ELLEN F. ROSENBLUM
ATTORNEY GENERAL

LISA M. UDLAND
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

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

May 9, 2023

VIA E-MAIL ONLY: carlpost@lawofficeofdanielsnyder.com

Carl Post
Law Offices of Daniel Snyder
1000 SW Broadway, Ste 2400
Portland, OR 97205

Re: Petition for Public Records Fee Waiver and Disclosure Order
Department of Corrections
DOJ File No.: 291200-GA0047-23

Dear Mr. Post:

This letter is the Attorney General's response to your petition, on behalf of a client's estate, for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received May 2, 2023, stems from a February 2023 request to the Department of Corrections (DOC) for fifteen categories of records relating to the death of your client while in DOC's custody. Your petition asks the Attorney General to find that DOC has improperly denied parts of your request by withholding nonexempt records. Your petition also asks the Attorney General to review the fee estimate DOC provided to you for processing certain parts of your request. Finally, your petition asserts that DOC has failed to respond within the required timeframes and has acted with bad faith and undue delay. You therefore ask the Attorney General to order DOC to disclose all nonexempt records within seven days, to pay a $200 penalty and to waive all processing fees. For the reasons that follow, we respectfully deny your petition.

a. Background.

Your petition stems from a broad request for:

1. All videos of your client since December 1, 2022;
2. All audio recordings of your client since December 1, 2022;

3. All documents concerning your client's death or cause of death, reasons for being placed in a dry cell, need for medical care, reasons why medical care was not provided, or otherwise relating to the circumstances of his death and what was done or not done to prevent it;

4. All communications concerning your client's death or cause of death, reasons for being placed in a dry cell, need for medical care, reasons why medical care was not provided, or otherwise relating to the circumstances of his death and what was done or not done to prevent it;

5. All documents concerning the reason why your client was placed in a dry cell;

6. All policies and procedures relating to placing inmates in a dry cell;

7. The Dry Cell Status Checklist and any logs or other documents concerning your client's time in the dry cell;

8. Housing records;

9. Unit log books for any unit that your client was housed in or transferred to since December 1, 2022;

10. All electronically stored information concerning your client or the terms or conditions of his incarceration from December 1, 2022 through January 9, 2023, including, but not limited to, information stored in AS400, Cronos, the Offender Information System, and the Post Information Log;

11. All documents concerning the reasons why your client was transferred to Three Rivers Correctional Institution;

12. All Adult in Custody communication forms or kytes;

13. All grievances;

14. All documents concerning any request for protection or transfer to a new unit or institution;

15. Any other documents concerning your client since January 1, 2023.

You initially requested these records on February 3, 2023. DOC denied your request on March 29, 2023, after initially determining that all of the requested records are exempt from disclosure under ORS 192.345(3) (investigatory information compiled for criminal law purposes) due to an ongoing criminal investigation into your client's death.

You appealed DOC's denial under ORS 192.411(1) in a petition filed with us on March 30, 2023. In response to that petition, DOC withdrew its initial claim that all of the requested records were exempt under 192.345(3), and agreed to process your request subject to your payment of any processing fees and the redaction of any information DOC may conclude is exempt from disclosure. Because DOC withdrew its initial denial of your records request, we dismissed your original petition. *See* Public Records Order, Apr 11, 2023, Post (the "first order").

On April 13, 2023, you filed a second petition asserting that DOC failed to provide the response required by ORS 192.329 within the prescribed timeframe. You also asserted that DOC's initial denial was issued "in bad faith and with undue delay by citing erroneous exemptions to [your] request in order to prevent disclosure of documents that [you] are entitled to receive." Your second petition asked us to order DOC to disclose all nonexempt records within seven days, to pay a penalty of $200, and to waive all processing fees associated with your request. We denied your second petition because we could not conclude that DOC had failed to provide you the response required by ORS 192.329 within the prescribed timeframe or that DOC had acted in bad faith for the purpose of unduly delaying the disclosure of nonexempt records. *See* Public Records Order, Apr 20, 2023, Post (the "second order"). On April 25, 2023, you instituted civil proceedings against DOC in the Circuit Court for Marion County seeking the same relief requested from this office in your second petition.

On April 27, 2023, DOC provided its revised response to your original request, which is the subject of your current petition. DOC denied your request for most of the records you seek after determining that they are exempt from disclosure under ORS 192.345(3) (investigatory information compiled for criminal law purposes), ORS 192.355(5) (certain Corrections records), and ORS 192.355(2)(b) (images of a dead body). In its response to item six of your request, DOC provided you a link to DOC's policy on dry cells. DOC also provided you with a fee estimate of $8,455.90 for the approximately 170 hours that DOC estimates it will take to process parts eight, nine, ten, thirteen, and fifteen of your request.

