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October 8, 2021

Philip McClure
SID #5072942
3405 Deer Park Drive S.E.
Salem, OR 97310

Re: Petition for Public Records Disclosure Order
Board of Parole and Post-Prison Supervision
DOJ File No.: 255001-GA0143-21

Dear Mr. McClure:

This letter is the Attorney General's order responding to your petition for the disclosure of records under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received October 1, 2021, asks us to order the Board of Parole (the "Board") to disclose certain records because you believe it has failed to complete its response to you within the timeframes prescribed by the Public Records Law. For the following reasons, we respectfully dismiss your petition in part and deny it in part.

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). Agencies are obligated to respond to records requests "as soon as practicable and without unreasonable delay." ORS 192.329(1). An agency that is unable to complete its response within fifteen business days of receiving a written request is required to provide the requester with a reasonable estimated completion date. ORS 192.329(5). A requester may petition the Attorney General if they believe an agency has failed to comply with the processing timelines and other provisions contained in ORS 192.329. ORS 192.407(1). Also, 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 your request for six documents prepared or used by a contract psychologist to make assessments and recommendations to the Board on whether you meet certain criteria under the Sexually Violent Dangerous Offender law. *See* ORS 144.635. The Board's acknowledgment of your request, dated September 2, 2021, informed you that it was uncertain whether it was the custodian of the requested records but that it expected to be able to

provide you with a final determination by September 7, 2021. As of the date of your petition, the Board had not completed its response to you or provided you with an estimated completion date.

We contacted Ms. Susi Hodgin, one of the Board's Operations Managers, regarding your petition. She explained that the Board originally determined that it was not the custodian of the records because the Board never used or possessed them. In light of your petition, however, the Board has determined that under the terms of its contract, the psychologist's work product – which includes the records you have requested – is the exclusive property of the Board and must be provided to the Board upon request. Accordingly, the Board now acknowledges that it is the custodian of the records you seek. Ms. Hodgin also informed us that the Board will disclose the first two records today. We therefore dismiss your petition with respect to those records as moot.

Regarding the four remaining records, the Board now asserts they are exempt from disclosure under ORS 192.355(5). That provision expressly exempts:

> Information or records of the Department of Corrections, including the State Board of Parole and Post-Prison Supervision, 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.

Id. According to the Board, the remaining records consist of psychological diagnostic tools, notes and assessments prepared by the contract psychologist to make her recommendation to the Board. Ms. Hodgin explained the Board's position that publicly disclosing such records could interfere with the rehabilitation of offenders and substantially prejudice the Board in carrying out its duty to identify and rehabilitate sexually violent dangerous offenders. Specifically, she described how contract psychologists use these assessment tools to determine the potential risk that an offender presents. The Board then uses the psychologists' findings to determine appropriate supervision levels and conditions to both help rehabilitate offenders and to protect the safety and security of the general public. She explained that the disclosure of such assessments could enable offenders to manipulate evaluation scores, which could result in less candor during evaluations and less accurate assessments. She also explained that disclosing such assessments could have chilling effect upon the candor of the evaluating psychologist due to the risk of retaliation. According to Ms. Hodgin, these potential consequences of disclosure may jeopardize public safety and interfere with offender rehabilitation.

In *Turner v. Reed*, 22 Or App 177 (1975), the Court of Appeals considered a former inmate's request for Board records that included psychological and psychiatric assessments. The Court held that, in general, the disclosure of such assessments would substantially prejudice the Board in carrying out its functions. *Id*. at 189. The Court also held that the public interest in the confidentiality of such records clearly outweighs the public's interest in their disclosure. Specifically, the Court observed that the public interest in ensuring candor by offenders and evaluators weighed heavily in favor of nondisclosure. *Id*.; *cf*. *Flowers v. Board of Parole*, 124 Or App 331 (1994) (there may be a need for confidentiality over information submitted to

the Board, otherwise, the Board may be deprived of information critical to its decision making because of the risk of reprisal by inmates).

In prior orders considering the application of ORS 192.355(5)[1] to such assessments prepared for the Board, we have consistently followed the Court's reasoning and concluded that they may be withheld from disclosure. *See* Public Records Order, Dec 6, 1990, Mann; Public Records Order, Feb 20, 1990, Whaley; Public Records Order, Jan 13, 1987, McClure; Public Records Order, Apr 21, 1986, McClure; and Public Records Order, Jan 29, 1982, Francis. As your petition does not provide us with a basis for departing from this precedent, we conclude that the Board is permitted to withhold the remaining records. We therefore respectfully deny the remainder of your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

FMB:pjn
c via e-mail only: Susi Hodgin, Board of Parole

[1] Including former versions of the statute – ORS 192.500(2)(d) (1975), ORS 192.502(4) (1987), and ORS 192.502(5) (1991).