



ROD UNDERHILL, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

February 5, 2020

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

Robert Sinnott
Multnomah County Attorney's Office
501 S.E. Hawthorne Blvd., Suite 500
Portland, Oregon 97214

Re: Petition of Molly Harbarger seeking medical examiner records relating to three deaths

Dear Ms. Harbarger and Mr. Sinnott:

Petitioner, Molly Harbarger, a reporter for The Oregonian/OregonLive, asks this office to order the Multnomah County Medical Examiner's Office to produce records relating to three individuals who were found dead in November and December of 2019. Specifically, 1) a person found dead in Washington Park on December 13, 2019, 2) a person found dead in Director Park on December 13, 2019, and 3) a person found dead at the 100 block of SE 84th Avenue on November 10, 2019.

The medical examiner's office denied petitioner's request, citing ORS 192.345(36), which conditionally exempts reports generated or ordered by the medical examiner's office. Petitioner does not dispute that the requested records are within the scope of this exemption, the only question is whether or not the public interest nonetheless requires disclosure.

For the reasons discussed below, which are unique to the one report that we address on the merits, we conclude that it requires only the release of the cause and manner of death.

DISCUSSION

A. 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.

Two of the three requests are readily resolved: as to the Director Park decedent and the SE 84th Avenue decedent, the medical examiner has not issued a final determination as to nature and cause of death pending toxicology results. Both this office and the Attorney General's office

have recently concluded that draft reports from the medical examiner's office were exempt from disclosure. *Petition of McCurdy*, MCDA PRO 19-25 (2019) ("It therefore follows that the release of this initial draft would be premature, as the cause of death is still an open question"); *Petition of Bial*, Att'y Gen. PRO (Aug. 15, 2019) ("As we have previously recognized, there is a strong public interest in the nondisclosure of ME reports generally.") We do not see a reason to deviate from those holdings on these facts.

The remaining case, the death occurring in Washington Park, proves a closer call. Petitioner and the medical examiner both agree that deaths of unhoused members of our community are of significant public interest. However, they differ in their proposed methods of satisfying that interest. Petitioner argues:

The city and county have historically struggled to respond when winter sets in and the cold and rain make weather deadly for people living outside. We saw this in 2017 during an unusually cold and dangerous winter. That winter, four homeless people died of exposure. Important questions about what occurred, and what safety nets or public systems might have failed in this case, were able to be answered in part because the media was able to obtain the names and causes of death of the victims of hypothermia and talk to their families and social service workers.

The public has a great interest in knowing whether and which systems or officials may have failed in these cases or if there was nothing reasonably or rationally preventable about these deaths. The public and most especially people in our community who lack housing have a great interest in any flaws in systems or public officials' conduct, brought to life by public records, can be fixed so as to prevent or lessen the likelihood of future deaths of people without housing.

Petitioner further points to a particular case, the 2017 death of Karen Batts, that has informed policy at the state level,

Batts' story was only told because we could confirm that her death in a parking garage was due to hypothermia and trace back her history to show how she ended up there. It now is informing state policy and local actions, as well as a call to bring change to the state's mental health system.

We confirmed that information through the medical examiner's office under Dr. Karen Gunson, as well as three more hypothermia-caused deaths. Gunson made it clear that she considered this information to be of public interest.

To evaluate the public interest in the release of medical examiner records, the Attorney General has written that, "[a]s for the general media interest in the case, we believe that general curiosity about a matter, without any connection to some question of public policy (or, possibly, to a public figure), will typically be insufficient to tilt the balance in favor of disclosing the kind of information that is protected by [former] ORS 192.501(36)." *Petition of Darling*, Att'y Gen. PRO (Nov. 10, 2014). Here, however, petitioner has pointed to a critical question of public policy implicated by the deaths issue, and she has also articulated how personalizing the story can advance the public interest in ways that aggregated and de-identified data cannot.

On the other hand, the medical examiner makes the compelling argument that but for the decedents' status as unhoused this would not be a close case:

Decedents who died while homeless should be afforded similar protections to decedents who were not homeless. If these decedents had not been homeless when they died, then their records and identities would undoubtedly be protected from disclosure. Many homeless individuals experience a lifetime of marginalization. Their families' dignity and privacy should not also be marginalized in death. The Medical Examiner is committed to protecting their rights, while also disclosing information that is actually relevant and material to the public interest.

The medical examiner also points to its annual "Domicile Unknown" report that it prepares in collaboration with Street Roots. This report provides aggregate and de-identified information about decedents who were homeless, including: (1) ages; (2) sexes; (3) races; (4) location of deaths; (5) toxicology results; (6) cause and manner of deaths; and (7) the time of year when the deaths occurred. *Id.* at 14-17. The report includes the season of death, to capture the risk of exposure to the environment, and identifies those cases when hypothermia caused or contributed to death. The Domicile Unknown report, the medical examiner argues, adequately addresses the acknowledged public interest in this area.

Public interest in issues of homelessness in our community is at a crescendo. Conversations, policy debate, and substantial proposed funding measures arising on an almost weekly basis. There is an interest unique to this place and time that requires public awareness in a way that can override some of these generalized privacy concerns in a way that it may not have five years ago and we are hopeful will not five years from now.

As to medical examiner's autopsy reports and investigative narrative, we believe the public interest does not require release absent unusual circumstances not present here. See, *Petition of Brouseau*, Att'y Gen. PRO (7/1/15) (discussing the nature of the report contents). While petitioner is correct that at common law privacy interests did not outlive the individual, the medical examiner is also correct that the enactment of ORS 192.345(36) supersedes that general rule for purposes of public records analysis of medical examiner records in Oregon.

As to the identity of the decedent and the nature and cause of death both sides have points in their favor, and the competing interests appear irreconcilable. Here, however, the specific, and unique, facts of the Washington Park death lead us to conclude that there is not an overriding public interest in the identity of the decedent, however, the manner and cause of death will somewhat advance the public interest while having little to no intrusion on the interests that this exemption seeks to protect.

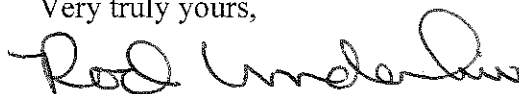
To provide some guidance to the parties in the future cases that our limited holding today invites, we do not believe that the mere fact that a person is unhoused at the time of his or her death provides sufficient public interest to require that he or she be identified. The Domicile Unknown report as well as the County's willingness to collaborate with the media to release de-identified or aggregate data goes a long way toward meeting this interest in a general sense.

We also, however, find merit in petitioner's well-articulated argument about the added value of personalized reporting to advance the public conversation around this critical issue, particularly where the cause of death can be directly tied to being unhoused, which is not the case as to the report at issue here. Where that balance lies will depend on the particular facts of each case.

ORDER

Accordingly, the petition is denied except that the medical examiner shall promptly release a copy of page 8 of 10 of Exhibit 1 provided for our review with all material excepting the sections "Cause of Death" and "Manner of Death" redacted.

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.

20-02