Your new petition, which we received May 2, 2023, asserts that the exemptions cited by DOC to deny the majority of your request either do not apply, were applied too broadly, or that the public interest requires the disclosure of the requested information. Your petition also states that based upon your own research, you believe DOC's response to the sixth part of your request is incomplete. Next, your petition asks us to review the amount of DOC's fee estimate, which you characterize as excessive. Finally, your petition expresses your continued belief that DOC has failed to provide a timely response and has acted in bad faith and with undue delay. Pursuant to ORS 192.407(3), you therefore ask the Attorney General to order DOC to disclose all nonexempt records within 7 days, to pay a $200 penalty and to waive all processing fees.

b. The Public Records Law.

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*.

Agencies are obligated to respond to records requests "as soon as practicable and without unreasonable delay." ORS 192.329(1). A requester may petition the Attorney General if they believe an agency has failed to comply with the processing timelines or other provisions contained in ORS 192.329. ORS 192.407(1). If the Attorney General grants a petition filed under ORS 192.407 and also finds that the agency responded with undue delay, she may order

the agency to pay a penalty of $200 and to waive or reduce its processing fees. ORS 192.407(3). The agency carries the burden to sustain its actions. ORS 192.411(1).

Agencies may also establish fees reasonably calculated to recover actual costs in making public records available. ORS 192.324(4). If an agency informs a requester of a fee, its obligation to process a request is suspended until the fee has been paid or waived. *See* ORS 192.329(3)(a).

c. DOC's partially incomplete response.

We begin by addressing your claim that DOC did not provide a complete response to your request for all policies and procedures relating to the placement of inmates in dry cells. We contacted Mackenzie Kath, Legal Information Officer in DOC's Office of the Inspector General, regarding your petition. She explained to us that DOC's rules and policies are already publicly available on its website at https://www.oregon.gov/doc/rules-and-policies/Pages/policies.aspx. *See* ORS 192.329(2)(a) (agency's response to a request is complete if it explains where the records are already publicly available). We also understand that in response to your new petition, DOC has provided you with links to additional rules on its website that reference dry cells. Ms. Kath explained DOC's position that it believes it has completed its response to this aspect of your request. Because DOC has completed its response and has not denied this part of your request, we respectfully deny this part of your petition.

d. DOC's partial denial.

DOC denied nine parts of your request claiming that those records are exempt from disclosure under ORS 192.345(3). That provision exempts from disclosure investigatory information compiled for criminal law purposes unless the public interest requires disclosure in the particular instance. ORS 192.345(3). According to Ms. Kath, all of the records that DOC withheld were compiled by law enforcement as part of its ongoing investigation into your client's death. She also informed us that after multiple discussions with the district attorney's office (the "DA's office") overseeing the investigation, the DA's office has advised DOC not to disclose the requested records to the public at this time because disclosure may interfere with the ongoing 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. Kath, the records withheld by DOC have been compiled as part of an ongoing criminal investigation and the DA's office represents that disclosure at this time could interfere with the investigation. As we have previously observed, DOC may reasonably rely

upon the representation from the DA's office. *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). DOC is therefore permitted to withhold any records compiled as part of the ongoing investigation unless the public interest requires disclosure in this particular instance. Your petition does not explain why the public interest requires disclosure at this time. And we are unaware of any heightened public interest in these 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 with respect to the records DOC withheld under ORS 192.345(3).[1]

e. DOC's fee estimate.

Your petition asserts that DOC's fee estimate is excessive because you believe, in part, that much of the work needed to process your request was already accomplished when DOC compiled the records for law enforcement. You also assert that such records are routinely provided as part of discovery in litigation and that DOC's fees do not bear any resemblance to the number of documents typically disclosed.

We begin by noting that there is no provision in the Public Records Law authorizing the Attorney General to review the reasonableness of an agency's fee estimate. *See Attorney General's Public Records and Meetings Manual* at 22 (2019). However, we have interpreted ORS 192.411(1) to permit the Attorney General to evaluate an agency's fee "where the amount of the fee in comparison to the nature of the request suggests that the true purpose of the fee is to constructively deny the request, rather than to recoup the agency's actual costs." *Id*. (citation omitted). Although your petition does not assert that the true purpose of DOC's fee estimate was to constructively deny your request, we will consider your characterization of DOC's fee as "excessive" as a request that we evaluate the true purpose of DOC's fee estimate. This evaluation typically requires the agency to explain how it calculated its fee. *Id*.

