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September 25, 2003

D. E. Bridges
Executive Director
Oregon Forest Products Transportation Association
P.O. Box 884
Salem, OR 97308-0884

Re: *Petition for Public Records Disclosure Order:*
Oregon State University Records

Dear Mr. Bridges:

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 18, 2003, asks the Attorney General to direct Oregon State University (OSU) to provide copies of the following records:

1. Any e-mail messages or other correspondence between OSU employees or contractors and ODOT employees Mark Hirota, Ray Mabey, Cathy Nelson, John Rosenberger or other ODOT employees discussing the content and/or conclusions of the bridge analysis ODOT commissioned OSU to perform and for which a final work product was anticipated in July, 2003.
2. Copies of all working notes, and preliminary or draft copies of the bridge analysis report as well as a copy of the final report.

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. ORS 192.450(1). Your request was denied by Caroline Kerl, OSU General Counsel, on September 3, 2003. The

basis of her denial was two provisions of the Public Records Law: ORS 192.501(14) and 192.502(1).

OSU entered into a Master Interagency Agreement (Agreement) with the Oregon Department of Transportation (ODOT) on July 22, 1999, to perform various research projects pursuant to specific Work Orders. The Agreement was designed to permit ODOT to contract for professional services in the areas of transportation research, policy analysis and quality assurance services in numerous transportation areas. The Agreement contemplates research results that will enhance Oregon's transportation system and also contemplates that the research will "make significant contributions to the body of scholarly research within the discipline." Agreement, Article I. ODOT asks OSU to perform work pursuant to Work Orders. The Agreement specifically permits OSU to publish its research findings "upon satisfactory completion of Work Orders." Agreement, Article 9.

Professor Christopher Higgins is the principal investigator on the work that is the subject of this public records request and for which ODOT has contracted pursuant to a Work Order. The work under the Work Order is to be completed on June 30, 2004, and the deliverables under the Work Order include reports to ODOT in the form of journal articles or draft journal articles. Professor Higgins is performing the work as part of his job as an OSU employee. He has multiple graduate students working with him who will also be publishing their research. To date, only an interim progress report has been issued to ODOT which sets out the status of the research, various preliminary conclusions and what work remains to be completed. Nothing has yet been published.

ORS 192.501(14) exempts from disclosure:

> Writings prepared by or under the direction of faculty of public educational institutions, in connection with research, until publicly released, copyrighted or patented.

This exemption was requested by the State System of Higher Education in 1987 and was sought "out of concern about risks associated with the release of incomplete and inaccurate data pending its verification, correction and final public release." Letter of Advice dated March 29, 1988, to W.T. Lemman, Executive Vice Chancellor (OP-6217) at 3.

The interim report prepared by OSU, working notes, data and preliminary or draft copies of the interim report, as well as e-mail messages or other correspondence from OSU employees to ODOT employees discussing the content or conclusions of the work performed thus far,[1] meet

[1] Included in your request are "e-mail messages or other correspondence between OSU employees or contractors and ODOT employees * * * discussing the content and/or conclusions of the bridge analysis." While ORS 192.501(14) does not address writings sent by ODOT employees to the researchers at OSU, the portions of such records that discuss the content or conclusions of OSU's work would, by necessity, disclose information exempt under ORS 192.501(14). Correspondence from ODOT to OSU discussing the research may contain other information that is not exempt from disclosure, and, to the extent it does, Ms. Kerl told us that the University is amenable to collecting, reviewing, and redacting those records, for which she would provide you with an estimated fee and require pre-payment (see page 3 of this Order).

the criteria stated in ORS 192.501(14). They are writings prepared by or under the direction of a public institution faculty member, and they are connected with research requested by ODOT pursuant to the Agreement. The records have not yet been publicly released, and are neither copyrighted nor patented. OSU has released preliminary results to ODOT. The research will be continuing until summer 2004 when the final report will be issued.

These records are exempt from disclosure unless the public interest requires disclosure in the particular instance. Your stated interest in disclosure is the investigation of public discussions implying that ODOT "overstated the bridge problem in order to pass a revenue package" to finance bridge work. As this office has previously stated:

> Barring substantial and persuasive argument to compel a decision that disclosure in this particular instance would be in the public interest, we may assume that ORS 192.501(15) [now 192.501(14)] authorizes the university researchers to withhold data in order to assure the accuracy and integrity of their research efforts and to avoid the potential detriment to the public interest if misleading or inaccurate data were released prior to being finalized and published.

OP-6217 at 4. According to Ms. Kerl, Professor Higgins has stated that the interim report presented to ODOT contains research findings that are not yet complete and preliminary conclusions that will be subject to revision as the research is continued over the next year. On balance with ORS 192.501(14)'s purpose of providing accurate information and permitting public university faculty and students to publish their research, we do not believe that your stated public interest requires disclosure of this preliminary information, which is not yet complete and therefore at an increased risk of being misinterpreted. Thus, we conclude that the identified records are exempt from disclosure under ORS 192.501(14).[2]

Finally, Ms. Kerl's September 3, 2003, letter specifically states the possibility that OSU may maintain a small number of records responsive to your request that do not fall within ORS 192.501(14) or another exemption from disclosure. Ms. Kerl's letter states that OSU would provide a cost estimate for the University to search for and review any such records, after receiving notice that you would like them to do so. A public body may charge a fee to reimburse it for the actual cost of making records available, including photocopy costs and time spent by agency personnel. ORS 192.440(3). A public body may also take a "reasonable time" to respond to a records request. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2001) at 9. While your request was initially made on July 31, 2003, and repeated on August 21, 2003, Ms. Kerl informed you on August 21 that the University had been unable to respond to your request because Professor Higgins was on vacation. Subsequent to the professor's return, and within two weeks of her August 21 letter, Ms. Kerl substantively responded to your request on September 3. In light of Professor Higgin's absence from campus, and OSU's prerogative to charge a reasonable fee for responding to a records request, we conclude that OSU has not denied your request for the records that Ms. Kerl offered to identify and disclose, if nonexempt,

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[2] Because we conclude that the faculty research exemption applies to the requested records, we do not address the second exemption, ORS 192.502(1), upon which OSU denied your request.

subsequent to receiving payment of fees for doing so. With regard to such records, we deny your request as premature.

Sincerely,

PHILIP SCHRADLE
Special Counsel to the Attorney General

c: Caroline Kerl

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