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January 31, 1994

Donald M. Drake Company
c/o Arnold L. Gray, Esq.
1700 Benjamin Franklin Plaza
One Southwest Columbia Street
Portland, OR 97258

Re: Petition for Public Records Disclosure Order:
Oregon Board of Higher Education

Dear Mr. Gray:

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 24, 1994, asks the Attorney General to direct the Oregon State Board of Higher Education to make available to you an array of documents pertaining to a large construction project at Oregon Health Sciences University (OHSU). This petition is essentially a duplicate of an earlier petition upon which we ruled in our order of October 18, 1993.

Our October 18 order denied your petition with respect to two types of documents: 1) reports of the consultants Milstead and Associates, Inc. and Construction Polymer Technologies, Inc., which we found to be exempt from disclosure under ORS 192.501(1) as documents pertaining to litigation, and 2) applications for health, disability or life insurance in the personnel records of Larry Caldwell and Steve Cruzen, which we found to be exempt from disclosure under ORS 192.502(2) as records of a personal nature, the disclosure of which would constitute an unreasonable invasion of privacy. Because that order fully resolved your earlier (and current) petition with respect to those two types of documents, we will not address those documents again in this order.

Our October 18 order also denied your petition as premature with respect to all of the remaining documents because there had not yet been a denial by the state agency of an opportunity to inspect any specific documents. Since our order of October 18, 1993, you have had access by inspection and copying to most of those remaining documents. However,

the state agency also has denied you access to some documents on the grounds that they are exempt from disclosure.

The state agency has made available for our review all of the documents to which you have been denied access. The agency now agrees to make a number of these records available to you. On further reflection, the agency has concluded that several of these records either are not exempt from public inspection, or are arguably not so exempt and the agency chooses not to assert the possible exemption. You may wish to contact James Van Dyke, Assistant Attorney General assigned the responsibility of representing OHSU in connection with the claim of your client against that agency, regarding transmittal of these documents and the cost thereof.

The originals of construction schedules prepared by the Donald M. Drake Company for Oregon Health Sciences University were not disclosed to you as part of your inspection. This was apparently due to inadvertence. You may contact Mr. Van Dyke regarding these records as well. They will be made available to you, should you wish.

With respect to the records that the agency now agrees to make available to you, we deny your petition as moot.

There remains, however, a collection of documents that the agency continues to claim are exempt from disclosure. We have reviewed each of these documents and conclude that they are all exempt from disclosure under either ORS 192.501(1) or ORS 192.502(8).

1. Records Pertaining to Litigation

ORS 192.501(1) exempts, unless the public interest requires disclosure in the 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.

The records within the scope of your petition that come under this exemption are:

1) correspondence with and materials from claims consultants retained by the state for purposes of anticipated litigation with your client,[1/] and

2) agenda for and notes from meetings of OHSU staff (both with and without the presence of Mr. Van Dyke) to discuss the claims by your client.

We understand that litigation has not yet been commenced, but a sufficient likelihood exists to meet the requirement of the exemption. See Attorney General's Public Records and Meetings Manual at 18 (1993).

This exemption for records pertaining to litigation is conditional, i.e., it applies unless the public interest requires disclosure in the particular instance. However, as we stated at page 7 of our order of October 18, 1993, the interest you may have in these records for purposes of private litigation does not rise to the level of public interest and disclosure. See Morrison v. School District No. 48, 53 Or App 148, 156, 631 P2d 784 (1981). Accordingly, we conclude that these records are exempt from disclosure under the Public Records Law.

2. Other State Law Exemption

ORS 192.502(8) exempts from disclosure "records the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law."

ORS 40.225 creates a privilege for confidential communications made for the purposes of facilitating the rendition of professional legal services to the client.

There are three categories of documents within the scope of your petition that come under this privilege:

1) correspondence between Mr. Van Dyke and his clients (OHSU and Oregon State Board of Higher Education),

2) materials prepared for and sent to Mr. Van Dyke by his clients (OHSU and Oregon State Board of Higher Education), and

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[1/] Several of these documents also may be exempt from disclosure by ORS 192.502(8) and ORS 40.225, the attorney-client privilege. See discussion below.

3) correspondence from Mr. Van Dyke to the lawyer(s) representing another in a matter of common interest (the architects).

Based upon our review, we conclude that each of the documents within these three categories are confidential communications made for the purposes of facilitating the rendition of professional legal services by Mr. Van Dyke to OHSU. These documents are privileged under ORS 40.225. Accordingly, they are unconditionally exempt from disclosure by ORS 192.502(8).

In summary, we do not to reconsider your petition to the extent that it requests us to do so concerning those documents that we found to be exempt from disclosure in our order of October 18, 1993. We deny your petition as moot with respect to those documents that now are being made available to you by the state agency, although originally withheld from disclosure. And, we deny your petition with respect to all of the remaining documents, which we conclude are exempt from disclosure by either ORS 192.501(1) or 192.502(8).

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the Attorney General

ESH:JJC:AV:JGG08CFD

c: Gordon Ranta, Director, Design and Construction Services, OHSU