THEODORE R. KULONGOSKI
ATTORNEY GENERAL

THOMAS A. BALMER
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400
TDD: (503) 378-5938

December 16, 1994

Shawn Eckardt, SID #7560536
Oregon State Penitentiary
2605 State Street
Salem, OR 97310

Re: Petition for Public Records Disclosure Order - Oregon Department of Corrections Records

Dear Mr. Eckardt:

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 December 6, 1994,[1/] asks the Attorney General to direct the Oregon Department of Corrections to make available to you copies of the following records:

1. Oregon Department of Correction's Procedure Number 46 (Tactical Emergency Response Team); and

2. All other procedures relating to, or regarding the Tactical Emergency Response Team.

For the reasons that follow, we respectfully deny your petition.

The Public Records Act confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. See ORS 192.420. If a public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. Turner v. Reed, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

ORS 192.502(4) expressly exempts from disclosure under the Public Records Law:

> Information or records of the Department of Corrections * * *, to the extent that disclosure thereof would interfere with the rehabilitation of a person in custody of the department or substantially prejudice or prevent the carrying out of the functions of the department, if the public interest in confidentiality clearly outweighs the public interest in disclosure.

The legislature has charged ODOC with a number of varied functions and duties concerning those offenders committed to its jurisdiction by the courts. See ORS 423.020(1). At the very core of its statutory functions and duties is the responsibility to exercise custody over convicted felons sentenced to a term of imprisonment until they are subject to lawful release, by safely confining them in one of the state's correctional institutions. Id.

Your petition states that you requested copies of the above-referenced public records from Trent Axen, Library Coordinator at the Oregon State Penitentiary (OSP), and that Mr. Axen denied your request on October 28, 1994. Attached to your petition is a copy of an inmate communication form referenced in the petition containing your written request to Mr. Axen for a copy of ODOC Procedure #46 (Tactical Emergency Response Team), and Mr. Axen's written response. There is no mention in the attached inmate communication form that you requested any records other than Procedure #46.

We have spoken with Mr. Axen regarding your petition. He advises us that he denied your request for a copy of the procedure for the reason stated in his written response to you, and that he orally advised you that the Department has purposefully not made the procedure available to inmates or to the public for reasons of institutional safety and security.

We have reviewed Procedure #46 and we find that disclosure of certain portions of the procedure would jeopardize and substantially degrade security in ODOC's correctional institutions and, thus, would "substantially prejudice or prevent ODOC from the carrying out of the functions of the department." See ORS 423.020(1). Knowledge of ODOC emergency response team capabilities, sophistication, tactics, training and organization could reasonably be used by inmates, and their confederates in the public, to frustrate or circumvent security and other emergency response measures employed at ODOC correctional institutions, and to assist in plans of escape.

We believe, therefore, that the public interest in maintaining the confidentiality of ODOC emergency response team capabilities, sophistication, tactics, training and organization clearly outweighs any public interest in disclosure of such information. Thus, this information is exempt from disclosure under ORS 192.502(4). See Public Records Order, January 26, 1993 (Patten).

We have discussed our conclusions with ODOC's Acting Chief of Security, Rusty Rice. Mr. Rice advises us that, in accordance with ODOC's responsibility under the Public Records Law to make available non-exempt portions of the requested records, ODOC will make available to you a copy of Procedure #46 that redacts only those portions of the document that we have determined to be exempt from disclosure. Accordingly, we deny your petition as to the redacted information in Procedure #46 because it is exempt, and we deny your petition as moot with respect to the remaining portions of the procedure because ODOC has agreed to make it available to you.

Mr. Rice further advises us that ODOC has additional records that may come within the scope of your petition. Although you have not made a proper written request of ODOC for additional procedures relating to the Tactical Emergency Management Team, as required by ODOC's administrative rules,[2/] Mr. Rice advises us that in this instance ODOC will treat your petition as a proper request for these additional records. After reviewing the additional documents we conclude that they are exempt from disclosure under ORS 192.502(4), for the same reasons discussed above in relation to Procedure #46.

Accordingly, we also deny your petition as to other procedures relating to the Tactical Emergency Management Team.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the Attorney General

ESH:JVV:jvv:clr/JGG0AC8D
c: Rusty Rice, Acting Chief of Security
Oregon Department of Corrections

[1/]We appreciate your extending the time within which the law would have otherwise obligated us to respond.

[2/]ORS 192.430 authorizes state agencies to adopt reasonable rules and regulations necessary for protecting the records and preventing interference with the regular discharge of duties of the custodian. ORS 192.430. Pursuant to this statute, ODOC has adopted administrative rules, OAR 291-37-020(2) and (7), which provide, in pertinent part:

(2) The request must be in writing, addressed to the Department's functional unit manager where the record(s) is located * * *

* * * * *

(7) Proper and reasonable opportunity for inspection and/or duplication of record(s) will be provided, consistent with security requirements at each Department facility and functional unit and as circumstances warrant.