



John S. Foote, District Attorney for Clackamas County

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May 17, 2017

Carlos J. Calandriello
Office of Multnomah County Attorney
501 S.E. Hawthorne, Suite 500
Portland, Oregon 97214

Kyle Iboshi
KGW
1501 SW Jefferson St.
Portland, OR 97201

RE: Petition by Kyle Iboshi for Multnomah County Sheriff's Office to disclose a copy of MCSO investigation report number 11-401045.

Dear Mr. Calandriello and Mr. Iboshi,

BACKGROUND

On this public records petition, petitioner Kyle Iboshi requests that Multnomah County Sheriff's Office (MCSO) be ordered to provide MCSO file #11-401045. The petition for review was filed on April 20, 2017. On April 25, 2017, the parties were advised that we had received the petition and requested that MCSO submit the entire case file for review and submit legal argument in support of their position.¹ On April 27, 2017, MCSO filed their brief in this matter through Multnomah County Senior Assistant County Counsel Carlos Calandriello (included in that submission was the MCSO investigatory file #11-401045). Subsequently, Mr. Iboshi responded in writing on May 2, 2017.

We have reviewed the written briefings from the Office of the Multnomah County Attorney (on behalf of MCSO) and Kyle Iboshi, as well as the records at issue. The county takes the position that the records are exempt from disclosure under the provisions of ORS 195.501(3)

¹ MCSO also indicated that the Multnomah County Sheriff was not exercising his discretion under ORS 192.480 to claim an elected official exemption which would have compelled Mr. Iboshi to seek declaratory or injunctive relief in Circuit Court as opposed to the appeal before the District Attorney's Office.



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as "Criminal Investigatory Material" and ORS 192.502(2), the Personal Privacy Exemption. The county attorney asserts that this investigatory file falls within the conditional exemption for criminal investigatory material, and that disclosure of these reports would interfere with the ongoing criminal investigations and potentially jeopardize law enforcement's active case. The county also argues that the case file contains information of a personal nature that would constitute an unreasonable invasion of privacy under ORS 912.502(2). For his part, Mr. Iboshi agrees that the reports are criminal investigatory material (under ORS 192.501(3)), but argues that despite the fact that the criminal investigation is ongoing, the age of the incident indicates that there is no "clear need" to delay disclosure and that the public interest should compel disclosure. He further argues that both Sean Rea and Terri Horman have voluntarily become public figures due to their willingness to speak with the media, and that disclosure of the reports would not constitute an unreasonable invasion of privacy.

For the foregoing reasons, we agree with the county that the records are exempt from public disclosure under ORS 192.501(3) and that at this stage, the public interest does not require disclosure.

DISCUSSION

I. Public Records Exemption for Criminal Investigatory Material.

Oregon has a "strong and enduring policy that public records and governmental activities be open to the public." *Jordan v. MVD*, 308 Ore. 433, 438 (1989). Disclosure is the rule and exemptions from disclosure are to be narrowly construed in a manner that promotes simple, quick and largely uniform application. *Jordan*, 308 Ore. at 438-39. When a public body withholds public records from disclosure, that body carries the burden of sustaining that action



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on appeal. See ORS 192.450(1); *Kluge v. Oregon State Bar*, 172 Ore. App. 452, 455 (2001). This case requires an analysis regarding the parties various claims as to the breadth of the so called "criminal investigatory material" under ORS 192.501, which conditionally exempts from disclosure:

[i]nvestigatory information compiled for criminal law purposes. The record of an arrest or the report of a crime shall be disclosed unless and only so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim. Nothing in this subsection shall limit any right constitutionally guaranteed, or granted by statute to disclosure or discovery in criminal cases. For purposes of this subsection, the record of an arrest or the report of a crime includes, but is not limited to:

- (a) The arrested person's name, age, residence, employment, marital status and similar biographical information;
- (b) The offense with which the arrested person is charged;
- (c) The conditions of release pursuant to ORS 135.230 to 135.290;
- (d) The identity of and biographical information concerning both complaining party and victim;
- (e) The identity of the investigating and arresting agency and the length of the investigation;
- (f) The circumstances of arrest, including time, place, resistance, pursuit and weapons used; and
- (g) Such information as may be necessary to enlist public assistance in apprehending fugitives from justice.

