THEODORE R. KULONGOSKI
ATTORNEY GENERAL

THOMAS A. BALMER
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400
TDD: (503) 378-5938

faculty research

June 19, 1995

Sheri A. Speede, D.V.M.
Regional Coordinator
In Defense of Animals
700 Southwest 126th Avenue
Beaverton, OR 97005

Re: ***Petition for Public Records Disclosure Order***
OHSU Records

Dear Dr. Speede:

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 June 14, 1995, asks the Attorney General to direct the Oregon Health Sciences University (OHSU) to make available the videotape(s) that served as data for the article, *Home Cage Behavior of Rhesus Monkeys with Long-Term Deficiency of Omega-3 Fatty Acids*, written by Reisbick, Neuringer, Hasnain and Conner and published in Physiology and Behavior, Volume 55, No. 2, pp. 231-239 (1994) (hereinafter *Home Cage Behavior*). The videotape(s) resulted from a research grant provided to an OHSU faculty member - Dr. Martha Neuringer. Your request is on behalf of a nonprofit organization, In Defense of Animals (IDA), whose mission you state is to protect the rights, welfare and habitat of animals and to educate the public about animal issues. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect any records[1/] of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. If a public record

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[1/] Public records for the purpose of the Oregon Public Records Law is defined in ORS 192.410(4) to include "any writing containing information relating to the conduct of the public's business * * *." In addition, "writing" is further defined in ORS 192.410(6) to mean, among other things, "photographing and every means of recording, including * * * pictures * * *."

contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

1. Background

A synopsis of *Home Cage Behavior* states:

> In an observational study with a blind observer, rhesus monkeys deficient in omega-3 (w-3 or n-3) fatty acids initiated more bouts of stereotyped behavior in their home cages than monkeys fed a matched control diet abundant in omega-3 fatty acids. Locomotion bouts were also more frequent in deficient monkeys, but nonstereotyped locomotion did not differ. Both stereotyped behavior and the sum of all behavioral bouts were more frequent in 4-5-year-old than in 2-3-year-old monkeys, and stereotypy decreased after meals in males but not females. The stereotyped behaviors associated with a deficit in omega-3 fatty acids were those typical of rhesus monkeys raised as partial social isolates or those whose surroundings have been disrupted.

Home Cage Behavior notes some of the differences betweens two groups of monkeys based on different diets given the two groups. The publication is based on an initial analysis of approximately 30 hours of videotape of individual monkeys in individual cages. The videotaping occurred during times when there was no person in the room with the monkeys. The researchers have informed us that they were looking for changes in species-typical behaviors related to diet. For example, they counted the number of times the different groups of monkeys engaged in more than 50 different well-defined behaviors.

Dr. Neuringer also informs us that she and her colleagues published only their initial review and analysis of the tapes. For example, she states that they counted only the number of times that the monkeys engaged in specific behaviors, not the length of time involved in each activity. Under the scope of the researcher's grant for this study, they intend to review the tape in more depth to ascertain if there are any conclusions that can be reached by, for example, counting the length of time different activities were engaged in by the monkeys. At the time of their initial analysis and eventual publication, the researchers did not have a computer system and program capable of assisting them in that analysis. They now have the capability for that analysis. Ms. Neuringer also informs us that their continuing work with the tapes involves reviewing in more detail the same material that supports the conclusions published in *Home Cage Behavior.*

2. Writings of Faculty

ORS 192.501(15) exempts faculty research from the disclosure requirements of the Public Records Law "unless the public interest requires disclosure in the particular instance[.]" This provision exempts:

> Writings prepared by or under the direction of faculty of public educational institutions, in connection with research, until publicly released, copyrighted or patented.

This office has previously recognized that this exemption protects public educational institutions from "piracy," as well as risks associated with the premature disclosure through the public records request process, of research ideas and data collected by faculty members. Letter of Advice dated March 29, 1988, to W.T. Lemman, Executive Vice Chancellor (OP-6217) at 3.

