information,

> "*a person may not disclose or be compelled, by subpoena or other means, to disclose the identity of an individual* upon whom a genetic test has been performed or the identity of a blood relative of the individual, *or to disclose genetic information about the individual* or a blood relative of the individual in a manner that permits identification of the individual, *unless*:
>
> (a) Disclosure is authorized by ORS 181.085 or comparable provisions of federal criminal law relating to identification of persons, or *is necessary* for the purpose of a criminal or death investigation, *a criminal or juvenile proceeding*, an inquest, or a child fatality review by a county multidisciplinary child abuse team;

(Emphasis added.)[2] ORS 181.085(4)(b), in turn, authorizes the Oregon State Police to, among other things, disclose genetic profiles obtained as a part of its authority to maintain a criminal identification database to "a party in a criminal prosecution" if the disclosure is required by a separate statutory or constitutional provision. That authorization, however, is subject to the following restriction: the State Police may not disclose genetic profiles unless the person receiving the information agrees to destroy it "if notified by the department that a court has reversed the conviction, judgment or order that created the obligation to provide the blood or buccal sample."

Reading those statutes together, the legislature has evidenced a strong public policy against disclosure of genetic information. As you correctly note, there is an exception for when disclosure "is necessary" in a criminal proceeding. Whether disclosure is "necessary" for a

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[2] OSP informs us that the genetic information contained in the validation studies likely could be traced back to the individuals to whom it pertains.

particular criminal defendant in a particular criminal proceeding, however, is necessarily a fact-intensive inquiry peculiar to the legal issues raised in that tribunal. Moreover, unlike a public agency, a trial court may possess the authority to order disclosure under special conditions limiting the use, and protecting the confidentiality, of the genetic information. As such, whether disclosure of genetic information is "necessary" to a criminal proceeding is an issue best left to the criminal trial court.[3]

Moreover, the State Police has indicated that it would provide you copies of the validation summaries. Those summaries show the nature of the test being validated and the results of the validation test, without revealing any genetic information. You have not explained why the summaries are insufficient, or why disclosure of the genetic profiles of countless individuals is "necessary" for Mr. Garrett's criminal proceeding or clearly in the public interest. Accordingly, insofar as your petition for a public records order challenges the State Police's decision to redact genetic profiles, your petition is denied.

Finally, you contend that the estimated time for completing the redaction is unreasonable and a *de facto* denial. The public is entitled to inspect non-exempt records as promptly as a public body reasonably can make them available. ORS 192.430. How quickly a public body reasonably can make non-exempt records available, however, will depend on factors like the specificity of the request, the volume of records requested, the staff available to respond to the records request, and the difficulty of determining whether any of the records are exempt from disclosure.

The State Police has estimated that it will take approximately 124 hours to redact the nearly 7,450 pages that are responsive to your request, and that the agency will be able to devote approximately 4 hours per week of staff time to the project. This amounts to approximately one minute per page, which seems a reasonable estimate. As explained above, significant redacting will be involved, given the nature of the information contained therein. The State Police has further indicated that it will begin the redacting process once it receives payment. ORS 192.440(4)(c) provides that "[a] public body may not establish a fee greater than $25 * * * unless * * * the requestor confirms that the requestor wants the public body to proceed." You, meanwhile, have not agreed to pay the costs associated with redacting the records responsive to your request, and have suggested that heavily-redacted documents will not be useful to you. Thus, to the extent that your petition can be read as requesting that we direct State Police to devote greater resources to this project than they anticipate being able to devote, in order to expedite its completion, it is premature.

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[3] ORS 192.502(2) exempts from disclosure information of a personal nature, such as that kept in a medical file, "unless *the public interest* by clear and convincing evidence requires disclosure in the particular instance." (Emphasis added.) Here, the particular interest in obtaining disclosure will necessarily be that of the private individual, as opposed to the public interest in obtaining the records more generally. Any countervailing public interest in ensuring the fairness and accuracy of criminal proceedings may also be addressed in the criminal forum itself.

B. Un-Numbered Pages in OSP Forensic Lab Case File No. 88L-4983

Next in your September public records request, you asked for all "un-numbered pages in the OSP Forensic Lab case file, Lab No. 88L-4983." The State Police has agreed to provide these documents, but states that it may redact certain material on the basis of ORS 192.501(3). Insofar as the State Police has agreed to provide the redacted documents, the petition is moot. Once the State Police has provided the redacted materials, you may submit a new petition to the Attorney General, challenging particular redactions.

C. CODIS and ASCLD-Lab Audit Reports

In your next request, you asked for complete copies of all CODIS Audit reports since March 2000, and the complete ASCLD-Lab Audit reports since 1988. Although the State Police initially declined to provide these reports on the basis of ORS 192.502(1), the State Police has informed us that they are willing to provide the responsive documents in its possession. Accordingly, this portion of your petition is denied as moot.

D. Proftrak Database Information

Next, you requested that the Oregon State Police provide you with all "Proftrak database information concerning Convicted Offender CODIS Sample # 12635." The State Police informed you on October 19, 2011, that upon prepayment of the costs associated with production, it would provide you with all of the requested information.

In your petition for a public records order, your only complaint is that, as of December 30, 2011, you had not yet received the information. Lt. Hormann informed us, however, that she did not receive payment for the requested items until shortly before she left for vacation around the winter holidays. The payment has now been processed, and the State Police expects to provide you with a CD of this material very shortly. Accordingly, this aspect of your petition is denied as moot.

E. Run Logs for Instrumentalities Used on January 25, 2002

Finally, you contend that the State Police denied your request for "run logs" on instrumentalities used on January 25, 2002. As Lt. Hormann explained, there are no run logs for that date, and all other requested "logs" have been provided. Lt. Hormann further explained to us that all electronic "run log" data for January 25, 2002, has already been provided. Your request for a petition is therefore denied on the basis that no additional responsive records exist.

CONCLUSION

For all of the foregoing reasons, your petition for a public records order is denied. If you believe disagree with any specific redactions of the "un-numbered pages" that the State Police ultimately determines are necessary, you may submit a new petition to the Attorney General.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

MHW:smg/3170902-v1

cc: Susan Hormann, Oregon State Police