This request requires a determination as to whether the requested reports at issue are conditionally exempt from disclosure, and if so, whether the public interest requires disclosure.



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A. Application of the Criminal Investigatory Material Exemption.²

Application of the criminal investigatory material exemption requires an identification and balancing of the various purposes for secrecy involved with a specific investigation and a determination of the stage of the investigation or prosecution. *See Jensen v. Schiffman*, 24 Or App 11 (1976). The criminal investigatory material exemption applies at all stages of the criminal process so long as it was gathered for purposes of a criminal investigation. *See Attorney General's Public Records Manual at 43 (2014); see also Petition of Garrettson, Att'y Gen Public Records Order (July 3, 1995)*(records exempt while district attorney is considering case for prosecution). The exemption is conditional, and was crafted to advance the public interest by preventing interference with ongoing law enforcement proceeding and investigations. *Jensen v. Schiffman*, 24 Or App at 16.

In *Jensen*, the Court of Appeals noted that that information compiled in "investigations connected with pending or contemplated prosecutions ordinarily will remain secret because disclosure would likely 'interfere with [law] enforcement proceedings.'" *Id.* (quoting 5 U.S.C. § 552(b)(7)(A), which the court found analogous to Oregon statute); *see also Att'y Gen Public Records Order, August 15, 2001, Padgett/Eller*. The governmental interest favoring nondisclosure in these situations "is the general public's interest in having persons who have violated the law successfully prosecuted." *Att'y Gen Public Records Order, August 30, 1995, Heinz*.

² We note at the outset that there is no dispute as to whether the MCSO file at issue is a criminal investigatory report. The only issue is whether conditional exemption applies, that is, whether the public interest requires disclosure.



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We have reviewed the police file, spoken with the Multnomah County District Attorney's Office, reviewed the Declaration of Multnomah County Sheriff Sergeant Keith Krafve, and taken notice of the Roseburg Police Department's refusal to provide their records pertaining to this investigation. We note that the referenced records in MCSO file 11-401045 pertain to an incident occurring in Douglas County in 1990. The case file chronicles an investigation regarding the crime of Solicitation to Commit Murder in violation of ORS 161.115. The crime of Solicitation to Commit Murder has no statute of limitations under Oregon law and "may be commenced at any time after the commission of the...solicitation to commit aggravated murder..." ORS 131.125(1).

The case at issue here contains statements of witnesses, potential suspects, references to evidence, police observations, and information regarding potential leads in regards to both the Kyron Horman disappearance investigation and the 1990 Douglas County incident. MCSO claims that the criminal investigation into the 1990 incident is ongoing and has not been closed by the Roseburg Police Department. (*Declaration of Keith Krafve, 17*). Further, MCSO states that the allegations detailed in the report were uncovered during the course of a separate MCSO criminal investigation into the disappearance of Kyron Horman, and other related allegations of criminal activity. (*Id.* at 15-6). Furthermore, the MCSO investigation into the disappearance of Kyron Horman is also ongoing, with detectives continuing to follow up on leads (*Id.* at 18). Additionally, the Multnomah County District Attorney's Office has confirmed that the grand jury has been convened on multiple occasions regarding the Kyron Horman case and MCSO has indicated that they continue to hear evidence. (*Id.* at 18). The MCSO case file number 11-401045 was generated because the allegations involved persons related to MCSO's investigation



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into the Horman disappearance and could potentially provide information of significant value to investigators and prosecutors. (*Id.* at 16).

