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April 23, 2021

W. Paul Smith  
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Re: Petition of Paul Smith requesting records and communications of the Portland Police Bureau.

Dear Mr. Smith and Ms. Law:

In his public records petition dated March 29, 2021, petitioner W. Paul Smith, an investigative researcher with The Intercept, asks us to further review and order the release of records that the Portland Police Bureau, through the City of Portland, claims are conditionally exempt under ORS 192.345(3). The records pertain to the following request of January 28, 2021:

**[A]ll records and communications made, sent, or received from September 1, 2019 January 28, 2021 that make mention of any of the following key terms or phrases: “Kealiher,” “Kealher,” “Kealhier,” “Armeanio Lewis,” “Armenio” and “Armanio”**

After the City received clarification regarding the request from petitioner, the City provided a fee estimate of \$2,800.00 to the petitioner. The petitioner is paying in installments. His first installment was \$100 and the City provided the first batch of records (“Batch 1”). Petitioner’s appeal pertains to records that the City withheld as exempt as a part of Batch 1.

The withheld Batch 1 records pertain to a homicide investigation of the death of Sean Kealiher on October 12, 2019. The City has asserted that this is an open and active investigation. Detective Scott Broughton, who is the lead detective in the investigation, has directly stated to us that the records that are requested are a part of an ongoing homicide investigation and that the release of the records at this time would interfere with the investigation, reveal investigative techniques being utilized in this matter, and could impact witness statements.

Petitioner has asserted that that the records pertaining to the homicide of Sean Kealiher are of “profound public importance” due to his outspoken activism in the Portland area and that

the public has “an interest in knowing whether the police have been rigorously investigating Kealiher’s murder.”

The City has stated that this is not a permanent denial of release of the records, but that the records should not be released while the investigation is open.

For the reasons discussed below, we deny the petition.

## DISCUSSION

### A. Criminal Investigatory material – ORS 192.345(3)

ORS 192.345(3) conditionally exempts from disclosure, “investigatory information compiled for criminal law purposes.”

An exemption in ORS 192.345 applies, unless the public interest requires otherwise. The analysis is a two-step process. The first part is to “determine what the competing interests are in disclosure and nondisclosure.” PUBLIC RECORDS AND MEETINGS MANUAL (2019) at 32. The second part is to “weigh those interests and determine which predominates, with the presumption in favor of disclosure.” *Id.*

The competing interests are the need of law enforcement to continue and complete a homicide investigation versus the public’s interest in the details of the current state of that investigation. We accept the determination of the criminal investigator that release of these records at this time could jeopardize the ongoing homicide investigation. We also recognize that there is a public interest in knowing how Sean Kealiher died.

The Oregon Court of Appeals has stated that, “investigations connected with pending or contemplated proceedings will ordinarily remain secret because disclosure would likely ‘interfere with enforcement proceedings.’” *Jensen v. Schiffman*, 24 Or App 11, 16 (1976) (quoting 5 U.S.C. s 552(b)(7) as a “persuasive catalog” of the purposes of our own criminal investigatory exemption). Among the purposes identified are to prevent interference with a prosecution and to prevent disclosure of investigative techniques, as well as ensuring a defendant is able to have a fair trial.

Following this holding, the Attorney General and the Multnomah County District Attorney have uniformly concluded that police reports relating to pending matters are not subject to release. *See, Petition of Garrettson*, Att’y Gen PRO (7/3/1995) (records exempt while district attorney is considering case for prosecution); *Petition of Padgett/Eller*, Att’y Gen PRO (8/15/01) (exemption found applicable while criminal case is on appeal); *Petition of Norman*, MCDA PRO 17-13 (2017); *Petition of Jon Friedman*, MCDA PRO 14-13 (2014); *Petition of Duin for The Oregonian*, MCDA PRO 99-05 (1999); *Foster for The Oregonian*, MCDA PRO 98-03 (1998).

While *Jensen* does not foreclose the possibility that an unusual case would warrant a finding that the public interest in promptly knowing what happened would override the public’s interest in ensuring a thorough investigation of a homicide within the community, it does provide strong guidance. *Jensen* instructs that, while the criminal investigatory exemption *can* remain in force after the conclusion of a prosecution, the balancing of interests is much more favorable to release at that point. The records that are the subject of this petition are a part of an investigation that has not yet concluded.

Given these prior rulings, we cannot find that the circumstances of this particular case warrant a different result. Although there is a public interest in how this investigation is being conducted, that interest is outweighed by need to complete this homicide investigation.

**ORDER**

Accordingly, the petition is denied.

Very truly yours,



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MIKE SCHMIDT  
District Attorney  
Multnomah County, Oregon