

April 9, 2002

Sent by FAX (503) 370-8649

Leslie I. Zaitz

Staff Writer, *The Oregonian*

Press Room

Capital Building

Salem, OR 97310

Re: *Petition for Review of Denial of Records:*
Oregon State University Records

Dear Mr. Zaitz:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on April 2, 2002, asks the Attorney General to order Oregon State University (OSU) to disclose "the subpoena served on the agency by representatives of the U.S. Justice Department." For the reasons below, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Any person who is denied the right to inspect or to receive a copy of a public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.450(1).

Your petition states that OSU denied your request on the basis that a federal grand jury subpoena is exempt from disclosure under ORS 192.501(3). With exceptions not relevant to the record you requested, the statute exempts from disclosure "investigatory information compiled for criminal law purposes," unless "the public interest requires disclosure in the particular instance." Information is "compiled" when it is *collected and assembled* into a document or larger grouping of materials. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) at 464. By its nature, a subpoena is "investigatory," its purpose being to uncover information.¹

¹ "Investigatory" or "investigative" means "characterized by or having a tendency toward investigation * * * of or relating to investigation." WEBSTER'S at 1189-90. To investigate is "to observe or study closely: inquire into systematically: EXAMINE, SCRUTINIZE * * * to subject to an official probe." *Id.* at 1189.

A subpoena may, and likely will, include information compiled in the course of an investigation. In providing the recipient with the information required to respond, the subpoena will necessarily direct the recipient to matters known or suspected by the investigators as a result of information already compiled in the course of their investigation. For example, the information contained in a subpoena may include information tending to identify suspects or tend to disclose investigators' knowledge of the techniques used by a person suspected of crime. We conclude that the exemption provided in ORS 192.501(3) does apply under the circumstances presented by your petition.

You state in your petition that the exemption is inapplicable because OSU itself did not compile the material you request for a criminal law function. There is nothing in ORS 192.501(3) requiring that the records custodian be the agency that compiled the information for criminal law purposes. Records compiled for criminal law purposes do not cease to be covered by ORS 192.501(3) simply because they are held by or transferred to an agency other than the one that compiled the records. In a prior public records order, this office stated the public policy reflected in ORS 192.501(3): "Criminal prosecution is dependent on the discreet acquisition of information, the early disclosure of which would often allow wrongdoers to avoid prosecution." Public Records Order, July 3, 1995, Garrettson. Persons innocent of criminal wrongdoing may also be injured by premature release of investigative information. For these and other reasons federal grand jury proceedings are secret. Federal Rule of Criminal Procedure 6. Federal grand jury subpoenas frequently are endorsed with a warning cautioning the recipient against disclosure of the fact of the subpoena. Federal law permits investigators to apply for a federal court order prohibiting even the existence of a subpoena. We find nothing in the text or context of the exemption to restrict its protection of the integrity of criminal prosecutions to those conducted by state, as opposed to federal, authorities. The policy behind the exemption would be seriously compromised if information compiled for a criminal prosecution were not protected from disclosure when held by a non-law enforcement agency during the course of an investigation.

In responding to a public records request, ORS 192.505 obligates a state agency to separate exempt from nonexempt material and make the latter available for review "where it is reasonably possible to do so." ATTORNEY GENERAL'S PUBLIC RECORDS AND PUBLIC MEETINGS LAW MANUAL (2001) at 87. Nothing would remain of a federal grand jury subpoena from which all substantive information had been excised except for the legally prescribed form for such subpoenas. Therefore, we conclude that it is not reasonably possible to separate exempt from nonexempt material in respect to a federal grand jury subpoena.

The criminal investigatory information exemption is conditional. Under this provision, records are exempt "unless the public interest requires disclosure in the particular instance." You do not explain why disclosure of a federal grand jury subpoena is required to serve the

Leslie I. Zaitz
April 9, 2002
Page 3

public interest. And, as described above, the public's interest in maintaining the confidentiality of ongoing criminal investigations is compelling. Therefore, we respectfully deny your petition.²

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS09990
c: Caroline Kerl, OSU Legal Adviser

² Because we deny your petition under authority of ORS 192.501(3) we do not discuss other possible grounds for exemptions, such as those applicable to student or faculty records.

Leslie I. Zaitz
April 9, 2002
Page 4

bc: Wendy Robinson
Charles Gorder, Assistant U.S. Attorney, Portland (by fax)