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October 11, 2022

**VIA E-MAIL ONLY:** steve@Shermlaw.com

Steve Elzinga
Sherman Sherman Johnnie & Hoyt, LLP
693 Chemeketa St NE
Salem, OR 97301

Re: Petition for Public Records Disclosure Order
*Oregon Secretary of State*
DOJ File No.: 165200-GA0087-22

Dear Mr. Elzinga:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition asks the Attorney General to direct the Elections Division (the "Division") of the Office of the Secretary of State to provide all candidate signature sheets "filed regarding the nomination of Elizabeth (Betsy) Johnson for Governor." Your petition explains that although the Division has provided you most of the responsive records, it withheld 74 signature sheets claiming that they are exempt from disclosure due to an ongoing investigation.

Specifically, the Elections Division has indicated that it is investigating possible violations of law by gatherers of the withheld signature sheets. It is not investigating the Johnson campaign. As of this time it has not referred any matters related to signature gatherers to our office for potential prosecution. And the withheld sheets were not counted as part of the Elections Division determination that Johnson qualified for the ballot.

Your petition appeals the Division's withholding of those 74 signature sheets. 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 its actions. ORS 192.411(1).

In response to your petition, we contacted Assistant Attorney General Josh Nasbe, the Secretary of State's DOJ-assigned contact counsel. He explained the Division's position that the withheld signature sheets are currently exempt from disclosure under ORS 192.345(3). That provision conditionally exempts "[i]nvestigatory information compiled for criminal law purposes," unless the public interest requires disclosure in the particular instance. *Id*. He explained that during its statutorily required review of the candidate signature sheets filed by the Johnson campaign, the Division identified potential violations of the election laws by signature gatherers that required further investigation and could warrant referral to the Attorney General for criminal prosecution. *See* ORS 246.345 (requiring the Secretary to investigate suspected violations of election laws and to refer alleged violations subject to criminal penalties to the Attorney General). He also indicated that the Division does not believe the public interest requires disclosure at this time because it is still conducting its internal investigation, it has yet to determine whether any matters warrant referral to the Attorney General, and because disclosure at this time could interfere with its ongoing investigation.

In support of the Division's position, Mr. Nasbe cited a prior order from this office in which we explained that:

> [O]ne of the central interests typically served [by the criminal investigatory exemption exemption] is that nondisclosure prevents parties other than law enforcement from contacting witnesses, handling evidence, and otherwise conducting themselves in a manner that would potentially impede the ability of law enforcement to obtain reliable information.

Public Records Order, Nov 3, 2010, Mills and Luisi. According to Mr. Nasbe, similar interests favor nondisclosure in this instance. For example, he explained, disclosing the specific names and signatures that are being examined would likely tip off the subjects of the investigation. And, he argued, it would be inappropriate to publicly reveal – prior to any formal determination that a criminal offense was committed – the identities of several hundred individuals who are likely unaware that they may be potential victims or witnesses. He argued that, considering the upcoming election and the political environment surrounding it, if the suspect petitions are disclosed, it is reasonable to expect that one or more parties would attempt to contact these individuals which could impede the investigation. Finally, Mr. Nasbe emphasized that the signature sheets at issue represent less than one percent of the signature sheets filed by Johnson's campaign; that they were not considered by the Division in determining whether Johnson qualified for the ballot; that the Johnson campaign is not the subject of Division's investigation; and that there are no indications of wrongdoing by the Johnson campaign.

Your petition argues that ORS 192.345(3) does not apply to the withheld signature sheets because they were initially obtained by the Division as part of its routine elections functions and not for criminal investigatory purposes. You also assert that even if ORS 192.345(3) applies to the signature sheets, the public interest requires their disclosure in this instance. You argue that the public has a strong interest in the integrity of the petition process, the elections process, and in the transparency of the Division's operations – specifically, the Division's review of the signature sheets to determine whether Johnson qualified for the ballot. You also assert that because the existence of the investigation has already been acknowledged publicly, the public interest in continued secrecy has been reduced. Finally, you argue that because the upcoming

gubernatorial election is one of the most competitive in the nation, the public has a strong interest in evaluating the types of voters who signed petitions for the Johnson campaign before voting begins.

