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January 6, 2020

Rafael Mora Contreras, #18-05511
215 SW Adams MS35
Hillsboro, OR 97123

Re: Petition for Public Records Disclosure Order
Oregon Department of Corrections
DOJ File No.: 291011-GA0153-19

Dear Mr. Contreras:

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 Department of Justice to review the Oregon Department of Corrections' (ODOC) response to a records request submitted by you on November 29, 2019. 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 its actions. ORS 192.411(1).

According to your petition, you asked ODOC to provide any correspondence it had with the Washington County District Attorney's Office ("DA's Office") relating to the recent transfer of a particular inmate between ODOC institutions. You also asked ODOC how many phone calls that inmate made after his transfer and how much it would cost to purchase the recordings of those phone calls. In its reply to your request, ODOC indicated that it did not have responsive correspondence with the DA's Office. ODOC's reply did not specifically address your request about the number of inmate calls, but it did indicate that the recordings of such calls would be exempt from disclosure under ORS 192.355(5). You have asked us to review ODOC's response pursuant to ORS 192.411.

In light of your petition, we contacted Michelle Dodson, ODOC Records Officer. She explained that ODOC confirmed with the DA's Office that there was no correspondence with the DA's Office relating to the inmate's transfer. She also explained that ODOC does not have a record that reflects the number phone calls made by that inmate subsequent to his transfer. We cannot order ODOC to disclose records that do not exist, and the Public Records Law does not require agencies to create new records in response to a request. *See Attorney General's Public Records and Meetings Manual* at 7 (2019) ("*Manual*"). Therefore, we must deny these aspects of your petitions.

Your petition also explains why you do not believe the recordings of the inmate's telephone calls are exempt under ORS 192.355(5). On the record before us, it does not appear that you ever requested those recordings. Rather, you requested only the "cost to purchase" them. Ordinarily we would deny this aspect of your petition for a lack of jurisdiction because ODOC did not deny a request for public records. *See* ORS 192.411(1). However, based upon ODOC's initial response and subsequent discussions with Ms. Dodson, it is clear that if you had requested the recordings, ODOC would have denied your request under ORS 192.355(5). Under the circumstances, we conclude it is appropriate to assess whether recordings of the inmate's telephone calls are exempt under that provision.

ORS 192.355(5) expressly exempts:

> Information or records of the Department of Corrections * * * to the extent that disclosure would interfere with the rehabilitation of a person in custody of the department or substantially prejudice or prevent the carrying out of the functions of the department, if the public interest in confidentiality clearly outweighs the public interest in disclosure.

ODOC asserts that disclosing the recordings of inmate telephone calls would substantially prejudice or prevent ODOC from carrying out its functions, and cites Public Records Order, Feb 17, 2017, Crombie ("PRO Crombie"), in support of its position. In PRO Crombie, we concluded that ODOC may withhold inmate visitation logs under ORS 192.355(5) because disclosure could stigmatize visitors and thereby discourage visitation. This, in turn, would substantially prejudice the carrying out of ODOC's functions, such as rehabilitating inmates and reducing recidivism. *Id.* In that instance, we took notice of studies that generally concluded that visitation improves inmate behavior within institutions and lowers the likelihood of recidivism. *Id.* We also concluded that the public interest in keeping the visitor logs confidential clearly outweighed the public interest in disclosure.

We see no meaningful distinction between the recordings of inmate telephone calls and the visitor logs at issue in PRO Crombie. A simple internet search reveals numerous studies that correlate contact between inmates and relatives or friends – whether in person, by mail, or by telephone – with improved inmate behavior and recidivism rates. And ODOC's rules specifically recognize that "telephone services are a positive means to strengthen ties and increase the likelihood of success upon release." ORS 291-130-0005(3). Disclosing the recordings would, at a minimum, reveal the identity of outside callers and thereby result in the same potential for stigmatization we recognized in PRO Crombie. And by disclosing the actual

contents of those conversations, disclosure will likely have an even greater chilling effect upon outside callers. This, in turn, is likely to substantially prejudice ODOC from carrying out its functions, including efforts to rehabilitate inmates and reduce recidivism.

We also find that the public interest in keeping the recordings confidential clearly outweighs the public interest in disclosure in this instance. As we found in PRO Crombie, there is significant public interest in improving the rehabilitation of inmates and reducing recidivism by keeping this sort of information confidential. *See* PRO Crombie at 2. Your petition offers reasons why you believe the public interest requires disclosure in this instance, such as learning whether the inmate has confessed to other crimes in prison or has taken responsibility for his crimes. To the extent that these questions implicate legitimate public policy concerns, disclosure of these records to you does not seem to be a meaningful way to address those concerns. We conclude that those interests are clearly outweighed by the public interest in keeping this information confidential.

Therefore, we conclude that recordings of the inmate's telephone calls are exempt from disclosure under ORS 192.355(5), and we respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

FMB:pjn/DM10031129
c via email only: Michelle Dodson, ODOC