THEODORE R. KULONGOSKI
ATTORNEY GENERAL

THOMAS A. BALMER
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400
TDD: (503) 378-5938

January 26, 1996

John E. Gutbezahl
P.O. Box 973
St. Helens, OR 97051

Re: ***Petition for Public Records Disclosure Order: Oregon Department of Corrections Records***

Dear Mr. Gutbezahl:

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 via facsimile on January 19, 1996, asks the Attorney General to direct the Oregon Department of Corrections (ODOC), to make available to you a complete copy of its agreement with Denton County, Texas, for the housing and care of ODOC inmates, specifically including those provisions of the agreement relating to medical screening criteria which ODOC has previously determined to be exempt from public disclosure under the Oregon Public Records Law. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to access any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. The law requires generally that the custodian of public records furnish proper and reasonable opportunities for inspection and copying of the records in the office of the custodian. ORS 192.430. If a public record contains both exempt and non-exempt material, the law requires that the public body separate and disclose the non-exempt material where it is reasonably possible to do so; no specific request is necessary. ORS 192.505; *see Turner v. Reed*, 22 Or App 177, 583 P2d 373 (1975). 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 public inspection. ORS 192.450(1).

Your petition states that you made your request for a copy of the agreement to ODOC by letter dated January 9, 1996, but that ODOC denied your request, in part, as

explained in its memorandum to you dated January 16, 1996. That memorandum, a copy of which is attached to your petition, memorializes ODOC's transmittal of an incomplete copy of the agreement to you, excluding certain provisions relating to medical screening criteria that ODOC withheld from disclosure to you as material exempt from disclosure under the Public Records Law, specifically, ORS 192.502(4).

We have discussed your petition with Gary Weeber, the Program Manager assigned to ODOC's Classification and Transfer Unit charged with responsibility for administration of ODOC' agreement with Denton County. Mr. Weeber informs us that upon further review of your request, and the pages withheld from you, there are approximately 150 pages of an attachment to the agreement that ODOC will make available to you upon prepayment of its costs in accordance with its fee schedule.[1/] Because ODOC has agreed to make available to you copies of this additional portion of its agreement with Denton County upon prepayment of its costs, the Attorney General has no authority to order disclosure of these materials. *See* ORS 192.450(1). Accordingly, we deny your petition with respect to these materials as moot.

The remainder of the records you seek through your petition are contained in two exhibits to the agreement, Exhibits A and F. Exhibit A sets out with particularity ODOC's medical criteria for determining whether an inmate can be considered for assignment to the Denton County Detention Facility. Exhibit F is ODOC's Health Services Division Policy and Procedure regarding the management of inmate hunger strikes. We first consider whether Exhibit A, ODOC's medical screening criteria, is exempt from disclosure.

ORS 192.502(4) expressly exempts from disclosure under the Public Records Law:

> Information or records of the Department of Corrections * * *, to the extent that disclosure thereof would interfere with the rehabilitation of a person in custody of the department or substantially prejudice or prevent the carrying out of the functions of the department, if the public interest in confidentiality clearly outweighs the public interest in disclosure.

The legislature has charged ODOC with a number of varied functions and duties concerning those offenders committed to its jurisdiction by the courts. *See* ORS 423.020(1).

[1/] The Public Records Law permits state agencies to establish and recover fees reasonably calculated to reimburse them for their actual cost in making public records available. *See* ORS 192.440(3). ODOC has adopted OAR 291-37-020(3)(b), which provides that no inspection and/or duplication of records is authorized until payment has been received.

At the very core of its statutory functions and duties is the responsibility to exercise custody over convicted felons sentenced to a term of imprisonment until they are subject to lawful release, by safely confining them in one or more correctional institutions. *Id.* In carrying out this responsibility, the legislature has expressly authorized ODOC to enter into agreements with both public and private entities in other states to provide correctional facilities and services for the confinement and care of ODOC inmates. *See* 1995 Or Laws, ch 621; *see also* ORS 421.205 to 421.229, 421.245 to 421.254 (Interstate Corrections Compact), and 421.282 to 421.294 (Western Interstate Corrections Compact).

ODOC has a legitimate and substantial interest in transferring Oregon prison inmates to correctional facilities located in other states as one tool to safely and effectively manage Oregon's burgeoning prison population. Due to recently enacted changes in state sentencing laws, Oregon's prison population is expected to double by the year 2001. Mr. Weeber informs us that the state is unable to build and bring into operation additional secure prisons in time to meet these population forecasts. He advises us that ODOC's current inmate transfer program is an essential part of the state's population management strategy, and will remain so until the state is able to build the additional prison capacity needed to accommodate the increase in prison population. By transferring inmates from crowded state prisons within this state to safe and secure correctional facilities available in other states, ODOC discharges its statutory responsibilities toward these offenders, while maintaining ODOC's existing correctional facilities as safe, secure and orderly facilities for inmates and staff.