We have previously observed that "with respect to election law violations, any criminal investigation is initially handled by the Secretary of State." Public Records Order, Jan 21, 2011, Steves. The Secretary is the state's chief elections officer and is responsible for obtaining and maintaining uniformity in the application, operation and interpretation of the election laws. *See* ORS 246.110. If the Secretary has reason to believe that an election law or rule has been violated, the Secretary is required to "make any investigation the Secretary * * * considers necessary." ORS 260.345. And if after an investigation the Secretary believes such a violation has occurred and that the violation is subject to criminal penalties under ORS 260.993, the Secretary "immediately shall report the findings to the Attorney General and request prosecution." ORS 260.345. Thus, the Secretary has both the authority and the responsibility to conduct investigations of suspected violations for purposes of determining whether to proceed criminally or civilly. *See* ORS 260.345(4). It follows that for matters investigated by the Secretary that implicate criminal laws, the Secretary is permitted to assert that investigatory information compiled as part of those investigations is conditionally exempt from disclosure under ORS 192.345(3). This would extend to information originally created or received for ordinary business purposes, such as the signature petitions at issue here, that may be subsequently compiled during an investigation if its disclosure would interfere with the investigation. *See Attorney General's Public Records and Meetings Manual* at 59 (2019) (citations omitted).

The Division has represented that the signature petitions it withheld were compiled as part of investigation into suspected criminal violations of the elections law. We have no reason to doubt that representation. And we do not agree with your position that the exemption for "investigatory information compiled for criminal law purposes" is or should be limited to records that were specifically *created for* such a purpose. The plain meaning of the term "compiled" is broader than your argument suggests. *See, e.g., John Doe Agency v. John Doe Corp.,* 493 US 146, 153 (1989); and Public Records Order, Jan 17, 2020, Bial. Consequently, we find that the petitions are exempt unless the public interest requires their disclosure in this instance.

When evaluating the public interest in the disclosure of criminal investigatory information, 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) (emphasis added) (internal quotations omitted). However, such investigatory information is only temporarily exempt while the criminal justice process continues. *Id.* Given the strong public interest in protecting the integrity of criminal investigations, we have long followed the court's guidance in public records orders examining the application of ORS 192.345(3). *See, e.g.,* Public Records Order, Jan 17, 2020, Bial (requested information will be no less useful to the public after the conclusion of criminal proceedings); 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,

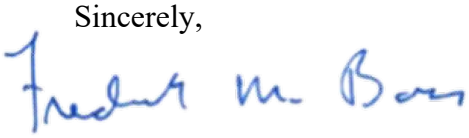
Jan 28, 2016, O'Brien (once criminal proceedings are concluded or abandoned, investigatory information remains exempt only if disclosure would result in particular harm).

Your petition asserts that the public interest in these signature petitions requires us to depart from the ordinary rule that criminal investigatory material remain exempt until the conclusion of criminal proceedings. Your arguments in favor of disclosure can generally be summarized as: the public's strong interest in ensuring the integrity of Oregon elections, which entails evaluating the Division's oversight of the election laws; and the public's heightened interest in knowing who signed petitions supporting Johnson's candidacy. Although we agree that the public interest in the upcoming gubernatorial election is indeed high, we cannot conclude that this heightened interest requires the Division to immediately disclose the 74 signature petitions. The Division informed us that it has publicly disclosed more than 99% (7,727 of 7,801) of the signature petitions filed by the Johnson campaign. These disclosures provide the public with adequate information before the election to evaluate the Division's oversight of the petition process and to evaluate the types of voters who supported Johnson's candidacy. And because the 74 withheld petitions were not considered in evaluating Johnson's eligibility for the ballot, their disclosure at this time would not meaningfully inform the public about the Division's petition review, nor provide any basis to speculate that it had not done that job correctly. We conclude that delaying the disclosure of the 74 sheets at issue will not substantially impair the public interests you have identified. That is, the 7,727 petition sheets that were disclosed provide an ample basis to assess the integrity of the Division's processes and allow an interested person to identify nearly everyone who signed a petition in support of Johnson's candidacy.

In contrast, and for the reasons discussed above, disclosure at this time could impede the Division's investigation and thereby undermine public confidence in the Secretary's oversight of the election laws. On balance, we conclude that the public interest does not require us to depart from the ordinary rule that criminal investigatory material remain exempt while the matter remains ongoing. *See Jensen,* 24 Or App at 16.

For the foregoing reasons, we conclude that the Division was permitted to withhold the 74 signature petitions from you under ORS 192.345(3) and that the public interest does not require their disclosure at this time. We therefore respectfully deny your petition.

Sincerely,



Frederick M. Boss
Acting Deputy Attorney General

ACF/pjn
c via e-mail only: P.K. Runkles-Pearson (SOS)
Josh Nasbe (DOJ)