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August 19, 2022

VIA E-MAIL ONLY: jonathanrbunn@gmail.com

Jonathan Bunn
249 NE Liberty St., Ste B20
Salem, OR 97301

Re: Petition for Public Records Disclosure Order
Oregon State Police
DOJ File No. 257001-GA0068-22

Dear Mr. Bunn:

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 State Police (OSP) to disclose all records and reports – including any audio and video recordings, records of arrest, and any drug or alcohol test results – relating to a July 6, 2022, vehicle accident allegedly caused by an impaired driver (the "driver"). For the reasons discussed below, we respectfully dismiss your petition in part and deny your petition 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). 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 explains that you need these records to assist a client who has a claim against the driver for personal injuries and other damages. We understand that OSP denied your request under ORS 192.345(3) because the records you seek have been referred to the Marion County District Attorney for possible criminal proceedings against the driver. ORS 192.345(3) conditionally exempts "[i]nvestigatory information compiled for criminal law purposes," unless the public interest requires disclosure in the particular instance. However, that provision also provides that "[t]he record of an arrest * * * *shall* be disclosed unless and only for so long as

there is a clear need to delay disclosure in the course of a specific investigation * * *." *Id.*[1] (Emphasis added.)

In response to your petition, we contacted Holly Bolton, OSP Legal Compliance Specialist. She informed us that the incident report prepared for this accident contains most of the information that would constitute a "record of an arrest" within the meaning of ORS 192.345(3). She also explained that OSP has determined that this information is not exempt and therefore has agreed to process your request as it pertains to the incident report, subject to the receipt of any processing fees and the redaction of any information OSP concludes is exempt from disclosure. *See* ORS 192.324 (agencies may establish fees reasonably calculated to reimburse the actual cost of making public records available), and ORS 192.338 (duty to separate exempt and nonexempt material). Because OSP has agreed to process your request with respect to the incident report, we respectfully dismiss that aspect of your petition as moot. If you disagree with any redactions to that report, you may petition this office for review.

As for the remaining materials you requested, Ms. Bolton explained OSP's position that those materials are currently exempt under ORS 192.345(3) because criminal proceedings are being contemplated in this case. Ms. Bolton also explained OSP's position that your interest in private litigation does not meet the public interest threshold and that the public interest favors nondisclosure in this instance because disclosure could have a negative impact on the anticipated criminal proceedings.

When evaluating the application of ORS 192.345(3), the Court of Appeals has explained that "investigations connected with 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). However, such records are only temporarily exempt while the criminal justice process continues. *Id.* We have long followed the court's guidance in public records orders examining the application of

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[1] With respect to a "record of an arrest or the report of a crime," ORS 192.345(3) provides, in relevant part:

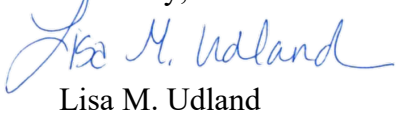
> The record of an arrest or the report of a crime shall be disclosed unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim. Nothing in this subsection shall limit any right constitutionally guaranteed, or granted by statute, to disclosure or discovery in criminal cases. For purposes of this subsection, the record of an arrest or the report of a crime includes, but is not limited to:
>
> (a) The arrested person's name, age, residence, employment, marital status and similar biographical information;
>
> (b) The offense with which the arrested person is charged;
>
> (c) The conditions of release pursuant to ORS 135.230 to 135.290;
>
> (d) The identity of and biographical information concerning both complaining party and victim;
>
> (e) The identity of the investigating and arresting agency and the length of the investigation;
>
> (f) The circumstances of arrest, including time, place, resistance, pursuit and weapons used; and
>
> (g) Such information as may be necessary to enlist public assistance in apprehending fugitives from justice.

ORS 192.345(3). *See, e.g.,* Public Records Order, Feb 26, 2019, Hasenstein (strong public interest in delaying disclosure until conclusion of criminal proceedings outweighs public interest in immediate disclosure); Public Records Order, Jul 8, 2016, Iboshi (investigatory information in pending criminal cases is exempt because the public has a strong interest in protecting the integrity of investigations and prosecutions); and Public Records Order, Jan 28, 2016, O'Brien (once criminal proceedings are concluded, investigatory information remains exempt only if disclosure would result in particular harm).

In light of your petition, OSP confirmed that the Marion County District Attorney is contemplating criminal proceedings against the driver for matters documented in the materials you seek. We therefore conclude that OSP is permitted to withhold those materials under ORS 192.345(3) unless the public interest requires disclosure in this instance. Your petition does not explain why the public interest requires disclosure in this case; rather, you indicate that you need these materials for purposes of a civil claim by your client against the driver. As we are not aware of any heightened interest in this accident that would require us to depart from the ordinary rule that such materials remain exempt until the conclusion of criminal proceedings, we conclude that the public interest does not require immediate disclosure in this instance.

For the reasons discussed above, we conclude that OSP has sustained its burden of denying your request for the remaining materials under ORS 192.345(3), but emphasize that they are only temporarily exempt.[2] We therefore respectfully deny the remainder of your petition.

Sincerely,



Lisa M. Udland
Deputy Attorney General

ACF:pjn
c via e-mail only: Holly Bolton (OSP)

[2] We also emphasize that this order only addresses your right to obtain these records under the Public Records Law. It does not address what rights you or other parties may have to access them under rules of civil discovery insofar as they may be relevant to private litigation.