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July 8, 2016

VIA EMAIL ONLY: kiboshi@kgw.com

Kyle Iboshi
KGW
1501 SW Jefferson Street
Portland, OR 97201

Re: Petition for Public Records Disclosure Order
Oregon State Police
DOJ File No.: 257001-GA0087-16

Dear Mr. Iboshi:

This letter is the Attorney General's order responding to your June 21, 2016, petition for disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505. Thank you for agreeing to extend the deadline for us to issue an order. Your petition asks the Attorney General to order the Oregon State Police (OSP) to produce the "audio or video recordings and/or written transcripts of interviews with Detective Sergeant Joe Kaney and Detective Todd Spingath from the Roseburg Police related to their response to the active shooter on the Umpqua Community College Campus."

We acknowledge a strong public interest in disclosure of these documents. We nevertheless deny your petition because these records are currently exempt from disclosure as criminal investigatory information under ORS 192.501(3). Criminal investigations into the shooting on the Umpqua campus continue at both the state and federal level. The exemption applicable to these records exempts them only temporarily while the criminal justice process continues. The criminal investigatory exemption itself serves an important public interest by protecting a fair and thorough criminal investigation and avoiding disclosures that could compromise the process. Delaying disclosure of these records protects those interests in the short term, while ultimately serving the public interest in disclosure as well.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions contained in ORS 192.501 to 192.505. *See* ORS 192.420(1). Any person denied the right to inspect or to receive a copy of a public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.450(1). The agency carries the burden to sustain any such denial. *Id.*

Your petition makes clear the strong public interest in disclosing these records. For example, you point out that these interviews will describe how public bodies responded to "one of the worst mass shootings in Oregon state history" and "will help the public understand the role of first responders, evaluate the relationship between local police and campus security, and monitor the training used to help resolve mass shooter incidents."

However, ORS 192.501(3) exempts "investigatory information compiled for criminal law purposes" unless the public interest requires disclosure in the particular instance. The Court of Appeals has explained that "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) (internal quotations omitted) (favorably citing to federal law in interpreting ORS 192.501(3)). But the court rejected the argument that such investigatory information forever remains exempt from disclosure; instead, the court concluded that "investigations not connected with pending or contemplated proceedings will remain secret only if" disclosure would result in specific harms such as depriving a person of a right to a fair trial or disclosing the identity of a confidential source. *Id.*

Our public records orders examining ORS 192.501(3) have long followed the Court of Appeals' guidance. That is, we have held that investigatory information in pending criminal investigations or prosecutions is exempt from disclosure because the public has a strong interest in seeing persons who have violated the law successfully prosecuted. *See, e.g.*, Public Records Order, Nov 10, 2015, Bernstein, at 3. Nondisclosure "serves the purposes of protecting the integrity of criminal investigations and avoiding any compromise of a potential criminal prosecution that might result from such investigations." *Id.* But once criminal proceedings have concluded, such information "remains exempt only if disclosure would work some particular harm. Public Records Order, Jan 28, 2016, O'Brien, at 2.

We spoke with Terri Davie, OSP's Deputy Superintendent, and with Douglas County District Attorney Rick Wesenberg. They explained that criminal investigations of the Umpqua shooting continue at both the federal and local levels, and that these investigations are connected with contemplated criminal prosecution. They added that although OSP interviewed these police officers as part of an investigation into their use of deadly force, those interviews were also part of the broader, ongoing investigation.

Although you argue that disclosure would not interfere with these ongoing proceedings because the police officers and deceased gunman will not be prosecuted, that is not necessarily correct. For example, the gunman's actions would be relevant to any prosecution for accomplice

liability. *See* ORS 161.155(2)(b) ("A person is criminally liable for the conduct of another person if . . . [w]ith the intent to promote or facilitate the commission of the crime the person . . . aids or abets . . . such other person in planning or committing the crime.").

Although the transcripts we reviewed are compelling, the public interests served by the criminal investigatory exemption justify withholding them from disclosure at this time. We emphasize that these records will remain exempt only temporarily while the criminal justice process continues. Therefore, we respectfully deny your petition because the records are exempt from disclosure under ORS 192.501(3).

Sincerely,

Frederick M. Boss
Deputy Attorney General

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