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August 1, 2008

Robert Cheeseman
718 Winchester Avenue
Reedsport, Oregon 97467

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

Dear Mr. Cheeseman:

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 July 25, 2008, asks the Attorney General to direct the Department of Administrative Services, Risk Management Division (DAS/RMD) to make available for inspection or to produce copies of the following records:

> * * * all records relative to Cheeseman, the Judicial Department (no designation) to include all telephone logs, facsimile transmissions, U.S. Mail, E Mail or any other form or method of transmittal that comprises the record pertaining to the matter of Cheeseman, Douglas County Circuit Court, Jack Banta, District Attorney, Robert Millican [*sic*], Judge, Ret. or any other participant.

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).

On July 28, 2008, Senior Assistant Attorney General Herbert F. Lovejoy spoke with Betsy Enos, a Claims Manager for DAS/RMD. Ms. Enos informed Mr. Lovejoy that on August 9, 2006, you filed a document with the Douglas County District Attorney's Office entitled "Complaint," which alleged wrongdoing by the clerk of the Douglas County Circuit Court. The Douglas County District Attorney's Office forwarded your "complaint" to the Douglas County Trial Court Administrator, who forwarded it to the State Court Administrator's Office. The State

Court Administrator's Office then forwarded it to DAS/RMD for investigation. 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 complaint, DAS/RMD opened a tort claim file and investigated the claims contained in your "complaint." In a letter to you dated November 27, 2006, DAS/RMD stated that it did not find that the court had acted negligently, and therefore denied your claim.

Ms. Enos further indicated to Mr. Lovejoy that on December 1, 2006, you wrote to DAS/RMD requesting clarification of the tort claim because your "complaint" was criminal, not civil, in nature. On January 10, 2008, you again wrote to DAS/RMD and asked for the original communication to DAS/RMD that requested a tort claim. On January 21, 2008, you again wrote to DAS/RMD and sought clarification of the persons or officials who contacted DAS/RMD and the reason for the tort investigation. On February 4, 2008, DAS/RMD wrote to you and explained that DAS/RMD's tort investigation resulted from your "complaint" to the Douglas County District Attorney's Office being forward to them by the Judicial Department to determine if a compensable claim was involved. In response to DAS/RMD's February letter, you wrote to DAS/RMD on February 16, 2008 requesting a copy of the document requesting the alleged tort claim, as well as the names of the persons requesting the tort claim investigation from DAS/RMD.

Your petition requests "the record[s] pertaining to the matter of Cheeseman, Douglas County Circuit Court, Jack Banta, District Attorney, Robert Millican [*sic*], Judge, Ret. or any other participant." As to the portion of your petition that seeks records that led up to DAS/RMD's investigation of a possible negligence claim against the clerk of the Douglas County Circuit Court, we respectfully deny your claim as moot because DAS/RMD has agreed to provide those records to you.

As to the portion of your petition that seeks records that comprise DAS/RMD's investigation of the claims contained in your "complaint," we respectfully deny your petition on the ground that those records are exempt from disclosure. 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 [.]
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> The Court of Appeals * * * has held that 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).]
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> * * *

> Public bodies need to investigate and prepare in advance for expected litigation. Consequently, we think it appropriate to interpret the phrase "reasonably likely" to mean "more likely than not," rather than "imminent." One indication that litigation is reasonably likely to occur is that a person has filed a notice of tort claim against the public body. Notes or reports prepared in response to such a notice would fall within the exemption.

ATTORNEY GENERAL PUBLIC RECORDS AND MEETING MANUAL (2001) (MANUAL) at 32.

As previously stated, upon receipt of your "complaint," 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 "complaint" alleged several instances of "misconduct, misfeasance, and possible fraud" by the clerk of the Douglas County Circuit Court. It alleged that the actions of the clerk were "intentional, malicious, and reckless," and sought an investigation by the Douglas County District Attorney. Based on the allegations and nature of your complaint, 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 "complaint," ORS 192.501(1) exempts those records from disclosure. For that reason, we deny that portion of your petition that seeks to compel disclosure of those records.

Your petition is respectfully denied.

Sincerely,

STEPHANIE L. STRIFFLER
Special Counsel to the Attorney General for
PETER D. SHEPHERD
Deputy Attorney General

DM636149
Enclosure
c: Betsy Enos, Claims Manager, DAS/RMD