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April 8, 2022

VIA E-MAIL ONLY: jblankfort@gmail.com

John Blankfort
63555 Bridle Ln
Bend, OR 97703

Re: Petition for Public Records Disclosure Order
Oregon Department of Forestry
DOJ File No.: 629400-GA0030-22

Dear Mr. Blankfort:

This letter is the Attorney General's response to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition asks the Attorney General to order the Oregon Department of Forestry (ODF) to disclose its investigative report for the March 28, 20201, Bull Springs fire. For the following reasons, we respectfully dismiss your petition in part and deny it in part.

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(1). The law is a disclosure law and exemptions from disclosure must be express. If a public record containing exempt material also contains nonexempt material, the public body must separate and disclose the nonexempt material. ORS 192.338. 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 192.411(1). The agency carries the burden to sustain its actions. ORS 192.411(1).

According to your petition, you first requested ODF's report on August 23, 2021. ODF informed you that the report was not yet complete but provided you with some reasonable expectation that it would be available to you once it was complete. After recently learning the investigation was complete, you submitted another request for the report on March 8, 2022. Your request indicated that you are being sued for defamation and that you need ODF's report to support your defense. ODF denied your request on March 9, 2022, asserting that the report was

currently exempt under ORS 192.345(1) (litigation exemption), ORS 192.355(4) (information submitted in confidence), ORS 192.355(8) (disclosure prohibited by federal law), and ORS 192.355(9) (disclosure restricted by state law). Your petition appeals each of ODF's determinations.

In response to your petition, we contacted Assistant Attorney General Michael Grant, DOJ's assigned counsel for ODF. He informed us that ODF no longer claims that the report, or any portion of it, is exempt from disclosure under ORS 192.355(4), ORS 192.355(8), or ORS 192.355(9). However, he explained ODF's position that the report is exempt in its entirety under the litigation exemption, ORS 192.345(1). That provision provides that the following information is exempt from disclosure unless the public interest requires disclosure in this particular instance:

> Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation.

ORS 192.345(1).

As background, AAG Grant explained that ODF has a statutory responsibility to seek reimbursement for costs incurred extinguishing human caused fires on its protected lands where it is able to identify a responsible party. *See* ORS 477.068. ODF therefore investigates wildfires that occur on its protected lands in order to identify potentially responsible parties, as well as to ascertain its legal rights and the viability of cost recovery. In this instance, he provided the following support for ODF's belief that the department is reasonably likely to engage in cost recovery litigation related to the Bull Springs fire:

1. ODF incurred significant fire suppression costs in this case.

2. ODF determined that it was a human-caused fire.

3. The president of the putative responsible party has suggested that the fire was caused by arson.

4. The president of the putative responsible party claimed that a March 23, 2021, earthquake may have shaken or stirred warm embers in debris burn piles that possibly reignited a smoldering fire. He also claimed there were 65 mile per hour winds around the time of the fire. These claims suggest that the putative responsible party may raise an Act of God affirmative defense against ODF's claim.

5. The president of the putative responsible party claimed that there was a 25-minute delay in the firefighting response, suggesting he may assert a failure to mitigate defense or a comparable negligence defense.

6. The president of the putative responsible party is also the plaintiff in two consolidated defamation actions against private individuals, including yourself, that allege, in part, that you falsely claimed that he was responsible for the fire.

Under the circumstances, ODF believes the putative responsible party is likely to reject ODF's demand for reimbursement of its fire suppression costs, in which case ODF concludes that cost recovery litigation is reasonably likely to occur. ODF's assessment appears reasonable in this instance, particularly given that the president of the putative responsible party has denied responsibility for the fire in the context of the ongoing defamation suit. *See Attorney General's Public Records and Meetings Manual* at 52 (the "*Manual*") (2019) (if an agency objectively can show that litigation is "reasonably likely to occur," the exemption may be claimed for records gathered for that litigation, regardless of whether an administrative proceeding also may be involved).

Although your petition acknowledges that ODF's report would be relevant to cost recovery litigation in this case, you assert that the litigation exemption does not apply because you believe ODF's investigative reports are prepared in the ordinary course of business and not for purposes of litigation. As support for your position, you reference guidance in the *Manual* that limits the scope of the litigation exemption "only to records 'compiled or acquired by the public body for use in the litigation,' as distinguished from records compiled or acquired in the ordinary course of business that subsequently become relevant to litigation." *Id.* at 52 (quoting *Lane County Sch. Dist. v. Parks*, 55 Or App 416, 420 (1981)).

The statutes governing ODF's fire investigations indicate that a primary purpose for such investigations is to determine whether fires are human caused and, if so, to identify potentially responsible parties who may be liable for reimbursing ODF for its fire suppression costs. *See, e.g.,* ORS 477. 120 (Liability of Owner or Operator); 477.068 (Liability for Cost of Abatement), ORS 477.085 (Liability for Cost of Protecting Land Within a Forest Protection District), and ORS 477.365 (Duties and Powers of Wardens). In other words, a primary purpose of the Bull Springs fire investigation was to determine whether ODF had legal basis for pursing cost recovery. ODF has concluded that cost recovery is appropriate in this case and that process now appears reasonably likely to result in litigation. Under the circumstances, we cannot conclude that ODF's report in this case was prepared "in the ordinary course of business" or that it *subsequently* became relevant to anticipated litigation. Rather, for fire investigations where litigation appears reasonably likely to occur, ODF's investigative reports are necessarily relevant to anticipated litigation from their inception. *Cf. Manual* at 52 (observing that public bodies need to investigate and prepare in advance for litigation that is reasonably likely). That said, our review ODF's report in this case disclosed that several attachments consist of records compiled by other public bodies in the ordinary course of their business. After discussing these materials with ODF, the department has now determined that they are not exempt under the litigation

exemption, and ODF will disclose them to you shortly. We therefore respectfully dismiss your petition with respect to those nonexempt materials as moot.

As for the remaining material in ODF's report, we find that it pertains to litigation that appears reasonably likely to occur. And as discussed above, we also find that it was not prepared in the ordinary course of business only to have become relevant to that litigation at some later time. We therefore conclude that ODF was permitted to withhold the remaining portions of the report under the litigation exemption unless the public interest requires disclosure in this instance.

In determining whether the public interest requires disclosure in this case, we note that ORS 192.345(1) is a temporary exemption – it is no longer available once litigation is abandoned or concluded. Because ODF's complete report will be available to the public at some future date, we must determine whether the public interest requires disclosure at this particular time. Your petition does not explain why you believe the public interest requires disclosure at this time. Rather, you have expressed that you need this information in order to defend against the defamation suit. As we have observed, the public interest typically does not depend upon a requester's private interests. *See Manual* at 33. This is particularly true with respect to private litigation, where we have consistently found that the "availability of ordinary tools of discovery would generally negate any need for an individual to use the Public Records Law to gain access to records for purpose of pursuing private litigation." *Id*. at 53. In contrast, the public has an interest in recovering the costs that ODF incurred responding to this fire and ODF asserts that its cost recovery efforts could be impaired by the early disclosure of the otherwise exempt report. On balance, we conclude that the public interest does not require ODF to disclose the remainder of the report at this time. We therefore respectfully deny the remainder of your petition.

Sincerely,

Lisa M. Udland

LISA M. UDLAND
Deputy Attorney General

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c via e-mail only: Jim Gersbach (ODF)