ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDERICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-6002

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SENT VIA E-MAIL ONLY: samantha.sondag@stoel.com
NBudnick@PortlandTribune.com
kevans@osp.oregon.gov

Re: Petitions for Public Records Disclosure Order
Oregon State Medical Examiner's Office
DOJ File Nos. 257001-GA0116-21 and -GA0117-21

Dear Ms. Sondag, Mr. Budnick and Ms. Evans:

This letter is the Attorney General's order in response to petitions filed under the Oregon Public Records Law, ORS 192.311 to 192.431, by Ms. Sondag and Mr. Budnick on behalf of *The Oregonian* and the *Portland Tribune* ("*The Tribune*"), respectively.[1] Together, their petitions ask the Attorney General to order the Oregon State Medical Examiner's Office ("ME") to provide the names, addresses, races/ethnicities, and dates of death for individuals who died from hyperthermia (elevated body temperature) during the heat wave that struck Oregon in late June. For the reasons that follow, we grant the petitions subject to the conditions described below.

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.[2] The law is a disclosure law, and exemptions from disclosure must be express. Even express exemptions are to be narrowly construed, meaning that "if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails."[3] 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.[4] The agency carries the burden to sustain any such denial.[5]

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[1] We thank Ms. Sondag and Mr. Budnick for agreeing to an extension of time in which to respond to their petitions.
[2] ORS 192.314(1).
[3] *Colby v. Gunson*, 224 Or App 666, 676 (2008).
[4] ORS 192.411(1).
[5] *Id.*

a. Background.

From June 25 to June 30, 2021, a heat wave struck Oregon that brought three consecutive days of temperatures between 106 and 117 degrees to multiple counties. According to the Office of Emergency Management as of July 26, 2021, 83 Oregonians lost their lives to hyperthermia during the extreme heat.[6] On June 30 and July 1, 2021, *The Oregonian* requested the ME disclose the names, races/ethnicities and addresses of individuals whose deaths were linked to the heat wave. *The Oregonian's* request characterized the heat wave as a major public health crisis and asserted that the disclosure of this data will help inform the public about the circumstances of the deaths and whether the government did enough to address the crisis. *The Tribune* requested similar information from the ME on July 13, 2021, but later limited the scope of its request to the decedents' names, addresses and dates of deaths.

The ME denied *The Oregonian's* request on July 1, 2021, and denied *The Tribune's* request on July 19, 2021. In denying the requests, the ME relied upon ORS 192.345(36), which makes "[a] medical examiner's report, autopsy report or laboratory test ordered by a medical examiner ***" conditionally exempt unless the public interest requires disclosure in the particular instance. The ME acknowledged the heightened public interest in the hyperthermia deaths generally and noted that it had publicly disclosed a considerable amount of de-identified data. However, after weighing the public interests in nondisclosure against the public interests in disclosure, the ME explained its determination that the public interest did not require the disclosure of the decedents' names, addresses, races/ethnicities, or dates of death in this instance.

b. Application of ORS 192.345(36) to the requested data.

As a threshold issue, petitioners question whether the information they have requested qualifies as part of a "medical examiner's report" report as that term is used in ORS 192.345(36). The ME informs us that the data at issue is maintained only in its "Medical Examiner Reporting" (MER) database, which is an electronic repository for ME reports submitted by district MEs and reports completed by the state ME. In a prior order addressing the MER database, we concluded that information in the MER system is a "medical examiner's report" within the meaning of ORS 192.345(36) and is thereby conditionally exempt from disclosure.[7] Consistent with our prior analysis, we conclude that the information petitioners seek falls within the scope of the exemption. It is therefore exempt from disclosure unless the public interest requires disclosure in this particular instance.

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[6] Office of Emergency Management, *Initial After-Action Review (AAR) of the June 2021 Excessive Heat Event* (Jul 27, 2021), available at: https://www.oregon.gov/oem/Documents/2021_June_Excessive_Heat_Event_AAR.pdf (accessed Jul 28, 2021).
[7] *See* Public Records Order, Jul 1, 2015, Brosseau ("*PRO Brosseau*").

c. The public interest balancing test.

