



ROD UNDERHILL, District Attorney for Multnomah County

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March 27, 2017

Molly Harbarger
The Oregonian
1500 S.W. First Avenue, Suite 400
Portland, Oregon 97201

Bernadette Nunley
Senior Assistant County Attorney
Office of the Multnomah County Attorney
501 S.E. Hawthorne Boulevard, Suite 500
Portland, Oregon 97214

Re: Petition of Molly Harbarger, on behalf of The Oregonian, seeking a report from the Multnomah County Medical Examiner

Dear Ms. Harbarger and Ms. Nunley:

In her public records petition, filed with this office¹ on March 5, 2017, petitioner Molly Harbarger requests this office to order the Multnomah County Medical Examiner to disclose copies of the following records:

the medical examiner's report on the death of a baby on the day it was born on Jan. 9, 2017.

On January 9, 2017 emergency personnel responded to a medical incident involving a homeless woman with a newborn infant out in the extreme cold. The infant was either stillborn or died shortly after birth. First responders transported the infant to OHSU. Dr. Karen Gunson, the Multnomah County Medical Examiner, subsequently performed an autopsy to determine the cause of death.

Existing media reports on this incident indicate that there is conflicting available information about the circumstances of the baby's death. Dr. Gunson has publicly released some basic facts about the case: 1) that there was no air in the baby's lungs; 2) that there was no air in the baby's stomach; and 3) that her conclusion was the baby was stillborn.

Portland Police Bureau reports relating to the incident, which have also been publicly released, include a statement from an OHSU doctor who said that the child was "viable." Other

¹ ORS 192.460 is ambiguous as to who has the authority to resolve this petition. Dr. Karen Gunson is both the Multnomah County Medical Examiner and the Oregon State Medical Examiner. Moreover, her offices are located in Clackamas County despite being the "Multnomah County" medical examiner. Both the parties to this petition have given their written consent to this office resolving the petition, and this office has consulted with the Attorney General's Office and the Clackamas County District Attorney's Office, both of whom have likewise consented to this office handling this matter.

reporting on this story has discussed the 911 dispatch log, which includes a written statement from dispatchers that “baby is conscious and breathing okay, but has been outside this entire time.” See, Jaquiss, N. “A Baby is Dead After Being Found With His Homeless Mother at a Portland Bus Stop.” WILLAMETTE WEEK (Jan. 16, 2017) (retrieved from <http://www.wweek.com>).

Last month this office denied a public records petition seeking copies of the Portland Fire Bureau narrative discussing this incident. *Petition of Jaquiss*, MCDA PRO 17-06 (2017).

Against that backdrop, petitioner asserts that the public interest requires disclosure of the medical examiner’s full report in this matter. For the reasons discussed below, we approve a limited release of information in this case.

DISCUSSION

A. Medical Examiner Records – ORS 192.501(36)

ORS 192.501(36) conditionally exempts from disclosure,

A medical examiner’s report, autopsy report or laboratory test report ordered by a medical examiner under ORS 146.117.

The records at issue self-evidently meet the statutory definition under this section, so the only question is, notwithstanding the exemption, does the public interest nonetheless require disclosure of these records.

Petitioner has identified three primary reasons why the public interest requires disclosure in this instance:

- 1) the apparent disagreement amongst the involved medical professionals as to the cause and timing of death;
- 2) the key role that this particular death played in the local political conversation surrounding homelessness in our community during this winter’s extreme cold; and
- 3) the public’s need to understand, and assess, what safety nets or public systems might have failed in this case.

On the specific facts of the medical care records at issue in *Jaquiss*, we concluded that similar concerns did not justify disclosure. In *Jaquiss* we wrote that:

The public is aware that a mentally ill homeless woman lost her child. The public can reasonably conclude that the child would have had a higher likelihood of survival had his mother not been homeless or, at least, been engaged with services. The exact timing and cause of this baby’s death would not galvanize public interest any more than the tragic facts already known[.]

Jaquiss at 3. With respect to the public discourse, circumstances have not materially changed in the month since we decided *Jaquiss*. However, these are different records with different contents.

This office does not have access to, and has not reviewed, the medical records from OHSU. However, the medical examiner's report does not offer information that would further the conversation as to whether Dr. Gunson's conclusion and the statement by the OHSU physician are reconcilable or, if they are not, who is correct. Nor does the report provide any additional insight into the success or failure of any public system or safety net beyond the information that is already out in public.

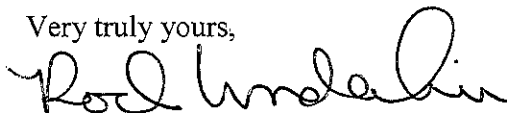
However, since the medical examiner has publicly commented on this case, and thereby released some information to at least one reporter, we believe that the exemption has been waived as to the very limited information already released. The first page of the autopsy report, including the sections "Autopsy Performed," "Cause of Death," and "Anatomic Diagnoses," contains only these bare details without any of the more clinical medical details. We believe this page is subject to disclosure under the circumstances of this case, although the last name of the baby may be redacted. The remainder of the autopsy report is properly exempt from disclosure.

The medical examiner's investigator report contains an abstract of factual, non-medical, information obtained from other agencies in addition to more personal medical and mental health information of the mother. The factual abstract does not implicate the medical treatment concerns discussed in *Jaquiss* nor does it contain any of the clinical detail found in the full autopsy report. We do believe that the public interest would be served by release of this material. Most of the factual information in this report has already been made available (albeit from other sources) to other reporters, so the countervailing privacy interests of the involved individuals do not necessitate a different result in this instance. We have attached to the medical examiner's copy of this report the pages we are ordering released with approved redactions indicated.

ORDER

Accordingly, the petition is denied except as specifically mentioned above.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.450(2), 192.460, and 192.490(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.