JOHN R. KROGER
ATTORNEY GENERAL

MARY H. WILLIAMS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400

December 11, 2009

Mark J. Wilson
SID # 7449142
3405 Deer Park Dr. S.E.
Salem, OR 97310

Re: Petition for Public Records Disclosure Order:
Board of Parole and Post-Prison Supervision Records

Dear Mr. Wilson:

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 4, 2009, asks the Attorney General to order the Board of Parole and Post-Prison Supervision ("Board") to produce the following records:

1. AGGRAVATED MURDER ATTORNEY GENERAL ADVICE. The "Attorney General advice" which was issued sometime after 1988, and instructed the Board that it did not have the authority to set a parole release date for a prisoner sentenced for aggravated murder until the Board determined, pursuant to ORS 163.105, that the prisoner was capable of rehabilitation. *See e.g., Severy v. Board of Parole*, 318 Or 172, 175, 864 P2d 368, 369 (1993)(En Banc).

2. PUBLIC DISCLOSURE OF HEARING SUBMISSIONS. Any and all public documents which form the basis of the Board's afore-quoted understanding,[1/] policy and/or position, including but not limited to any

[1] We understand the "afore-quoted understanding" to which you refer in the second paragraph to be the following statement contained in your request to the Board:

On September 6, 2009, I was informed by a potential Board hearing witness:

> published and/or unpublished judicial decisions, Attorney General advice, and/or other communications. I also request any and all public records which establish the scope of this newly expressed public disclosure policy, including but not limited to information relating to whether this position extends to "anything submitted" by any party in opposition to an offender as well (i.e., "victim/prosecutor letters," anonymous letters, etc).

By order dated November 17, 2009, we denied your earlier petition for disclosure of these records as premature, as the Board had not yet denied your request for the listed records. On November 18, 2009, the Board, through its Executive Director, Nancy Sellers, issued its response to your request. The Board denied your request for "Aggravated Murder Attorney General Advice" on grounds of attorney-client privilege. With regard to your request for materials pertaining to development of its current disclosure policy, Ms. Sellers explained:

- The Board did not create published or unpublished judicial decisions regarding public disclosure of hearing submissions, and Attorney General advice is exempted from disclosure by attorney-client privilege.

- Attached is the information posted on the Board's website regarding the disclosure of non-victim written submissions to the Board. Contrary to what someone told you, this was not based on a judicial decision and does not change the confidentiality of materials submitted by crime victims, which continue to be exempted from disclosure under Oregon Public Records Law.

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 any 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).

1. Aggravated Murder Attorney General Advice

Having performed a thorough search of its records, the Board has been unable to locate a record of advice from DOJ matching the court's description in *Severy* or the description in the Board orders you listed. Because a public body cannot be required to disclose a record it does not possess, we deny your petition.[2]

I checked with Nancy Sellers at the Parole Board about submitting confidential statements on behalf of persons appearing before the board. She said they had recently received a judicial decision that anything submitted is a public document and are required to deliver to the press the entire package submitted on behalf of an inmate, if requested to do so.

[2] We also reviewed DOJ records for written advice matching the description given by the Oregon Supreme Court and the various board orders. Like the Board, we were unable to find any such advice.

2. Public Disclosure of Hearing Submissions

Your petition specifically addresses two categories of records: legal advice from the office of the Attorney General, and judicial opinions forming a basis for the Board's current disclosure policy. We address those, and then turn to your broader request for "any and all" records in two categories.

A. "Attorney General advice"

ORS 192.502(9) unconditionally exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." Confidential communications between a lawyer and client are privileged under Oregon law. ORS 40.225 (OEC 503). A person upon whom ORS 40.225 to 40.295 confer a privilege waives the privilege if the person voluntarily discloses or consents to disclosure of any *significant part* of the matter or communication. ORS 40.280 (OEC 511). Consequently, disclosure of the record itself waives the exemption. *Springfield School District # 19 v. Guard Publishing Co.*, 156 Or App 176, 182-83, 967 P2d 510 (1998). Moreover, disclosure of a summary of a report may act as a waiver of the privilege if the information contained in the summary is equivalent to the privileged information. *Oregonian Publishing v. Portland School Dist. No. 1J*, 152 Or App 135, 142-43, 952 P2d 66 (1998), *aff'd on other grounds*, 329 Or 393, 987 P2d 480 (1999).

With regard to any advice on which the Board might have based its current disclosure policy, we have reviewed the records of confidential communications between DOJ and the Board and conclude that neither the policy itself nor any statement Ms. Sellers made or is alleged to have made discloses a "significant part" of that communication within the meaning of OEC 511. The fact that the Board both consulted with counsel on a legal issue, and also developed and disclosed an approach to that issue, does not disclose the substance of the Board's communications with its counsel. The Board has not waived attorney-client privilege with regard to that advice, and it remains exempt from disclosure under ORS 192.502(9)(a). We therefore deny your petition as it pertains to those records.

B. "Judicial decisions"

With regard to your request for "published and/or unpublished judicial decisions" that "form the basis of the Board's" current disclosure policy, the Board maintains that the policy is not "based on" a decision or decisions. However, the Board explained that two orders issued by the Court of Appeals did help inform the current policy, and will provide copies of those orders within five days of the date of this order. We deny your petition for these records, as the Board is not denying you the right to inspect them. *See* ORS 192.450(1).

C. "Any and all" records

You sought "any and all" records of the Board in two categories. First, you sought "any and all records" that "form the basis of the Board's * * * understanding" described in footnote 1

of this order. Second, you sought "any and all" records that "establish the scope of this newly expressed public disclosure policy." The Board has located two reports that may be responsive to this aspect of your request. The Board will provide copies of those reports within five days of the date of this order. We therefore deny your petition for these records as well.

For the reasons described above, your petition is respectfully denied.

Sincerely,

DAVID E. LEITH
Associate Attorney General

DEL:MCK:DM
c: Nancy Sellers, Board of Parole and Post-Prison Supervision