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October 1, 2003

Robin Franzen
The Oregonian
1320 S.W. Broadway
Portland, OR 97201-3499

Re: *Petition for Public Records Disclosure Order*:
Department of Administrative Services Records

Dear Ms. Franzen:

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 September 24, 2003, asks the Attorney General to direct the Department of Administrative Services, Risk Management Division (DAS/RMD), to make available its investigative file and final report on the failure to create a judicial record during the trial of Northwest Steelheaders v. Simantel. For the reasons that follow, 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 from disclosure. ORS 192.450(1).

You sent your records request, dated August 20, 2003, to David Hartwig, Administrator of DAS/RMD. Stating that "the potential for litigation remains likely," he denied your request by a letter dated August 27, 2003. In Mr. Hartwig's absence, we contacted Mike Baird at DAS/RMD regarding your petition. He confirmed that Mr. Hartwig denied your request on the basis of the exemption from disclosure stated in ORS 192.501(1), which exempts:

> Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur.

This office has concluded that the filing of a notice of tort claim is sufficient evidence that litigation is reasonably likely to occur for purposes of exempting records from disclosure under ORS 192.501(1). ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2001) 27.

In your petition, you suggest that the litigation exemption does not apply to the requested DAS/RMD records because you "believe documents were generated before the tort claim triggered an indication of 'likely litigation.'" We have reviewed the DAS/RMD investigative file regarding the failure to create a judicial record in Northwest Steelheaders v. Simantel. Contained in that file is a notice of tort claim dated April 2, 2002, filed by Carson Bowler on behalf of Robert John Grover and received by DAS/RMD on April 3, 2002. No record in the file predates that document. Except for your records request and Mr. Hartwig's response, the records contained in the investigative file were developed or compiled by DAS/RMD in response to the tort claim notice filed by Mr. Bowler and related notices subsequently received by the Department. Given that the time period in which a person may initiate a court action in relation to those notices has not expired, the records come within the exemption stated in ORS 192.501(1).[1] Because the exemption for records pertaining to litigation is conditional, the records in the DAS/RMD investigative file are exempt from disclosure "unless the public interest requires disclosure in the particular interest." AG'S MANUAL at 26.

The purpose of the litigation records exemption "is to place governmental bodies on an even footing with private parties before and during court litigation." AG'S MANUAL at 27. In your petition, you contend that the public interest favors disclosure because failure to produce a record of the original trial of Northwest Steelheaders v. Simantel "was a costly error for litigants, witnesses, and state court personnel * * * * and a failure of this magnitude warrants a full public explanation." However, from our review of the file, we conclude that disclosure of records that would contribute to explaining the failure to produce a record of the original trial would prejudice the state in future litigation regarding this matter. Given that the time period in which litigation remains a possibility is finite, we conclude that, on balance, the public interest in protecting the state's ability to defend against a tort action outweighs the public interest in disclosure at this time.

Accordingly, your petition is denied because the requested records are exempt under ORS 192.501(1).

Sincerely,

PHILIP SCHRADLE
Special Counsel to the Attorney General

AGS13042
c: Mike Baird, DAS/RMD

[1] We note that additional exemptions may apply to some of the records contained in the file.