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Corrections exempt

January 26, 1993

Joanna Patten, Assignment Editor
Ten O'Clock News
KPTV
735 SW 20th Place
PO Box 3401
Portland, OR 97208

Re: Public Records Disclosure Order: Oregon Department of Corrections Records

Dear Ms. Patten:

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 January 19, 1993, asks the Attorney General to direct the Oregon Department of Corrections (ODOC) to make available to you copies of the following records:

1. An Oregon State Penitentiary security audit conducted in the wake of the Jeffrey Scott Wagner escape;

2. Any and all employee disciplinary records related to the same escape;

3. Any and all policy changes stemming from the escape.

Your petition further asks the Attorney General to order ODOC to waive its fees for making public records available to you. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to access to any public record of a public body in Oregon, subject to certain exemptions and limitations. See ORS 192.420. The law requires generally that the custodian of public records furnish proper and reasonable opportunities for inspection and/or copying of the record in the office of the custodian. ORS 192.430. If a public record contains both exempt and non-exempt material, the law requires that the public body separate and disclose the non-exempt material where it is reasonably possible to do so; no specific request is necessary. ORS 192.505; see Turner v. Reed, 22 Or App 177, 583 P2d 373 (1975). Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection. ORS 192.450(1). Under these provisions, an agency may be said to have "denied" a request to inspect or to receive a copy of a public record only if it receives a proper request for public records. Public Records Order, July 7, 1989 (Baker).

ORS 192.430 authorizes state agencies to adopt reasonable rules and regulations necessary for protecting the records and preventing interference with the regular discharge of duties of the custodian. ORS 192.430. Pursuant to this statute, ODOC has adopted administrative rules, OAR 291-37-020(2) and (7), which provide in pertinent part:

> (2) The request must be in writing, addressed to the Department's functional unit manager where the record(s) is located * * *
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> * * * * *
>
> (7) Proper and reasonable opportunity for inspection and/or duplication of record(s) will be provided, consistent with security requirements at each Department facility and functional unit and as circumstances warrant.

Your petition states that you requested copies of the above-requested public records from Al Chandler, Acting ODOC Communications Manager, on January 12, 1993, and that Mr. Chandler refused to provide copies of the records.

Mr. Chandler, informs us that he denied your request for a copy of the Oregon State Penitentiary (OSP) security audit during a telephone conversation with you, because ODOC had determined that the security audit was exempt from disclosure under the Public Records Law. In recalling your telephone conversation with him, Mr. Chandler further stated that he believed that the

conversation was limited to your request for a report provided to the Governor summarizing the security audit, and did not concern the other records listed in your petition. He informs us that he did not deny any request for those other records. We understand from Mr. Chandler that neither you, nor any other employee of KPTV, has requested any of the above-referenced records of ODOC in writing, as required by ODOC's administrative rule.

In an effort to avoid unnecessary delay in responding to your request for public records, Mr. Chandler informs us that ODOC will treat your telephone request for a copy of the OSP security audit as a proper request for both the security audit and ODOC Director Frank Hall's report to the Governor summarizing the security audit, and his verbal denial as ODOC's partial "denial" of that request, under the Public Records Law, waiving its rule requirement of a written request directed to ODOC, in this instance. Mr. Chandler also advises us that, in accordance with ODOC's responsibility under the Public Records Law to make available non-exempt portions of the requested record, ODOC will make available to you a redacted copy of both the security audit and Director Hall's report to the Governor. We understand from Mr. Chandler that the redacted copies of the security audit and report disclose only the date and general subject matter of the audit and report, the authors and recipients of each, and information concerning the institution of a mid-day count of inmates at all ODOC correctional facilities. He informs us that ODOC reaffirms its denial of your request with respect to the remainder of the redacted information contained in the security audit and report.

ORS 192.502(4) expressly exempts from disclosure under the Public Records Law:

> Information or records of the Department of Corrections * * * , to the extent that disclosure thereof would interfere with the rehabilitation of a person in custody of the department or substantially prejudice or prevent the carrying out of the functions of the department, if the public interest in confidentiality clearly outweighs the public interest in disclosure.

The legislature has charged ODOC with a number of varied functions and duties concerning those offenders committed to its jurisdiction by the courts. See ORS 423.020(1). At the very core of its statutory functions and duties is the responsibility to exercise custody over convicted felons sentenced to a term of imprisonment until they are subject to lawful release, by safely

confining them in one of the state's correctional institutions. Id.

When an inmate escapes from one the state's correctional institutions, ODOC has a legitimate and substantial interest in auditing its security practices to ensure against future escapes, and to maintain the safe, secure and orderly operation and management of those institutions. To these ends, a security audit of OSP was conducted by ODOC after the escape of inmate Jeffrey Scott Wagner. The security audit and Director Hall's report to the Governor detail the specifics of security practices and procedures at OSP in place at the time of inmate Wagner's escape, and evaluate the adequacy of, and recommend changes to, those security practices and procedures to ensure against future escapes from OSP.

We agree with ODOC that disclosure of the redacted information contained in the OSP security audit and subsequent report to the Governor would jeopardize and substantially degrade security at the state's only maximum security facility for male offenders, and would thus, "substantially prejudice or prevent ODOC from the carrying out of the functions of the department." See ORS 423.020(1). Knowledge of specific security practices and procedures at OSP, ODOC's internal evaluation of the adequacy of certain of those practices and procedures, together with knowledge of how, when, and where certain of those security practices and procedures might be or have been changed, could reasonably be used by certain inmates, and their confederates in the public, to circumvent security measures employed at OSP and assist in plans of escape, or to traffic in drugs or other contraband within the confines of OSP.

We believe, therefore, that the public interest in maintaining the confidentiality of security practices and procedures at OSP clearly outweighs any public interest in knowing the specifics of those security practices and procedures, and the state's internal evaluation of the adequacy of, and recommended changes in, those security practices and procedures. Thus, ODOC properly denied your request for a copy of the OSP security audit and report to the Governor pursuant to ORS 192.502(4), to the extent that the audit and report contain such exempt material. ORS 192.502(4); ORS 192.505; see Turner v. Reed, supra, 22 Or App at 184-94. Accordingly, we deny your petition to the extent that it requests the Attorney General to order ODOC to make available to you the remainder of the OSP security audit and ODOC Director Hall's report to the Governor concerning the audit, for which ODOC has claimed the exemption pursuant to ORS 192.502(4).

Because you have not made a proper written request of ODOC for the remaining items listed in your petition, and ODOC has not denied any request for public records with respect to these items, we have no authority to order ODOC to provide copies of these records to you. See ORS 192.450(1); Public Records Order, July 7, 1989 (Baker). We, therefore, deny the remainder of your petition with respect to these additional records, including your request for a fee waiver, as premature.

Sincerely,

Elizabeth S. Harchenko

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the Attorney General

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