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May 9, 2011

Marilyn Deutsch
KPTV Fox 12
14975 NW Greenbrier Parkway
Beaverton, OR 97006-5731

Re: Petition for Public Record Disclosure Order:
Oregon Department of Transportation

Dear Ms. Deutsch:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 197.410 to 192.505. Your petition, which we received on May 2, 2011, asks the Attorney General to order the Oregon Department of Transportation (ODOT) and its employees to make available for inspection, or to produce copies of, "any investigation that was done concerning Robert Sork and possible pay irregularities" and "any possible discipline that may have been taken." For the reasons that follow, we respectfully deny your petition.

Your original request for documents petitioned for records regarding the income earned by Bridge Maintenance Supervisor Robert Sork and any investigation into "irregularities." In response, ODOT produced information regarding Mr. Sork's income from ODOT in 2010 and 2011, but declined to produce personnel records relating to any investigation that may or may not have been done. You then renewed your request for any investigative materials. ODOT denied that request.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exceptions. *See* ORS 192.420. ORS 192.501(12) provides one such exception: "A personnel discipline action, or materials or documents supporting that action" are exempt from disclosure "unless the public interest requires disclosure in the particular instance." In denying your request, ODOT specifically cited that provision.

The Oregon Supreme Court has held that ORS 192.501(12) applies only if discipline is actually imposed on an employee. *City of Portland v. Rice*, 308 Or 118 (1989). We have opined that, while a personnel matter is being diligently pursued by a public body, it is appropriate for a public body to decline to provide records until the investigation has concluded, unless the public interest requires disclosure at the time a request is made. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2011) at 44-45. That is because, while the investigation is pending, it cannot be known whether the exemption will ultimately apply to the information. On the other hand, the exemption always depends on the balance of the public interest under the particular circumstances. Thus, if it can be determined that the public interest requires disclosure of the information at the time of the request, there is no difficulty determining that the exemption does not apply.

Applied to your request, that means that ODOT's decision to decline to provide you with the records at this time was lawful, unless the public interest favors disclosure at this time. There is a presumption favoring disclosure of public records that are exempt under ORS 192.501. *Turner v. Reed*, 22 Or App at 177, 187 (1975). And public bodies bear the burden of sustaining denials of public records requests. ORS 192.450(1).

Under the circumstances, however, we conclude that the public interests favoring nondisclosure outweigh any public interest in disclosure. We have learned that a complaint about Mr. Sork's conduct has been made, and that ODOT is following up on that complaint. But neither your request to ODOT nor your petition to this office articulates any specific public interest in the present disclosure of additional documents related to ODOT's inquiry.

Disclosure of the additional records you requested at this juncture may prejudice the internal investigation. And disclosing information about the allegations before they have been fully reviewed by ODOT could lead to incorrect conclusions being drawn about the conduct of Mr. Sork or others. As our Supreme Court has observed, the purpose of ORS 192.501(12) is to protect public employees from unwarranted embarrassment. *City of Portland v. Rice*, 308 Or at 124, fn 5. Based on the information available to us, we conclude that the public interests favoring nondisclosure presently outweigh any public interests favoring disclosure. Accordingly, we respectfully deny your petition.

Sincerely,

Mary H Williams

MARY H. WILLIAMS
Deputy Attorney General

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c: Patrick Cooney, ODOT