Plainly, given the involvement of an OHSU faculty member in the above-referenced research and her use of videotaping, those tapes are writings as that term is used in ORS 192.501(15). Although some preliminary results of the research project have been released, Dr. Neuringer informs us that continuing publications based on the data are planned. In addition, she informs us that the actual portions of the videotapes that would substantiate the conclusions in *Home Cage Behavior* is also the same data that will be analyzed in more depth relative to other issues being examined in the research project. Because (1) this research project is still in progress; (2) there are expected to be continuing publications based on the data; and (3) the data to be used in the future research is the same as that which supports the conclusions of the earlier published research, OHSU has the discretion to deny disclosure of that data.

Premature disclosure of the writings of faculty to third parties would have a chilling effect on faculty publications. If disclosure of faculty research writings were required after publication of an incomplete, preliminary review of those findings, faculty members of public institutions would refrain from publishing any of their findings until they were absolutely certain that they had gleaned all data that had any possible scientific value from their materials. The substantial delay in the publication of the findings of faculty would result in the inability of faculty of public institutions to gain the recognition that enables faculty members to be the recipients of research grants in the first place. If faculty were thus forced to wait until research data were completely analyzed before publishing an initial review of any findings, it would also prevent the public institutions from maintaining a reputation of being on the forefront of innovative research.

Moreover, faculty of private institutions, by being able to publish initial findings while faculty of public institutions waited for technology or equipment to be available to complete their entire review of the data before being able to publish any results, would gain a substantial edge in the research community. The most qualified researchers would likely prefer to work for private (rather than public) institutions in order to protect their raw research data from disclosure to the public while still enabling publication of an initial analysis of some of their findings. A drain of highly qualified researchers and instructors from the public sector would deprive students of public institutions from the benefit of an education in a research institution that is at the forefront of scientific research.

The continuing nature of the research and resultant publications were also compelling reasons why the Attorney General concluded that the Public Records Law did not require Oregon State University to disclose records prepared under the direction of an instructor in its College of Home Economics. *See* Public Records Order, July 7, 1989, McCleary. Accordingly, we conclude that the videotapes have not yet been "publicly released, copyrighted or patented," as that phrase is used in ORS 192.501(15), so as to terminate the exemption.

3. Public Interest Does Not Require Disclosure

In addition to asserting that the faculty research exemption of ORS 192.501(15) should not be found to apply to these videotapes, IDA also asserts that even if that exemption does apply, the public interest requires disclosure in this particular instance. You articulate several reasons, some of which overlap, to support the public interest in disclosure. First, you believe that the conclusions of the researchers are scientifically controversial and require peer review by professionals capable of providing such. You also assert that IDA is made up of members and others with such qualifications. Second, you make reference to the fact that the research is publicly funded and that taxpayers have an interest in seeing how public money is spent and whether the research methodology was efficient and led to accurate results. Third, you believe the public interest requires disclosure because of heightened public concern over the humane treatment of animals recently manifested by passage of 1995 legislation and the recent ballot measure banning certain types of bear and cougar hunting in Oregon. Fourth, you assert that public scrutiny is needed in order for the public to verify whether or not applicable federal guidelines for the care and protection of laboratory animals is being observed. Fifth, you believe the public interest requires disclosure because the data should be made available for educating the public in light of the fact that OHSU is a public institution with an education mission. Finally, you outline IDA's mission and believe that it has the professional expertise to accurately interpret the data and to accurately disseminate information to the public.

For the reasons that follow, we do not find these assertions of public interest to require disclosure in this circumstance.

We find unpersuasive IDA's assertion that it should be in a position to analyze the videotapes and give its own peer review because the research is scientifically controversial. Much scientific research is susceptible to being characterized as controversial. Research cannot or should not lose its exemption potential merely because others in a position to analyze the data may find it controversial. Similarly, we're not persuaded that the public interest demands disclosure in this particular circumstance because the research is publicly funded. It goes without saying that the exemption itself only has relevance to public institutions. Most, if not all, research undertaken at such institutions is in one way or another publicly funded.

Similarly, we do not find heightened public interest or concern over the humane treatment of animals to be compelling under a circumstance where the research is subject to federal requirements and guidelines intended to look out after the interest of animals used in research. Nor are we persuaded that the asserted public interest in scrutinizing OHSU's compliance with federal guidelines for the care and protection of laboratory animals is compelling. The federal government has extensive requirements for research institutions to have animal care and use committees with qualified veterinarians and reporting mechanisms for seeing that its requirements are observed.