To determine whether the public interest requires disclosure in this instance, we balance the public's interest in disclosure against the public's interest in nondisclosure, with the presumption in favor of disclosure.[8] The "public interest" in disclosure is the interest that the public has in knowing how public business is conducted and what state officials are doing on the job.[9] This includes the public's interest in knowing how public bodies are administering particular programs, such as those relating to matters of public health and safety. We have found the following factors to be relevant when balancing the public's interests: the importance of the particular governmental activity at issue; how high-profile the matter is; whether disclosure would impede government functions; whether disclosure would help the public better monitor public business; and the effect of disclosure on any privacy interests.[10]

d. Arguments for and against disclosure in this instance.

We begin by noting that we have long recognized a strong public interest in the nondisclosure of ME reports generally.[11] ME reports typically contain medical details that are routinely protected from public disclosure, such as the details of autopsy reports, toxicology results, mental health records and medical records.[12] The ME has consistently asserted that without limitations on the disclosure of such intimate medical information, it risks losing access to information that it needs to perform its core function. We have also recognized the strong public interest in obtaining the cooperation of family members on matters such as authorizing autopsies and providing relevant information about the decedent. If ME reports are broadly disclosed to the public, it may become more difficult for the ME to obtain such cooperation from families in the future.[13]

Notwithstanding the strong public interest in the nondisclosure of ME reports generally, petitioners assert that the public interest requires disclosure of limited information from those reports in this instance. First, they note that the heat wave and associated deaths were unprecedented and resulted in substantial media coverage at the local, state, and national levels. Given the high number of fatalities and the association between the heat wave and ongoing global climate change, petitioners characterize the deaths as a public health crisis of substantial and continued public interest. Petitioners also observe that the Governor has described the heat wave as a harbinger of things to come and has acknowledged the state's central role in protecting the health of Oregonians – particularly those in historically underserved communities – against

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[8] *See American Civil Liberties Union v. City of Eugene*, 360 Or 269, 290 (2016).
[9] *See In Defense of Animals v. OHSU*, 199 Or App 160, 175-76 (2005) (citing *Jensen v. Schiffman*, 24 Or App 11, 17 (1976)).
[10] *See Attorney General's Public Records and Meetings Manual* at 33 (2019) ("*Manual*") (citations omitted).
[11] *See* Public Records Order, Aug 15, 2019, Bial; Public Records Order, Jun 11, 2019, Ryan; and *PRO Brosseau*.
[12] *See, e.g.,* ORS 192.553-.581 (exempting protected health information); ORS 146.100(7) (prohibiting 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).
[13] *See PRO Brosseau* at 7.

extreme weather events in the future.[14] Within this context, they argue, disclosing the requested data will help inform the public about the impact of this event on various communities; enable the public to fact check and assess the reported preparedness and responsiveness of public bodies before, during and after the event; and inform public dialogue about the policies and allocation of public resources necessary to prepare for future extreme weather events.

Finally, petitioners assert that the facts presented here are substantially similar to those considered by us in *PRO Brosseau*, a matter in which we considered a request for similar data in the MER database. In that order, we concluded that the public interest required the ME to disclose the name, month and year of birth, date of death and cause of death for each person whose death was determined to be a homicide.[15] We found that disclosing such data would not significantly interfere with the public's interest in nondisclosure, particularly since the ME often releases such data on a case-by-case basis. Moreover, we noted, the petitioner articulated a substantial public interest that would be served by the disclosure of the data; i.e., the nexus between homicides and the fields of public health, public safety, and criminal justice – fields in which the public has a strong interest in obtaining reliable data in order to ensure the proper and adequate investment of public resources.[16] Petitioners argue that the public interest in disclosure is even greater in this instance because the information requested relates to a climate-driven mass casualty event. And because the data they seek is similar to what we considered in *PRO Brosseau*, they argue that disclosure will not substantially interfere with the public's interests in nondisclosure.

