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DEPARTMENT OF JUSTICE

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March 30, 2009

Margaret Fiorino
Attorney at Law
P.O. Box 14068
Portland, OR 97293

Re: Petition for Inspection of Public Records
Oregon Department of Agriculture Records

Dear Ms. Fiorino:

This letter is the Attorney General's order on your Petition for Inspection of Public Records (Petition) under the Oregon Public Records Law, ORS 192.410 to 192.505. We received your Petition on March 23, 2009. For the reasons that follow, we respectfully deny your petition.

Your Petition states that you and John R. O'Neill, as attorneys for Kevin and Karen Kohlman, submitted requests for copies of public records to the Oregon Department of Agriculture (ODA) on June 20, 2008 and September 12, 2008.[1] Upon our request, you provided us with copies of both of your requests. The earlier of your requests asks for copies of the following:

Pesticide Application Records for Township and Range #s

T24S, R 7W: 34, 35, 36
T25S, Range 7W: 1, 2, 3, 9, 10, 11, 12, 13, 14;

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[1] Your Petition describes the records requested as:

> All records obtained by the Oregon Department of Agriculture under the Pesticide Use Reporting System regarding the application of pesticide or herbicides for the years 2005 through 2008 for the following sections in the Southern Oregon Water Basin in Douglas County:
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> Township 24S, Range 7W, Sections 34, 35, and 36;
> Township 25S, Range 7W, Sections 1, 2, 3, 9, 10, 11, 12, 13, and 14;
> Township 25S, Range 6W, Sections 6, 7, and 18.

T25S, Range 6W: 6, 7, 18

for Douglas County for years 2005-2008

Your later request takes the form of a letter. In that letter, you state:

> I represent the plaintiffs in the above-referenced litigation. As you may be aware, Ron Simeroth has been involved in investigating our client's reports of loss, including this most recent 2008 report. Mr. Simeroth was contacted by my office today regarding his 2008 investigation. We had hoped that we could obtain copies of the 2008 pesticide spray records for the involved parcels from him through his investigation. Mr. Simeroth directed us to contact you with a request for those records.
>
> We are seeking copies of any and all pesticide/herbicide spray records from 2008 retained by the Oregon Department of Agriculture for the following sections in Douglas County:
>
> Township 25S, Range 7W, Section 12
> Township 25S, Range 7W, Section 1
> Township 25S, Range 7W, Section 2
> Township 25S, Range 6W, Section 6
> Township 25S, Range 6W, Section 7

Your petition states that both of your requests were denied. At our request, you provided us with a copy of a response you received from ODA, dated June 24, 2008. The response states:

> I have received your request for application records for Douglas County from years 2005-2008. However, I am not able to provide you with the information you have requested. ODA does not have pesticide use information unless it is part of a specific investigation. The Pesticide Use Reporting System (PURS) information is confidential and reported by water basin not county. I have enclosed a copy of the Oregon Administrative Rules and Revised Statutes that pertain to the PURS program for your review.

On March 25, 2009, you informed us by telephone that you spoke with Dale Mitchell of ODA regarding the second request and that he denied it orally. Mr. Mitchell informed us that he does not recall discussing the second request with you. However, ODA provided us with the fee sheet and cover letter that relate to its response to your second request. The fee sheet estimates that filling the request would cost a total of $382.30 and a notation on the document indicates that you paid the fee on October 15, 2008. On October 23, 2008, ODA sent you a response to your September 12, 2008 request:

> Please find enclosed the copies, photos and maps of the ODA Investigation #061004 that your requested from our office. If you have any questions, please feel free to contact [Shannon Gilkison].

We address each of your requests in turn.

With respect to your request of June 20, 2008, we observe that your request is clearly aimed at obtaining information specific to parcels of land that are identified by township, range and section. ODA responded to your request by flatly asserting that "ODA does not have pesticide use information unless it is part of a specific investigation" and "[t]he Pesticide Use Reporting System (PURS) information is confidential and reported by water basin not county." ODA also enclosed various legal provisions pertaining to PURS.

