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January 17, 2020

VIA EMAIL ONLY: jbial@opb.org

Jon Bial
Oregon Public Broadcasting
7140 SW Macadam Avenue
Portland, OR 972191

Re: Petition for Public Records Disclosure Order
Oregon Department of Corrections
DOJ File No.: 291011-GA0151-19

Dear Mr. Bial:

This letter is the Attorney General's order responding to your petition, on behalf of Oregon Public Broadcasting (OPB), for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition asks the Attorney General to order the Oregon Department of Corrections (ODOC) to disclose the inmate file of former inmate Jeremy Christian. For reasons that follow, we respectfully deny your request.

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).

As background, in 2002 Christian was sentenced to 90 months in prison after pleading guilty to first-degree robbery with a firearm and second-degree kidnapping. He is currently awaiting trial in Multnomah County where he faces, among other things, two charges of first-degree murder and one charge of attempted murder stemming from a 2017 stabbing incident on a Portland MAX train. Christian's trial is scheduled to begin on January 28, 2020. The records

OPB requested consist of Christian's inmate file while incarcerated with ODOC after his 2002 conviction.

Your petition explains that ODOC denied OPB's request because the records are exempt from disclosure under ORS 192.345(3). That provision conditionally exempts "investigatory information compiled for criminal law purposes." You assert that ORS 192.345(3) does not apply in this instance because the records were not initially compiled for criminal law purposes. You also assert that even if the criminal investigatory exemption applies, the public interest requires disclosure in this instance.

We contacted Michelle Dodson, ODOC's Records Officer, regarding your petition. She explained that soon after Christian's arrest in 2017, ODOC received a subpoena from the Multnomah County District Attorney's Office ("DA's Office") for all records relating to Christian's incarceration for his 2002 conviction. The subpoena indicated the records were sought in connection with the charges now pending against Christian. Ms. Dodson noted that the subpoena was accompanied by a court order to produce the records and a protective order shielding the records provided to the DA's Office from public inspection. Ms. Dodson also informed us that in response to your records request, the DA's Office specifically requested that ODOC not disclose Christian's inmate file to you because disclosure could negatively affect the pending criminal proceedings.

After reviewing the subpoena and protective order,[1] we have no trouble concluding that the records OPB seeks were compiled by the DA's Office for criminal law purposes. Although the records were not initially created for criminal law purposes, we have long held that the criminal investigatory information exemption applies to non-law-enforcement records that were originally created for ordinary business purposes but that are subsequently compiled or gathered in the course of a criminal investigation.[2] We think the plain meaning of the word "compiled" strongly supports our longstanding interpretation. For example, Merriam Webster's Dictionary defines "Compile" to mean:

> 1: to compose out of materials from other documents * * *
> 2: to collect and edit into a volume * * *
> 3: to build up gradually * * *
> 4: to run (something, such as a program) through a compiler

The Merriam-Webster.com Dictionary, Merriam-Webster Inc., https://www.merriam-webster.com/dictionary/compile (accessed 17 January 2020). We are not persuaded that the

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[1] Although the protective order does not expressly apply to the records in ODOC's custody, the existence of the protective order suggests concerns about the public disclosure of Christian's inmate file.

[2] *Attorney General's Public Records and Meeting Manual* at 59 (2019) *citing* Public Records Order, Dec 23, 1991, Mayes; and Public Records Order, Oct 10, 1996, Reed. *See also John Doe Agency v. John Doe Corp.*, 493 US 146 (1989) (interpreting a nearly identical federal statute to extend to documents not originally created for criminal law enforcement purposes but later gathered for as part of an investigation); and Public Records Order, Oct 24, 2005, Iboshi and Williams (it is not necessary that a public record have originated as part of a criminal investigation to qualify for exemption under ORS 192.355(3)).

narrower interpretation of "compiled" you propose is plausible in this context. Criminal investigatory work will often involve the gathering of preexisting material for criminal law purposes.

