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October 18, 1993

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 Order
Donald M. Drake Co. Public Records Request
DOJ File No. 580-700-ED143-93

Dear Mr. Gray:

This letter is the Attorney General's response to your petition for disclosure of records under Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on October 4, 1993[1/], asks the Attorney General to direct the Oregon Board of Higher Education to make available to you an array of documents pertaining to a large construction project at Oregon Health Sciences University. Specifically, you seek the following records:

1. All documents arising out of or relating to the general contract (the "Contract") between OSBHE [a reference to the Oregon State Board of Higher Education] (hereinafter the "Owner," and intended to include without limitation OHSU [a reference to Oregon Health Sciences University]) and Donald M. Drake Company ("Contractor").

[1/] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

2. Any organizational chart or charts, current as of the period 1989 and thereafter, for OSBHE and/or for OHSU.

3. All documents arising out of or relating to budgets, estimates, reviews, assessments, evaluations or projections of the cost of the Project or of any part thereof, whether prepared before, during or after the Project, and whether in proposed, draft, interim or final form.

4. All cost or expense records maintained by the Owner relating to the Project.

5. All documents arising out of or relating to any investigation, study, evaluation, report or inquiry arising out of or relating to this Project, including without limitation relating to project schedule, delays, disruptions, floors 0 and/or 2, steel erection or steel shims, excavation or foundation work, fire department requirements, proposals or requests for changed or additional work, claims or requests for revised compensation between the Owner and any design professional or other consultant, or requests by Contractor or Owner for adjustment of the Contract price or time.

6. All documents arising out of or relating to communications between the OSBHE and OHSU, or between either OSBHE or OHSU and any other agency, entity or individual relating to this Project, including without limitation employees or agents of OSBHE or OHSU, elected officials, contractors, design professionals, experts, consultants, claim consultants, and testing or inspection services, including all their respective employees and agents.

7. All documents reflecting communications between the Owner and any design professional in connection with the Project.

8. All documents, correspondence, meeting notes, proposals and other writings used for the selection of the architect in connection

with the Project. The owner-architect contract and all proposed or final changes or amendments thereto in relation to the Project.

9. All documents relating to quantities of material excavated in connection with the Project.

10. All photographs, video tapes and other visual documents relating to the Project.

11. All audio or other records or communications relating to the Project, including without limitation computer message displays, electronic mail, and tapes of meetings or telephone conversations.

12. All documents arising out of or relating to interviews, meetings, conversations, correspondence, or investigations arising out of or relating to the Project and to Contractor or any design professional on this Project, or to any of their consultants, subcontractors or suppliers at any tier.

13. All business and personal diaries, reports, notes, calendar entries or correspondence arising out of or relating to the Project.

14. All Milstead and Construction Polymer Technology reports, and any other reports or analyses relating to Floors 0 and 2, or to steel erection work or steel shims in connection with the Project.

15. All depositions, affidavits, other sworn testimony, and any other statements or notes of statements or notes of recollections of any person or entity in connection with this Project.

16. All documents reflecting communications between or among representatives of OSBHE and OHSU, or between or among representatives of OSBHE or OHSU and any other public entity.

17. All documents reflecting or relating to the condition of the Project site and the design presumptions underlying the design of the Project.

18. All documents reflecting or relating to notes, drawings, calculations and other records concerning the design and design revisions relating to the Project.

19. All documents that reflect or relate to or disclose any inspection or observation of the Project or Project site.

20. All documents that reflect or relate to any geotechnical study (including without limitation any soil boring, soils or other geological investigation, study or evaluations), analysis, investigation or observation of the Project site or any similar or nearby sites in connection with the Project.

21. All chronologies, transmittal logs, submittal logs, or other log of communications or of project documents for the Project.

22. Copies of all time sheets for Owner's personnel assigned to or charged to the Project, including without limitation their activity, date of work, hours and individual names.

23. All documents arising out of or relating to Larry Caldwell's or Steve Cruzen's complete work history or employment history; position description(s) for all positions held; and their work activities, including without limitation performance reviews throughout their employment.

Your original request for inspection of public records is dated July 16, 1993. The scope of the request is identical to that in your petition. On page two of your July 16, 1993, letter[2/], you describe that your interest relates to documents pertaining "to the planning, feasibility, funding, design, development, construction or

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[2/] The header on page two is dated June 17, 1993; we assume this is a typographical error.

administration of the OHSU Basic Science/C.R.O.E.T. Addition Project * * *." You make clear that the "documents" you wish to inspect "includes without limitation computer stored or generated information, electronic or other transcriptions or tapes of telephone or personal conversations or conferences, and any and all written, printed, typed, punched, taped, magnetic media, filmed or graphic matter or tangible thing, of whatever description." You ask for a fee waiver pursuant to ORS 192.440(4) and further request that if fees are not waived and are estimated to exceed $500 you should be advised of the estimated cost before the request is processed.

James Van Dyke, Assistant Attorney General in the Department of Justice's Trial Division, Commercial and Environmental Litigation Unit, responded on August 19, 1993. That letter contained a four-page document entitled "Board of Higher Education's Response to Public Record Request of the Donald M. Drake Company" (hereinafter, "Board's Response"). The request for a fee wavier was denied, but there is no estimate that costs of the response will exceed $500 "because that depends on how extensively the Drake Company wishes the Board to search for duplicate records and the extent to which copies are requested." We are now advised that OAR 572-01-020 imposes certain copy costs and requires reimbursement "for actual costs" for "documents and other materials such as computer tapes, microfilm and microfiche copies, audio tape cassettes, computer services, etc." OAR 572-01-020(3). We understand the Agency interprets this rule to include staff costs. We are advised by the Agency that they estimate that staff costs will be considerably in excess of $500 in order to produce the documents responsive to your request, without consideration of copy costs. Nevertheless, considering our disposition of your request, we will not consider further the impact of this information upon your petition, except to note that were we not to dispose of your petition on other grounds, the $500 fee limit expressed in your July 16, 1993, letter would seem to make your petition moot.

