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April 3, 2008

Robert Butler
824 SW 18th Avenue
Portland, OR 97205

Re: Petition for Public Records Disclosure Order:
Oregon Dept. of Transportation Records

Dear Mr. Butler:

This letter is the Attorney General's response to your letter of March 25, 2008. In that letter, which we received on March 27, you "appeal[] ODOT's refusal" to provide certain information that you had requested. We treat that letter as a petition for an order requiring ODOT to disclose records under Oregon's Public Records Law, ORS 192.410 to 192.505. 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 192.420. If a state agency denies a request for disclosure of records, the requestor may petition the Attorney General for review of the denial. However, the Attorney General may order a state agency to disclose records only when the agency has denied a request for the records. *See* ORS 192.450(1). Agencies are not required to create records in response to a public records request. *See*, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) at 6 ("Public bodies are not required to create a record to disclose * * * "knowledge" their staff might have"). The Attorney General cannot order an agency to disclose records that it does not possess.

Because the precise scope of your request is hard to discern, we must begin by determining what you are seeking. In a conversation with Assistant Attorney General Bonnie Heitsch, Fred Eberle stated ODOT's belief that you seek a general update on the progress of the proposed Springwater interchange project. ODOT does not understand you to seek documents that contain relevant information in an unconsolidated form. We conclude that this is a

reasonable interpretation of your January 19, 2008 request.[1] The request refers to "inquiries as to the progress of this study" that had gone unanswered, and also to "[u]pdates * * * promised from the Portland District of ODOT." These phrases suggest that you want a fairly broad overview of progress on the project, and do not refer to any specific documents. The second phrase seemingly alludes to Mr. Eberle's statement in a June 5, 2007 letter that "you will be added to the project mailing list and informed of public involvement opportunities." Matthew Garrett similarly indicated on June 21, 2007 that ODOT "will keep you apprised of developments." This context supports ODOT's belief that you seek an overall update, rather than whatever documents might help you piece together the pertinent information.[2]

Mr. Eberle also informed Ms. Heitsch that, at the time of your request, ODOT had not prepared such an update. That is, ODOT was not in possession of any documents responsive to your request as they reasonably interpreted it. As we indicated above, the Public Records Law does not require agencies to create records in response to requests, and the Attorney General cannot order agencies to disclose records that they do not have. Therefore, your petition under the Public Records Law must be respectfully denied.

Nevertheless, we understand from Mr. Eberle that on April 1, 2008, ODOT sent you a letter updating you on the status of the Springwater project. ODOT believes that letter responds to the concerns underlying your January 19 request.[3] Mr. Eberle also indicated that ODOT will strive to keep you informed in a timelier manner as the Springwater project progresses.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS21484
c: Fred Eberle, ODOT

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[1] If you meant something else by your request, you are free to file a new request clarifying the documents that you seek.

[2] This understanding is consistent with your petition to our office, which seeks "the details relating to a contract" including "where it is towards completion, funds expended, further funds obligated if any, progress schedule, and description [of] work product provided to date."

[3] To the extent that the prepared letter constitutes a public record that is responsive to your request, there is no need for us to order ODOT to disclose it to you. ODOT has already done so; indeed, ODOT prepared the record for that very purpose.