To these ends, ODOC has transferred approximately 250 Oregon prison inmates to a correctional facility located in Texas pursuant to an agreement with Denton County. Mr. Weeber advises us that all but a handful of those inmates were transferred involuntarily, notwithstanding their desire to remain in Oregon. ODOC has also just recently entered into an agreement with a private corrections corporation for the housing and care of approximately 500 Oregon prison inmates in a correctional facility located in Florence, Arizona. Mr. Weeber advises us that by the end of the current biennium ODOC expects to enter into additional agreements with authorities in other states for the housing and care of ODOC inmates in correctional facilities located outside Oregon, bringing the total to approximately 1400 inmates.

ODOC's agreement with Denton County contains provisions detailing the specific medical criteria used by ODOC in screening its inmate population for suitability for transfer to the Denton County Detention Facility. Identical or substantially similar medical screening criteria has and will be included in each of ODOC's other agreements with private and public authorities for the housing and care of Oregon prison inmates. As explained by Mr. Weeber, the vast majority of ODOC inmates understandably view their potential transfer

to a correctional facility located outside this state for several years, away from family and friends in Oregon, as undesirable.

We have reviewed Exhibit A and find that disclosure of the specific provisions detailing ODOC's medical screening criteria would jeopardize and substantially degrade ODOC's ability to effectively implement its current inmate transfer program, and would thus, "substantially prejudice or prevent ODOC from the carrying out of the functions of the department." *See* ORS 423.020(1); *see also* 1995 Or Laws, ch 621. Knowledge of the specific medical criteria used by ODOC to screen its inmates from transfer to correctional facilities located in Denton County, Texas, or in other states, could reasonably be used by individual inmates to feign certain medical conditions or otherwise act in such a manner as to preclude their transfer under the criteria. This in turn could effectively curtail ODOC's ability to readily identify inmates in sufficient numbers at any one time to effect necessary transfers.

We conclude, therefore, that the public interest in maintaining the confidentiality of ODOC's medical screening criteria clearly outweighs any public interest in knowing the specifics of those criteria. That portion of Exhibit A that details these criteria is exempt from disclosure under ORS 192.502(4). Accordingly, we deny your petition as to this portion of Exhibit A to the agreement. (ODOC has agreed to make available to you the remainder of Exhibit A upon prepayment of its fees.)

Lastly, we consider whether Exhibit F, ODOC's Health Services Division policy and procedure on management of inmate hunger strikes meets the legal standard set forth in ORS 192.402(4).

An inmate's decision to go on a hunger strike in a prison is a wilful act that threatens not only the individual's physical and mental health, but also the safe, secure and orderly management and operation of the prison. Experience has shown that hunger strikes in prisons are generally motivated out of an inmate's desire to coerce from prison officials particular acts that the inmate has been unable to obtain through authorized means. By their very nature, prison hunger strikes constitute a direct challenge to the lawful authority of prison administrators and to their control of the prison. Like any inmate disturbance, hunger strikes by individual inmates may escalate beyond the individual to other inmates, further jeopardizing the safety and security of inmates and staff alike.

To preserve and maintain the health and well-being of persons committed to its custody and care by the courts, and to maintain the safe, secure and orderly operation of its correctional facilities, it is ODOC's policy to intervene with inmates who choose to

participate in a hunger strike, with force when necessary. Exhibit F sets out with particularity the procedures employed by Health Services staff in carrying out that policy.

We have reviewed Exhibit F and find that disclosure of the provisions describing ODOC's intervention procedures would substantially interfere with its ability to manage appropriately inmate hunger strikes within its correctional facilities and would thus "substantially prejudice or prevent ODOC from the carrying out of the functions of the department." *See* ORS 423.020(1). Inmate knowledge of the specific intervention procedures could reasonably lead to prolonged hunger strikes within ODOC facilities, increasing both the threat of serious physical harm or death to individual inmates participating therein and the threat posed by such disturbances to other inmates and staff in the prison environment.

We conclude, therefore, that the public interest in maintaining the confidentiality of the portion of Exhibit F that contains ODOC's procedures regarding the management of inmate hunger strikes clearly outweighs any public interest in its disclosure and that such material is exempt from disclosure under ORS 192.502(4). Accordingly, we deny your petition as to this portion of Exhibit F. (ODOC has agreed to make available to you the remainder of Exhibit F upon prepayment of its fees.)

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the Attorney General

ESH:JVV:AV:jvv:clr:JAA01BDC
c: Gary Weeber, Program Manager, Classification and Transfer Unit
Oregon Department of Corrections