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November 22, 1995

Lars K. Larson
KPTV NEWS
Post Office Box 3401
Portland, OR 97208

Re: ***Petition for Public Records Disclosure Order: Records Withheld by Judge Paula Brownhill***

Dear Mr. Larson:

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. Your petition, which we received on November 17, 1995, asks the Attorney General to direct Clatsop County Judge Paula Brownhill to make available for inspection and copying a "videotape of the police 'sting' admitted as evidence in the trial of State v. Vorce currently being tried in Clatsop County." For the reasons that follow, we respectfully deny your petition.

ORS 192.480 provides in relevant part:

> In any case in which a person is denied the right to inspect or to receive a copy of a public record in the custody of an elected official, or in the custody of any other person but as to which an elected official claims the right to withhold disclosure, no petition to require disclosure may be filed with the Attorney General or district attorney, or if a petition is filed it shall not be considered by the Attorney General or district attorney after a claim of right to withhold disclosure by an elected official.

In this case, it is unnecessary to determine the custodian of the videotape. Arguably, the custodian could be the Clatsop Circuit Court or the Oregon Judicial

Department as a public agency, the State Court Administrator, Judge Brownhill or the Chief Justice of the Supreme Court as the officer with supervisory authority over the Oregon court system. *See* ORS 1.002(2).[1/] However, ORS 192.480 requires the Attorney General to decline consideration of a petition to disclose a public record "as to which an elected official claims the right to withhold disclosure," regardless of whether that official has actual custody of the record.

In your petition, you allege that Judge Brownhill has denied your request to inspect and copy the videotape. Judge Brownhill informs us that she has not denied your request, but she does claim the right to withhold disclosure if she should decide to do so.[2/] Accordingly, this office has no authority to rule on your petition if Judge Brownhill is an "elected official."

Under the Article VII (amended), section 1, of the Oregon Constitution, the judges of the courts of this state are elected by the voters. We understand that Judge Brownhill was appointed by the Governor to fill the unexpired term of her predecessor who was elected to that office. *See* Or Const, Art V, § 16.

For purposes of review of decisions to deny disclosure of public records, the Public Records Law, creates three mutually exclusive categories: state agencies, for which review of denial decisions is by the Attorney General; public bodies other than state agencies, for which review is by the district attorney; and elected officials, for which review is directly to the circuit court. ORS 192.450, 192.460, 192.480. There is nothing in the Public Records Law to suggest that jurisdiction for the review of a denial of a public records request by a person holding an elective office would be dependent on the happenstance of whether the particular individual was appointed to that office to serve an unexpired term of that elective office. Once in office, judges who have been appointed are indistinguishable from those who have been elected. Their actions may not be controlled by the appointing authority; they are subject to removal solely by the means available for removal of elected judges. Or Const, Art II, § 18 (recall); Art VII (Am), § 8 (removal by Oregon Supreme Court); ORS 1.420, 1.430 (judicial fitness commission).

[1/] ***See State ex rel KOIN-TV v. Olsen***, 300 Or 392, 397, 711 P2d 966 (1985) (discussing the problems of determining the custodian of evidentiary court records).

[2/] For purposes of this order, we need not determine whether, in fact, Judge Brownhill has denied your request for inspection and copying of the records.

We do not believe that jurisdiction for review of a judge's decision to deny disclosure of public records is dependent on the means by which an individual judge came into office. Such an interpretation of the Public Records Law could lead to the absurd result that decisions to deny disclosure made by two judges who had offices next to each other in the same courthouse would be subject to different avenues for review, depending upon whether the individual judge had been appointed to serve an unexpired term or had been elected. Even more absurd would be differences in review depending upon whether an individual judge's decision to deny disclosure was made while serving an unexpired term under appointment from the Governor or after having been subsequently elected to the same office.

Therefore, in determining whether ORS 192.480 applies, we conclude that it is necessary to look to the character of the office itself, rather than the means by which the individual in that office was selected. As noted above, the office of judge in this state is an elective office. Thus, we conclude that ORS 192.480 prohibits the Attorney General from considering your petition.[3/]

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the Attorney General

ESH:jpl/17082247.W51
c: Judge Paula Brownhill, Clatsop County Circuit Court

[3/] Because the Attorney General may not consider this petition, we need not determine whether an order by the Attorney General to disclose the videotapes at issue in your petition would violate the constitutional doctrine of separation of powers. *See* ***Circuit Court v. AFSCME***, 295 542, 550, 669 P2d 314 (1983); *see also* ***State ex rel Frohnmayer v. Oregon State Bar***, 307 Or 304, 309-10, 767 P2d 893 (1989).

bc: Linda Zuckerman, State Court Administrator's Office
Lynn Rosik, AAG