DAVE FROHNMAYER
ATTORNEY GENERAL
STATE OF OREGON

STANTON L. LONG
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4400

June 25, 1982

Leslie L. Zaitz
The Oregonian
Press Room, Capitol Building
Salem, Oregon 97310

Dear Mr. Zaitz:

This constitutes the order of the Attorney General in response to your petition dated June 23, 1982, for disclosure of public records. You request us to order the Oregon Workers' Compensation Department and its employes to make available for inspection:

"1. All Workers Compensation Department (hereafter "WCD") internal documents, including letters, memorandums, notes, reports, including those in the possession of Roy Green, Lloyd Gardner, and Eddie Pittman concerning audit of C. Dennis Williams' companies.

"2. All WCD records concerning the audit of WCD vendors operated by C. Dennis Williams. This includes all working papers, original and duplicated documents, and financial worksheets."

Your request to inspect these records was denied by the Workers' Compensation Department on the basis that they are exempt from disclosure under ORS 192.500(1)(a).

That statute exempts from disclosure:

> "(a) 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 paragraph shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation;"

The exemption is conditional; disclosure may nevertheless be ordered if "the public interest requires disclosure in the particular instance." ORS 192.500(1).

Our investigation has shown that almost all of the records which you seek were collected in order to determine the liability (if any) of C. Dennis Williams and companies with which he is associated, to the Workers' Compensation Department and to determine whether any claimed offsets or reciprocal liabilities might exist. The records are being and will be used to support the department's findings with respect to the respective rights, liabilities and obligations of the parties in an attempt to resolve the matter by agreement. If the parties are unable to reach a satisfactory agreement with respect to these rights, liabilities and obligations, the records will be used to support the department's position in the law suit which will then follow. This office is now reviewing the records, entirely aside from your petition, to determine whether settlement is possible or appropriate or whether litigation will be necessary.

We find that such records relate to litigation which is reasonably likely to occur, to which the Workers' Compensation Department would be a party. The exemption of ORS 192.500(1)(a) is therefore applicable, unless the public interest requires disclosure in the particular instance.

Your letter notes on page two:

> ". . . that the department has engaged in several conversations with Mr. Williams regarding the audit findings. WCD officials report such conversations concerning recovery by the state of monies paid to Williams' companies."

We are informed that such negotiations have in fact occurred, and have continued during the period since filing of your petition. We note that if the dispute is settled as a result of these negotiations, the litigation exemption will no longer be available and the records will be made available for your immediate inspection. It is asserted to us that publicity concerning the details of the positions of the parties, and particularly of the underlying cases and transactions remaining at issue, would jeopardize successful competion of the negotiations. We conclude that this assertion is justified.

Page three of your letter states that:

> ". . . the audit records and findings of WCD have been presented to Mr. Williams in several recent meetings. . . . Mr. Williams now is fully informed of WCD's finding. By such a disclosure, WCD has surrendered any advantage it may have by keeping the records secret. . . ."

You apparently do not mean to imply a waiver of the right of non-disclosure, and we conclude that there can be no waiver, as such, of that right. Rather, we believe you mean that a lessening of the value to the department of the right not to disclose lessens the public interest justifying non-disclosure, so that greater weight can be given to the factors assertedly tending to create and support a public interest in disclosure.

If that is your position, there is merit to it. But the audit records and findings you seek, constituting a great mass of documents, have not been presented to Mr. Williams. Many individual documents, of course, come from the files of Mr. Williams' company and are available to him there. Some comparatively small numbers of documents from the department's files were taken to and discussed at the meetings; Mr. Williams' own files (probably duplicated in or added to the department's files) were examined and discussed to a much greater extent; and Mr. Williams was informed of the department's basic conclusionary findings. We conclude that the purposes of the ORS 192.500(1)(a) exemption have not been destroyed as to the records in question by the partial disclosure described.