According to Ms. Kath, DOC's fee estimate was calculated to recoup the department's anticipated costs in responding to certain parts of your request and it does not encompass time already spent compiling records for law enforcement. She explained DOC's position that the fee was prepared in good faith and that the estimate of approximately 170 hours of staff time was based upon broad scope of your request, the difficulty in searching particular categories of records, and the need to review those records for exempt information. She also emphasized that the fee is only an estimate and acknowledged that DOC will refund any overpayment if the estimate later proves to have been too high.

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[1] DOC also denied your request for most of this same information under ORS 192.355(5) (certain Corrections records) and ORS 192.355(2)(b) (images of a dead body). Because we conclude that DOC is permitted to withhold these records under ORS 192.345(3), we need not evaluate the application of these additional exemptions.

We observe that DOC itemized each the five categories of records for which it prepared a fee estimate as follows:

8. Housing records - $3.40 (5 minutes)
9. Unit log books - $100 (2.5 hours)
10. All electronically stored information - $1,920 (48 hours)
13. All grievances - $30 (40 minutes)
15. Any other documents - $6,200 (120 hours)

Regarding the first four categories of records, DOC's fee estimates appear to us to be reasonably calculated in comparison to the nature and scope of each request. The fee for the final category stands out because it constitutes nearly 75% of DOC's total fee estimate. Ms. Kath explained that given the breadth of that portion of your request, DOC estimates it will take staff approximately 80 hours to sort through every possible source of responsive records within department, including shower logs, food services records, phone logs, library records, religious services records, accounting documents, business services and commissary records, voice mails, e-mails, and text messages. She also explained that DOC will need to search for notes or other records from any staff who may have interacted with your client or who may have information relating to his death. Finally, she explained that DOC estimates it will take 40 hours to review any responsive records it locates for exempt information. Given the broad and unqualified nature of the final category of records you seek, it is reasonable to anticipate that DOC will expend considerable staff time and resources to process that part of your request. Under the circumstances, we cannot conclude that the true purpose of the final portion of DOC's fee estimate was to constructively deny your request.

On this record, we find that DOC has adequately described how its fee estimate was calculated in relation to breadth of your request and the volume of records it expects to locate and review. We are satisfied that DOC's fee estimate is reasonably calculated to recover its actual costs and understand that DOC will refund the difference if the estimate later proves to have been too high. Because it appears that the fee estimate was reasonably calculated to recover DOC's actual costs, we respectfully deny that aspect of your petition asking us to find that the true purpose of the fee estimate was to constructively deny your request.

f. Timeliness and undue delay.

Your current petition continues to assert that DOC has failed to respond within the required processing timeframes and has acted in bad faith and with undue delay. *See* ORS 192.407(3). We previously addressed these claims in our second order. *See* Public Records Order, Apr 20, 2023, Post. In that instance, we denied your petition because we could not conclude that DOC had failed to comply with required processing timeframes, nor could we conclude that DOC had acted in bad faith for the purpose of unduly delaying the disclosure of nonexempt records. *Id*. To the extent your new petition asks us to reconsider those determinations, we decline to do so.

Moreover, there is nothing in the available record from which we can conclude that DOC has acted in bad faith and undue delay *subsequent* to our April 20, 2023 order. Rather, DOC has now completed its response to ten of the fifteen categories of records you seek, and it has provided you with an itemized fee estimate to process the remaining parts of your request. DOC's obligation to process the remainder of the request is currently suspended pending receipt of payment or a waiver of fees. ORS 192.329(3). Under the circumstances, we cannot conclude that DOC is currently in violation of any provision of ORS 192.329 that would support granting a petition under ORS 192.407, which is a necessary condition for ordering any of the penalties you have requested. *See* ORS 192.407(3).

g. Conclusion.

For the reasons discussed above, we respectfully deny your petition.[2] We conclude that DOC is currently permitted to withhold the records that have been compiled by law enforcement as part of an ongoing criminal investigation into the death of your client. We also find that DOC has completed its response to the sixth part of your request. Regarding DOC's fee estimate, we are unable to conclude that the true purpose for the estimate was to constructively deny your petition, and we are otherwise unable to evaluate the fee's reasonableness. Finally, we cannot find that DOC failed to respond within the prescribed timeframe, and we cannot conclude that DOC has acted in bad faith for the purpose of unduly delaying the disclosure of nonexempt records. We therefore lack the authority to order the sanctions you seek under ORS 192.407(3).

Sincerely,

Lisa M. Udland

Lisa M. Udland
Deputy Attorney General

ACF:pjn
c via e-mail only: Mackenzie Kath (DOC)

[2] As noted in our second order, we understand that you have filed a Tort Claim Notice with the Department of Administrative Services on behalf of your client's estate. We again emphasize that this order only applies to your right to access the requested information under the Public Records Law. It does not address what rights you or other parties may have to obtain these records under the rules of civil discovery insofar as they may be relevant to private litigation.