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August 15, 2019

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 State Medical Examiner's Office
DOJ File No.: 257001-GA0109-19

Dear Mr. Bial:

This letter is the Attorney General's order responding to your petition, on behalf of Oregon Public Broadcasting, 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 Medical Examiner's Office ("ME") to produce a copy of the medical examiner's report regarding the death of Otis Michael Gulley Jr. 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).

We contacted Ms. Kelsey Evans, the ME's Forensic Administrator who explained the ME's position that the report you seek is exempt from disclosure under ORS 192.345(36). Under that provision, "a medical examiner's report, autopsy report or laboratory test report ordered by a medical examiner under ORS 146.117" is conditionally exempt from disclosure "unless the public interest requires disclosure in the particular instance."

You concede that the report you seek is conditionally exempt from disclosure under ORS 192.345(36). However, you argue that the public interest requires disclosure in this instance. You note that Ms. Gulley was a homeless black transgender woman who was found hanging from a tree in a Portland park in May 2019. Although the Portland Police Bureau reported the cause of death as suicide, you cite concerns raised primarily by Ms. Gulley's family that she may have been murdered because she was homeless or because of her race or gender identity.[1] In light of these concerns, you argue that the ME's report should be disclosed because the African American, transgender and homeless communities have a strong interest in knowing whether Ms. Gulley committed suicide or was murdered. You assert that these interests are particularly acute given what you describe as the troubled relationship between Oregon law enforcement and these historically vulnerable communities. You also argue that the ME's report may contain information of interest to the general public, such as support for the family's early claims that the law enforcement investigation into Ms. Gulley's death was not thorough. Finally, you argue that nondisclosure may foster continued speculation about the cause of Ms. Gulley's death and thereby erode the public's trust in law enforcement.

According to Ms. Evans, the ME considered your arguments and concluded that the public interest does not require disclosing the ME's report in this instance. She described the ME conclusion that Ms. Gulley died by suicide and that there were no indications she was murdered. She indicated that the ME's conclusion should be sufficient to quell any concerns among Portland's vulnerable communities that Ms. Gulley was targeted because of her race, gender identity or housing status. Ms. Evans also explained that the report contains sensitive medical and mental health information that is generally protected from public disclosure. Finally, she informed us that Ms. Gulley's family – which has a right to review the ME's report under ORS 146.035(5) – has asked that it not be disclosed to the public.

To determine whether the public interest requires disclosure, we must balance the public's interest in disclosure against the public's interest in nondisclosure, with the presumption in favor of disclosure. *See American Civil Liberties Union v. City of Eugene*, 271 Or App 276 (2015). The Oregon Court of Appeals has described the public interest in disclosure as the right of the public at large to monitor how public business is conducted and how public officials are performing their jobs. *See Guard Publishing Co. v. Lane County School Dist.*, 96 Or App 463, 469 (1989); *Jensen v. Schiffman*, 24 Or App 11, 17 (1976). However, if disclosure will prejudice

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[1] *See, e.g.*, Katherine Cook, *Portland Family Fears Transgender Person Found on Rocky Butte Was Killed*, KGW 8 (Jun 13, 2019), *available at* https://www.kgw.com/article/news/crime/portland-family-fears-transgender-person-found-on-rocky-butte-was-killed/283-93015781-ebc7-4d15-955a-95a93968fdd7 (accessed Aug 13, 2019); Christen McCurdy, *Family, Police Seek Answers in Death of Black, Queer Portlander*, The Skanner News (Jun 13, 2019) *available at* https://www.theskanner.com/news/northwest/28676-family-police-seek-answers-in-death-of-black-queer-portlander (accessed Aug 13, 2019); Blair Stenvick, *Portland Police Ask Public For Information on Death of Titi Gulley*, Portland Mercury (Jun 12, 2019) *available at* https://www.portlandmercury.com/blogtown/2019/06/12/26628756/portland-police-ask-public-for-information-on-death-of-titi-gulley (accessed Aug 13, 2019); Erica Morrison, *Portland Police Open Investigation in Death of Black Transgender Woman,* Oregon Public Broadcasting (Jun 12, 2019) *available at* https://www.opb.org/news/article/ portland-police-investigation-otis-michael-gulley-jr-black-trans-woman/ (accessed Aug 13, 2019); and Blair Stenvick, *A Black, Queer, Homeless Portlander Was Found Hanging From A Tree. Police Say It's Suicide. Her Family Disagrees*, Portland Mercury (Jun 10, 2019) *available at* https://www.portlandmercury.com/blogtown/2019/06/10/ 26621949/a-black-queer-homeless-portlander-was-found-hanging-from-a-tree-police-say-its-suicide-her-family-disagrees (accessed Aug 13, 2019).