The ME frames the issue as whether the public interest requires the disclosure of the personal health information of all of the individuals who died from hyperthermia. The ME contends that the petitioners have failed to demonstrate that disclosing such personal health information will enhance public health and safety, substantially contribute to the public's understanding of how public business is conducted, or otherwise meaningfully advance any of the public interests they have identified. That said, the ME does acknowledge the substantial public interest in this event and recognizes that the public interest requires the disclosure of some information about the hyperthermia deaths. But, the ME asserts, any such disclosure must account for the privacy and security concerns raised by some of the decedents' families.

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[14] *See, e.g.,* Press Release, *Governor Kate Brown Issues Statement on office of Emergency Management Extreme Heat After Action Report* (Jul 28, 2021), available at: https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=64170 (accessed Jul 28, 2021) ("What we learned from June's extreme heat wave is that we all must do more at every level—state, county, local, and individually—to prepare for extreme weather events."); Press Release, State of Oregon Newsroom, *Governor Kate Brown Urges Oregonians to be Disaster Prepared by Signing Up for Emergency Alerts through the OR-Alert Notification System* (Jul 26, 2021), available at: https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=64160 (accessed Jul 28, 2021) ("Between extreme weather, wildfires, and the pandemic, it became clear that our state needed a streamlined and customizable way to enable emergency managers at the local, county, Tribal, and state level to communicate with the populations they serve across the state and at a moment's notice"); and Press Release, State of Oregon Newsroom, *Governor Kate Brown Directs Oregon OSHA to Enact Emergency Rules to Protect Workers from High and Extreme Heat* (Jul 6, 2021), available at: https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=64091 (accessed Jul 28, 2021) ("I am concerned that our recent record-breaking heat wave in the Willamette Valley is a harbinger of what's to come. Even with the immense resources directed to preparing communities for the excessive heat, it is critical that we need to be better prepared, flexible, and resilient.").

[15] *PRO Brosseau* at 7-8.

[16] *Id*.

Specifically, the ME informs us that some family members have objected to the release of this information for reasons including respect for their privacy during a period of grief, fears of being judged on social media, concerns about identity theft, and concerns about the security of unoccupied residences. The ME explained that to balance these interests, it has released some de-identified information, including the decedents' race, zip code, county of residence, sex, and age. The ME also notes that Multnomah County, which had at least 54 confirmed hyperthermia deaths, has disclosed:

> [D]etailed, aggregate, and de-identified information about decedents, including: (1) ages; (2) races; (3) sexes; (4) housing type (e.g., single family, multi-family, mobile home, RV, or automobile); (5) the types of cooling systems at issue (i.e., fans or A/C); (6) dates of deaths; (7) distribution of death in buildings owned by Home Forward and Central City Concern; and (8) the geographical distribution, including the 25 different zip codes where the deaths occurred.[17]

The ME argues that these disclosures strike the balance the Legislative Assembly intended in adopting ORS 192.345(36). Regarding the application of *PRO Brosseau* in this instance, the ME counters that our prior order is distinguishable because it involved the disclosure of information specific to homicides, which is primarily a law enforcement matter about which the names, causes and manners of death are regularly released to the public.

Petitioners argue that the utility of the de-identified data released by the ME is hampered by their inability to verify it or use it to obtain other salient facts. In other words, they contend, the disclosure of de-identified data selected by the ME is no substitute for the records themselves and in no way diminishes the substantial public interest in those records. Petitioners also emphasize that they only seek a limited subset of demographic data that will not require the ME to disclose any records containing personal health information or sensitive medical information. They also argue that any privacy interests in an individual's name, address, and race/ethnicity are outweighed by the fact that such information is almost always a matter of public record. With specific regard to the decedents' addresses, the petitioners explain:

> The Oregonian's request for decedents' addresses rather than locations of death *** was purposeful. The public interest is in understanding the circumstances that gave rise to the hyperthermia—and the information released to date indicates this primarily occurred at home—not the medical facilities where individuals ultimately perished. This information will facilitate investigation into the specific temperatures where hyperthermia occurred (temperatures can vary by 10 to 20 degrees depending on the presence or absence of trees and pavement), the efficacy of the placement of the cooling centers, and the age and type of buildings where deaths/fatal hyperthermia occurred, among other things.

