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December 23, 1991

Steve Mayes
Business Reporter
The Oregonian
1320 S.W. Broadway
Portland, OR 97201

Dear Mr. Mayes:

This letter is the Attorney General's order on your petition requesting disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on December 16, 1991, asks the Attorney General to direct the Oregon State Treasury to disclose the following records: (1) loan service reports supplied to the Oregon State Treasury by banks, mortgage companies and others who service mortgages held by the Treasury's commercial mortgage program; (2) Oregon State Treasury records related to loans made to George Heidgerken and others specified in a letter dated November 22, 1991; and (3) reports and memos prepared by Terry Canby for the purposes of updating or briefing senior Treasury officials on the Treasury's real estate investment activities. For the reasons stated below, we deny your petition.

1. Loan Service Reports and Heidgerken et al Loan Files

In Mr. Ryan's letter of December 5, attached to your petition, he informed you that your requests for these documents raised a "series of significant legal questions which require Department of Justice review and research." Letter at 3. Because of the complexity of the matter, that research took some time. Our advice was completed and sent to Treasury on December 20; a copy was sent to you.

The Public Records Law requires a custodian of public records to "furnish proper and reasonable opportunities for inspection and examination" of the records

in its custody. ORS 192.430. When a public body has a question about its legal duty to disclose requested records, it is reasonable for that public body to consult its legal counsel. When a public body does so, it does not thereby actually or constructively deny the request. See Morse Bros., Inc. v. ODED, 103 Or App 619, 622, 798 P2d 719 (1990); Attorney General's Public Records and Meetings Manual at 9-10. Absent a denial, the Attorney General has no authority to issue an order compelling disclosure. See ORS 192.450(1). Your petition, therefore, is premature. See ORS 192.450(1) (person who has been denied right to inspect or receive copy of public record may file petition with Attorney General). We deny your request for the loan service reports and the Treasury records, related to loans made to George Heidgerken and others, at this time. Treasury is undertaking a file-by-file review, in consultation with counsel, and will release nonexempt documents in early January. (We had hoped to complete review of the files before the holidays, but holiday vacation and the fact that Mr. Ryan was out ill made that impossible.)

2. **Reports or Memos Prepared by Terry Canby**

With regard to your request for reports or memos prepared by Terry Canby, Mr. Ryan stated that Treasury could not respond because those documents were under review by the Criminal Justice Division. We deem this statement a denial under the Public Records Law. We deny your petition under the exemption for criminal investigatory materials.

ORS 192.501(3) exempts conditionally "investigatory information compiled for criminal law purposes" unless "the public interest requires disclosure in the particular interest." The documents you seek have been compiled from Treasury files as part of the ongoing criminal investigation into the activities of Mr. Canby. In John Doe Agency v. John Doe Corp., 110 S.Ct. 471 (1989), the United States Supreme Court construed recently the nearly identical provision in the federal Freedom of Information Act exempting "records or information compiled for law enforcement purposes." 5 U.S.C. §552(b)(7). The Court held that the exemption may be invoked to prevent disclosure of documents not originally created for, but

later gathered for, law enforcement purposes. We believe that Oregon courts would reach the same conclusion in interpreting ORS 192.501(3). See Jensen v. Schiffman, 24 Or App 11, 16 544 P2d 1048 (1976) (concluding that federal exemption comparable to Oregon version). While we recognize the substantial public interest in this matter, the Criminal Justice Division believes that disclosing that information at this time would create a significant risk and burden to its continuing investigation. Accordingly, we deny your petition at this time.

Sincerely,

PAMELA L. ABERNETHY
Special Counsel to the
Attorney General

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