STATE OF OREGON

DEPARTMENT OF JUSTICE

Justice Building
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June 11, 1987

Alice Weatherford-Harper
Circle W Ranch
P.O. Box 8
Ione, Oregon 97843

Michael Schlender
Senior Environmental Engineer
811 SW 6th Avenue
Portland, Oregon 97204

Re: Public Records Request

Dear Ms. Weatherford-Harper and Mr. Schlender:

This letter responds to Ms. Weatherford-Harper's public records petition, received June 4, 1987. The petition requests that the Attorney General direct the Department of Environmental Quality (DEQ) to allow Ms. Weatherford-Harper to inspect records withheld by DEQ. Pursuant to ORS 192.450(1), the Attorney General grants Ms. Weatherford-Harper's petition.

Ms. Weatherford-Harper originally requested DEQ to disclose to her a copy of DEQ's report of a September 1986 inspection of the Chem-Security Systems, Inc. (Chem-Security) hazardous waste disposal facility in Arlington, Oregon. DEQ provided the inspection report to Ms. Weatherford-Harper, but excised portions of the report "in accordance with ORS 192.500(1)(a) on the basis that the Department is or is likely to pursue litigation on the issues discussed in those portions." Letter from Michael Schlender to Alice Weatherford-Harper, May 21, 1987.

Our review indicates that the excised portions of the inspection report withheld by DEQ relate to waste analysis and groundwater monitoring issues at the Chem-Security facility. Those issues are currently the subject of negotiations being conducted between DEQ, Chem-Security, and the United States Environmental Protection Agency (EPA) for the purpose of entering an administrative consent order resolving the issues.

DEQ evidently determined that due to the sensitive nature of these negotiations, and the possibility that litigation will result if the negotiations were not successful, DEQ was entitled to withhold the waste analysis and groundwater monitoring portions of the inspection report under the litigation exemption.

Our determination, however, is that ORS 192.500(1)(a) does not exempt the excised information from public records law disclosure requirements. That section conditionally exempts "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 beed filed, if the public body shows that such litigation is reasonably likely to occur. . ." The legislative history makes clear that this exemption does not apply to administrative proceedings, such as an administrative proceeding involving DEQ, Chem-Security and EPA.

Moreover, even if the administrative proceeding might lead to litigation, the records at issue here were not compiled for purposes of litigation. DEQ made and compiled the records as part of an inspection of the Chem-Security facility. Such inspections are made regularly as a condition of Chem-Security's permit to operate the hazardous waste facility. Although we question some aspects of the Court of Appeals ruling in the Lane County School District v. Parks, 55 Or App 416, 420, 637 P2d 1383 (1981), the court held, in that case, that the litigation exemption does not apply to agency records collected in the ordinary course of business.

We conclude that the excised portions of the September 1986 inspection report are not exempt from disclosure. We allow the disclosure petition and direct that DEQ allow the petitioner to inspect or to receive a copy of the excised portions within seven days of this letter.

Sincerely,

James E. Mountain Jr.

JAMES E. MOUNTAIN, JR.
Special Counsel to the
Attorney General

JEM:cm
cc: Kurt Burkholder
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