Pursuant to federal law, 42 USC § 289d, OHSU has an Institutional Animal Care and Use Committee (IACUC). The IACUC is specifically responsible for "[r]eview[ing] the care and treatment of animals in all animal study areas and facilities of the research entity at least semi-annually to evaluate compliance with applicable guidelines * * * for appropriate animal care and treatment." 42 USC § 289b(3). Under the National Institute of Health's guidelines, the functions of the IACUC include reviewing the institution's program for the humane care and use of animals, inspecting the institution's animal facilities, and reviewing concerns involving the care and use of animals at the institution, as well as the ability to suspend an activity involving animals at the institution. NIH Guide for Grants and Contracts, Laboratory Animal Welfare. The public interest in the humane treatment of animals is already served by federal law and standards, which provide for the monitoring and inspection of animal research facilities and enable the IACUC to enforce those standards by suspending animal activities that do not comply with the guidelines.

The public interest in humane animal treatment is also safeguarded by the United States Congress in the enactment of the Animal Welfare Act. The Act enables the Secretary of Agriculture to promulgate and enforce regulations designed to ensure the "humane handling, care, treatment and transportation of animals" in federally funded research

facilities. 7 USC § 2143. In so doing, the Secretary is directed to "consult experts, including outside consultants." Expert advice, then, has been sought by the Department of Agriculture in the promulgation of federal requirements that safeguard the public's interest in the humane treatment of animals. The Secretary is further authorized to enforce these regulations, through civil penalties as well as orders that violations of the regulations must cease, thus further safeguarding the public interest. 7 USC § 2149. The Department of Agriculture's regulations implementing these statutory mandates and specifying standards for the humane handling, care, treatment, and transportation of animals may be found at 9 CFR ch. 1.

The public's interest in deciding whether federal guidelines are being met has already been served by the United States Congress. Congress has acted to safeguard the public interest in the humane treatment of animals by providing an elaborate statutory scheme of requirements and standards, as well as mandating committees to monitor compliance with these requirements and standards, and regulations for the enforcement of these requirements and standards.

Concerning IDA's fifth assertion why disclosure should be required, it is undoubtedly true that OHSU is a public educational institution. However, to find this in and of itself to be grounds for finding a public interest to require disclosure would totally abrogate the legislature's exemption for writings by the faculty of publicly supported institutions.

Finally, while we can take at face value IDA's assertion of its mission and its capacities to assess and evaluate the data and to disseminate the information for lay persons, its status or reason for being in and of itself is no reason to find a public interest for requiring disclosure in this circumstance. For example, the same contention arguably could be made by a nonprofit corporation created for the purpose of providing the public information on the use of trade secrets where it might request of a public agency the disclosure of trade secrets otherwise conditionally exempt under ORS 192.501(2). A private party's particular interest or expertise is not reason for requiring disclosure merely because it credibly describes an intention to contribute to the public discussion about a topic of public interest. *See* Public Records Order, June 22, 1993, Lear.

4. Conclusion

In summary, we believe that the asserted public interest in requiring disclosure in this particular instance is not well founded because to require disclosure would prejudice or prevent OHSU from carrying out its functions. OHSU has as one of its missions, research - both basic and applied. *See* ORS 351.070(2)(a), 351.865 to .890, 352.055(1). *See also* ORS 351.003(4) and 351.007(4). While we can appreciate that the use of animals in

research is highly controversial, nevertheless, the legislature (in exempting writings prepared under the direction of faculty while those writings are still part of ongoing research and not publicly released) has struck the balance allowing for nondisclosure in order to protect the researchers, the public institutions and ultimately the public's interest in advancing research for various purposes.

For these reasons, we find the records you seek to be exempt from disclosure under ORS 192.501(15). Accordingly, we respectfully deny your petition.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the
Attorney General

ESH:JMM:AV:cro:jpl:JAA018BB/

c: Dennis Borden, Director
Research Services, OHSU