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June 21, 2017

Kenneth Thunderbird
SID# 3525722
Oregon State Correctional Institution
3405 Deer Park Dr.
Salem, OR 97310

Re: Petition for Public Records Disclosure Order
Oregon Department of Administrative Services
DOJ File No.: 107130-GA0103-17

Dear Mr. Thunderbird:

This letter is the Attorney General's order responding to your petition for disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on June 14, 2017, asks the Attorney General to order the Department of Administrative Services (DAS) to produce various records related to your potential case against the state.

As discussed below, we respectfully deny your petition because these records are exempt from disclosure under ORS 192.501(1) as records pertaining to potential litigation.

Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions contained in ORS 192.501 to 192.505. ORS 192.420(1). Any person denied the right to inspect or 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. ORS 192.450(1). The agency carries the burden to sustain any such denial. *Id.*

We spoke with Penny Evans, a risk manager at DAS. She told us that DAS denied your request because the materials DAS has related to your case were compiled in anticipation of litigation, and thus are exempt from disclosure under ORS 192.501(1), which as relevant here applies to "[r]ecords of a public body pertaining to litigation . . . if such litigation is reasonably likely to occur" unless the public interest requires disclosure. This exemption applies only until the litigation is concluded. Ms. Evans explained that you submitted a tort claim notice to DAS on March 8, 2017, alleging violations of the Americans with Disabilities Act, and that DAS's file

consists of internal correspondence and correspondence with the Department of Corrections discussing how to respond to your notice.[1]

The Oregon Court of Appeals has interpreted ORS 192.501(1) to apply to "information compiled or acquired by the public body for use in ongoing litigation or, if a complaint has not been filed, if the public body shows that such litigation is 'reasonably likely to occur.'" *Lane County School District No. 4J v. Parks*, 55 Or App 416, 420 (1981). We have noted that the filing of a tort claim notice is one indication that litigation is reasonably likely to occur. *Attorney General's Public Records & Meetings Manual* 37–38 (2014). And in determining whether the public interest requires disclosure, we have explained that the purpose of this exemption is "to place governmental bodies, as parties or potential parties to litigation, on an even footing with private parties." *Id.* at 37. That is, public bodies should generally not have to disclose information that would be protected from discovery in the course of litigation. "An interest in private litigation does not qualify as a public interest requiring disclosure." *Id.* at 38.

We conclude here that DAS's correspondence discussing how to respond to your tort claim notice qualify as records compiled for use in litigation that is reasonably likely to occur. We further conclude that the public interest does not require disclosure in this particular instance. You have pointed to no public interest to be served by disclosing these records now, as opposed to at the conclusion of litigation, while allowing you to obtain records that would be unavailable through discovery would force the state to litigate the case on unequal footing.

Because the requested records are exempt from disclosure under ORS 192.501(1), we respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:nog/pjn/DM8338209
c via email only: Penny Evans, DAS
Matt Shelby, DAS

[1] Ms. Evans added that DAS's file also contains correspondence with you. It is unclear from your petition or your records request whether you are seeking this correspondence. If you are, you may clarify the scope of your request with DAS.