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September 12, 2018

**VIA EMAIL ONLY:** dsupham58@gmail.com

Donald Scott Upham
3906 SW Altadena Avenue
Portland, OR 97239

Re: Petition for Public Records Disclosure Order
*Oregon State Police*
DOJ File No.: 257001-GA0054-18

Dear Mr. Upham:

This letter is the Attorney General's response to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, received by this office on September 5, 2018, specifically asks us to order the Oregon State Police (OSP) to produce pictures and videos depicting your client, as well as messages authored by her, that are contained on electronic devices seized by OSP pursuant to a search warrant. We respectfully deny your petition for the reasons that follow.

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(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 192.411(1). The agency carries the burden to sustain any such denial. *Id.*

OSP indicates the records you seek reside on several electronic devices belonging to your client's boyfriend. The devices were seized from their joint residence pursuant to a search warrant and the contents of the devices were reviewed consistent with the terms of the warrant. That review revealed images and videos depicting your client. However, OSP explains, those records were not tagged, inventoried or segregated because they did not reveal evidence or information concerning the commission of a crime. *See* ORS 133.535(1).

One exception involved a video depicting your client that raised suspicion that she may be the victim of a crime. OSP subsequently interviewed your client and she denied being a victim. This information was provided to the Deschutes County District Attorney, who determined that any records on the devices pertaining to your client are not relevant to any pending criminal cases. We also understand that OSP already provided this video to you in response to a subpoena in a related civil action. Because it appears you already have this video, the remainder of our analysis only addresses the rest of the records in OSP's custody.

Although the electronic devices are in OSP's custody, they remain the legal property of the boyfriend[1] and are subject to search only pursuant to a search warrant issued under ORS 133.525 to 133.703, or upon lawful consent. ORS 133.539(2); *see also*, *State v. Mansor*, 363 Or 185 (2018) (affirming the general requirement for a warrant to search electronic devices and holding that the warrant must identify as specifically as reasonably possible the information to be searched); and *Riley v. California*, 573 US __, 134 S Ct 2473 (2014) (striking down warrantless searches of cell phones incident to arrest because search of a cell phone is analogous to searching a "place" rather than a "thing"). According to OSP, the original search warrant in this case does not extend to searching the devices for information about your client. We reviewed the search warrant and agree that it does not encompass the records you seek. And we have no indication that the owner of the devices has otherwise consented to a search for these records. Under the circumstances, it appears that responding to your request would require OSP to violate ORS 133.539(2), as well as the prohibition against unreasonable searches in Article I, section 9, of the Oregon Constitution. We do not believe the Public Records Law requires such a result. We must therefore deny your petition.

As a separate matter, we question whether the records you seek are "public records" within the meaning of the Oregon Public Records Law. A public record is defined as "any writing that contains information relating to the conduct of the public's business ... prepared, owned, used or retained by a public body regardless of physical form or characteristics." ORS 192.311(5)(a). A "public record" does not include "any writing that does not relate to the conduct of the public's business and that is contained on a privately owned computer." ORS 192.311(5)(b).

We acknowledge that the records you seek are writings in OSP's custody, at least temporarily. However, the records exist on privately owned devices and – except for the video discussed above – it is not clear to us that they relate to the conduct of the public's business. The records were not the subject of the original search warrant and it does not appear they are relevant to any pending police business. They are in OSP's custody only because they exist on devices that also contain evidence of a crime. But this fact does not convince us that *all* writings contained on privately owned electronic devices necessarily "relate to the conduct of the public's business" once seized by the police. We do not need to resolve this issue here, however, because we conclude the Public Records Law does not require OSP to conduct non-consensual and warrantless searches of seized electronic devices in response to public records requests.

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[1] The state is obligated to protect items it seizes and owners may seek the return of seized property. *See, e.g.*, ORS 133.535 and ORS 133.633-.663.

For the foregoing reasons, we respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

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