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SENT VIA EMAIL ONLY

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The Oregonian
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Joanie Stevens-Schwenger
Oregon State Lottery
500 Airport Road SE
Salem, OR 97301

Re: Petition for Public Records Disclosure Order
Oregon State Lottery
DOJ File No. 177001-GA0046-14

Dear Mr. Bailey and Ms. Stevens-Schwenger:

This letter is the Attorney General's order in response to The Oregonian reporter Everton Bailey's petition asking our office to direct the Oregon State Lottery (Lottery) to disclose an unredacted copy of a memorandum from Lottery Security Section Detective Travis Neubauer to Lottery Security Section Sergeant Molly Cotter requesting termination of Lottery contracts with Stars Cabaret. Following Mr. Bailey's petition, our office corresponded with Therese Bottomly, managing editor of The Oregonian. This order will treat The Oregonian as the petitioner.

The Oregon Public Records Law, ORS 192.410 to 192.505 provides that "Every 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). Exemptions from public disclosure requirements must be explicit in statute and cannot be inferred. *See, e.g., Colby v. Gunson*, 224 Or App 666, 675-676. Even express exemptions are construed narrowly to favor public disclosure, "mean[ing] that, if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails." *Id.* at 676. A person denied a request to inspect a public record of a state agency may file a petition with the Attorney General's office seeking review of the agency's decision. ORS 192.450.

In this case, petitioner was provided with a copy of the requested report. However, Lottery redacted the report heavily. The agency cited ORS 419B.035 in support of the bulk of its redactions, which mask portions of the report that came from a probable cause affidavit filed by a Beaverton Police Department officer investigating sex crimes involving a minor victim. That statute makes confidential "reports and records compiled under the provisions of ORS 419B.010 to 419B.050." (The cited statutes are Oregon's child abuse reporting laws.) Lottery also relied on the personal privacy exemption of ORS 192.502(2) and the psychotherapist-patient privilege of ORS 40.230 to justify redactions pertaining to the abuse investigation. The agency also redacted some information not related to the abuse investigation, citing the exemption for "[c]ommunications within a public body or between public bodies of an advisory nature" codified at ORS 192.502(1). For the reasons that follow, we largely uphold the agency's redactions related to the child abuse investigation, based on ORS 419B.035. But we grant the petition to the extent that some material about the child abuse case came from media reports, and we grant the petition with respect to the unrelated material the agency redacted pursuant to ORS 192.502(1).

The essence of The Oregonian's petition is to assert that ORS 419B.035 does not apply wholesale to law enforcement documents such as the police reports and search warrant affidavits that are generated in investigations of child abuse. As we understand the core of petitioner's argument, documents like police reports and search warrant affidavits generally would be compiled in law enforcement investigations of child abuse even if ORS 419B.010 to 419B.050 did not exist; consequently such documents are not "compiled under" those statutes and not governed by ORS 419B.035.

Or at least, not *all* such documents are compiled under the child abuse reporting statutes. Petitioner acknowledges that redactions to protect the identity of child victims of possible abuse are appropriate. *See* ORS 192.502(2) (exempting information from public disclosure if disclosure would constitute an unreasonable invasion of privacy); *see also*, *Jensen v. Schiffman*, 24 Or App 11, 16 (1976) (exemption for criminal investigatory information survives the conclusion of a criminal matter if its disclosure would be an unwarranted invasion of privacy). And petitioner does not dispute that sometimes police reports and similar documents may contain information that directly implicates ORS 419B.010 to 419B.050. Essentially, The Oregonian seems to contend that, although ORS 419B.020 requires an investigation to be opened, the investigation itself is not conducted "under ORS 419B.010 to 419B.050" but instead is conducted under the law enforcement agency's general power to investigate crimes.

We note these aspects of The Oregonian's position to emphasize that we do not understand The Oregonian to be arguing that sensitive information about abused minors, or those who report suspected child abuse, should be freely available. The Oregonian's position is more limited and nuanced, and seems designed to lead to public disclosure about suspects and the criminal investigatory process. We can see how the statute might plausibly be understood in such a constricted manner.

