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

February 1, 2007

Mel Stewart
5180 Zosel Ave. S.
Salem, OR 97306

Re: Petition for Public Records Disclosure Order:
Records of John W. Burgess

Dear Mr. Stewart:

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 January 25, 2007, asks the Attorney General to direct John W. Burgess to:

> Provide the audio tape created by hearing officer in Contested Case pre-hearing conference in permit RF-6580 Final Order dated January 18th 1993. Specifically the tape referenced in foot note 1 on page 2 of that order that shows whether or not DSL in a pre-hearing telephone conference in fact agreed to Mr. Stewart stipulation in exchange for Stewart agreeing that 0.95 of his property was wetland.
>
> Provide all evidence submitted to the John Burgess in the Contested case proceeding to permit RF-6580.
>
> Provide any and all communication between John Burgess and any other party to that proceeding.
>
> Provide any personal noted taking during any pre-hearing conferences.
>
> Provide any call logs showing telephone communication to or from Bill Cook or the AG,s office that did not involve Mel Stewart as a participant.
>
> Provide any and all e-mails between any party to a that proceeding.

Provide all other items in possession of Burgess relating to Permit 6589.

These records relate to Mr. Burgess's handling of a contested case hearing in 1991-1992 as a contract hearing officer for what was then called the Division of State Lands (now the Department of State Lands).

For the reason that follows, 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. A private body is also subject to the Public Records Law if the entity is the "functional equivalent" of a public body. *Marks v. McKenzie High Schl. Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1991). Any person denied the right to inspect or receive a copy of a public record by a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.450(1). The Attorney General may order a state agency to disclose records only when the agency has denied a request for the records. ORS 192.450(1). An agency is required to make available nonexempt public records in its possession but is not required to create public records. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2004) at 5, E-5.

Your petition states that the Department of State Lands has looked for the records you requested and has not found them. You also state that Mr. Burgess had an "agency" relationship when he was a contract hearing officer for the Department and should therefore possess these records. We have spoken with John Burgess and he has informed us that he does not have in his possession any documents related to the hearing. For that reason, we decline to analyze whether John Burgess is a public body or private body from whom records may be obtained under the Public Records Law. Because you request records from an entity that does not possess the records, we deny your petition as moot.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS19218

cc: Kevin Moynahan, Michael Morales, DSL
Joseph Groshong, Trial