DAVE FROHNMAYER
ATTORNEY GENERAL
STATE OF OREGON

WILLIAM F. GARY
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400

August 6, 1987

Lars Larson
News Department
KPTV
735 SW 20th Place
P.O. Box 3401
Portland, Oregon 97208

Re: Public Records Disclosure Petition

Dear Mr. Larson:

This letter responds to your July 30, 1987 petition for a public records disclosure order, and your subsequent telephone communications with our office. In your petition, you ask the Attorney General to order the Oregon Department of Human Resources to make available for your inspection:

> "1. Advertising materials prepared for the State Health Division and/or the Department of Human Resources for use in the state's aids education campaign. These materials were prepared by the advertising firm of Pihas, Schmidt and Westerdahl and by the firm of Turtledove-Clemens.
>
> "2. Public opinion polls on the subject of aids or 'acquired immune deficiency syndrome' and [sic] used by the state Health Division or by the State Departmen [sic] of Human Resources."

We respectfully deny your petition.

At the time you filed your petition, none of the materials you seek to inspect were subject to the Public Records Disclosure Law. The advertising materials are "story boards" prepared by the private advertising agencies. According to information we have received, the public opinion polls were commissioned by an advertising firm and were conducted by a

private pollster to measure current public understanding of AIDS for future comparative use by the advertising agency if it conducts polling of AIDS awareness after the education campaign is conducted. These materials were not "public records."

ORS 192.410(4) defines "public record" to include:

> ". . . any writing containing information relating to the conduct of the public's business, prepared, owned, used or retained by a public body regardless of physical form or characteristics." (Emphasis added.)

It is significant that the definition does not stop after describing a public record as any writing containing information relating to the conduct of the public's business. State officials routinely are presented with "writings" (as broadly defined by ORS 192.410(5)), but those writings do not thereby become public records simply because a public officer reviews the material. The public may have an interest in knowing or inquiring about the public officer's response to information in the material, but that fact alone does not convert private, personal property into a public record. The issue is whether the writing which relates to public business is "prepared, owned, used or retained by a public body."

The advertising story boards were created by the private advertising agencies, not state employes or officials. The polling information was compiled by a private pollster for a private advertising agency. When you filed your petition, these two sets of materials were the property of the advertising firms, not the state. At that time, the state was not using the materials in any public education campaign; in fact, to the best of our knowledge, state officials had not decided what materials would be used or recommended for use in the campaign.

Nor were the materials "retained" by state officials, as that term is used in the Public Records Law. Based upon information we received, we believe that state officials and the advertising firms understood that the materials you seek to inspect were the property of the advertising firms and that if the firms left any of the materials with state officials for review, the materials promptly would be returned to the firms after the materials were reviewed by state officials. Under the particular circumstances of this case, such an understanding does not necessarily constitute an attempt to

circumvent the Public Records Law. As noted above, state officials had not decided which if any of the materials would be used. The advertising agencies thus were not acting as storage facilities for documents used by the state. The advertising firms were not required by law to submit the materials for examination by the state as part of a structured, competitive public contracting process. The advertising firms submitted privately developed concepts in the nature of intellectual property for possible consideration and future use by the state. Moreover, the state was not obligated to maintain possession, control, or access to the materials; and, in fact, after review, the state returned the materials to the firms, presumably in recognition of the personal property nature of materials. For all of the above-stated reasons, the materials you seek to inspect were not public records at the time state officials denied your initial request to inspect the documents and when you filed your petition for review of that denial with this office.

After you filed your petition, you and others informed us that the state had made a decision to use certain advertising materials for an AIDS education campaign. Those particular materials are public records, and we are informed that those materials reasonably will be made available for inspection by the public, you, and other members of the media, at a news conference to be conducted on this date: August 6, 1987. With regard to those materials, your request for inspection is moot; with regard to other materials, your petition is denied.

Respectfully submitted,

James E. Mountain Jr.

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

JEM:cm
cc: Vicki Gates, Dept. of Human Resources
Cory Streisinger, Governor's Legal Counsel
Mike Reynolds, Assistant Attorney General
Len Pearlman, Assistant Attorney General
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