



John Hummel District Attorney

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November 13, 2018

Mary Winters
City Attorney
City of Bend
mwinters@bendoregon.gov

Tim Underwood
tim@audiotango.com
SENT VIA EMAIL ONLY

Dear Mr. Underwood and Ms. Winters:

Pursuant to ORS 192.470, Tim Underwood (Underwood) filed an appeal requesting that I review the City of Bend's (Bend) denial of his recent public records request. I received Underwood's appeal on November 6 2018.

Underwood's request to Bend was sent via a letter dated October 15, 2018 (Exhibit 1). In summary, Underwood requested all records related to the death of Mary Jo Templeton on April 20, 1979 in Bend.

Via a letter dated October 22, 2018 (Exhibit 2) Bend denied Underwood's request, relying on Oregon's public records exception for certain records in active criminal investigation (ORS 192.345(3)).

Via a letter dated November 2, 2018, and received on November 6, 2018 (Exhibit 3), Underwood appealed Bend's decision to me. The gravamen of Underwood's appeal is that because the records he seeks are more than 25 years old, per ORS 192.390, Oregon's criminal investigation exception does not apply, thus the records were improperly withheld.

On November 13, 2018 (today), I notified Bend of this appeal via email, as follows:

Pursuant to ORS 192.470, Tim Underwood filed an appeal with me requesting that I review what he claims to be the City of Bend's (Bend) denial of his recent public records request. The details of the request are contained in the attached letter dated November 2, 2018 (received November 6).

The gravamen of Mr. Underwood's claim is that Bend improperly denied his request for a copy of a search warrant. Mr. Underwood claims Bend improperly relied on the criminal law investigation exception (ORS 192.345(3)) because, per ORS 192.390, the

criminal law investigation exception does not apply to records more than 25 years old and the record he seeks is more than 25 years old.

Please let me know if you agree that the Bend withheld responsive documents from Mr. Underwood.

If Bend did withhold responsive records, please let me know if the Bend intends to provide the records in question to Mr. Underwood.

If Bend did withhold responsive records and intends to continue to withhold them, pursuant to ORS 192.470(2), please: “[T]ransmit the public record disclosure of which is sought, or a copy, to [me], together with a statement of [Bend’s] reasons for believing that the public records should not be disclosed.”

Pursuant to ORS 192.465 and 174.120 I will issue my decision by 5:00 PM TODAY, so please provide your response immediately. I apologize for the ridiculous time crunch on this.

On November 13, 2018, Bend submitted their response (Exhibit 4). Bend acknowledges that ORS 192.390 removes exemptions for records that are more than 25 years old. However, they point out that the records sought by Underwood include records more than 25 years old and records less than 25 years old. Bend agreed to allow inspection of records more than 25 years old, but maintained their reliance on Oregon’s criminal investigation exemption statute (ORS 192.345(3)) to withhold records less than 25 years old.

This letter constitutes my Order in this case.

LEGAL ANALYSIS

Burden of Persuasion:

Bend has the burden of persuasion to convince me that their decision in this matter was proper. *ORS 192.450(1)*.

Standard of Proof:

In order for Bend to carry their burden of persuasion I must affirmatively conclude that the records request was not denied, or, that the request was denied but the requested records are exempt from disclosure. If I do not so conclude, I must order them to be disclosed. *Attorney General’s Public Records and Meetings Manual 2014, section I.G.1.b. (citing Oregon Attorney General Public Records Order, March 4, 2008, Brent Walth)*.

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Application of Law:

There are two issues to address in this appeal:

- 1. Does Oregon law regarding “old” records (ORS 192.390) apply to records in a criminal investigation that are less than 25 years old if the majority of the records in the criminal investigation are more than 25 years old?**

This is not the question Underwood thought we would be addressing in this appeal because this was not the argument made by Bend when they denied his original request. Bend originally argued that the criminal law investigation exemption (ORS 192.345(3)) trumped the 25-year-old record law and they used this legal analysis to deny Underwood’s request in toto. Kudos to Bend for re-evaluating their position and focusing on getting it right.

Bend’s concession to provide Underwood with records more than 25 years old is appreciated and the result is something required by law.

