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SENT VIA EMAIL ONLY
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Rob Davis
The Oregonian
1500 SW 1st Avenue
Portland OR 97201-5815

Re: Petition for Public Records Disclosure Order
Oregon Military Department
DOJ File No. 248001-GA0108-15

Dear Mr. Davis:

This letter is the Attorney General's order in response to Mr. Davis' petition seeking an order compelling the Oregon Military Department (OMD) to provide him with certain records under the Oregon Public Records Law, ORS 192.410 to 192.505. Specifically, Mr. Davis seeks two orders. First, he asks that we order OMD to provide him with copies of reports resulting from blood lead level tests administered to individuals who have been exposed to lead in armories throughout Oregon, with redactions to protect the identities of the tested individuals. Second, he asks that we order OMD to search for, and provide him with copies of, certain emails sent to or from Roy Swafford, director of the Operations Branch of the Installations Division of OMD. We deny Mr. Davis' petition with respect to the first of these categories because, as explained further below, OMD informs us that it has provided Mr. Davis with copies of all responsive records in its custody. We grant Mr. Davis' petition insofar as he asks us to order Mr. Swafford's emails searched.

The Oregon Public Records Law provides that "[e]very person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). The law defines "public record" broadly to include "any writing that contains information relating to the conduct of the public's business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics." ORS 192.410(4)(a). "Writing," in

turn, encompasses "any means of recording." ORS 192.410(6). "The "custodian" of a public record is a "public body mandated, directly or indirectly, to create, maintain, care for or control a public record." ORS 192.410(1)(a). When a petition is filed with our office, ORS 192.450(1) provides that "the burden is on the agency to sustain its action."

Blood Test Results

As noted above, the first category of records sought by Mr. Davis is blood lead level testing results for individuals exposed to lead in Oregon armories:

> I'm requesting redacted medical surveillance reports from the OMD. I would expect only the blood lead testing results/diagnosis and date of the test to be provided. I would also want to ensure that we were able to discern that any repeated results were for distinct employees (I.e. If John Doe has a two-page report with multiple elevated results on both pages, I would want to ensure we were able to know that those multiple results were only for one person, so we did not double-count them.)

In conversations with this office related to his petition, Mr. Davis has identified three categories of individuals for whom he believed that such records should exist. First, Mr. Davis asserts that OMD and the National Guard should have been testing individuals exposed to lead in Oregon armories since OMD and the National Guard became aware of potential lead issues; he asks for redacted copies of such records going back to 2000. Mr. Davis states that he has received no such records. OMD informs us that it does not have any records in this category. Second, Mr. Davis notes that OMD provided him with basic information about a group of 30 individuals who were offered blood lead testing recently due to their work in locations with high levels of lead. Specifically, OMD told Mr. Davis that none of those employees' tests revealed elevated blood levels, and provided him with a range of results that the tests found. Mr. Davis states that he has not received redacted copies of the actual test reports pursuant to his request. OMD explains that the individuals tested are federally employed national guardsmen and that OMD does not have access to the actual reports sought by Mr. Davis; instead, OMD explains that the results must be requested from the National Guard under the federal Freedom of Information Act (FOIA). The information OMD previously shared with Mr. Davis it received orally from the National Guard. The third category consists of individuals who are now working on cleaning up lead-contaminated areas. Their blood levels were tested to establish a baseline, and will be tested again following the completion of the work. OMD informs us that it has provided those baseline test results to Mr. Davis in redacted form, and Mr. Davis acknowledges that he has received them. Because OMD has provided Mr. Davis with the records in its possession that are responsive to Mr. Davis' request, we deny Mr. Davis' petition in this regard.

Emails Sent To or From OMD Director Swafford

We turn to the second category of records Mr. Davis asks us to order disclosed. Mr. Davis requested from OMD:

> Any email including attachments, memo, or written document sent to or from or written by * * * Roy D. Swafford* * * from 1/1/2013 to the date the search is run with any of the following search terms: "IFR," "indoor firing range," "contamination," "Forest Grove", "hazlog", "elevated lead", "holistic lead," "indoor range," "armory" or "IHSW".

Following this request, OMD replied that it would not individually search Mr. Swafford's emails:

> As a point of clarification, you asked for state employee Roy Swafford be applied to the search terms [listed above]. Mr. Swafford was instructed to search his own emails for [other requests]. However the "search terms" request requires a much broader search of the federal server, as a result, Mr. Swafford's emails are not going to be individually searched[.]

