DAVE FROHNMAYER
ATTORNEY GENERAL

JACK L. LANDAU
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400

June 14, 1991

Ann S. Christian
Indigent Defense Services Director
Office of the State Court Administrator
Supreme Court Building
Salem, OR 97310

Lars K. Larson
KPTV 12
P.O. Box 3401
Portland, OR 97208

Re: Petition for Public Records Disclosure Order; State Court Administrator Records

Dear Ms. Christian and Mr. Larson:

This letter is the Attorney General's order on Mr. Larson's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on June 7, 1991, asks the Attorney General to direct the State Court Administrator to make available copies of all records in his custody relating to expert testimony on DNA evidence or payments to experts to testify on the subject of DNA in three court cases, identified as Futch, Wheeler and Herzog. For the reasons stated below, we grant the petition.

1. Background

The Indigent Defense Services Division of the State Court Administrator's office maintains records concerning the payment of defense experts in criminal trials of indigent defendants. Most of the records are received from the trial court that approved the payment pursuant to ORS 135.055(3). The State Court Administrator processes the payment to the expert.

The records involved here are: defense affidavits in support of motions for expert witness fees; court orders granting these motions; itemized billings and receipts by expert witnesses documenting their services and expenses; certifications by

defense counsel of the expert witness expenses incurred; and Judicial Department payment records.

2. Analysis

We previously have determined that the State Court Administrator is a "state officer," and thus a "public body" within the meaning of ORS 192.410(1). Consequently, records in his custody are subject to the Public Records Law. Public Records Order, November 8, 1988 (Harcleroad).

Under the Oregon Public Records Law, disclosure is the rule. Exemptions from disclosure must be narrowly construed. The party claiming the exemption has the burden to demonstrate that the exemption is both legally and factually justified. Guard Publishing Co. v. Lane County School Dist., 310 Or 32, 791 P2d 854 (1990).

In this case, no specific exemption in the Public Records Law applies to these records. The claim of exemption rests on ORS 135.055(3), which provides in relevant part:

> The person for whom counsel has been appointed is entitled to reasonable expenses for investigation, preparation and presentation of the case. The person or the counsel for the person may upon motion, which need not be disclosed to the district attorney prior to conclusion of the case, secure approval and authorization of payment of such expenses as the court finds are necessary and proper in the investigation, preparation and presentation of the case * * *. The motion must be accompanied by a supporting affidavit which sets out in detail the purpose of the requested expenditure, the name of the service provider or other recipient of the funds, the dollar amount of the requested expenditure which may not be exceeded without additional authorization and the date or dates during which the service will be rendered or events will occur for which the expenditure is requested. (Emphasis added.)

This statute provides a process by which counsel for indigent defendants may obtain court approval of payment for expert witnesses or other investigation expenses. The statute specifically provides that the motion need not be disclosed to the district attorney before the "conclusion of the case."

The initial question is whether this statute creates an exemption from public disclosure which would be incorporated into the Public Records Law through ORS 192.502(8):

> The following public records are exempt from disclosure under ORS 192.410 to 192.505:
>
> * * * * *
>
> (8) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

ORS 135.055(3) expressly permits temporary withholding of these records from only district attorneys, not the public generally. We understand that the State Court Administrator has interpreted the statute to permit withholding the records from the public generally, because a contrary reading would allow district attorneys ready access through other members of the public, thus vitiating the exemption. We concur with that construction of the statute, and conclude that if the statute applies to the records here, the exemption is incorporated into the Public Records Law through ORS 192.502(8).

The next question is whether the temporary exemption from disclosure has ended in this instance. ORS 135.055(3) permits the records to be withheld until the "conclusion of the case." We understand that all of the cases at issue have gone to trial and are now on appeal. The issue thus is whether the case "concludes" upon completion of the trial, or whether the exemption lasts until the ultimate resolution of the case, including any subsequent appeals or retrials. The State Court Administrator has adopted the latter interpretation. See Indigent Defense Payment Policies and Procedures, Volume 1, Chapter 13, Section 02, 3.5.

ORS 135.055(3) is reasonably susceptible to different readings. "Conclusion of the case" may mean the end of the trial. This interpretation is consistent not only with the ordinary meaning of the statutory language, but also with the apparent underlying policy and the district attorneys' role in handling criminal prosecutions for the state. The statute evidently aims to permit indigent defendants in criminal cases to develop defense strategy without district attorney scrutiny. Typically, that purpose has been satisfied once the trial is over and the defense strategy and evidence have been revealed. Additionally, in Oregon district attorneys do not handle criminal appeals, a fact of which the legislature undoubtedly is aware. Thus, the statutory reference to "the district attorney" suggests

that the legislature intended the exemption to last only through the portion of the criminal proceeding handled by the district attorney.

The phrase "conclusion of the case" also logically could refer to the end of all proceedings in a case, including any appeals and subsequent retrials. We recognize that, as the State Court Administrator points out, the defense sometimes elects not to use expert testimony paid for under ORS 135.055(3) in a first trial. Revealing the motion and affidavit to the district attorney before a retrial, thus disclosing previously abandoned defense strategies, conceivably could help the district attorney. We believe, however, that this possibility is too remote to have concerned the legislature.[1]

In light of the Supreme Court's repeated admonitions to construe Public Records Law exemptions narrowly, we conclude that the exemption in ORS 135.055(3) lasts only until the end of the first trial. Accordingly, the records here are not exempt from disclosure.

In sum, we grant the petition, and order the State Court Administrator to disclose the requested records. The State Court Administrator has seven days from the date of this order in which to comply. ORS 192.450(2).

Sincerely,

PAMELA L. ABERNETHY
Special Counsel to the
Attorney General

PLA:LR:RDW:tmt/JGG00B54
c: R. William Linden, Jr.
State Court Administrator
Supreme Court Building
Salem, OR 97310

---

1. We have reviewed the legislative history of Oregon Laws 1987, chapter 803, section 14, in which the language "conclusion of the case" was adopted. That history is unhelpful here.