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January 12, 1990

Susan G. Bischoff
Garrett, Seideman, Hemann, Robertson & De Muniz, P.C.
Willamette Professional Center
1011 Commercial St. N.E.
Post Office Box 749
Salem, Oregon 97308-0749

Re: **Petition For Public Records Disclosure Order; Department of Corrections Records**

Dear Ms. Bischoff:

This letter is the Attorney General's order on your petition, submitted on behalf of Ms. Teri Rice, for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on January 5, 1990, asks the Attorney General to direct the Department of Corrections (department) to disclose "[a]ll notes, records, and/or recordings of the interviews conducted between November 7, 1989 and the present, by Department of Corrections personnel pursuant to OAR 291-06-015 relating to the complaint of sexual harassment in the workplace by Ms. Teri Rice." For the reasons that follow we respectfully deny your petition for disclosure.

By letter dated November 7, 1989, you requested administrative investigation of Ms. Rice's claim of sexual harassment. Presumably, you made this request pursuant to OAR 291-06-015. On the same day, you filed a formal notice of tort claim, based on the same charges, again on behalf of Ms. Rice. Upon receipt of the letter and notice, personnel from the department and the Risk Management Division of the Department of General Services conducted joint investigatory interviews concerning the matters alleged. These interviews had dual functions. The two department personnel services representatives were conducting an investigation to find facts preliminary to a determination whether any disciplinary action

would be appropriate in light of Ms. Rice's allegations of sexual harassment. The Risk Management employment claims specialist was gathering information for use in any ensuing tort litigation. See ORS 30.275 (5)(a); OAR 125-150-000. Even if he had not been present, the Risk Management representative (and ultimately, this office) would have used and relied on the information gathered in the course of the department's investigation.

One of the department employees took the lead in conducting the interviews. The Risk Management representative and both of the department employees took notes of the interviews. Two of the persons interviewed tape recorded their interviews, providing copies of the tapes to the state. It is the notes, records, and recordings of those interviews that you seek, and to which the department has denied you access.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exceptions. ORS 192.420. As explained below, we conclude that the records in question are exempt from disclosure under ORS 192.501(1)(a) and, at least on an interim basis, under ORS 192.501(13).[1]

1. ORS 192.501(1)(a)--Records Pertaining to Litigation

ORS 192.501(1)(a) conditionally exempts from disclosure records of a public body pertaining to litigation. The statute specifically exempts

> "Records of a public body pertaining to litigation to which the public body is a party if a 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 subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation[.]"

The exemption applies "unless the public interest requires disclosure in the particular instance."

In the absence of a filed complaint, the litigation exemption applies only when litigation is reasonably likely to occur. As the court stated in Lane County School District v. Parks, 55 Or App 416, 420, 637 P2d 1383 (1981), rev den 293 Or 103 (1982):

> "[T]o further the statutory policy that government records be open to the public, we hold that under ORS 192.500(1)(a) [now ORS 192.501(1)], public records are exempt only when the records contain information compiled or acquired by the public body for use in ongoing litigation or, if a complaint has not been filed, if the public body shows that such litigation is 'reasonably likely to occur.'"

Lane County School District v Parks, supra, 55 Or App at 420.

On November 7, 1989, Ms. Rice filed a notice of tort claim against the state (the Department of Corrections) claiming injury resulting from sexual harassment and unequal treatment in the workplace. Notice of tort claim is a formal written communication to a public body stating that a claim for damages is or will be asserted against that public body. ORS 30.275(4). We conclude that the filing of notice of tort claim indicates that litigation is reasonably likely to occur. Notes taken by the state's representatives at interviews conducted after the date the state received the notice of tort claim (November 8, 1989, according to the stamped receipt date), contain information compiled or collected in anticipation of litigation that is reasonably likely to occur.

As already noted, the litigation records exemption is conditional. Therefore, having concluded that the records here fall within the exemption, we must determine whether the "public interest requires disclosure in the particular instance." The policy furthered by this exemption is "to place governmental bodies on an even footing with private parties before and during court litigation." Attorney General's Public Records and Meetings Manual 14 (1989) (emphasis deleted) (hereafter Manual). You have supplied us with no information suggesting that this general policy must be overridden in this instance, and we are aware of none. Moreover, the availability of ordinary tools of discovery, see ORS 192.501(1), tends to negate any need to use the Public Records Law to gain access to these records. We conclude, therefore, that the records are exempt from disclosure under ORS 192.501(1).

2. ORS 192.501(13)--Personnel Discipline Action Records

ORS 192.501(13) conditionally exempts from disclosure documents supporting personnel disciplinary actions. For investigatory records, this exemption is triggered only when

the investigation results in a disciplinary sanction. City of Portland v Rice, 308 Or 118, 775 P2d 1371 (1989).

The timing of your request for these investigatory records requires us to consider how this exception applies before a determination whether to impose a disciplinary sanction. We recently addressed this question:

> "Neither ORS 192.501(13) nor City of Portland v. Rice, supra, specifies how the statute applies when a person seeks records in a file in a pending personnel disciplinary matter. We believe, however, that in those circumstances an agency may postpone action on the request until the personnel matter is finally resolved, in order to determine whether those records are exempt. That practice would be consistent with ORS 192.430, which requires a custodian of public records to furnish a reasonable opportunity to inspect or copy public records. Under the circumstances discussed, it would be entirely reasonable for an agency to delay responding to a records request until it had the facts--the resolution of the personnel disciplinary matter--necessary to determine whether the records are exempt. Moreover, a contrary reading of ORS 192.501(13) effectively would eviscerate the exemption, by compelling the disclosure of records that later could be exempt from disclosure."

Manual at 21. Accordingly, unless the public interest requires immediate disclosure in the particular instance, the department may withhold these records pending a final determination on any disciplinary sanction.

As we stated above in our discussion of the litigation records exemption, we are unaware of any facts from which to conclude that the public interest requires disclosure in this particular instance. Therefore, pending a final decision on any disciplinary sanction, the investigatory records may be withheld from public access. If the department imposes a disciplinary sanction, the supporting materials will be exempt from disclosure under 192.501(13). If there is no disciplinary sanction imposed, the notes, records, and recordings will not be exempt under this provision.

Conclusion

For these reasons, we conclude that the documents you seek are exempt from disclosure under ORS 192.501(1)(a) and, at least until a decision is made on the imposition of a disciplinary sanction, under ORS 192.501(13). Accordingly, we respectfully deny your petition to compel disclosure.

Sincerely,

PAMELA L. ABERNETHY
Special Counsel to the
Attorney General

PLA:LRR:RDW
cc: Manfred Maass, Superintendent, Oregon State Penitentiary
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[1] Some of these materials also may be information submitted to a public body in confidence, exempt from disclosure under ORS 192.502(3). Because we have resolved your petition on other grounds, we do not address the applicability of ORS 192.502(3).