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January 30, 2017

Paris Achen
The Portland Tribune
pachen@portlandtribune.com

Re: Petition for Public Records Disclosure Order
Oregon Department of Administrative Services
DOJ File No. 107090-GA0049-17

Dear Ms. Achen:

This letter is the Attorney General's order responding to your January 23, 2017, petition for disclosure under Oregon's Public Records Law, ORS 192.410 to 192.505. Your petition asks the Attorney General to order the Department of Administrative Services (DAS) to produce McKinsey & Co.'s draft performance review of ODOT's management.

We respectfully deny your petition because DAS has not yet denied your records request. Your petition shows that you made a formal records request for the draft on January 10th, and that Matt Shelby, communications strategist at DAS, told you that DAS would not release the draft until McKinsey & Co. was provided the opportunity to assert any trade secrets. We spoke with Mr. Shelby, who confirmed that DAS has not yet determined whether any information in the draft is exempt from disclosure, and therefore has not denied your request. Mr. Shelby added that DAS promptly notified McKinsey of your request, but asked McKinsey to prioritize finishing the final report before identifying asserted trade secrets in the draft.

The Attorney General may order a state agency to disclose records only when the agency has denied the records request. *See* ORS 192.450(1). Here, there has been no explicit denial, and public bodies are permitted time to determine whether any public records exemptions apply, *Morse Bros, Inc. v. Or. Dep't of Economic Development*, 103 Or App 619, 622 (1990) ("The Public Records Law clearly contemplates that agencies have the opportunity to review the requested records and to act on the request before the Attorney General or the courts can review the matter."). However, an agency's failure to produce records within a reasonable amount of time may constitute a constructive denial of the request. *See, e.g.*, Public Records Order, Dec 11, 2008, Harbaugh, at 2.

We find that DAS has not constructively denied your records request. Only eight business days elapsed between the date of your official request and your petition to this office. Although you argue that there are no potential trade secrets in the draft because the State's contract with McKinsey provides the State with ownership of all work product, the contract does allow the State to receive confidential information from McKinsey (section 15). And DAS is permitted time to determine whether the contract allows it to assert exemptions over trade-secret or confidential information provided by McKinsey in the draft.

Because DAS has not taken an unreasonable amount of time to determine what, if any, exemptions it is asserting over the draft, DAS has not constructively denied your records request and we respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn /DM8016562
c via email only: Matt Shelby, DAS