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September 27, 2021

VIA E-MAIL ONLY: dsupham58@gmail.com

Donald Scott Upham
3906 SW Altadena Ave
Portland, OR 97239

Re: Petition for Public Records Disclosure Order
Oregon Department of Correction
DOJ File No.: 291200-GA0134-21

Dear Mr. Upham:

This letter is the Attorney General's order responding to your September 17, 2021, petition under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition asks us to review the Department of Corrections' (ODOC) partial denial of a request for records. For the following reasons, 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 relates to an eight-part request submitted to ODOC in August 2021. ODOC provided you with a fee estimate to process four parts of the request, explained that it is not the custodian of records responsive to two parts of the request; and denied the remaining two parts of the request. Specifically, ODOC denied your requests for records that ODOC exchanged with the Oregon State Police (OSP) regarding its investigation into an assault upon one of your clients, and any records relating to any other investigations into the assault. In denying those parts of your request, ODOC relied upon ORS 192.345(3), which exempts from disclosure investigatory information compiled for criminal law purposes unless the public interest requires disclosure in the particular instance.

In response to your petition, we contacted Michelle Dodson, ODOC Records Officer. She explained that ODOC provided all of its investigative records regarding the assault upon your client to OSP as part of its criminal investigation. She also indicated that ODOC contacted OSP in response to your request and OSP represented that its criminal investigation is ongoing, and that the disclosure of these records would interfere with the investigation.

When considering the application of ORS 192.345(3), we have long followed guidance from the Court of Appeals that records compiled for "pending or contemplated proceedings will ordinarily remain secret because disclosure would likely interfere with enforcement proceedings." *Jensen v. Schiffman*, 24 Or App 11, 16 (1976) (internal quotations omitted); *see also* Public Records Order, Jul 8, 2016, Iboshi (investigatory information compiled for pending criminal cases is exempt because the public has a strong interest in protecting the integrity of investigations and prosecutions). However, such records are generally not exempt once the criminal process concludes, unless disclosure would result in a particular harm. *Id.*

According to Ms. Dodson, the records withheld by ODOC were compiled by OSP as part of an ongoing criminal investigation and OSP has represented that disclosure at this time could interfere with its investigation. As we have previously observed, ODOC may reasonably rely upon OSP's representation. *See* Public Records Order, Jan 17, 2020, Bial (it is appropriate for agencies in this position to rely on the guidance of the law enforcement agencies actually responsible for the relevant criminal matter). ODOC is therefore permitted to withhold the investigative records at this time unless the public interest requires disclosure in this particular instance.

In a recent order addressing a previous request by you to OSP for the same investigative records, we concluded that OSP was permitted to withhold the records under ORS 192.345(3) because the public interest did not require disclosure in that instance. *See* Public Records Order, Aug 16, 2021, Upham. As with your prior petition, your current petition does not explain why the public interest requires disclosure at this time. And we remain unaware of any heightened public interest in these investigative records requiring us to depart from the "ordinary rule" that they will remain exempt until the conclusion of any pending criminal proceedings. We therefore conclude that the public interest does not require disclosure at this time and respectfully deny your petition.[1]

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

FMB:pjn
c via e-mail only: Michelle Dodson (ODOC)

[1] As with our prior order, this order only addresses your access to the investigative records under the Public Records Law. It does not address what rights you or other parties may have to access them under rules of discovery insofar as they may be relevant to private litigation.