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April 1, 2019

VIA EMAIL ONLY: dsupham58@gmail.com

Donald Scott Upham
3906 SW Altadena Ave
Portland, OR 97239

Re: Petition for Public Records Disclosure Order
Oregon State Police
DOJ File No. 257001-GA0028-19

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 asks the Attorney General to order the Oregon State Police (OSP) to disclose certain communications seized pursuant to a search warrant, as well as other records related to the application for the search warrant. For the reasons discussed below, we respectfully deny your petition.

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). The law is a disclosure law, and exemptions from disclosure must be express. 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.*

Your petition stems from a request you submitted to OSP on March 4, 2019 for two categories of records. The first part of your request sought all electronic communications between Dylan Sullivan and a female minor that were seized pursuant to a search warrant. The second part of your request sought any records sent to or created by OSP relating to the authenticity of a text message from Mr. Sullivan to the female minor that was included as an exhibit to the application for the search warrant. OSP denied your request on March 11, 2019, explaining that ORS 419B.035 restricts OSP from disclosing the records to you.

We contacted Wendy Landers, Director of OSP's Central Records Section, regarding your petition. She explained that the underlying investigation involved allegations that Mr. Sullivan engaged in sexually inappropriate communications with two 16 year old girls. The alleged misconduct met the definition of child abuse under ORS 419B.005 and triggered the child abuse investigation requirements of ORS 419B.020. ORS 419B.035 provides that reports and records compiled under ORS 419B.010 to 419B.050 are confidential and may not be disclosed except as provided in that section.[1] Ms. Landers indicated that the records you requested were compiled under ORS 419B.010 to 419B.050 and are therefore confidential. She also indicated that OSP separately considers the records exempt under ORS 192.345(3) as investigatory information compiled for criminal law purposes. Finally, she explained that OSP does not have any records responsive to your request for records sent to OSP relating to the authenticity of the exhibit submitted with the application for the search warrant.

In previous orders considering the application of ORS 419B.035 to investigative records compiled by law enforcement, we have applied the statute broadly and have consistently concluded that such records are confidential.[2] However, in *Pamplin Media Group v. City of Salem*, 293 Or App 755 (2018), the court's interpretation of ORS 419B.035 suggests that law enforcement agencies may need to better distinguish between records compiled under ORS 419B.010 to 419B.050 and those compiled under separate law enforcement authorities.[3]

Regardless of any implications the *Pamplin* decision might have on the application of ORS 419B.035, an issue which we do not address here, we conclude the records you seek are exempt under ORS 192.345(3). That provision conditionally exempts from disclosure 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

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[1] ORS 419B.035 states in relevant part:

> (1) Notwithstanding the provisions of ORS 192.001 to 192.170, 192.210 to 192.478 and 192.610 to 192.810 relating to confidentiality and accessibility for public inspection of public records and public documents, reports and records compiled under the provisions of ORS 419B.010 to 419B.050 are confidential and may not be disclosed except as provided in this section. ***

[2] *See, e.g.,* Public Records Order, Jun 23, 2014, Bailey (observing that "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 419.050' for purposes of the latter.") *See also* Public Records Order, Feb 17, 2015, Moriarty; Public Records Order, Jul 3, 2014, Woolington and Redding; and Public Records Order, Mar 1, 2012, Johnson.

[3] In *Pamplin*, the City denied a request made under ORS 192.345(3) for the "record of an arrest" on the grounds that the record was confidential under ORS 419B.035. The court rejected the City' argument after it concluded that a law enforcement agency's "record of an arrest" is not a record "compiled under the provisions of ORS 419B.010 to 419B.050." *Id.* at 765 (internal quotations omitted). The court observed that the provisions of Chapter 419B "do not govern or even address the arrest of a perpetrator" and they "neither authorize nor require any agency to keep records of such arrests." *Id.* at 765-66.

disclosure would likely interfere with enforcement proceedings." *Jensen v. Schiffman*, 24 Or App 11 (1976). The court also explained that investigatory information "not connected with pending or contemplated proceedings will remain secret only if" disclosure would result in a specific harm, such as revealing the identity of a confidential source or resulting in an unreasonable invasion of privacy. *Id.*

We understand that the criminal proceedings against Mr. Sullivan are complete. However, because the records you seek contain direct evidence of child abuse, we conclude their disclosure would result in an unreasonable invasion of the victims' privacy. And based upon the record before us, we have no reason to conclude that the public interest otherwise requires disclosure in this instance.

For the foregoing reasons, we conclude the records you seek are exempt from disclosure under ORS 192.345(3). We therefore respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM9518686
c: via email only: Wendy Landers, OSP