When applying ORS 192.345(3), we have also long followed guidance from the Court of Appeals that records gathered 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.*; *see also* Public Records Order, Jan 28, 2016, O'Brien (once criminal proceedings are concluded, investigatory information remains exempt only if disclosure would result in a harmful consequence).

You argue that this understanding of the Court of Appeals decision in *Jensen* is incorrect. You point out that the Court of Appeals in that case actually assessed whether disclosure of the documents would implicate any of the interests that, under what the court described as a "comparable" federal exemption, would justify continuing to withhold information even after the conclusion of a matter. But in the first part of that analysis the Court of Appeals observed that "no prosecutions are contemplated" in the underlying matter. That is not the case in this instance. In any event, we are not persuaded that our understanding of *Jensen* is incorrect. The Court of Appeals described federal law favorably, noted a strong "analogy" between the state statute and the federal statute, and in the context of this favorable discussion of analogous federal law, went on to "reject the extreme positions of the parties ***." *Jensen*, 24 Or App at 16. And in fact, neither of those "extreme" positions argued that disclosure during the pendency of a criminal matter should be required; the positions were "plaintiff's claim that reports of investigations must always be disclosed once the criminal purpose had ended, and defendant's claim that such reports forever remain secret." *Id.* To drive the point home, the Court of Appeals explained in a footnote that its "conclusion is consistent with the balance of [the then-existing exemption statute] which indicates the legislature generally intended that secrecy would last only as long as there was a reason for secrecy." *Id.* at footnote 7.

According to Ms. Dodson, the DA's Office has represented that disclosure at this time could interfere with ongoing criminal proceedings and we find that ODOC is entitled to rely upon that representation in this instance. You argue that ODOC and our office must make completely independent determinations whether disclosure in this instance is likely to interfere with ongoing criminal proceedings. However, neither our office nor ODOC is as well-positioned to make such a determination as is the prosecutor's office responsible for the case. Thus, we have consistently found that in evaluating the application of ORS 192.345(3), agencies may reasonably rely upon the views of investigators and prosecutors. *See* Public Records Order, Jul 29, 2015, Budnick (if a law enforcement agency gathers records from another public body as part of a criminal investigation, that public body may rely upon the law enforcement agency's representation that public disclosure would interfere with the pending or contemplated criminal prosecution); and Public Records Order, Feb 27, 2007, Zaitz (same). We continue to believe it is

appropriate for public bodies in this position to rely on the guidance of the law enforcement agencies actually responsible for the relevant criminal matter.

Your petition provides several reasons why you believe the public interest requires disclosure in this case, including the high profile nature of the 2017 stabbing incident and pending prosecution, understanding Christian's alleged ties to white nationalism and the rise of white nationalism generally, and understanding whether Christian's previous incarceration with ODOC played a role in his radicalization. We acknowledge the substantial public interest in Christian's pending murder trial, and in the other issues you have identified. However, your petition does not explain why the public interest requires ODOC to disclose Christian's inmate file prior to the conclusion of the criminal proceedings. Instead, you argue that the law does not require you to make such a showing. As noted above, however, we understand *Jensen* to mean that "investigations connected with pending or contemplated proceedings will *ordinarily* remain secret." 24 Or App at 16 (emphasis added). Regardless of how one might couch this question, we are not persuaded that there is a public interest that requires departure from the "ordinary" rule in this instance. And we think the fact the exemption being relied on will largely expire in the relatively near future is relevant to our analysis; the public interests you have identified will not be frustrated by application of the "ordinary" rule. That is because we have no reason to conclude that this information will be less useful or interesting to OPB and the general public after the conclusion of the criminal proceedings, at which time the strong public interest in avoiding the premature disclosure of criminal investigatory information will have diminished.

Under the circumstances, we conclude the strong public interests described in *Jensen* outweighs the public interest in immediate disclosure of the records you seek. We therefore respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

FMB:pjn/DM10022918
c via email only: Michelle Dodson, ODOC