Mr. Iboshi, in response to the assertions made by MCSO argues that it “is hard to see how potentially relevant information about Kyron Horman’s disappearance could be jeopardized by releasing police reports into a 1990 incident in Roseburg.” *Response of Kyle Iboshi*, 2. To that end, we note that were these reports only relevant to the 1990 incident, we may have been inclined to agree with petitioner, that there is no clear need to delay disclosure. The age of that incident strongly suggests that the passage of time has attenuated the need for the investigation to remain secret. However, several factors weigh against such a conclusion.

First, the investigation involves the crime of Solicitation to Commit Murder. That offense has no statute of limitations and charges can be brought at any time under Oregon law. Second, these reports contain potential evidence, witnesses, and information that is helpful for developing leads as to the investigation into the disappearance of Kyron Horman. The Kyron Horman investigation is active and ongoing and the Multnomah County District Attorney’s office continues to empanel and offer evidence before a grand jury for the Kyron Horman case, meaning *both* the criminal investigation and legal proceedings are underway.

We accept the determination of the criminal investigators that, under the circumstances, the information gathered in the reports relate to the Kyron Horman disappearance case, that the information has potentially significant value to the ongoing case and that disclosure could interfere with the investigation and could jeopardize future law enforcement proceedings. *See generally, Declaration of Keith Krafve*. We also accept the representations of the Roseburg Police Department that their investigation is ongoing. In accepting these representations, we



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again note that a grand jury is currently empaneled in the Kyron Horman case. While the grand jury process is secret, evidence contained in MCSO report 11-401045 may cover evidence and testimony which has been or will be presented to the grand jury. Disclosure of these reports could clearly interfere with that evidence and testimony before the grand jury. Furthermore, the evidence contained in MCSO report 11-401045 could be offered into evidence in a future criminal prosecution (in either a guilt or punishment phase of a criminal case) regarding the Kyron Horman disappearance. *See e.g.*, OEC 404; *State v. Williams*, 357 Or 1 (2015)(discussing the applicability of OEC 404 and the admissibility of other acts evidence in criminal cases); *see also State v. Longo*, 341 Or 580, 604 (2006) (discussing the state's burden to prove the probability of "future dangerousness" in certain capital cases). For the foregoing reasons, we conclude that at this time there does exist a clear need to delay disclosure and that the MCSO report falls within the exemption outlined in ORS 192.501(3).

b. Public Interest in Disclosure.

Criminal investigatory material is exempt "unless the public interest requires disclosure in the particular instance." ORS 192.501. We conclude that the public interest in the orderly progress of the investigation outweighs the public interest in disclosure at this time.

In so ruling, we must balance the public interest for disclosure against the public's interest in having persons who have violated the law successfully prosecuted and the need to avoid interference with criminal investigations and potential prosecutions. First, we acknowledge that the public has a considerable interest in ensuring a thorough investigation into the disappearance of minor children and crimes of violence against minors. The Kyron Horman disappearance has been covered by local, national, and even international media outlets which has included



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extensive and comprehensive coverage by KGW and Mr. Iboshi. Conversely, there is also a significant public interest in investigating disappearances of crimes against minors without interference. To that end, petitioner points out that releasing the records could help investigators. To whatever extent it may, we defer to the trained and experience police investigators on whether to utilize the public to further their investigation. In this case, to the extent that investigators in this active case surrounding Kyron Horman's disappearance believe secrecy is still needed to aid the investigation and help solve the case, we accept that conclusion. We believe that the public interest in disclosure at this point is outweighed by the competing interest in ensuring that those responsible for Kyron Horman's disappearance are brought to justice, and that delayed disclosure of the MCSO case file at this time will help fulfill that goal.

II. Personal Privacy Exemption.

Based on the foregoing ruling, whether the records are exempt from disclosure under ORS 192.502(2) is moot.

ORDER

Accordingly, it is ordered that the petition of Kyle Iboshi on behalf of KGW to disclose MCSO file 11-401045 is denied.

DATED this 17th day of May, 2017.

JOHN S. FOOTE
District Attorney

Matt Semrite, OSB #095023
Deputy District Attorney