HARDY MYERS
ATTORNEY GENERAL

PETER D. SHEPHERD
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400
TTY: (503) 378-5938

October 15, 2007

Michael Milstein
The Oregonian, Northwest Team
1320 SW Broadway
Portland, OR 97201-3499

Re: Petition for Public Records Disclosure Order:
Oregon State University Municipal Wastewater Testing Records

Dear Mr. Milstein:

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 October 1, 2007,[1] asks the Attorney General to direct Oregon State University ("OSU") to make available "copies of data and results derived from the new method developed to detect traces of drugs in municipal wastewater" as described in OSU's press release of August 21, 2007. Specifically, you request "all records and documents, including but not limited to reports, analyses, emails, notes, correspondence and any other records mentioning, citing, discussing or otherwise relating or referring to the municipalities or other areas where this method has been used and the results that were obtained." For the reasons that follow, we deny your petition.

Assistant Attorney General Wendy Robinson spoke to Professor Field about the research the professor reported at the American Chemical Society. The research was conducted using frozen effluent samples collected previously for research on fluorochemicals. As part of the current research, it was discovered that frozen samples do not produce reproducible results, as each time a sample is defrosted the test outcome changes. Thus, measured concentrations of drugs within a sample do not represent actual concentrations at the time the sample was taken approximately five years ago. Research is required to determine how to collect and store wastewater samples so that test results will accurately reflect concentrations and ratios at the time of sample collection.

Researchers involved in the current project presented a report to the American Chemical Society explaining the development of an analytical technique for identifying drug traces in

[1] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

small samples of wastewater. Although some results were discussed anonymously, the presentation did not identify municipalities or make claims specific to any identified municipality. A professional publication regarding this methodology is being prepared, and will be submitted for peer review to relevant academic journals. Submission has not yet occurred.

The Public Records Law confers a right to inspect public records of Oregon public bodies, subject to certain exemptions and limitations. *See* ORS 192.420. An exemption codified at ORS 192.501(14) applies to "writings prepared by or under the direction of faculty of public educational institutions, in connection with research, until publicly released, copyrighted or patented." The documents you request are "writings prepared by or under the direction of" a member of the OSU faculty in connection with research. This includes information initially provided by the municipalities, as that information was gathered and forwarded to the researchers according to directions provided by researchers, analogous to a survey response. Moreover, the vast majority of documents that you seek (which essentially identify participating municipalities and describe particular results) have not been released, copyrighted or patented. The only possible exceptions are documents that you state were disclosed to the American Chemical Society.

You suggest that the presentation by OSU faculty to the American Chemical Society constitutes a public release that now requires OSU to disclose all of the documents that you request. You imply the same with respect to OSU's press release and comments made by Professor Field on *Talk of the Nation*. However, none of these communications disclosed the information that you seek, or any information of comparable specificity. In each case, the generalized and anonymous discussion served to illustrate the capabilities and potential utility of the methodology. No specific claims were made concerning results in identified communities. As we indicated in Public Records Order – Speede (June 19, 1995):

> If disclosure of faculty research writings were required after publication of an incomplete, preliminary review of those findings, faculty members of public institutions would refrain from publishing any of their findings until they were absolutely certain that they had gleaned all data that had any possible scientific value from their materials. The substantial delay in the publication of the findings of faculty would result in the inability of faculty members to be the recipients of research grants in the first place. If faculty were thus forced to wait until research data were completely analyzed before publishing an initial review of any findings, it would also prevent the public institutions from maintaining a reputation of being on the forefront of innovative research.

This analysis is equally applicable here. It refutes your suggestion that various public or semi-public comments by OSU and OSU faculty have completely waived the faculty research exemption.

Not only have the findings released been preliminary, but the researchers will make further use of the documents you seek. Not only is publication of the research to date still forthcoming, but research to develop an effective method of obtaining and storing samples must be carried out. In several previous Public Records Orders, we have concluded that where future

work and publications based on the requested data are planned, the research has not yet been "publicly released, copyrighted or patented" so as to terminate the exemption, regardless of the release or publication of preliminary data or results. *See* Public Records Order – McCleery (July 7, 1989).[2]

You alternatively suggest that the information actually presented to the American Chemical Society should be made available to you. However, a limited disclosure does not waive public records exemptions unless the limited disclosure thwarts the policy supporting the exemption. *See* Letter of Advice to Executive Vice Chancellor Lemman, March 29, 1988 (OP-6217, pp. 4-5). Limited disclosures to an appropriate professional audience such as the American Chemical Society are protected by this flexibility. This protection in turn ensures that researchers employed by Oregon's public universities can make proper use of peer review processes and professional associations. Because the limited disclosure to the American Chemical Society has neither affected the ability of the researchers to make further use of the underlying data nor resulted in the circulation of erroneous data that could be misused, we conclude that the policies underlying the faculty research exemption were not frustrated and the exemption was not waived even with respect to the particular documents.

For the reasons above, we conclude that the faculty research exemption, ORS 192.501(14) applies to the documents you requested. As you correctly point out, exemptions under ORS 192.501 are conditional. The statute provides that the exemptions do not apply if "the public interest requires disclosure" in a particular instance. We conclude that the public interest does not require disclosure of the documents that you seek. We reach this conclusion because of ongoing and planned research related to the documents, and because the documents that you seek contain results that are unreliable due to the sample storage issues. As a result of these factors, the public interest in encouraging and protecting research by public university faculty outweighs any public interest in disclosure.

In OP-6217 we discussed the purpose of the faculty research exemption. In addition to preventing piracy of research ideas and data, the State System of Higher Education also sought the exemption "out of concern about risks associated with the release of incomplete and inaccurate data pending its verification, correction and final public release." OP-6217, p. 3. *See also* Public Records Order – Bridges (September 25, 2003).[3]

In this case, the data contained in the documents you seek is not an accurate indicator of the drug content of the original effluent, because the measured concentrations change each time the sample is defrosted and tested. Research is ongoing to identify an effective method for collecting and storing wastewater samples that facilitates accurate testing. Oregon has, and the people of Oregon have, an interest in facilitating this research by OSU faculty. We agree that the

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[2] This PRO involved interview responses and data from faculty interviews where the participants were assured of confidentiality if they participated. The PRO did not address whether the exemption for information submitted in confidence, ORS 192.502(4), was applicable because the exemption for faculty research applied.

[3] This PRO involved an interim report issued by OSU to ODOT regarding analysis of the safety of bridges in Oregon. Nothing had been published by OSU. Because the information was preliminary and there was a high risk that the information would be misinterpreted we concluded that the exemption in ORS 192.501(14) applied.

public may also have an interest in access to accurate data concerning overall drug use in various communities. We also agree that the public may have an interest in knowing how much drug residue is contained in effluent for environmental and ecological reasons. However, the unreliable nature of the data at issue makes it unnecessary to decide whether those interests would otherwise overcome the countervailing public interest in protecting the research of public university faculty. Simply put, the public has no interest in the release of inaccurate or unreliable data concerning the drug content of effluent.

In conclusion, the information you seek has not been publicly released, copyrighted or patented. In addition, Professor Field is still analyzing the information. Thus, it falls under the faculty research exemption of ORS 192.501(14). Given the ongoing research and the potential inaccuracy of the data you seek, any public interest in disclosure is insufficient to require disclosure in this case. Because we conclude that OSU's decision to withhold the documents is justified by the faculty research exemption, we need not determine whether it is also justified by the confidential submission exemption of ORS 192.502(4). We respectfully deny your petition.

Sincerely,

PETER D. SHPEHERD
Deputy Attorney General

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