We ultimately disagree with The Oregonian's position because one of the duties specifically imposed on law enforcement agencies by ORS 419B.010 to 419B.050 is the duty to immediately "[c]ause an investigation to be made to determine the nature and cause of the abuse of the child[.]" ORS 419B.020. The Oregonian is correct that ORS 419B.010 to 419B.050 have little to say about the authority of law enforcement agencies to conduct criminal investigations or the procedures for such investigations. But we think the most natural understanding of the interplay between ORS 419B.020 and ORS 419B.035 is that the investigation the former compels is an investigation "under ORS 419B.010 to 419B.050" for purposes of the latter.

That understanding is informed by the context of related statutes. Most significantly, ORS 419B.007 explains the legislature's view that "it is necessary and in the public interest to require * * * investigations of abuse of children[.]" Importantly, both the policy statement of ORS 419B.007 and the original version of the confidentiality provision now codified at ORS 419B.035 were enacted at a time when mandatory child abuse reports had to be made to law enforcement; the option to report to DHS was added subsequently. It is clear that the legislature was intending to require law enforcement agencies to actually open child abuse investigations after receiving reports. And we think it is natural to regard documents that the resulting investigations generate as "compiled under" the statutes that require the investigations to be commenced.[1]

We consequently deny The Oregonian's petition with respect to redacted material from the probable cause affidavit. The affidavit was generated in an investigation of "abuse" as that term is defined by ORS 419B.005(1). As we have just explained, documents compiled in law enforcement investigations of child abuse are "compiled under" the child abuse reporting statutes of ORS 419B.010 to 419B.050 and consequently confidential pursuant to ORS 419B.035.

Not all of the redacted information, however, is information Lottery necessarily obtained from the probable cause affidavit. In the "Summary" and "Narrative" sections of the memorandum, before reporting the contents of the probable cause affidavit, the memorandum recites the essential facts about the case that were available from information that the Beaverton Police Department disclosed to the press during its investigation of the abuse allegations. We conclude that any information Lottery gleaned from press reports is not covered by ORS 419B.035. We therefore grant the petition to the extent that information in the "Summary" and "Narrative" sections was gleaned from press reports rather than from investigatory documents provided by Beaverton PD to Lottery. We order Lottery to review that section and redact only

[1] We recognize that the report by the Lottery enforcement officer is not, itself, a report in a child abuse case made confidential by ORS 419B.035; it merely contains information from Beaverton PD's child abuse investigation materials. ORS 419B.035(4) authorizes law enforcement agencies to share records and reports with other law enforcement agencies "when the law enforcement agency determines that disclosure is necessary for the investigation or enforcement of laws relating to child abuse and neglect." ORS 419B.035(5) authorizes sharing between law enforcement agencies "for the purpose of managing and supervising offenders in custody or on probation, parole, post-prison supervision or other form of conditional or supervised release." Lottery did not obtain the records for either of these purposes. In light of our conclusion that the records are subject to ORS 419B.035, it does not appear that Beaverton PD had authority to share its investigative records with Lottery's enforcement officers.

the information that it can confirm came, more likely than not, from investigative documents provided by Beaverton PD. To the extent that Lottery is able to confirm that all of the redacted information came from Beaverton PD investigative documents, it may make the same redactions.

We turn to the information Lottery redacted pursuant to ORS 192.502(1). We begin by observing that the redactions include some factual information, despite the fact that the exemption only applies "to the extent that [documents] cover other than purely factual materials." The general nature of the redacted sections is to document earlier recommendations with respect to Stars Cabaret, and to elaborate on the reasons for the current recommendation "to terminate contracts with all Stars locations." We agree that some of the information is non-factual and "of an advisory nature" and therefore within the scope of the exemption. Nevertheless, the exemption applies only if "the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure." After discussing the reasons for the redactions with Lottery officials, we are not persuaded that the public interest clearly favors nondisclosure in this case. We consequently order disclosure of the information redacted under this basis.

As explained above, the petition is granted in part and denied in part. The Lottery has seven days within which to either comply with the portions of this order requiring disclosure of redacted information or else announce its intention to initiate legal proceedings. ORS 192.450.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General