



ROD UNDERHILL, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
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January 9, 2020

Jayati Ramakrishnan
The Oregonian/OregonLive
1500 S.W. First Avenue, Suite 400
Portland, Oregon 97201

Jenifer Johnston
Sr. Deputy City Attorney
Portland City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Jayati Ramakrishnan, on behalf of The Oregonian/OregonLive, requesting police reports relating to the Owen Klinger missing person investigation

Dear Ms. Ramakrishnan and Ms. Johnston:

In her public records petition, Jayati Ramakrishnan, on behalf of The Oregonian, asks this office to order the Portland Police Bureau (PPB) to release records concerning its investigation of the death of Owen Klinger.

Mr. Klinger was a University of Portland student who disappeared from campus on October 6, 2019. After much publicity and community support for the search, on October 21, 2019, Mr. Klinger's parents released a written statement indicating they had been notified that his body had been recovered near the St. Johns Bridge. During the two weeks between his disappearance and the discovery of his body, the Portland Police Bureau conducted an investigation in an attempt to determine what had occurred. Petitioner, a reporter, covered the extensive community efforts to locate Mr. Klinger at the time.

PPB denied petitioner's public records request for the reports documenting its investigation, citing ORS 146.189, which requires the sealing of certain information in missing person cases where the person is located and deceased. On appeal PPB additionally cites ORS 192.355(2), the exemption for information of a personal nature, in support of its decision to withhold some or all of these reports.¹

Mr. Klinger's parents have submitted a letter to this office indicating that, although this is an understandably complex set of circumstances for them, they support petitioner's request and do not oppose the release of these reports to the media provided that limited and appropriate

¹ In its initial response to this office PPB also cited ORS 192.345(3), the criminal investigatory exemption. During the pendency of this appeal the medical examiner's office issued its final report, which had been the only outstanding portion of the investigation. Given that change in circumstance, PPB has withdrawn its assertion of exemption under this section, and we do not address it further.

redactions are made to any personal details of their son such as social security number, details of medical information, and whatever similar information may exist in the reports.

As required by statute, PPB has afforded this office the opportunity to review the 64 pages of police reports that were generated by PPB during this investigation. For the reasons discussed below, we grant the petition and order the records released, subject to the limited redactions identified below.

DISCUSSION

A. Missing Persons Investigations – ORS 146.189

Generally ORS 146.189(2) provides that “[i]n the case of a missing person found to be no longer living, the [investigating law enforcement] agency shall seal the information and material obtained under ORS 146.181.” As PPB points out in its response brief, the scope of this sealing provision appears to be one of first impression in Oregon. No reported appellate opinions, attorney general opinions, or other helpful authorities have addressed this section.

If a record is “sealed” that means that no one may access it unless expressly authorized by the applicable statute or a court order. *Department of Human Services v. M.R.*, 251 Or App 387 (2012) (“Sealing [...] refers to the process of closing a record and preventing access to it.”) (citing *Black’s Law Dictionary*). Sealing maintains the record and allows the possibility of future access as distinct from destruction. ORS 146.189(2) separately provides that if a missing person is found alive, then “[t]he agency shall destroy all information and material received under ORS 146.181[.]”

If information is sealed by statute then it is unconditionally exempt from public records disclosure by operation of ORS 192.355(9) (unconditionally exempting “information the disclosure of which is prohibited or restricted or otherwise made confidential [...] under Oregon law.”) ORS 146.189 does not, however, seal all records or information relating to a missing person investigation. Rather, it seals only “information and material obtained under ORS 146.181.”

ORS 146.181(2) is the subsection of that statute that relates to the acquisition of information. It provides that the law enforcement agency receiving a missing person report “[m]ay request from the person making the report information or material likely to be useful in identifying the missing person or the human remains of the missing person, including, but not limited to [...]”² The section goes on provide a non-exclusive list of 19 categories of information including personal identifiers, regular behavior, and circumstances surrounding the missing person’s last known location that may be requested under this section.

