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November 20, 2015

SENT VIA EMAIL ONLY
wax@oregoninnocence.org

Steven T Wax
Oregon Innocence Project/OJRC
618 NW Glisan Street
Portland OR 97209

Re: Petition for Public Records Disclosure Order
Oregon State Police
DOJ File No. 257001-GA0153-15

Dear Mr. Wax,

On behalf of the Oregon Innocence Project (OIP), you have petitioned our office to order the Oregon State Police (OSP) to disclose public records to you under the Oregon Public Records Law, ORS 192.410 to 192.505. This letter respectfully denies your petition. You describe the record you are seeking:

> The full list of cases on which crime lab worker/forensic analyst/criminalist, Nika Larsen, worked during her time at the OSP Crime Laboratory, cited in The Oregonian article dated 9/18/2015, authored by Laura Gunderson. The full list should include all cases on which Nika Larsen worked, whether or not those cases were referenced in the aforementioned article. The full list should specify, for each case: (1) The names of the defendants, suspects, accused individuals, assailants, perpetrators, and/or any other person who has been identified in connection with a request for testing (defendant), which were initially received by the investigating agency, prosecuting office, and/or any other person or office requesting forensic analysis, or later developed through the course of the investigation; and (2) the defendants' corresponding Oregon State Police case numbers (case ID), request numbers (req num), services (case name), agency names (agc name), and agency case numbers (acn).

You requested this information from OSP on November 3, 2015.[1] OSP denied your request on November 5, 2015. Your petition followed on November 13, 2015.

The Oregon Public Records Law provides that "[e]very person has 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). The law is a disclosure law, and exemptions from its public disclosure requirement must be express. Even express exemptions are construed narrowly to further the public purposes served by disclosure. The narrow construction rule means 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).

OSP cited ORS 192.501(3) as the basis for its denial of your request. That exemption from the disclosure requirements of the Public Records Law allows public bodies to withhold "[i]nvestigatory information compiled for criminal law purposes." This exemption is conditional in that it applies "unless the public interest requires disclosure in the particular instance[.]" The Oregon Court of Appeals has indicated that information compiled as a part of investigations "connected with pending or contemplated proceedings will ordinarily remain secret because disclosure would likely 'interfere with enforcement proceedings[.]'" *Jensen v. Schiffman*, 24 Or App 11, 16 (1976). However, information related to criminal proceedings that have concluded, or that have been abandoned, remains exempt only if disclosure would work some particular harm. *Id.* Though Nika Larsen remains the subject of an ongoing investigation, you argue that the list is not exempt under this provision for three reasons. We discuss those in turn.

First, you argue that the list you are requesting does not constitute information compiled for law enforcement purposes, but consists of information that exists independently of any criminal investigation. Whether or not your assertion is correct, we have long held that the exemption is not limited to information originally created for purposes of a criminal investigation:

> A public record need not have originated as part of a criminal investigation to come within the exemption. * * * [T]he scope of the exemption for criminal investigatory information extends to prevent disclosure of records not originally created, but later gathered, for criminal law enforcement purposes.

ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2014) (MANUAL) at 45.

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[1] For purposes of this order, we have proceeded on the assumption that the specific list you requested is an existing document. In fact, we are informed that may not be the case; the existing list compiled by OSP may not contain precisely the same information you requested. However, there is no dispute that any information you requested that is not contained in the existing list would be available from separate records.

Second, you argue that the public interest requires disclosure of this information. You explain that OIP intends to use the information to "insure the notification of each individual whose case was affected by Ms. Larsen's work and the coordination of review of those cases." You elaborate:

> Each individual should have the opportunity to have his or her conviction reviewed to determine whether the work Ms. Larsen conducted was done properly, whether the work was central to the individual's conviction, and whether there is a legitimate basis to file a motion to set the conviction aside.

We disagree that this interest requires wholesale disclosure of the information you requested at this time. An orderly notification process is underway, and we do not agree that the interest you have identified requires the public disclosure of a comprehensive list of Ms. Larsen's cases at this time.

Finally, you argue that the information has been publicly disclosed:

> All the cases on the list we seek have already been litigated, rendering each individual case public information. Also, we understand the list of cases has been distributed to the district attorneys in counties where cases were affected by Ms. Larsen's work, and those district attorneys were encouraged to notify defense attorneys whose cases were affected. Finally, we understand the DOJ intends to distribute the information we seek to [the Oregon Public Defender Service,] OPDS. Because the information we seek is already part of the public record and has been or will be disclosed to defense attorneys and OPDS, additional disclosure to OIP would not impeded any pending or contemplated prosecution.

Though you might be correct that it would be theoretically possible to compile the list you are seeking through publicly available information, we do not believe that means that OSP should be required to disclose the composite list to the public before the related criminal matter is resolved. Likewise, the fact that pieces of the information you requested may be individually disclosed to specific recipients does not persuade us that OSP should be required to disclose the entirety of this investigatory material. The possibility that independent investigatory efforts could result in interested individuals effectively duplicating some parts of a criminal investigatory file is not unique to these circumstances. We do not think the fact that someone else could potentially obtain the same information obtained by law enforcement means that a law enforcement agency should be required to disclose that information from its investigatory files during the course of its investigation. Nor do we believe that the fact that law enforcement may selectively disclose pieces of information from its investigatory files to specific people means that a law enforcement agency should be required to publicly disclose all of the disclosed information in aggregate while its investigation remains ongoing.

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For the foregoing reasons, your petition is respectfully denied.

Sincerely,

FREDERICK M BOSS
Deputy Attorney General

6962927
cc via email only:
Erin Redding, OSP
Eric Davenport, OSP