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January 28, 2015

SENT VIA EMAIL ONLY

Sean J. Riddell
4411 NE Tillamook
Portland, OR 97213

Re: Petition for Public Records Disclosure Order
Department of Oregon State Police
DOJ File No. 257001-GG0086-15

Dear Mr. Riddell:

This letter is the Attorney General's order on your petition for public records disclosure, filed on behalf of your client, Trooper Marc Boyd, under the Oregon Public Records Law, ORS 192.410, *et seq.* The petition, which we received January 21, 2015, asks the Attorney General to order the Department of Oregon State Police (OSP) and its employees to make available for inspection or copy the following records:

> "All reports, notes, or recordings regarding Major Mike Bloom's and Captain Eric Davenport's interview of former Oregon State Trooper Jeffery Lanz regarding his investigations of Senior Trooper Mike Boyd while former Oregon State Trooper Jeffery Lanz was serving in the Office of Professional Standards and Training."

For the reasons that follow, we respectfully deny the 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/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).

On June 6, 2014, you submitted a "Tort Claim Notice and Preservation Letter" to the Department of Administrative Services, Risk Management Division. On behalf of your client, your letter alleges damages caused by former Captain Jeffery Lanz and Captain Andy Heider, in their professional capacities with OSP. As part of its investigation of your claims, OSP interviewed former Captain Lanz on June 11, 2014. On January 14, 2015, you requested the transcript of OSP's interview under the Oregon Public Records Law. On January 20, 2015, OSP denied the request, asserting that the requested record "is exempt from disclosure under ORS 192.501(1) which exempts records compiled by a public body for use in anticipated litigation."

We conclude that the interview transcript is exempt from disclosure under the Public Records Law. ORS 192.501(1) conditionally exempts from disclosure:

> 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 been filed, if the public body shows that such litigation is likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation [.]

This exemption applies only to records "compiled or acquired by the public body for use in ongoing litigation or, litigation [that] is reasonably likely to occur." *Lane County School District v. Parks*, 55 Or App 416, 419-20, 637 P2d 1382 (1981). Litigation is "reasonably likely to occur" when such litigation is "more likely than not." ATTORNEY GENERAL PUBLIC RECORDS AND MEETING MANUAL (2014) (MANUAL) at 37. The filing of a tort claim notice is "[o]ne indication that litigation is reasonably likely to occur," and "reports prepared in response to such a notice would fall within the exemption." MANUAL at 37-38. Based on your tort claim notice, OSP concluded it was more likely than not that your complaint would result in litigation. We cannot disagree with this reasonable assessment.

OSP conducted its interview with former Captain Lanz five days after receiving your tort claim notice. The interview transcript is part of OSP's investigative file prepared in anticipation of tort claim litigation. It therefore falls within the scope of ORS 192.501(1).

The exemptions listed in ORS 192.501 are conditional in that they apply "unless the public interest requires disclosure in the particular instance." ORS 192.501. You assert that disclosure of this transcript is in the public interest because you see reason to believe that the record "contains evidence or admissions of other criminal acts" that former Captain Lanz committed while he was a high ranking official at OSP.

For several reasons, we do not agree that the public interest requires disclosure under the circumstances.

First, our office has long held that an interest in private litigation does not qualify as a public interest that would require disclosure of records under ORS 193.501(1). MANUAL at 38. OSP's interview of former Captain Lanz was specifically related to your tort claim notice. OSP did not conduct this interview to investigate unrelated criminal conduct by former Captain Lanz. From all appearances, you are requesting the investigative report to advance private tort litigation, not for purposes of illuminating unrelated criminal acts. "Generally, the availability of ordinary tools of discovery would negate any need for an individual to use the Public Records Law to gain access to records for purposes of pursuing private litigation." *Id.*

Relatedly, we have stated that the purpose of the exemption is "is to place governmental bodies, as parties or potential parties to litigation, on an even footing with private parties." MANUAL at 37. Requiring public bodies to disclose their work product to litigation adversaries in advance of likely litigation would severely undercut that purpose, and the primary beneficiary would be a private litigant rather than the general public.

Finally, the exemption OSP relies on, by its terms, "does not apply to litigation which has been concluded." Thus, ORS 192.501(1) does not ultimately prevent the public disclosure of the information in the record. The exemption merely allows OSP to withhold the information temporarily during the pendency of the expected litigation. In the meantime, you and your client will presumably have access to ordinary discovery tools to acquire or develop information regarding the activities of Mr. Lanz.

For those reasons, we conclude that the public interest does not require OSP to disclose its work product to its likely litigation adversary in advance of litigation. We respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

cc via email only:
Erin Redding, OSP
Captain Eric Davenport, OSP