One of the reasons for the exemption is to protect the government's ability to prepare for litigation and to conduct litigation on "an equal footing" with opposing parties. It disadvantages the government to require it to make its litigation papers available outside of the court processes. We conclude that the public interest lies in favor of the settlement of this matter without litigation, if possible, or by the processes of law in court proceedings, if settlement is not possible. We conclude that disclosure of the records at this time would prejudice a settlement and could possibly prejudice the processes of law.

We agree that there is a public interest in "determining the facts causing the delay in the conclusion involving a matter of inappropriate expenditure of public funds," and in assurance to the public "that the public's interests are not being subverted to the interests of a private vendor." Whether the "long delay" which you assert is in fact excessive, is a matter on which you are entitled to reach your own conclusions. We conclude that the public interest will equally well be served by disclosure of the records after settlement, if settlement occurs, and if litigation occurs by press monitoring of the records and events of that litigation, and disclosure of all the departments' records (if any remain undisclosed) after conclusion of the litigation. We conclude that the public interest in press discussion of the liabilities and obligations of the parties during settlement negotiations and trial preparations is outweighed by the potential prejudice and inconvenience to the settlement and litigation process, and by the public interest in resolution of the matter by an appropriate settlement on the processes of law. Your petition is accordingly denied, as to the records collected and created for the purpose of determining the liabilities and obligations of the parties, with the ultimate purpose of litigation to collect amounts determined to be owing and not otherwise collectible.

Some documents in the file, however, are not appropriately subject to the litigation exemption. These documents are contained in three separate geeen-colored folders.

I. Some of the documents in the folder labeled "MS 81-31" came within the litigation exemption and disclosure is denied for that reason; others are exempt from disclosure under ORS 190.500(2)(a), and with respect to the particular memo involved we find minimal public interest in disclosure, and a substantial likelihood that disclosure would inhibit frank communication within the agency. A few of the documents are exempt under the attorney-client privilege.

Other documents, however, are already in the public record and no public interest would be served by refusing disclosure. Still others, particularly interim (1981) audit reports, and internal memoranda, are arguably subject to the ORS 190.500(2)(a) exemption, but we have carefully examined them and in each case conclude that the heavy burden to

justify nondisclosure has not been met. We have very carefully examined certain additional correspondence between this office and WCD, which we order disclosed, to assure ourselves that it is in fact not subject to the attorney-client privilege.

We attach a list of documents in the folder "MS 81-31" which we hereby order to be disclosed. That list is made a part of this order. Your petition is denied as to any contents of the folder not set forth on the list.

II. With three exceptions, all of the documents in the folder labeled "Green File No. 2" are subject to disclosure. Its contents are largely internal memoranda and correspondence. We attach and make a part of this order a list of the documents which we hereby order to be disclosed. The considerations discussed above under paragraph I are also applicable.

The exceptions are a document which is exempt under ORS 190.500(1)(a), and duplicates of two memos in the MS 81-31 folder which we find to be exempt under ORS 190.500(2)(a). Your petition is denied as to these items, which we have temporarily removed from the folder and placed in the MS 81-31.

III. All of the documents in the folder labeled "Green File No. 3" are duplicates of the documents we have already ordered to be disclosed, except certain affidavits and blank affidavits which we also find to be subject to disclosure. We attach and make a part of this order a list of the contents of this folder, which we hereby order to be disclosed.

The Workers' Compensation Department is hereby ordered to make available for your inspection the documents as to which we have ordered disclosure, set forth in the attached lists. Your petition is granted to that extent, and otherwise denied. Of course, both the department and you may challenge in court any part of this order with which you disagree.

As noted above, the files in question will remain in our custody temporarily. If the Workers' Compensation Division

decides not to challenge this order and we still have that custody, please call John Reuling of this office to arrange for inspection.

Very truly yours,

Stanton F. Long
Deputy Attorney General

SFL:JAR:nh
cc: Roy G. Green
Cliff A. Allison