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DEPARTMENT OF JUSTICE

Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400

December 22, 1988

Lars Larson, Reporter
KPTV-12
735 S.W. 20th Pl.
P.O. Box 3401
Portland, OR 97208

Re: **Petition for Public Records Disclosure Order; Multnomah County Circuit Court Videotapes**

Dear Mr. Larson:

This letter responds to your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which the Department of Justice received on December 15, 1988, asks the Attorney General to direct the Circuit Court for Multnomah County and its employes to disclose videotapes made on December 15, 1988, in the courtroom of the Honorable Harl Haas, Multnomah County Circuit Court Judge, in the case of State v. Sandra Jones.

According to our information, the requested videotapes do not constitute evidence in the trial court proceeding, nor are they part of the trial court file in that proceeding. The videotapes instead recorded the conduct of the proceedings in the circuit court, and were made by or on behalf of the Oregon Trial Lawyers' Association pursuant to authorization given by Judge Haas under Canon 3A.(7)(c) of the Code of Judicial Conduct. The videotapes are the property of the OTLA, but at this time are in Judge Haas's possession.[1]

For the reasons that follow, the videotapes are subject to a "claim of right to withhold disclosure by an elected

official." ORS 192.480. That statute, therefore, requires the Attorney General to decline consideration of your petition.

ORS 192.480 provides in relevant part:

> "In any case in which a person is denied the right to inspect or to receive a copy of a public record in the custody of an elected official, or in the custody of any other person but as to which an elected official claims the right to withhold disclosure, no petition to require disclosure may be filed with the Attorney General * * *, or if a petition is filed it shall not be considered by the Attorney General * * * after a claim of right to withhold disclosure by an elected official."

In this case, it is unnecessary to determine the custodian of the videotapes. Arguably, the custodian could be the Multnomah County Circuit Court or the Oregon Judicial Department as a public agency, the State Court Administrator, the circuit court judge himself, or the Chief Justice of the Supreme Court as the officer with supervisory authority over the Oregon court system. See ORS 1.002(1).[2] ORS 192.480 requires the Attorney General to decline consideration of a petition to disclose a public record "as to which an elected official claims the right to withhold disclosure," regardless of whether that official has custody of the record.

Judge Haas has stated that he denied disclosure of the videotapes in reliance on Canon 3A.(7)(c)(iii) and (iv) of the Code of Judicial Conduct.[3] The judge, of course, is an elected public official. See Or Const Art VII (Amended), § 1. Thus, an elected official has claimed the legal right to withhold disclosure of these tapes. Additionally, by the promulgation of Canon 3, another elected official, the Chief Justice of the Oregon Supreme Court, has established a standing claim of right to deny disclosure of the videotapes. ORS 1.002(1)(a) empowers the Chief Justice to make rules and issue orders appropriate to the exercise of his administrative authority and supervision of the court system. Canon 3's bar on exhibiting the videotapes until the conclusion of the proceeding in which they were taken and the exhaustion of all direct appeals constitutes a claim of right by an elected official to nondisclosure. Under these circumstances, ORS

192.480 prohibits the Attorney General from considering your petition.[4]

Very truly yours,

JAMES E. MOUNTAIN, JR.
Special Counsel to the
Attorney General

JEM:cm
cc: The Honorable Harl Haas
Circuit Court Judge
Multnomah County Courthouse
1021 SW 4th
Portland, OR 97204

R. William Linden, Jr.
State Court Administrator
Justice Building
Salem, OR 97310

The Honorable Edwin J. Peterson
Chief Justice
Oregon Supreme Court
Supreme Court Building
Salem, OR 97310

JEM:clr:33991

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[1] Judge Haas informs us that the videotapes might be given to the OTLA pursuant to an agreement under which the tapes will be held in escrow or otherwise deposited so as to prevent the exhibition of the tapes until the conclusion of the proceeding and the exhaustion of all direct appeals, consistent with Canon 3A.(7)(c)(iii) and (iv).

[2] For a discussion of the problems of determining the custodian of evidentiary court records, see State ex rel KOIN-TV v. Olsen, 300 Or 312, 397, 711 P2d 966 (1985), in which the court held that a broadcasting company had no common-law right of access to videotapes that were presented as evidence in a civil action.

[3] Under Canon 3A.(7) of the Code of Judicial Conduct, a judge may authorize:

> "(c) * * * electronic recording or photographic reproduction of appropriate court proceedings which are subject to the following conditions:
>
> "* * * * *
>
> "(iii) the recording or reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
>
> "(iv) the recording or reproduction will be exhibited only for instructional purposes in educational institutions." (Emphasis added.)

[4] Because the Attorney General may not consider this petition, we need not determine whether, under the circumstances of this case, an order by the Attorney General to disclose the videotapes would violate the constitutional doctrine of separation of powers. See Circuit Court v. AFSCME, 295 Or 542, 550, 669 P2d 314 (1983); see also State ex rel Frohnmayer v. Oregon State Bar, 91 Or App 690, 695-96, 656 P2d 686 rev allowed, 306 Or 660 (1988).