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October 29, 1996

William J. Birhanzl, SID #6410207
c/o Mike Hart
821 N. Shore Drive
Lake Oswego, OR 97035

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

Dear Mr. Birhanzl:

This is Attorney General's order on your petitions[1/] for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petitions, which we received on October 15, 1996[2/], ask the Attorney General to direct the Oregon Department of Corrections (ODOC) and its employees to make available to you for inspection the following records:

1. The audio record of disciplinary court proceedings in Oregon State Penitentiary case # 08-96-166 on August 29, 1996, and on September 9, 1996;

[1/] We received six separate petitions for public records disclosure orders in one mailing from you. For ease of administration and clarity, we have decided to respond to each petition by subject matter in this single order.

[2/] We appreciate your courtesy in extending the time within which the law would have otherwise obligated us to issue our order on your petitions.

2. The audio record of proceedings in Oregon State Penitentiary Disciplinary Court Case # 08-96-166 taking place on September 13, 1996 before so-called Hearings Officer Terence Anderson;

3. The complete file relating to the "proposed amendments" to OAR 291.105-005 through 291.105-0050 and a current status report regarding those amendments currently pending;

4. The written complaint by Santiam Correctional Institution Prison Guard, Mike Harvey, filed with the Department of Corrections between July 30, and August 10, 1996 alleging that he was interfered with in the performance of his duties by a Lt. Colonel at the Eugene Natl. Guard while acting as Military I crew boss;

5. a) All D.O.C. misconduct reports filed by prison guard Mike Harvey (BPST-unk) in the months of March, April, May, June, July and August of 1996;

   b) Cellular telephone billing documents listing all phone calls made on the cell phone possessed by Harvey between July 30, and August 20, 1996;

6. The law which is in force prescribing a change of my custody level or classification, termination of my employment on Military I work crew at Santiam Correctional institution on 8/20/96 as part of my discipline (prior to my hearing) while committed to the custody of the D.O.C.

For the reasons that follow, we respectfully deny each of your petitions.

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/or copying of the record in the office of the custodian. ORS 192.430. 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). Under these provisions, an agency may be said to have "denied" a request to inspect or to receive a copy of a public record only if it receives a proper request for public records. Public Records Order, July 7, 1989 (Baker).

ORS 192.430 authorizes state agencies to adopt reasonable rules and regulations necessary for protecting the records and preventing interference with the regular discharge of duties of the custodian. ORS 192.430. Moreover, the Public Records Law permits public bodies to establish and recover fees reasonably calculated to reimburse them for their actual cost in making public records available, including the time spent by agency staff in locating and reviewing the requested records in order to delete exempt material. *See* ORS 192.440(3); *see also* Public Records Order, April 7, 1989 (Martin).

Pursuant to these statutes, the Oregon Department of Corrections (ODOC) has adopted administrative rules, OAR 291-37-020(3)(b) and (7), which provide in pertinent part:

> (3)(b) No inspection and/or duplication of record(s) is authorized until payment has been received.
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> * * * * *
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> (7) Proper and reasonable opportunity for inspection and/or duplication of record(s) will be provided, consistent with security requirements at each Department facility and functional unit and as circumstances warrant.

Your petitions collectively state that you asked various ODOC officials to inspect the above-listed records, but that your requests were subsequently denied by those officials. As reflected in your petitions, some of the requested records are maintained in different functional units within ODOC. We consider your petitions in turn below.

1. **Audio Record of Proceedings on August 29 and September 9**

The disciplinary hearing records sought by this petition are identical to those requested in a prior petition to the Attorney General received on September 18, 1996. We denied your previous petition regarding the disciplinary hearing records because ODOC determined that it would make copies of the records available to you upon receiving your prepayment of its costs. Public Records Order, October 16, 1996 (Birhanzl). We have again spoken with Connie Barnett, Hearings Secretary at OSP, regarding your request to inspect the audiotape record of the hearings conducted in disciplinary case # 08-96-166. She advises us that ODOC remains willing to make copies of the audiotape record of the hearings available to you upon your prepayment of ODOC's costs. Accordingly, we deny your current petition seeking to inspect ODOC's audio records for these dates for the reasons explained in our prior order, a copy of which is enclosed.

2. **Audio Record of Proceedings on September 13**

Your second petition seeks the audio record of a hearing taking place on September 13, 1996, in the same disciplinary case. Ms. Barnett informs us that ODOC will make copies of the audiotape of this proceeding available to you upon your prepayment of ODOC's costs. You may contact Ms. Barnett for an estimate of those costs. Because ODOC has agreed to make this record available to you, we deny your petition with respect to this record as moot.

3. **File Relating to Proposed Amendments to ODOC's Rules OAR 291-105-0005 to 291-105-0080**

In a memorandum dated October 8, 1996, Dave Schumacher, Administrator of ODOC's Rules/Compliance/Hearings office, responded to your request to inspect ODOC's file regarding proposed amendments to its administrative rules governing the disciplining of inmates confined in ODOC facilities. A copy of Mr. Schumacher's response is attached hereto for your convenience. In addition to providing you with a copy of the proposed amendments without cost, Mr. Schumacher's response informed you that ODOC's file, relating to the proposed rule amendments, consists of over 250 pages of documents and he set out the agency's costs for making those records available. That memorandum also explained how you may obtain copies of the records.

