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October 4, 1995

BY FACSIMILE AND REGULAR MAIL

Jeffory E. Adams
Murray, Dunham & Murray
Attorneys at Law
3200 Bank of California Center
900 Fourth Avenue
Seattle, Washington 98164-1001

Re: **Petition for Public Records Disclosure Order; Department of Corrections Records**

Dear Mr. Adams:

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 22, 1995,[1/] asks the Attorney General to direct the Oregon Department of Corrections (ODOC) to make available to you certified copies of all documents in its possession concerning its dealings with Ergometrics, Carla Swander, or Oscar Spurlin, regarding the development and use of a video test for persons applying for correctional officer positions, including but not limited to the following records:[2/]

1. All correspondence;
2. all contracts and modifications thereto between the State of Oregon and Carla Swander, Oscar Spurlin, or Ergometrics;
3. the complete video test that was given to applicants;
4. all memoranda, notes, telephonic messages, etc.;
5. your [ODOC] production files (i.e., all documents relating to the creation of the video test);
6. instructions given to applicants at any time during the test;
7. all documents relating to whether the funding for the preparation of the video test was categorized as a minority/female set aside;

8. all documents setting forth your termination of the use of the test, including the reasons therefore;
9. any follow up studies regarding the test and its validity; and
10. the answer key.

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

The Public Records Law confers a right to access any public record of a public body in Oregon, subject to certain exemptions and limitations. See ORS 192.420. The law requires generally that the custodian of public records furnish proper and reasonable opportunities for inspection and/or copying of the record in the office of the custodian. ORS 192.430. Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection. ORS 192.450(1).

Your petition states that you requested certified copies of public records from ODOC by letter dated August 1, 1995, but as of the date of your petition you had received no reply.[3/]

We have spoken with Tom Wells, ODOC's Administrator for Personnel and Risk Management, regarding your petition. After locating the requested records, Mr. Wells and his staff undertook a cursory review of the records with ODOC's legal counsel in this office. As a result of that review, Mr. Wells has identified a number of records, including notes, memoranda and correspondence, and a contract entered into by ODOC and Carla Swander, certified copies of which ODOC will make available to you upon receiving your payment of ODOC's costs.[4/] Accordingly, as to these records which ODOC has determined to make available to you, we deny your petition as moot.

In addition to the foregoing records, Mr. Wells has identified other documents within the scope of your request that may be subject to one or more statutory exemptions from disclosure, in whole or in part, under the Public Records Law, ORS 192.501 and 192.502. Mr. Wells has advised this office, and we concur, that with respect to these additional records he and his agency require substantial advice from legal counsel before determining which documents, if any, lawfully may be withheld from disclosure. This office is currently working on ODOC's request for advice regarding the legal issues raised by your public records request.[5/]

This office has previously concluded that when a public body is confronted with physically extensive or legally complex requests for disclosure of public records, and seeks to consult with legal counsel for advice, the agency does not thereby actually or constructively deny the request. Attorney General's Public Records and Meetings Manual,

at 12 (1993). Nor does a public body deny a request merely because it fails to comply with a deadline the requestor seeks to impose. Public Records Order, May 9, 1989, Hribernick.

Accordingly, under these circumstances we cannot say that ODOC has "denied" a request for these additional records. Therefore, we deny the remainder of your petition as to these additional records as premature.

Sincerely,

THOMAS A. BALMER
Deputy Attorney General

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c: Tom Wells, Administrator
Personnel and Risk Management
Oregon Department of Corrections

[1/] Although your petition is dated September 6, 1995, this office did not receive it until September 22, 1995, when you caused a facsimile copy of the petition to be transmitted via telecopier to Joan Linn, Executive Secretary to the Attorney General. We appreciate your courtesy in extending the time within which we otherwise would have been required under the statute to issue the order.

[2/] The context for the itemized list of records set forth in your petition is supplied by your original letter requesting records from the Department of Corrections dated August 1, 1995, a copy of which you have attached to and referenced in your petition.

[3/] Your petition also states that ODOC failed to reply to your records request within seven days as required by ORS 192.465(2). That provision of the Public Records Law pertains to elected officials, and has no application to ODOC.

[4/] The Public Records Law permits a public body to establish and recover fees reasonably calculated to reimburse it for its actual cost in making public records available, including the time spent by agency staff in locating and reviewing the records in order to delete exempt material. *See* ORS 192.440(3); *see also*, Public Records Order, April 7, 1989 (Martin).

[5/] Legal counsel assigned to ODOC estimates that he may require at least a month to complete his research and analysis of the legal issues, and provide his advice regarding these issues to the agency.