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July 22, 1988

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State of Oregon Health Division
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Re: Public Records Disclosure Petition; Health Division, State Medical Examiner Records

Dear Messrs. Goffredi and Hirst:

This letter constitutes the Attorney General's order on the public records disclosure petition filed by Mr. Goffredi and dated July 12, 1988. On behalf of his client, Stressla Lynn Johnson, Mr. Goffredi invokes the Public Records Law, ORS 192.410 to 192.505, and seeks an opportunity to inspect records of the State Medical Examiner and Oregon State Health Division. The petition asks the Attorney General to order Health Division representatives to make the following records available for inspection under the Public Records Disclosure Law:

> " . . . death certificates, medical examiner's reports or autopsies . . . which would indicate means of death by ligature asphyxiation."

We respectfully deny the petition.

At the outset of our analysis, we note that Mr. Goffredi bases the petition upon his client's constitutional rights as a criminal defendant, as well as his client's rights under the

Public Records Law. Our function, however, on a petition for an Attorney General's order of disclosure of state agency records is to determine a statutory issue regarding the public's right of access to particular records.

The Public Records Law states that our function is " . . . to determine if [a public record] may be withheld from public inspection." ORS 192.450(1). (Emphasis added.) The right which a petitioner asserts in presenting a disclosure petition to the Attorney General is a public right, rather than a personal right. The Records Law provides: "Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.410. (Emphasis added.) As the Court of Appeals recently noted:

> " . . . . That right is part of the state's policy of open government and belongs to everyone. The statute 'creates a right of access to public records that is not dependant on the requestor's need or motivation.' Smith v. School Dist. No. 45, 63 Or App 685, 692, 666 P2d 1345, rev den, 295 Or 773 (1983)."

State ex rel Frohnmayer v. Oregon State Bar, 91 Or App 690, 694-95, ___ P2d ___ (June 22, 1988).

Thus, the right asserted by a Public Records Law petitioner who happens to be a defendant in a criminal case is not an accused's right to discovery as provided by criminal procedure laws; and the pendency of a prosecution, " . . . neither adds to nor subtracts from the Public Records proceeding. . . ." See State ex rel Frohnmayer, 91 Or App at 695 and 696 n.6. In sum, when a person files a petition for a public records disclosure order under the Public Records Law, the petitioner stands in the shoes of other members of the public, and our role is to determine whether the public -- and consequently the petitioner -- has a right of access to the records the petitioner wants to inspect.

In this case, the petitioner seeks access to three types of records maintained by the Health Division: death certificates, medical examiner reports, and autopsy reports. The Health Division lawfully denied the petitioner access to medical examiner and autopsy reports on the basis of ORS 146.035(5). That statute provides:

> "(5) Any parent, spouse, child or personal representative of the deceased, or any person who may be criminally or civilly liable for the death, or their authorized representatives respectively, may examine and obtain copies of any medical examiner's report, autopsy report or laboratory test report ordered by a medical examiner under ORS 146.117."

We previously interpreted this law as restricting public access to autopsy records, and therefore as an exemption to the public disclosure requirement of the Public Records Law by reason of ORS 192.502(8). That Records Law subsection exempts from public inspection rules those "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." (Emphasis added.) Public Records Order, Woodall (January 13, 1988) (copy enclosed); Public Records Order, Larson (May 10, 1988).

As in the Woodall order, we conclude here that because ORS 146.035(5) restricts inspection of autopsy reports, the Health Division may withhold public disclosure of such reports under the Public Records Law. We reach the same conclusion with regard to the medical examiner's reports to which ORS 146.035(5) refers. Therefore, the Health Division may withhold from petitioner's inspection, autopsy and medical examiner's reports (other than those relating to the deceased victim of his alleged crimes).

Petitioner's access to death certificates, filed by a medical examiner pursuant to ORS 146.095(2) and 432.307, similarly is controlled by a law outside the Public Records Law. A death certificate is a "vital record." ORS 432.005(16). Disclosure of such a record is severely limited by ORS 432.120(1), which provides:

> "(1) To protect the integrity of vital records, to insure their proper use and to insure the efficient and proper administration of the system of vital statistics, it shall be unlawful for any person to permit inspection of, or to disclose information contained in vital records or to copy or issue a copy of all or part of any such record except as authorized by this chapter and by rules adopted pursuant

thereto or by order of a court of competent jurisdiction. Rules adopted under this section shall provide for adequate standards of security and confidentiality of vital records."

We acknowledge that ORS 432.120 and the pertinent rule adopted thereunder, OAR 333-11-096, do authorize disclosure of vital record information for certain purposes (e.g. "research"), to certain persons; or upon a showing of a "direct and tangible interest." See ORS 432.120(2) and OAR 333-11-096(1) and (3). But it is clear that ORS 432.120 is a law that is incorporated as an exemption from the Public Records Law by ORS 192.502(8), supra. In fact, ORS 432.120 requires that appeals of denials of vital record disclosure be conducted under the judicial review provisions of the Administrative Procedure Act rather than the review procedures outlined in the Public Records Law and invoked by the petitioner in this case. ORS 432.120(3). See also OAR 333-11-096(7) (providing that vital records of death become "public records" 50 years after the date of death).

We conclude that death certificates, medical examiner reports and autopsy reports are not available to petitioner for inspection pursuant to the Public Records Law. Accordingly, the petition for an order directing the Health Division to allow public inspection of those records is denied.

Respectfully submitted,

James E. Mountain, Jr.

JAMES E. MOUNTAIN, JR.
Special Counsel to the
Attorney General

JEM:cm
Enclosure
cc: Leonard Pearlman, Assistant Attorney General
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