THEODORE R. KULONGOSKI
ATTORNEY GENERAL

THOMAS A. BALMER
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400
TDD: (503) 378-5938

February 11, 1994

Mark D. Hass
KATU Television
P.O. Box 2
Portland, OR 97207

Re: **Petition for Public Records Disclosure Order: Oregon Department of Corrections Records**

Dear Mr. Hass:

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 February 8, 1994, asks the Attorney General to direct the Oregon Department of Corrections (ODOC) to make available to you for inspection the following records:

> The complete investigation of the escape of Jeffrey Scott Wagner, including the investigation done by the Inspector General's Office

For the reasons that follow, we respectfully deny your petition as premature.

The Public Records Law confers a right to access 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. 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. Moreover, the Public Records Law permits public bodies

to establish and recover fees reasonably calculated to reimburse them for their actual cost in making public records available, including the time spent by agency staff in locating and reviewing the requested records in order to delete exempt material. *See* ORS 192.440(3); *See also* Public Records Order, April 7, 1989 (Martin).

Pursuant to these statutes, ODOC has adopted administrative rules, OAR 291-37-015(2), and OAR 291-37-020(1), (2), (3) and (7), which provide in pertinent part:

> 291-37-015
>
> * * * * *
>
> (2) The request [for public records] must be in writing, addressed to the Department's functional unit manager where the records(s) is located * * * .
>
> * * * * *
>
> 291-37-020(1) The functional unit manager will designate one (1) or more employees to review record(s) for release.
>
> (2) Upon direction from the functional unit manager, the designated staff member(s) will review the record(s) as necessary and will determine whether the record(s) are exempt from disclosure, in accordance with all applicable laws * * *.
>
> (3) Except as specifically provided for by statute, the designated staff member will advise the person requesting a public records, within a reasonable amount of time, whether the record(s) may be disclosed and the cost of inspection and/or duplication. * * * .
>
> * * * * *
>
> (b) * * * [n]o inspection and/or duplication of record(s) is authorized until payment has been received.
>
> * * * * *
>
> (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.

"Functional unit manager" is defined at OAR 291-37-010(4) to mean:

> Any person within the Department who reports to the Director, an assistant director or an administrator and has day-to-day responsibility for the delivery of services or coordination of programs.

We understand from ODOC that in this instance the functional unit manager of its Inspections Office, where the records you seek to inspect are maintained, is John Foote, ODOC's Inspector General.

Your petition states that you asked to inspect the requested records, but that your request was denied by Dennis Baker. We have spoken with Dennis Baker, ODOC Internal Affairs Officer, concerning your petition. Mr. Baker informs us that you originally asked to review the "Wagner file" in a telephone conversation with Denise Turner, an Office Specialist employed in ODOC's Inspections Office. Both Mr. Baker and Ms. Turner advise us that they mistakenly permitted you to inspect a portion of the Wagner escape investigation file, without first consulting ODOC's administrative rules governing disclosure of ODOC records. Mr. Baker further advises us that he stopped your inspection of the records after learning from Mr. Foote that ODOC's rules require that any request to review the records be made in writing to Mr. Foote, and that the records first be reviewed by Mr. Foote, or staff designated by him, to determine which, if any, of the records are exempt from disclosure under the Public Records Law. OAR 291-37-015(2), and OAR 291-37-020(1), (2), (3) and (7).

Because you have not made a proper written request of ODOC for public records, and because John Foote has not had an opportunity to review the records to determine whether the records are exempt from disclosure in whole, or in part, and to calculate ODOC's actual costs in making non-exempt records available to you, as provided by ODOC's administrative rules, ODOC has not denied a request for public records within the meaning of the Public Records Law.[1/] Public Records Order, July 7, 1989 (Baker). Under these circumstances, we have no authority to order ODOC to make the records available to you. *See* ORS 192.450. We therefore deny your petition as premature.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to
the Attorney General

ESH:AV:JVV:jvv/bjs/JGG08E63
Enclosure
c: John S. Foote, Inspector General
Oregon Department of Corrections
Dennis Baker, Internal Affairs Officer
Oregon Department of Corrections

[1/] We have enclosed for your information a copy of ODOC's administrative rules governing disclosure of public records.

We understand from John Foote that ODOC regrets the misunderstanding caused by his staff's failure to first consult ODOC's administrative rules before they mistakenly advised you that you could inspect the records on demand. Mr. Foote assures us that, in anticipation of receiving a proper written request to inspect the records directed from you, he will begin the process of reviewing the over five hundred pages of documents pertaining to the Wagner escape investigation to determine which records will be made available to you for inspection. Because of the extensive number of records requiring review, Mr. Foote anticipates that the process of reviewing the records with ODOC security staff, and consulting with legal counsel in this office, will likely require two to three weeks.