Bend’s argument that the 25-year-old record law only applies to the records in this criminal investigation that are more than 25 years old is supported by words of the statute. And there are no reported court decisions suggesting the statute should apply to records less than 25 years old if the records relate to an investigation more than 25 years old.

Therefore, I find that the 25-year-old record law does not apply to the records in this case that are less than 25 years old, meaning, this law does not mandate their disclosure. But also, this law does not prohibit the disclosure of the records less than 25 years old. Bend argues the records less than 25-years old are properly withheld from Underwood pursuant to Oregon’s criminal law investigation exemption.

- 2. Does Oregon’s criminal law investigation exemption authorize Bend to withhold records less than 25 years old?**

The only issue left to consider is whether Bend is properly relying on the criminal law investigation exemption to deny Underwood access to the records less than 25 years old.

ORS 192.345(3) conditionally exempts: “Investigatory information compiled for criminal law purposes. The record of an arrest or the report of a crime shall be disclosed unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim.”

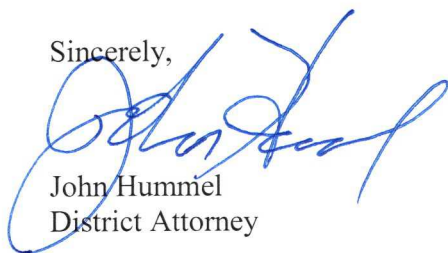
Bend argues the records sought by Underwood relate to a pending murder investigation and releasing the records would hinder the Bend Police Department’s ability to effectively continue to investigate the case. In his appeal Underwood did not address Bend’s claim regarding the potential impact on this investigation if they were to release the records.

There is no evidence presented to rebut Bend’s claim that releasing the records less than 25 years old would compromise this investigation, therefore I find Bend’s reliance on ORS 192.345(3) is proper and lawful.

CONCLUSION

Bend agreed to provide Underwood responsive records more than 25 years old. This concession is founded in the law and is appreciated. As to the records less than 25 years old, Bend appropriately relied on Oregon's criminal law investigation exemption to withhold these records, thus they do not have to be provided to Underwood.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Hummel", is written over the typed name.

John Hummel
District Attorney

15 October 2018

Custodian of Records
Bend Police Department
555 Northeast 15th Street
Bend, OR 97701

Custodian of Records
Deschutes County Sheriff's Office
63333 West Highway 20
Bend, OR 97703

Custodian of Records
Oregon State Police, Bend
20355 Poe Sholes Drive
Bend, OR 97703

Dear Records Custodians:

Please accept this as my request pursuant to ORS 192.311, *et seq*, for any and all records,¹ which contain information relating to the death of Mary Jo Templeton on April 30th, 1979 in Bend, Oregon.

Please note that pursuant to ORS 192.390, and notwithstanding ORS 192.338, 192.345 and 192.355 and except as otherwise provided in ORS 192.398, public records that are more than 25 years old **shall** be available for inspection.

Pursuant to ORS 192.324 (1)(b) I am not averse to an in-person inspection of the records responsive to this request. If that is not a possibility, I understand that pursuant to ORS 192.324(4)(c) should the fee for providing the requested records exceed \$25.00 your agency will provide the undersigned with a written notification of the estimated amount of the fee so that I may confirm that I want your agency to proceed with my request.

Sincerely,

Tim Underwood
65720 Mariposa Lane
Bend, OR 97703

¹ handwriting, typewriting, printing, photographing and every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings.





CITY OF BEND

October 22, 2018

710 NW WALL STREET
PO BOX 431
BEND, OR 97709
(541) 388-5505 tel
Relay Users Dial 7-1-1
(541) 385-6676 fax
bendoregon.gov

MAYOR
Casey Roats

MAYOR PRO TEM
Sally Russell

CITY COUNCILORS
Justin Livingston
Bill Moseley
Bruce Abernethy
Nathan Boddie
Barb Campbell

CITY MANAGER
Eric King

Tim Underwood
65720 Mariposa Lane
Bend OR, 97703

Mr. Underwood,

Pursuant to ORS 192.390, records notwithstanding ORS 192.345, public records older than 25 years old shall be available for inspection. Per ORS 192.345(3), the report of a crime shall be disclosed unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation. At this time, the case regarding the death of Mary Jo Templeton (April 30th, 1979) is still under active investigation by the Bend Police Department's Detective Division. Release or review of these records would hinder the Police Department's ability to effectively continue to investigate this case and for this reason it is still necessary to delay disclosure through our office.