an agency or prevent it from performing its functions, that fact is relevant to the public interest in nondisclosure.

As we have previously recognized, there is strong public interest in the nondisclosure of ME reports generally. *See* Public Records Order, Jun 11, 2019, Ryan (PRO Ryan); and Public Records Order, Jul 1, 2015, Brosseau (PRO Brosseau). Such reports contain medical details that are routinely protected from public disclosure, such as the details of autopsy reports, mental health records and medical records. According to the ME, reports that contain such information are akin to medical records containing protected health information. *See* ORS 192.553-.581 (protected health information); *see also* ORS 146.100(7) (prohibiting MEs from releasing medical records without a court order), and ORS 432.350(1)(a) (unconditionally exempting vital records, including records of death, from public disclosure). The ME has consistently asserted that without safeguards on the disclosure of such intimate medical information, it risks losing access to information from health care facilities that it needs to perform its core function.

We have also recognized the strong public interest in obtaining cooperation from family members on matters such as authorizing autopsies and providing relevant information about the decedent. If ME reports are broadly disclosed to the public, it may become more difficult for the ME to obtain such cooperation from families in the future. *See* PRO Brosseau at 7. We have also observed that in the context of a suicide, the surviving family members may have privacy interests of their own. *See* Public Records Order, Dec 12, 2012, Webb (family of suicide victim may have profound interest in avoiding public disclosure of the fact that decedent was a recreational drug user) (*citing Colby v. Gunson*, 224 Or App 666, 681 (2008) (concurring in the decision, Judge Wolheim of the Court of Appeals remarked that "[w]hen I die, and if there is an autopsy, the last thing I want is for a perfect stranger to review my autopsy report"); and *National Records and Archives Administration v. Favish*, 541 US 157 (2004) (recognizing strong privacy interests for surviving family members in the context of a suicide)).

On balance, we conclude that the public interest does not require the disclosure of the ME's report in Ms. Gulley's case. We observe that the public interests you cite are premised largely upon the family's initial belief that Ms. Gulley may have been murdered. Thus Ms. Gulley's family appears to be quite sympathetic to the public interests you have asserted. And given its right to review the ME's report, the family is well-positioned to evaluate whether disclosure will meaningfully advance those interests. We therefore find it significant that the family does not want the report disclosed to the public.

We also reviewed the ME's report and could not identify any information that, if disclosed to the public, would substantially advance any of the public interests you have identified. We acknowledge that disclosure would permit the public to evaluate the quality of the ME's investigation and conclusion. But the same can be said about every ME report and your petition does not identify a basis for questioning the ME's findings in Ms. Gulley's case. Moreover, our reading of the report did not reveal anything that seems to contradict the ME's determinations. We therefore conclude that the public interest in nondisclosure, which includes respecting the privacy of Ms. Gulley and her family, outweigh the public interest in disclosure in this particular instance. And because Ms. Gulley's family has access to the report, we have no

reason to conclude that nondisclosure will fuel continued speculation about the cause of her death or otherwise erode public confidence in law enforcement.

For the reasons discussed above, we conclude that the ME's report is conditionally exempt from disclosure under ORS 192.345(36) and that the public interest does not require disclosure in this instance. We therefore respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

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c via email only: Kelsey Evans, Oregon State Medical Examiner's Office