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[17] ME Response to Petitions (Jul 23, 2021) (citing *Preliminary Review on Excessive Heat Deaths in Multnomah County June 2021* (Jul 13, 2021)), available at: https://www.multco.us/preliminary-review-excessive-heat-deaths-multnomah-county-june-2021 (accessed Jul 28, 2021).

e. Discussion and Conclusions.

On balance, we conclude that the public interest requires the disclosure of the limited data that petitioners seek. The heat wave and associated hyperthermia deaths are unquestionably high-profile matters that implicate a number of important governmental policies and activities. Conversely, we have not been able to identify any public interests in nondisclosure in this instance that are not also present in every death investigation. In other words, the strong public interest in the nondisclosure of ME reports generally does not appear to be any stronger here.[18] And notwithstanding the ME's assertion, releasing the data will not entail the disclosure of records that contain personal health information or sensitive medical information. Although the combination of this data with other publicly available information will reveal the cause of death for particular individuals, we do not believe this truism strengthens the argument for withholding the fact that the ME investigated a particular person's death under these circumstances. Moreover, given the unprecedented nature of the heat wave, we do not believe that disclosure in this instance will substantially interfere with the general interests in nondisclosure. For instance, we think it is unlikely that the disclosure of this limited demographic information will have any greater chilling effect on future cooperation by relatives than in homicide cases, where similar information is often disclosed by the ME.[19]

More importantly, we find that the petitioners have articulated substantial public interests that will be served by the disclosure of this information. As we concluded in *PRO Brosseau*:

> The public has a strong interest in proper and adequate investment of public resources into the fields of public health, public safety, and criminal justice. Reliable data is a cornerstone of policy development, which in turn drives the appropriate allocation of public resources. For those reasons, we conclude that the public interest requires the disclosure * * * notwithstanding the general exemption for medical examiner reports * * * .[20]

We find that the public health and safety interests implicated in this case are at least as great, and we conclude that disclosing the requested data will advance those interests. Disclosure will help inform the public about the impact of this historic event on affected communities, help the public assess the government's preparedness and responsiveness, and facilitate the development of appropriate public policies that anticipate future extreme climate events. For these reasons, and given the presumption favoring disclosure, we conclude that the public interest requires disclosure in this instance.

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[18] As to identity theft and other security concerns, we observe that petitioners represent major news organizations. We also emphasize that this order is limited to the circumstances presented here. We express no opinion about public interest balancing or the application of ORS 192.345(36) in the context of other public records requests. *See Manual* at 1 (the identity or motive of the person seeking disclosure may be relevant in determining whether a record is exempt from disclosure under a conditional exemption).

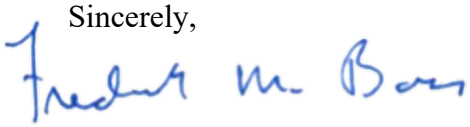
[19] *Cf. PRO Brosseau.*

[20] *Id*. at 8.

To facilitate the implementation of this order, we provide the following guidance. We understand that the ME has confirmed hyperthermia as the cause of death in at least 83 cases, but that it has several open investigations in which death by hyperthermia is suspected, but not yet confirmed. We also understand that the petitioners only seek data for cases in which hyperthermia was the confirmed cause of death, in which case information pertaining to suspected cases is not responsive to petitioners' requests. It follows that our order is limited to confirmed cases and does not extend to suspected cases. We also understand that the ME is still in the process of locating and notifying the next of kin in at least six cases. In those instances, we conclude that interests in nondisclosure – specifically, the interests of the next of kin in learning about their loved one's death through official means and not through the press or representatives of the press – outweigh the public interest in disclosure at this time.

For the foregoing reasons, we grant both petitions and order the ME to disclose the requested demographic data for individuals whose cause of death was confirmed to be hyperthermia. The ME has seven days within which to comply or announce its intention to seek judicial review.[21]

Sincerely,



FREDERICK M. BOSS
Deputy Attorney General

FMB:pjn

[21] ORS 192.411(2).