OMD explains that Mr. Swafford's emails reside on federal servers, and OMD is concerned that it lacks authority to disclose them from those servers. OMD further argues that the emails are federal records because many of them document Mr. Swafford's communications with federal employees. And OMD argues that, although he is a state employee, Mr. Swafford is performing primarily federal military business, meaning that his emails are not related to the conduct of state business.

On this record, we cannot find that OMD has met its burden to show that Mr. Swafford's emails either are exempt from public disclosure or are not "public records" within the meaning of the Oregon Public Records Law.

1. We are not persuaded that all responsive emails are unrelated to state business.

We accept, for purposes of argument only, OMD's suggestion that Mr. Swafford is primarily or exclusively performing federal business. We recognize that OMD and the National Guard necessarily have a very close working relationship, though it does seem unusual that a state employee would primarily or exclusively be performing federal business. Succinctly, even if we accept the premise, "primarily or exclusively" is not the same as exclusively. OMD's position leaves open the possibility that Mr. Swafford's role reflected in some of the emails is a state role rather than a federal role. Moreover, this argument does not eliminate the possibility that Mr. Swafford received at his federal address emails from other state employees; such emails would presumably be related to state business. We assume – without deciding – that Mr. Swafford's emails do not relate to state business when he is the only state employee participating in the email chain and he is doing so in furtherance of federal, rather than state business. It remains distinctly possible that performing the search requested by Mr. Davis would reveal responsive documents that do relate to public business – either because Mr. Swafford was performing state business on those emails or because other state employees might have been. The possibility that such emails exist makes it unnecessary to decide whether OMD is correct

that Mr. Swafford's emails are not "public records" to the extent that they reflect his work with federal employees on federal military business.

2. We are not persuaded that no responsive records are disclosable.

OMD further argues that it cannot disclose emails stored on the federal server. Again, we need not resolve that issue at this point because OMD does not yet know whether having Mr. Swafford search his email account will result in the discovery of emails that are responsive to the request and stored on the state server. Again, and example would be an email involving both Mr. Swafford and a state employee. Even assuming that OMD is prohibited from disclosing records that are on the federal server, without searching for records OMD does not know how such a prohibition would actually apply to the records that are responsive to Mr. Davis's request. There may well be records on the state server that are responsive to the request. Indeed, it is conceivable that all of the records responsive to Mr. Davis's request may also appear on the state's email system. On the other hand, if OMD concludes that one or more of Mr. Swafford's emails are disclosable under Oregon law, Mr. Davis is entitled to know that OMD actually is withholding records responsive to his request. ORS 192.440. *See also* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2014) at 28 ("Whenever a public body discloses less than all of the information requested because it determines that one or more records, or portions of records, are exempt from disclosure, the public body should inform the requester of that fact.")

3. The fact that many emails will document Mr. Swafford's correspondence with federal employees does not excuse searching for emails in response to Mr. Davis's request.

To the extent that Mr. Swafford's emails may otherwise be nonexempt public records, the fact that many of them may document correspondence with federal officials does not change our analysis. In this regard, we see no reason to treat Mr. Swafford's communications with federal military personnel any differently than we would treat, for example, communications between the Oregon Department of Agriculture and the United States Department of Agriculture. To clarify, Mr. Swafford's communications with federal military personnel very likely are federal records for purposes of FOIA. But that does not mean that they are not also OMD records subject to the Oregon Public Records Law. Oregon law does not exclude from the definition of "public records" communications with other government entities.

4. Conclusion

We consequently grant Mr. Davis's petition to the extent he asks us to order OMD to review Mr. Swafford's emails and disclose any non-exempt public records to him. We leave for future resolution OMD's arguments that at least some of the emails may not be "public records" for purposes of Oregon law and that at least some of them may be exempt from disclosure. Deciding those issues at this point would be premature, as the arguments raised by OMD leave open the possibility that at least some – and possibly even all – of the emails sought by Mr. Davis relate to the conduct of state business and are available from the state – rather than the

federal – server. Succinctly put, without performing the search to see what it finds, OMD cannot possibly bear its burden of persuading this office that none of Mr. Swafford's emails that have been requested by Mr. Davis are subject to disclosure under the Oregon Public Records Law. Should OMD's search reveal emails that it believes are not subject to disclosure, OMD can make those claims with respect to particular emails and Mr. Davis can, if he chooses, petition this office to review those determinations.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

MCK:tmt/6768150
cc via email only:
David Stuckey, OMD
Roy Swafford, OMD