



**ROD UNDERHILL**, District Attorney for Multnomah County

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December 27, 2018

Everton Bailey  
The Oregonian  
1500 S.W. First Avenue, Suite 400  
Portland, Oregon 97201

Robert E. Sinnott  
Senior Assistant County Attorney  
Office of Multnomah County Attorney  
501 S.E. Hawthorne Boulevard, Suite 500  
Portland, Oregon 97214

Re: Petition of Everton Bailey, on behalf of The Oregonian, seeking a copy of the Multnomah County Medical Examiner's report regarding the death of Richard Barry

Dear Mr. Bailey and Mr. Sinnott:

In his public records appeal, dated December 14, 2018, petitioner Everton Bailey asks this office to order the Multnomah County Medical Examiner to release a copy of the reports of the post-mortem examination and toxicological testing relating to the November 22, 2018 death of Richard Barry.

On November 22, 2018 Richard Barry, a 52 year old man, died as a result of a drug overdose in downtown Portland. At the time Mr. Barry went into cardiac arrest due to the stimulants in his body, he was in handcuffs after having been restrained by a Portland State University police officer and three campus security guards with the assistance of two later-arriving cover officers from the Portland Police Bureau. Since Mr. Barry's death occurred in the context of a law enforcement action, this office conducted a review of the case.

The medical examiner issued a press release on December 10, 2018 that recounts the cause of death (acute methamphetamine and cocaine toxicity) and the conclusion that the death was not caused by police action.

This office documented our conclusion that none of the involved officers caused Mr. Barry's death in a case decline memorandum dated December 19, 2018. That memo relied, in part, on the detailed autopsy report prepared by Deputy State Medical Examiner Sean Hurst.

Because this death was not caused by officer involvement, the medical examiner's office has declined to release their full report or any of the laboratory testing associated with it, citing ORS 192.345(36), which exempts medical examiner reports from disclosure unless the public interest requires otherwise. The medical examiner's office now also cites HIPAA, as incorporated into the public records law by ORS 192.355(8), and ORS 192.355(2), which exempts information of a personal nature.

For the reasons discussed below, we grant the petition.

## **DISCUSSION**

### **A. Federal Law – HIPAA – ORS 192.355(8)**

ORS 192.355(8) exempts from disclosure:

Any public records or information the disclosure of which is prohibited by federal law or regulations.

The medical examiner asserts that the federal Health Insurance Portability and Accountability Act (HIPAA) applies to the autopsy report in this case and that, accordingly, it is exempt from disclosure under ORS 192.355(8).

Although no Oregon court has expressly addressed this, we have found one published court decision on the topic. *Las Vegas Review-Journal v. Clark County Office of the Coroner*, 2017 Nev. Dist. LEXIS 2337 (Nev. 8<sup>th</sup> Jud. Dist. 2017) (holding that, “by its plain language, HIPAA is not intended to apply to autopsy records, and cannot be used by the Coroner's Office to withhold the requested records.”) The *Las Vegas Review-Journal* court determined, and we agree, that a medical examiner or coroner is not a covered entity under HIPAA because it is not either (1) a health plan, (2) a health care clearinghouse, or (3) a health care provider, the only three categories of “covered entities” under HIPAA. 45 CFR 160.103.

Particularly in light of the Oregon legislature’s enactment of a medical examiner-specific public records exemption in 2009, discussed further below, we conclude that HIPAA does not unconditionally exempt medical examiner records from release.

### **B. Medical Examiner Records – ORS 192.345(36)**

ORS 192.345(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 investigator’s report, autopsy report, and toxicology results in this case fit squarely within this exemption. The question then, as this is a conditional exemption, is whether or not the public interest nonetheless requires disclosure. ORS 192.345. We conclude that it does as to the autopsy report, toxicology report, and a substantial portion of the investigator’s report.

The medical examiner’s office has previously released autopsy reports in situations where police officers acting in the course of their duty shot and killed another person, presumably concluding that the public interest so required. In this case, the medical examiner’s press release indicates that “the full medical report will not be released, as this death was not related to officer involvement.”

We, respectfully, disagree with the medical examiner’s assessment of the public interest in this case. In this particular case the medical examiner’s conclusion as to the manner and cause

of death was of critical importance to assessing the actions taken by law enforcement. While it is true, as the medical examiner observes, that other sources of information, including body camera footage and official police reports, will shed substantial light on the conduct of the officers in this case, the medical examiner's report contains information of a different nature than the others. Based on all of these sources this office agreed with the medical examiner's determination that the involved officers did not contribute to Mr. Barry's death, but the interests of accountability, transparency, and a "trust but verify" mentality all weigh in favor of release in this instance.

This is not to say that this balance will always weigh in favor of release. The Oregonian argues that the fact of a state-funded autopsy alone establishes a public interest. To the contrary, the legislature's enactment of ORS 192.345(36) indicates an intent that medical examiner reports will usually not be released. However, here an individual died while receiving treatment immediately following an arrest. The facts contained in the records are not particularly salacious or surprising beyond what is already publicly known. Under these circumstances, the public interest weighs in favor of a transparent evaluation of the facts.

That said, we do not find that the public interest requires disclosure of the following information appearing in the medical examiner's investigation report, which may be redacted prior to production:

- Contact information for any of Mr. Barry's family;
- Mr. Barry's social security number;
- On pages two to three of the investigator's report, everything under the heading "Relevant historical information" and "Previous medical history & current medications" with the exception of the sentence beginning "He was discharged home with...", which documents particular medications Mr. Barry was prescribed after a prior hospitalization;
- On page three of the investigator's report, the first two paragraphs under the heading "Follow Up."

None of that information is of critical importance to understanding the events of November 22, 2018 and ORS 192.345(36) exempts it from disclosure.

C. Information of a Personal Nature – ORS 192.355(2)

ORS 192.355(2) exempts from disclosure:

Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

In *Colby v. Gunson*, 224 Or App 666 (2008), the Court of Appeals noted that ORS 192.355(2), then ORS 192.502(2), might apply to a medical examiner's report and instructed the trial court to consider the matter on remand. The court register for that case shows no further action after the Court of Appeals' opinion, so it is not known what conclusion, if any, was reached as to the applicability of this exemption.

Regardless, we need not determine here whether or not an autopsy report fits within this exemption because, even assuming it does, petitioner has shown by clear and convincing evidence that the public interest nonetheless requires disclosure except as to the items noted in the previous section.

Mr. Barry's next of kin, his mother, is opposed to release of these documents as she fears such a release or, more precisely, the resulting media coverage will further aggravate an already painful incident in her life and does not wish to be contacted by media regarding this matter. We are sympathetic to this concern, but questions of a death potentially related to police conduct are of paramount public interest. The argument submitted by The Oregonian is articulate and persuasive that public confidence in governmental review of such matters depends, in part, on the public's ability to evaluate whatever materials can responsibly be made available for that purpose.

### **ORDER**

Accordingly, the petition is granted except as expressly mentioned above. The Multnomah County Medical Examiner is ordered to promptly provide petitioner with a copy of Dr. Hurst's autopsy report, their investigator's report, and the related toxicology reports redacted consistent with our determinations above. This production is subject to the payment of fees, if any, not to exceed the medical examiner's actual costs in preparing the records.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

### **Notice to Public Agency**

Pursuant to ORS 192.411, 192.415, and 192.431(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.