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June 11, 2019

VIA EMAIL ONLY: jryan@oregonian.com

Jim Ryan
The Oregonian
1500 SW 1st Ave, Suite 400
Portland, OR 97201

Re: Petition for Public Records Disclosure Order
Oregon State Medical Examiner's Office
DOJ File No.: 257001-GA0045-19

Dear Mr. Ryan:

This letter is the Attorney General's order responding to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, received by this office on May 28, 2019,[1] asks the Attorney General to order the Oregon State Medical Examiner's Office ("ME") to produce a copy of the "medical examiner's report on the death of Brian Glover," including "autopsy reports and related test results, any death investigation records and the like." For reasons that follow, we respectfully deny your request.

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 its actions. ORS 192.411(1).

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[1] Thank you for granting an extension on the deadline to issue this order.

We begin by observing that your initial request to the ME did not seek copies of public records; rather, it was a request for information.[2] Specifically, you asked the ME to answer the following questions: "Did your office perform an autopsy for Mr. Glover? If so, what's his cause and manner of death?" Kelsey Evans, the ME's Forensic Administrator, replied to you that the ME cannot release this information because medical examiner reports are exempt from public disclosure under ORS 192.345(36).[3]

Your petition now asks the Attorney General to order the ME to disclose the report of death and supporting documentation. Ordinarily we would deny your petition for a lack of jurisdiction because the ME did not deny a request for public records. *See* ORS 192.407 and 192.411(1) (Attorney General may order disclosure only when a records request has not been processed in accordance with ORS 192.329 or when a request has been denied). However, Ms. Evans ostensibly treated your request for information as one for public records. She also explained to us that if you had requested the records from the ME, your request would have been denied under ORS 192.345(36). Under the circumstances, we conclude it is appropriate to consider your petition.

We contacted Ms. Evans, who explained the ME's position that the records you seek are exempt from disclosure under ORS 192.345(36). Under that provision, "a medical examiner's report, autopsy report or laboratory test report ordered by a medical examiner under ORS 146.117" is conditionally exempt from disclosure "unless the public interest requires disclosure in the particular instance." Your petition does not dispute that the records you seek conditionally exempt from disclosure under this provision. However, you characterize the circumstances surrounding Mr. Glover's death as a "rare instance" in which the public interest requires disclosure. You note that Mr. Glover died in a single car accident on a public road, resulting in a road closure for several hours. You also reference a remark by a state trooper that Mr. Glover may have suffered a medical event before the accident. You assert that as a matter of public safety, the public has an interest in knowing whether Mr. Glover suffered from an underlying medical condition or was otherwise impaired at the time of the accident.

To determine whether the public interest requires disclosure, we must balance the public's interest in disclosure against the public's interest in nondisclosure, with the presumption in favor of disclosure. *See American Civil Liberties Union v. City of Eugene*, 271 Or App 276 (2015). The Oregon Court of Appeals has described the public interest in disclosure as the right of the public at large to monitor how public business is conducted and how public officials are performing their jobs. *See Guard Publishing Co. v. Lane County School Dist.*, 96 Or App 463, 469 (1989); *Jensen v. Schiffman*, 24 Or App 11, 17 (1976). However, if disclosure will prejudice an agency or prevent it from performing its functions, that fact is relevant to the public interest in nondisclosure. *Attorney General's Public Records and Meetings Manual* (2014) at 31.

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[2] A public record is defined as a "writing," which generally consists of documentation and recordings. *See* ORS 192.311(5) & (7). The Public Records Law does not require public bodies to respond to requests for information by disclosing "knowledge" their staff might have. *See Attorney General's Public Records and Meetings Manual* (2014) at 7 (citations omitted).

[3] Ms. Evans' response to you cited ORS 192.345 generally, but she confirmed for us that her denial was based more specifically upon subsection ORS 192.345(36).

On balance, we conclude that the public interest does not require disclosure in this instance. We acknowledge that the public has an interest in the circumstances surrounding traffic fatalities generally. But you have not identified, and we are not aware of, any broad or heightened public interest in this particular incident that would require the disclosure of the ME's report or supporting documentation. This is in contrast to the examples you cite, such as in police-involved shootings, where MEs have released limited information about causes of death (but not full reports). This is also in contrast to instances where we have ordered the ME to disclose similar information because disclosure could meaningfully contribute to understanding matters that affect the public at large. *See* Public Records Order, December 14, 2012, Webb and Gunson (ongoing concern about a bridge's safety increased public interest in disclosure of ME toxicology report). Moreover, we reviewed a summary of the records you seek and could not identify any information that, if disclosed to the public, would enhance public safety, substantively contribute to the public's understanding of how public business is conducted, or otherwise meaningfully advance any of the potential public interests you have identified. We therefore conclude that there is only modest public interest in the records you seek.

In contrast, we have previously recognized the strong public interest in the nondisclosure of ME reports. *See* Public Records Order, July 1, 2015, Brosseau (PRO Brosscau). Such reports routinely contain intimate medical details, including the details of autopsy reports and medical records, that are routinely protected from public disclosure. Ms. Evans explained to us that the ME considers its reports that contain such information to be akin to medical records containing protected health information. *See* ORS 192.553-.581 (protected health information); *see also* ORS 146.100(7) (precluding MEs from releasing medical records without a court order), and ORS 432.350(1)(a) (unconditionally exempting vital records, including records of death, from public disclosure). The ME asserts that, absent careful limits on the disclosure of such sensitive medical information, it risks losing access to information from health care facilities that is necessary to performing its core function. We have also recognized the strong public interest in obtaining cooperation from family members by providing information about the decedent and allowing autopsies. It may become more difficult to obtain such cooperation in the future if ME reports are broadly disclosed to the public. *See* PRO Brosseau at 7. Given the relatively modest public interest in this particular case, we conclude that the public interest in withholding the ME's report outweighs the public interest in disclosure.

For the reasons discussed above, we conclude the records you seek are conditionally exempt from disclosure under ORS 192.345(36) and that the public interest does not require disclosure in this instance. We therefore respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

FMB:pjn/DM9644597
c via email only: Kelsey Evans, Oregon State Medical Examiner's Office