By its terms, ORS 146.181(2) applies only to information obtained “from the person making the report” to a law enforcement agency. In this case the police reports state that the

² ORS 146.181(2)(b) further provides that information may be requested in writing from certain medical providers. However, such information is not contained within the reports at issue, so this section is not relevant to the present analysis.

formal missing person report was made to law enforcement by Mary Klinger, Owen Klinger's mother, on behalf of her and her husband, Dustin Klinger. As such, ORS 146.189(2) only requires the sealing of information obtained from Mary and Dustin Klinger. To the extent that any of this information was independently obtained from a separate source (e.g. witness interviews, video records, etc.) that independently obtained information is not subject to seal under this section.

PPB further argues that ORS 146.181(1) indicates an intent that police reports generally are also included within this section. We disagree. ORS 146.181(1) provides that after a person has been reported missing the law enforcement agency "within 12 hours thereafter, shall enter into state and federal records maintained for that purpose, a report of the missing person." It is unlikely that "report" in this section refers to final police investigative reports that, in almost no circumstances, would be completed within 12 hours of the initial report of a missing person. ORS 146.189(2) confirms this understanding by its reference to "cancel[ing] the reports to state and federal authorities under ORS 146.181" after a person has been located. This cannot mean police investigative reports; those cannot be "canceled."

In any event, ORS 146.189(2) seals only "information and material received under ORS 146.181." A report to a state or federal authority is information sent out or transmitted under ORS 146.181, not information "received" (although it could conceivably contain information that had been previously received.)

PPB further points to the caption of ORS 146.181 ("Missing Persons, - police report, - supplementary report") as evidence of an intent to apply the sealing provision to the entire case. Again, we disagree. It is well-established that the captions and subcaptions should not be considered in construing its meaning. *Mitchel v. Board of Education*, 64 Or App 565 (1983) ("Captions and headings are provided by Legislative Counsel simply for the reader's convenience. They are not part of the statute and are of no value in determining legislative intent.")

The only internally consistent way of reading ORS 146.181 and ORS 146.189, to us, is to construe it as described above: limited to information provided by the initial reporter. As such, the only information that can, and indeed must, be withheld from release under this section is "information or material likely to be useful in identifying the missing person" that was obtained from Mary or Dustin Klinger.

B. Personal Information – 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.

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PPB asserts that in the event we find ORS 146.189 does not exempt these records, as we have, that we allow for certain redactions under ORS 192.355(2) to protect personal privacy. PPB has not identified any particular items to which it believes this exemption applies nor has it precisely specified whose privacy it is protecting. Petitioner responds on the assumption that this relates to the deceased and argues that deceased persons do not have a right of privacy.

While it is true that as a general matter a deceased individual does not have a common law right to privacy, the United States Supreme Court has recognized that the term “personal privacy,” as used in the federal Freedom of Information Act, was “intended to permit family members [of a deceased person] to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions.” *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004). As such, for purposes of public records law, there are circumstances in which a privacy interest continues after death. That said, *Favish* addressed death scene photographs of an individual suspected to have committed suicide and extends its discussion of family’s privacy interests only far enough to sweep in “disclosure of graphic details surrounding their relative’s death.” *Id.* at 171.

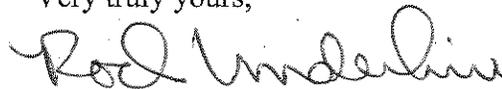
Having reviewed the police reports in this case, the information that we already indicated is not disclosable under ORS 146.189 will most likely cover the same ground as that to which the family would or could raise a legitimate privacy concern. However, Mr. Klinger’s family, to date, has not had the opportunity to review the reports generated in the investigation of his death. We do not presume to know if there are particular details recounted about Mr. Klinger that would cause an extraordinary invasion of his family’s privacy.

By statute, PPB has seven days from the date of this order to provide reports, with ORS 146.189 information redacted, to petitioner. If during that period the family is afforded the opportunity to review the records, and PPB wishes to propose limited and specific additional redaction based on their input under ORS 192.355(2), we are willing to consider supplemental argument on that issue at that time.

ORDER

Accordingly, the petition is granted. Subject to redaction of ORS 146.189 information consistent with the analysis above, and with the opportunity to reconsider the applicability of ORS 192.355(2) on an individualized basis upon input from the family, PPB shall promptly provide a copy of the investigative reports in PPB’s custody to petitioner. This release is subject to the payment of fees, if any, not to exceed PPB’s actual costs in producing the records.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.411(2), 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.

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