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July 21, 1992

Michael Dale Kell, SID #5570692
Oregon State Penitentiary
2605 State St., N.E.
Salem, OR 97310

Re: Petition for Public Records Disclosure Order: Oregon Department of Corrections, and Oregon State Penitentiary Records

Dear Mr. Kell:

This letter is the Attorney General's order on your petition for disclosure of records, and for a waiver of fees, under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition[1/], which we received on July 14, 1992, asks the Attorney General to direct the Oregon Department of Corrections (ODOC), and specifically, the Oregon State Penitentiary (OSP), to make available to you for inspection and to produce copies of, public records specified in a request for production of documents served on ODOC in a pending civil action filed in the Marion County Circuit Court, Kell v. Maass, et al, Case No. 91C-12293. Your petition further asks the Attorney General to order ODOC to waive its fees for making public records available to you. For the reasons that follow, we respectfully deny your petition.

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, the Oregon Department of Corrections has adopted administrative rules, OAR 291-37-020(3)(b) and (7), which provide in pertinent part:

> (3)(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.

Your petition states that you originally requested copies of public records maintained by OSP in a request for production of documents served on ODOC's legal counsel in this office, in connection with litigation you have filed against OSP Superintendent Fred Maass and other ODOC employees.[2/] Your petition further states that your "request" to inspect and to receive copies of the above-referenced records was subsequently "denied" by Charles Keaton, Social/Support Services Manager for OSP, who informed you that in order to receive copies of the requested records you would be required to pay for them at the rate of 50 cents per page.

In a previous public records order directed to ODOC's predecessor agency, the former Corrections Division, we concluded that the right to inspect public records under the Public Records

Law was satisfied by the Division's furnishing copies of the requested records at a cost of 50 cents per page. Public Records Order, July 19, 1982 (Baucom). At that time, the Corrections Division had provided by rule that the manner in which it made records available for inspection was by providing copies at a cost of 50 cents per page. The division had determined that the cost of the alternative to making copies, which would require a responsible employee of the division to supervise the actual inspection, and to return the records to the files, would be at least as great as the cost of furnishing copies, and that greater administrative inconvenience would result. Based upon the division's representations, and the fact that the division could charge for its costs in making the records available, we determined that we could not say that the division's policy of providing copies in lieu of making the records available was unreasonable. Baucom at 2.

We have spoken with ODOC's Assistant Director for Institutions, Denis Dowd, who reaffirmed on behalf of ODOC those determinations made by the division that underlie the Baucom order. Accordingly, we reaffirm our conclusion here that the right to inspect is satisfied by the furnishing of copies of requested records upon payment to ODOC of its costs in making the records available.

Because OSP has informed you that you may obtain copies of the requested records as provided by ODOC rule at a cost of 50 cents per page, OSP has not denied a request for disclosure of public records. Under these circumstances, we have no authority to order ODOC or OSP to provide copies of the requested records to you. ORS 192.450(1). However, your petition also asks the Attorney General to order OSP to waive its fees for making the records available to you.

ORS 192.440(4), enacted in 1989, allows agencies to furnish copies "without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction is in the public interest because making the record available primarily benefits the general public." A person who believes that a state agency has unreasonably denied a fee waiver or reduction may petition the Attorney General to review the agency's decision. ORS 192.440(5). You have petitioned the Attorney General under this provision. In support of your petition, you state:

> [t]he documents referenced in the aforementioned request are relevant * * * to a civil action which is brought against state officials for constitutional violation and malfeasance; therefore, it is to the public's interest that these records be disclosed and produced.

We do not agree with your contention that a fee waiver in this instance is in the public interest. Generally speaking, we conclude that making the records available to private litigants so that they may utilize the records for their private ends in the context of the litigation does not primarily benefit the public, and therefore fails to satisfy the public interest test. See Attorney General's Public Records and Meetings Manual 7-9 (1989) (under fee waiver statute, "public interest" not satisfied by private party's desire to use records to aid his defense against criminal prosecution, or by allegation that agency has treated individual oppressively); cf. Public Records Order, June 8, 1990 (Madrid) (under litigation exemption, private desire to show possible inconsistencies between report to Risk Management Division prepared for anticipated litigation, and internal reports of agency concerning incident in question did not qualify as "public interest" sufficient to override exemption). Although the lawsuit you have filed alleges unlawful action and malfeasance by state officials, we are not persuaded that there is anything concerning the nature of this private litigation sufficient to satisfy the public interest test. Accordingly, we deny your petition for fee waiver.

Sincerely,

Amy Veranth
Opinions Coordinator

AV:JVV:bjs/JGG03CA0
c: Denis Dowd, Assistant Director
Institutions Branch;
Fred Maass, Superintendent
Oregon State Penitentiary;
Oregon Department of Corrections

Lynn Larsen, Attorney-in-Charge,
Corrections Litigation Unit
Jan Londahl, Assistant Attorney General
Trial Division

[1/]We received an amended petition on July 16, 1992. As explained in a cover letter received with the amended petition, the amended petition merely corrected some typographical errors and an erroneous statutory citation which appeared in the original