We have spoken with Birdie Worley, Rules Secretary for ODOC and assistant to Mr. Schumacher, regarding your petition. Ms. Worley advises us that as of this date her office has not received from you the prepayment of ODOC's costs as required by ODOC's administrative rules governing release of public records. Under these circumstances, ODOC has not denied a request for records, and we have no authority to order ODOC to provide copies of the requested records to you. Accordingly, we deny your petition for these records. *See* ORS 192.450(1), and see our prior order to you of October 16, 1996, at page 3.

4. **Complaint Filed by ODOC Correctional Officer Mike Harvey**

In this petition you seek to inspect a complaint filed by ODOC Correctional Officer Mike Harvey regarding alleged interference with his duties by a Lt. Colonel with the National Guard while Officer Harvey was assigned to supervise inmates on a work crew for the Military Department. We have spoken with Tony Santos, Acting Superintendent of the Santiam Correctional Institution (SCI), regarding your petition pertaining to this record. Mr. Santos informs us that ODOC has no record of a complaint filed by Officer Harvey

regarding interference with his duties as an inmate work crew supervisor by any officer of the National Guard. Because the record you seek does not exist, we deny your petition with respect to this record. This office cannot order an agency to produce records that do not exist.

5. **Misconduct Reports and Cellular Telephone Billing Documents**

Your petition seeks an order directing ODOC to make available to you for inspection all misconduct reports filed by Officer Harvey during the months of March through August, 1996, and cellular telephone billing documents listing all phone calls made on the cell phone possessed by Officer Harvey between July 30 and August 20, 1996. We have spoken with Mr. Santos regarding your petition for these records. He advises us that his office has yet to respond to your request for records directed to former SCI Superintendent Robert Scheidler due to staff availability and workload pressures. Additionally, Mr. Santos considered it appropriate to consult with legal counsel in this office regarding disclosure of the requested records. Under these circumstances, Mr. Santos' failure to respond to your request for the misconduct reports within a month and a half of receipt is not unreasonable, and does not constitute a denial of your request. *See* ORS 192.430; *see also Morse Bros. v. ODED*, 103 Or App 619, 798 P2d 719 (1990). Absent a denial of a records request by a state agency, this office has no authority to order disclosure. *See* ORS 192.450. Accordingly, we deny your petition as to these records as premature.

Nevertheless, Mr. Santos has asked us to pass the following information along to you.

A. **Misconduct Reports**

Mr. Santos states that he has located only one misconduct report issued by Officer Harvey during the time period referenced in the petition and that ODOC will make a copy of the document available to you upon your prepayment to ODOC of its costs. This is the only misconduct report that Officer Harvey recalls issuing.

Mr. Santos advises us that inmate misconduct reports issued by correctional officers assigned to SCI may also be maintained in other ODOC correctional facilities because the disciplinary records follow ODOC inmates transferred from SCI to other facilities. Other facilities do not necessarily file or index inmate misconduct reports under the name of the issuing officer. Thus, in order to determine whether Officer Harvey may have issued additional misconduct reports that are now maintained at other facilities, Mr. Santos states that ODOC staff would first need to identify the inmates transferred from SCI during the

relevant time period, and then hand-search the disciplinary records of those inmates. If you wish ODOC to attempt to locate such additional inmate misconduct reports, Mr. Santos states that you should direct your request in writing to him and he will advise you of ODOC's estimated costs for locating and reviewing the records. He further advises us that you will be required to prepay those estimated costs.

B. **Cellular Telephone Billing Documents**

Mr. Santos informs us that he has located six pages of billing records for the cell phone possessed by Officer Harvey during the time period in question, and that ODOC will make redacted copies of the records available to you its costs pursuant to ODOC's administrative rules governing release of public records.[3/]

6. **Law Prescribing Changes in Inmate Custody Level, Classification and Discipline**

Your petition seeks inspection of the "law" prescribing a change in you custody level or classification, and termination of your work assignment to the Military I inmate work crew at OSCI. Mr. Santos informs us that he unaware of any ODOC administrative rule or procedure regarding termination of inmate work assignments. Mr. Santos further states that ODOC has promulgated administrative rules regarding inmate classification and discipline, and that copies of both rules are available to ODOC inmates for their inspection and review in ODOC correctional facility libraries.

Additionally, as set forth in his memorandum to you dated October 8, 1996, Mr. Schumacher advised you that you could obtain personal copies of ODOC administrative rules

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[3/] Mr. Santos informs us that the information to be redacted is information identifying the times of the phone calls. Mr. Santos states that ODOC has determined that this information is exempt from disclosure pursuant to ORS 192.502(4).

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.

upon written request to him and prepayment of ODOC's fee of $.50 per page. Ms. Worley advises us that as of this date her office has not received prepayment of ODOC's costs as required by ODOC's administrative rules governing release of public records.

Under these circumstances, ODOC has not denied a request for records, and we have no authority to order ODOC to provide copies of the requested records to you. Accordingly, we deny your petition for these records. *See* ORS 192.450(1).

Sincerely,



THOMAS A. BALMER
Deputy Attorney General

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Enclosures
JVV:AV:clr\JGG0ECC4
c: S. Frank Thompson, Superintendent
Terrance Anderson, Hearings Officer
Connie Barnett, Hearings Secretary
Oregon State Penitentiary

Tony Santos, Acting Superintendent
Santiam Correctional Institution

Dave Schumacher, Administrator
Rules/Compliance/Hearings
Oregon Department of Corrections