Those statements are not entirely accurate. ODA does, in fact, possess "pesticide use information" apart from information that is specific to investigations. Namely, it possesses information in PURS. Nor is PURS information entirely confidential. ODA publishes an annual report summarizing the pesticide data. *See* Or Laws 1999, ch 1059, §8(1)(a).[2] The data is also released to the public, but only in a manner "consistent with the limitations" provided in Oregon Laws 1999, chapter 1059, section 8. *See* Or Laws 1999, ch 1059, §8(1)(b). However, PURS data is confidential if the data would reveal the identity of the owner or lessee or the specific location where a person has applied a pesticide: (1) for a private agricultural operation; (2) for a forestry operation; (3) on private property; or (4) on public property leased to a private person. Or Laws 1999, ch 1059, §8(2)(a). Information that would reveal the identity of the owner or lessee or the specific location of property where a person has applied a pesticide is prohibited from public release.[3] OAR 603-057-0417; *see* Or Laws 1999, ch 1059, §8(1)(b). Any person that causes information identified as confidential to be released or who fails to preserve the confidentiality shall be denied all future access to confidential data collected through any aspect of the PURS program. *See* OAR 603-057-0417(5).

Nevertheless, we deny your petition because we conclude that, even within PURS, ODA does not have the information you are seeking. The information within PURS is the following:

- the identification number of the applicator;
- the month or date of pesticide use;
- the category of the site on which the pesticide was applied (e.g. "Agriculture" or "Forestry");
- potentially more specific information about the activity on the site (e.g. "Vegetables");
- the "Water Basin" within which the pesticide was used (selected from a dropdown list of 15 basins within the state); and
- the product ID number and product name of the pesticide used.

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[2] PURS is not codified. It is in the Oregon Revised Statutes in a note following ORS 634.042.

[3] There are exceptions that do not apply to Petitioner's requests. Instead, they apply if the information is required for an investigation conducted under a provision of law, needed by a federal, state, or local agency, or needed by a health or environmental researcher. Or Laws 1999, ch 1059, §8(3); OAR 603-057-0417(2); OAR 603-057-0418. The agency or person must agree to maintain the confidentiality of any confidential information, except that an agreement is not required if the public interest by clear and convincing evidence requires disclosure of the information to the agency or person in the particular circumstances. Or Laws 1999, ch 1059, §8(3); OAR 603-057-0417(3). A violation of any confidentiality agreement is subject to a civil penalty up to $10,000. Or Laws 1999, ch 1059, §9; *see also* OAR 603-057-0417; OAR 603-057-0418(5); OAR 603-057-0420.

To illustrate the content of the database, we have enclosed with our order printouts of the computer program by which PURS data is reported. None of the information within the PURS system is the site-specific information that you were clearly seeking on June 20, 2008. We cannot order ODA to disclose to you information that it does not have. We therefore respectfully deny your petition with respect to your first request.

To the extent that you would like to reformulate your first request to comport with the PURS information that ODA actually has, you are free to do so. We note, however, that data is confidential if the data would reveal the identity of the owner or lessee or the specific location where a person has applied a pesticide.

We turn to your second request. ODA understood your second request to be seeking (a) records from Mr. Simeroth's investigative file and (b) site specific data regarding pesticide applications. We believe this was a reasonable understanding of your request.

ODA states that you are in possession of all of the documents in the investigative file. You have not been "denied the right to inspect" those records, and we must therefore deny your petition with respect to them. With respect to the site-specific pesticide information you seek, we must deny that petition on the same basis as we denied your petition with respect to the first request. Again, ODA's PURS records do not include the specific information that you are seeking. And Oregon law does not permit ODA to disclose information that would reveal the identity of the owner or lessee or the specific location where a person has applied a pesticide: (1) for a private agricultural operation; (2) for a forestry operation; (3) on private property; or (4) on public property leased to a private person.

For the reasons described above, we must respectfully deny your petition.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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Enclosure