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April 10, 2009

Robert Fernandez
SID #5907786
3920 East Ashwood Road
Madras, Oregon 97741

Re: Petition for Public Records Disclosure Order:
Department of Administrative Services, Risk Management Division Records
Department of Corrections Records

Dear Mr. Fernandez:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Laws, ORS 192.410 to 192.505. Your petition, which we received on April 3, 2009, asks the Attorney General to direct either the Department of Administrative Services, Risk Management Division (DAS/RMD) or the Department of Corrections (ODOC), to make available for inspection or to produce copies of the following records:

> Risk Management sends a Notice of Denial on February 10, 2009. In this letter the Department of Corrections investigation found no merit to my allegations and the Department of Corrections is prepared to go to litigation. Petitioner requests a copy of this investigation, February 12, 2009, done by Department of Corrections in finding no merit to petitioner's allegations, which is denied March 1, 2009.

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 195.420. 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 disclosure. ORS 192.450(1).

We deny your petition with respect to the Department of Corrections because the petition is premature. On April 8, 2009, Mr. Richard Ackerly, Assistant Superintendent of Security for Deer Ridge Correction Institution spoke to Senior Assistant Attorney General Herbert F. Lovejoy. Mr. Ackerly reports that you were informed in writing that public records requests should be pursued through the function unit manager's office of the institution. Mr. Ackerly informed Mr. Lovejoy that to date, the Department of Corrections has not denied your request. Because ODOC has not denied your request for records, we are without authority to order ODOC to make its records available to you. ORS 192.450(1).

On the other hand, DAS/RMD has denied your request for records. On April 8, 2009, Mr. Lovejoy spoke with Ellen Hewitt, the Lead Worker for the Claims Unit of DAS/RMD. Ms. Hewitt informed Mr. Lovejoy that on December 12, 2008, you filed a "NOTICE OF TORT" with DAS/RMD, which alleged wrongdoing by the Department of Corrections and sought $1.1 million in compensation plus punitive damages. DAS/RMD is responsible for investigating and handling claims against the State where an agency or its employees are alleged to have been negligent and such negligence caused damages. Upon receipt of your "NOTICE OF TORT," DAS/RMD opened a tort claim file and investigated your claims. As part of its investigation, DAS/RMD requested information from the Department of Corrections. That request resulted in the preparation of the investigation report you seek. In a letter to you dated February 10, 2009, DAS/RMD stated that it did not find liability on the part of the State of Oregon, its officers, agents or employees, and therefore denied your claim. On February 13, 2009, you then made a public records request for the Department of Corrections investigative report to DAS/RMD, which DAS/RMD denied on March 4, 2009. On March 26, 2009, you renewed your request to DAS/RMD for the investigative report, which DAS/RMD again denied on March 27, 2009.

We conclude that the report is exempt from disclosure under the Public Records Law. ORS 192.501(1) conditionally exempts from disclosure:

> Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation [.]

This exemption applies only to records "compiled or acquired by the public body for use in ongoing litigation or, litigation [that] is reasonably likely to occur." ***Lane County School District v. Parks***, 55 Or App 416, 419-420, 637 P2d 1383 (1981). Litigation is "reasonably likely to occur" when such litigation is "more likely than not." ATTORNEY GENERAL PUBLIC RECORDS AND MEETING MANUAL (2008) (MANUAL) at 32. The filing of a tort claim notice is "[o]ne indication that litigation is reasonably likely to occur," and "reports prepared in response to such a notice would fall within the exemption." MANUAL at 32.

As previously stated, upon receipt of your "NOTICE OF TORT," DAS/RMD considered it to be a tort claim, opened a tort claim file, and investigated your complaint as such. A "tort" is defined as "* * * the breach of a legal duty that is imposed by law, other than a duty arising from contract or quasi-contract, the breach of which results in injury to a specific person or persons for which the law provides a civil right of action for damages or for a protective remedy." ORS 30.260(8). Your "NOTICE OF TORT" alleged wrong doing by the staff of the Department of Corrections. It alleged the use of "electro magnetic pulsation" which caused interference with personal privacy, interference with legal work, and interference with religious ceremony. Based on the allegations and nature of your "NOTICE OF TORT," DAS/RMD concluded that it was more likely than not that your complaint would result in litigation. We cannot say that DAS/RMD was incorrect in that assessment. For this reason, DAS/RMD's investigative files come within the exemption for public records pertaining to litigation.

The exemptions listed in ORS 192.501 are conditional in that they exempt specific types of records or information "unless the public interest requires disclosure in the particular instance." ORS 192.501. An interest in private litigation does not qualify as a public interest requiring disclosure of records under ORS 192.501(1). MANUAL at 32. You have not asserted a public interest requiring disclosure of the litigation records in this instance, and in reviewing your petition, we can discern none. Consequently, because DAS/RMD's investigative records were compiled in preparation for possible litigation, *i.e.* in response to the filing of your "NOTICE OF TORT," ORS 192.501(1) exempts the investigative report from disclosure. For that reason, we deny that portion of your petition that seeks to compel disclosure of those records from DAS/RMD.

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

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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