ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDRICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4400

January 15, 2014

SENT VIA EMAIL ONLY

Les Zaitz
Senior Investigative Reporter
The Oregonian
PO Box 837
John Day OR 97845
lzaitz@oregonian.com

Re: Petition for Public Records Disclosure Order
Oregon Department of Corrections
DOJ File No. 291020-GA0134-13

Dear Mr. Zaitz,

This letter is the Attorney General's order in response to your petition asking our office to direct the Oregon Department of Corrections (ODOC) to disclose certain public records to you under Oregon's Public Records Law, ORS 192.410 to 192.505. Specifically, your petition asks us to order ODOC to provide you with:

1. "The record of attachments to emails provided to The Oregonian."
2. "The record of the handling of this mail by Jill Curtis, an executive at SRCI."
3. "The record of the handling of this mail by Jeff Morford of the Office of Inspector General."
4. "The record of the investigation into confiscated mail."
5. The documents withheld from you by ODOC pursuant to its assertion of the disclosure exemption for certain ODOC records, ORS 192.502(5).

Your petition relates to a request you originally made to ODOC on October 25, 2013.

In large part, your petition seems to stem from a rather unclear response provided to you by ODOC on December 16, 2013 following a prior, related, petition that you filed with our office. That response, which ODOC supplemented on January 15, 2014, suggests that records were being withheld by ODOC pursuant to ORS 192.502(5), but does not explain what those records are. ODOC has clarified to us, however that the only undisclosed records in ODOC's

possession that fall into any of these specific categories are four pages that inmate James DeFrank attempted to mail to you that were intercepted by ODOC and subsequently withheld in response to your public records requests. ODOC has not withheld any letters from you. Those four pages are responsive to the fifth of the requests listed above. With regard to the first four, ODOC provided us with the following explanation:

1. Though ODOC did not correlate emails and attachments in providing you with records, the only responsive attachments actually withheld by ODOC are the four pages just discussed. Otherwise, the attachments consist entirely of documents provided to you. You have stated that a representation to this effect from ODOC would satisfy this aspect of your request, as you do not require duplicate documents.

2. Jill Curtis's "handling" of this matter consisted of email correspondence and telephone calls to other ODOC officials to determine a course of action. ODOC has searched and has provided you with the only records documenting this involvement.

3. Mr. Morford had some involvement in the matter of the confiscated mail, but to the extent that records document that involvement, they have been provided to you.

4. SRCI conducted an "investigation" consisting of an internal review of the content of the outgoing confiscated letters from inmate James DeFrank addressed to you pursuant to ODOC's administrative rules governing the processing of inmate mail. The investigation concluded that the outgoing mail contained information, which if communicated, would create a clear and present danger of violence and physical harm to a human being. The only documents generated as a part of that review are two mail violation notices issued to inmate DeFrank, copies of which ODOC has furnished to you with its supplemental response dated January 15, 2014.

In addition to the five specific items listed above, you ask us to order ODOC to provide you with any information ODOC has not disclosed that is responsive to your October 25 request. ODOC's letter of January 15 also informs you that 10 pages responsive to another part of your October 25 request are being withheld by ODOC based on the lawyer-client privilege of ORS 40.225, and the disclosure exemption for "Public records or information * * * otherwise made confidential or privileged under Oregon law," ORS 192.502(9)(a). Those pages consist of email correspondence pertaining to the confiscated mail between ODOC's assigned General Counsel and ODOC. Based on our review, we conclude the pages constitute confidential communications for the purpose of facilitating the rendition of professional legal services by our office to ODOC, and are consequently privileged and exempt from disclosure pursuant to ORS 192.502(9)(a).

We turn to the four pages of material directly implicated by your petition. We begin by observing that the Oregon Public Records law does not authorize us to consider whether ODOC properly intercepted and confiscated these pages in the first place. Our order is instead limited to the question whether ODOC's assertion that the pages are exempt from disclosure under the Public Records Law is correct.

The pages in question are pages from the transcript of an interview of an inmate conducted by the Oregon State Police in connection with a homicide investigation. ODOC initially cited ORS 192.502(5) to justify its denial of your public records request and in its most recent letter states that it continues to rely on that exemption. But ODOC also relies on ORS 192.501(3), which conditionally exempts from public disclosure "[i]nvestigatory information compiled for criminal law purposes." The exemption is conditional in that it applies "unless the public interest requires disclosure in the particular instance." We conclude that the pages are exempt from disclosure pursuant to the criminal investigatory exemption, and express no view with respect to ODOC's other claim of exemption.

ODOC explains that Malheur County District Attorney Dan Norris has expressed significant concern that disclosure of the transcript pages while criminal proceedings are pending against Mr. DeFrank would put a potential state's witness at increased risk of harm or pressure to change or recant prior statements. The Oregon Court of Appeals has indicated that, pursuant to this exemption, "investigations connected with pending or contemplated proceedings will ordinarily remain secret because disclosure would likely interfere with enforcement proceedings * * * but * * * investigations not connected with pending or contemplated proceedings will remain secret only if the government establishes that disclosure would produce one of the consequences" the exemption is intended to avoid. *Jensen v. Schiffman*, 24 Or App 11, 16 (1976) (emphasis added; citations and quotations omitted).

We readily conclude that the transcript from which these pages were extracted is "investigatory information compiled for criminal law purposes." Because criminal proceedings with regard to Mr. DeFrank are pending, the material falls within the Court of Appeals statement that such information "will ordinarily remain secret because disclosure would likely interfere with enforcement proceedings." Mr. Norris's specific concerns are directly related to such interference, and we are not in a position to second-guess his judgment. We consequently conclude that the transcript pages withheld by ODOC are presently exempt from disclosure pursuant to the criminal investigatory exemption of ORS 192.501(3). Your petition is respectfully denied.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

c: Mark Nooth, SRCI Superintendent
Jill Curtis, SRCI