JOHN R. KROGER
ATTORNEY GENERAL

MARY H. WILLIAMS
DEPUTY ATTORNEY GENERAL

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

October 10, 2011

Harry Esteve
The Oregonian
1320 SW Broadway
Portland, OR 97201

Re: Petition for Public Records Disclosure Order:
Oregon Lottery Records
DOJ File No.: 177001-GA0093-11

Dear Mr. Esteve:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. You seek an order directing the Oregon Lottery and its employees to produce a copy of a report "regarding an investigation into a complaint by [a lottery employee] of sexual harassment or retaliation by Larry Niswender." For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public records of a public body, subject to certain exemptions and limitations. *See* ORS 192.420. Any person who is denied the right to receive a copy of a public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld from disclosure. ORS 192.450(1).

In response to your initial request for records, Mary Loftin, Public Affairs Manager for the Oregon Lottery, indicated in an email dated September 30, 2011, that the Lottery would not disclose the requested investigation report. She indicated that the report was exempt "under the following Public Records Law exemptions: records pertaining to litigation under ORS 192.501(1); and, work product and attorney-client privilege, as covered by ORS 192.502(9)(a)." We conclude that the report is exempt under ORS 192.501(1), and deny your petition on that basis.

ORS 192.501(1) conditionally exempts materials from disclosure if they pertain to ongoing or impending litigation. The provision 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 been filed, if the public body shows that such litigation is reasonably likely to occur.

The litigation exemption "does not apply to litigation which has been concluded." *Id.* Prior to the conclusion of the relevant litigation, it 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 1383 (1981). The record in question here meets that description.

The Lottery initiated the investigation after a lottery employee made a complaint about Mr. Niswender to the Lottery's human resources department. The employee's complaint came in the context of a just-completed investigation of numerous complaints concerning the conduct of that employee and two other Lottery employees. That prior investigation, which generated a written report from an independent investigator, led to the employee being placed on paid administrative leave in April of 2011. The employee's complaint about Mr. Niswender was submitted four days after the employee had been placed on leave.

Upon receiving the complaint, human resources managers became concerned about the increasing complexity of the matter and about the likelihood that the employee would initiate legal action in response to any discipline they might impose as a result of the first investigation. On April 20, 2011, they authorized another investigation—this time, with regard to the complaint about Mr. Niswender's conduct. The purpose for requesting a second inquiry by the investigator was to determine the validity of the allegations against Mr. Niswender before taking any disciplinary actions with regard to the first investigation. The investigator's report regarding Mr. Niswender was submitted to the Lottery on approximately May 10, 2011.

The circumstances in which the investigation report was generated and prepared satisfy us that it is a record "pertaining to litigation" that is "reasonably likely to occur." The timing of the complaint—just four days after the complaining employee was placed on leave—suggested that the employee would claim that any discipline imposed was retaliatory in nature. The Lottery's concerns about future litigation were confirmed when, on September 16, 2011, the complaining employee's attorney sent a "Notice of Tort Claim" to the Department of Administrative Services. The notice alleges, among other things, that discipline imposed on the employee constitutes retaliation for the employee's allegations concerning Mr. Niswender's conduct. We have previously indicated that a tort claim notice is evidence that litigation is reasonably likely to occur. In this instance, we believe the September tort claim notice vindicates Lottery's April determination that litigation was reasonably likely to occur.

Based on the reasonable likelihood that litigation would occur, the report is conditionally exempt from disclosure under ORS 192.501(1). Because ORS 192.501(1) is a conditional exemption, however, it does not apply if "the public interest requires disclosure" in this instance. As noted above, the subject of the report is an allegation of sexual discrimination and retaliation by the Director of the Oregon Lottery. The allegations are described in the September tort claim notice, which apparently has been provided to you; thus the allegations against Mr. Niswender have already been made public. The report in question reflects Lottery's efforts to prepare a defense to those anticipated claims. Thus, the relative public interests that must be weighed are (1) the present public interest in the disclosure of the information Lottery has compiled in preparing its defense of these allegations against (2) the public interest in keeping the Lottery on relatively even footing with its litigation opponents. *See* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 2011 at 31 (describing the purpose of ORS 192.501(1)). Based on our review of the report in question, we cannot conclude that immediate disclosure would serve the public interest in any especially compelling way. If the complaining employee proceeds with the tort claim noticed in September, the Lottery will presumably make its defense. Disclosure of the facts contained in Lottery's report may occur during litigation. Moreover, public disclosure of Lottery's report while litigation remains reasonably likely would give Lottery's adversaries the benefit of Lottery's work product. Withholding the report at this juncture merely permits Lottery to present its defenses to these claims without the disadvantages that advance public disclosure could create. On the whole, we conclude that the balance of the public interest favors preserving Lottery's equal footing in reasonably likely litigation.

Because we conclude that the report is exempt from disclosure under ORS 192.501(1), we need not assess the Lottery's contention that it is also protected by the lawyer-client privilege and therefore exempt under ORS 192.502(9)(a).

For the reasons explained above, your petition is respectfully denied.

Sincerely,

Mary H Williams

MARY H. WILLIAMS
Deputy Attorney General

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c: Mary Loftin