The Board's Response enclosed in Mr. Van Dyke's letter of August 19, 1993, in addition to denying the fee waiver, goes on to describe "categories of items that will not be produced for any specific request." Seven such categories are listed. Each describe a specific basis for exemption from disclosure of public records. However, there is no effort within the Board's Response to identify specific documents that will not be produced. The Board's Response seems only to indicate that should specific exempted documents be identified in preparation for inspection and review then those documents would not be produced.

The Board's Response goes on to state, on page two:

> "Therefore, subject to general objections noted above, the State Board will produce the documents requested by the Donald M. Drake Company * * *."

The Board's Response then discusses nine specific requests. However, in every case it appears that, with one possible exception to be discussed below, there is no reference to a specific document or documents. Rather, the discussion appears to be an iteration of the categories of exemptions from disclosure that might apply to specific documents should any come to light as the Board identifies records which are responsive to your request.

The exception noted above pertains to the response to item 5 of your request and a report by a consultant hired "to help * * * [OHSU] understand Drake's contentions in regard to Floors 0 and 2." Item 14 of your request also is specific with respect to reports of the consultants Milstead & Associates, Inc. and Construction Polymer Technologies, Inc. These reports have been supplied to us by the Agency, together with a claim that they constitute documents which are exempt from public inspection because they pertain to litigation. ORS 192.501(1).

We understand that in or about September 1992, the Agency was advised by an official of the Donald M. Drake Construction Company that a claim would be made by the Drake Company against OHSU and that the claim would be "big." That advice apparently had been anticipated by OHSU who, at that time, already had consulted with the Department of Justice attorneys in anticipation of litigation. The consultants' reports, which are dated January 6, 1993, were obtained by OHSU for purposes that included use in the event of litigation, which was considered likely at that time. The likelihood continues, as represented by your July 16, 1993, letter, which states:

> "While it remains my client's preference to resolve this matter without litigation, I intend to pursue all avenues of claim resolution as rapidly as feasible consistent with our professional judgment, to achieve a timely and equitable recovery for my client."

Our conclusion is that the reports by consultants Milstead and Construction Polymer Technologies constitute documents pertaining to litigation that is reasonably

likely to occur. Therefore, we conclude that these consultants' reports are exempt from disclosure under ORS 192.501(1).

Your request also included, at item 23, access to the personnel records of Larry Caldwell and Steve Cruzen. The Agency has called to our attention one document in Caldwell's file and three documents in Cruzen's file that are applications for health, disability or life insurance. Our inspection of these documents indicates they are exempt from disclosure under ORS 192.502(2) as "records of a personal nature * * *, if the public disclosure thereof would constitute an unreasonable invasion of privacy." See also ORS.496(1). In our discussions with you we have heard no information which would constitute "clear and convincing evidence that the public interest requires disclosure in the particular instance" or "that the public disclosure would not constitute an unreasonable invasion of privacy."

You have stated that these insurance applications may contain medical information that could indicate these employees were unable to fulfil their work responsibilities with respect to the construction project in question. However, the interest you may have in such information for purposes of private litigation does not rise to the level of a public interest in disclosure. Accordingly, we conclude that these insurance applications are exempt from disclosure under ORS 192.502(2).

With the exception of the records discussed above, the Board's Response enclosed in Mr. Van Dyke's letter of August 19, 1993, is not a denial of access to particular documents. In fact, we understand that commencing November 8, 1993, and for the two weeks following, you will have access to the records for purposes of inspection at OHSU. We understand that prior to November 8, 1993, the Agency will have completed its gathering and review of the records and at that time will be able to determine what specific documents, if any, fall within the categories of exemptions described in the Board's Response. Until that is done, there has been no denial of access by the Agency. Therefore, with respect to all of these remaining documents, we respectfully deny your petition as premature. Absent a denial by the agency, the Attorney General has no authority to order the disclosure of records. See ORS 192.450.

We understand your position to be that the failure of the Agency to identify possibly exempt documents by the time of your petition for review of October 1, 1993, is a constructive denial. We disagree. The requests contained in your

July 16, 1993, letter are extensive. The fact that your review of these documents may consume as much as two weeks is evidence of the volume and complexity of your demand for inspection. Both Mr. Van Dyke's letter of August 19, 1993, and the Board's Response, invite your immediate access, although Mr. Van Dyke concedes that not all the records would be instantly available. However, we understand that there was no reply to the August 19, 1993, letter for at least four weeks. Then followed the agreement to inspect beginning November 8, 1993. This strongly suggests that a reasonable response time to a public records inspection request of this volume and complexity would take at least until November 8, 1993. See Morris Bros., Inc., v. Oregon Department of Economic Development, 103 Or App 619, 798 P2d 719 (1990). Until that time, or such prior time that the Agency identifies additional specific documents which it claims are exempt from disclosure, no denial of access, real or constructive, has occurred.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the Attorney General

ESH:JJC:cro/JJC0141.LET
cc: Jim Van Dyke, Assistant Attorney General