Thank You,

Brandie Swindle
Records and Evidence Program Manager
City of Bend Police Department



02 November 2018

Mr. John Hummel
Deschutes County District Attorney
1164 NW Bond Street
Bend, Oregon 97703

John:

First, *thank you* again for your help with looking into my request for a search warrant served on the premises of Charles Lee Crawford. One of the detectives who worked Templeton's murder in 1979 told me to check and see if I could locate a warrant that may have been served on his residence.

This detective doubts whether Crawford's home was ever checked for blood evidence in the death of Mary Jo Templeton. Crawford was a prime suspect in her murder.

Having your assurances that there are no records of any warrant served on Crawford (business or residence), could be an indication that the detective was right and that if Bend PD still has a record of his home address in 1979, MAYBE it's possible to now get that home checked for blood/DNA which may match Templeton's.

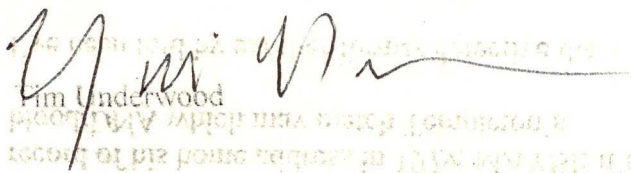
I've been told by another former detective that police have her hair samples in evidence.

Second, pursuant to ORS 192.415, I am appealing the City of Bend's recent denial of my request for public records regarding the Templeton murder and investigation. I'm including a copy of my request and the City's denial.

It's my position that the "**notwithstanding**" and "**shall**" (emphasis added) language found in ORS 192.390 and the fact that it specifically refers to the entirety of ORS 192.345, including subsection (3) relied on by the City, is dispositive of the City's obligation to provide the records requested by me.

I look forward to your decision on this appeal.

Many thanks!



Jim Underwood

cc: Brandie Swindle, City of Bend Police Department

EXHIBIT

tabbles

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John Hummel

From: Gary Firestone <gfirestone@bendoregon.gov>
Sent: Tuesday, November 13, 2018 3:25 PM
To: John Hummel
Cc: Tim Underwood; Ian Leitheiser; Mary Winters
Subject: RE: Urgent public records deadline: 4:45 today

The City's investigation into the murder of Mary Jo Templeton is currently active because of information recently received by the Bend Police Department.

Mr. Underwood cites to ORS 192.390 for authority that the City must provide the records to him. The City acknowledges that ORS 192.390 removes exemptions for records that are more than 25 years old. The records in this case include records from the time of the original investigation (1979 and early 1980s) as well as more recent records. The City is willing to allow inspection or to provide copies of the records that are more than 25 years old.

However, as to more recent records, they are investigatory records compiled for criminal law purposes and are exempt from disclosure under ORS 192.345(3). While the exemption is conditional, Mr. Underwood has not provided any explanation why the public interest would outweigh the interest in non-disclosure of criminal investigatory information. The City believes that disclosure of criminal investigation material can make it more difficult for the police to obtain evidence or could complicate any trial that may occur.

Please let me know your decision on Mr. Underwood's appeal.

Gary Firestone
Associate City Attorney
City of Bend
541-693-2124

From: John Hummel <John.Hummel@dcda.us>
Sent: Tuesday, November 13, 2018 3:14 PM
To: Ian Leitheiser <ileitheiser@bendoregon.gov>; Mary Winters <mwinters@bendoregon.gov>
Cc: Tim Underwood <tim@audiotango.com>; Gary Firestone <gfirestone@bendoregon.gov>
Subject: RE: Urgent public records deadline: 4:45 today

Thanks Ian.

And I now see Mr. Underwood's request was for all records related to the investigation in question – not merely a search warrant as I state in the below email. Same issue of the applicability of the 25 year rule in 192.390.

