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Telephone: (503) 378-4400

November 7, 1991

Steve Mayes
The Oregonian
1320 S.W. Broadway
Portland, OR 97201

Re: **Petition for Public Records Disclosure Order; Treasury Records**

Dear Mr. Mayes:

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. The petition, which we received on October 31, 1991, asks the Attorney General to order the Office of the State Treasurer and its employees to provide access to the following records: (1) files detailing real property in Oregon owned by the Oregon State Treasury; and (2) working papers and documents and notes in the possession of KMPG Peat Marwick which were gathered pursuant to Treasury Contract 004 dated August 2, 1991. You state that you asked to inspect these records on October 10, 1991, and that the request was denied by Michael Ryan, Assistant to the State Treasurer.

For the reasons that follow we deny the first part of your petition as premature and the second part because it does not relate to "public records" as that term is defined in ORS 192.410(4).

In a letter dated October 10, 1991, addressed to the Office of the State Treasurer, a copy of which is attached, you requested "information on real property owned by the Treasury, funds managed by the Treasury or shell corporations controlled by the Treasury." This letter does not mention the Peat Marwick documents. The Peat Marwick documents were identified in a letter addressed to Michael Ryan of the Oregon State Treasury, dated October 14, 1991, a copy of which also is attached.

On October 17, 1991, Michael Ryan responded to your requests by letter, a copy of which is attached. He stated his belief that your request for information on real property owned by the Oregon State Treasury is based upon your assumption that a comprehensive document exists that completely details the status of all Treasury transactions. He then added, "Such a document does not exist but is rather embodied in the combination of over 1400 individual files." Treasury is in the process of computerizing this information, but the job is not yet finished. Notably, Mr. Ryan stated, "I am not denying your request for a listing of real property mortgaged by the State Treasury, but, rather, assisting you in requesting the sought material when it is available." There is nothing in your letter of October 10, 1991, suggesting that you have asked to inspect the individual files. Nor is there anything in Mr. Ryan's letter of October 17 suggesting that he was denying such a request. (However, a number of exemptions may apply in particular instances, if such a request were made.)

Because Treasury did not deny you the right to inspect an existing public record, this office lacks authority to order that agency to disclose records. See ORS 192.450(1). Moreover, the Public Records Law does not impose on public bodies the duty to create public records: for instance, to prepare a list to satisfy a records request. Attorney General's Public Records and Meetings Manual 3 (1989). In any event, we have been informed that Treasury has now completed a listing of real property owned by it and various investment funds which it manages, and that it is prepared to make this listing available for inspection and copying.

If you wish to inspect the individual real property files mentioned by Mr. Ryan, your request must be denied as premature. Absent a request for and denial

of public records, we have no authority to order the Office of the State Treasurer or its employees to make documents available for inspection. See ORS 192.450(1).

In his October 17 letter, Mr. Ryan stated that he is confirming his oral denial, on October 14, of your request for KPMG Peat Marwick working papers, because those records have been and still remain solely the property of Peat Marwick. "Public records" are records that are "prepared, owned, used or retained by the public body." ORS 192.410(4). Treasury Contract No. 004 with KMPG Peat Marwick contains no provisions relating to the working papers, notes and documents that you seek. Paragraph 10 provides:

> All work products of the Contractor which result from this Contract are the exclusive property of the Treasury. Contractor hereby grants the State of Oregon, by and through the Oregon State Treasury, fully paid-up and perpetual license and copyright to use, reproduce, copy, transfer and modify, in whole or in part, the work products delivered by Contractor pursuant to this contract, as Treasury sees fit for governmental purpose.

We construe this provision to relate to draft policies and procedures and reports that Peat Marwick was and is required to produce for the Office of the State Treasury, as described in the exhibits to the contract. There is no suggestion that it was intended to include working papers and notes. Moreover, we think it highly unlikely that a private accounting firm would agree to such a provision, at least without clear language and limiting provisions which would permit the firm to dispose of or at least edit erroneous, overstated, understated, irrelevant, incomplete or inappropriate remarks before such notes and working papers were to be made public.

Paragraph 18 provides:

> The Treasury, the Office of the Secretary of State, the federal government, and their duly authorized representatives shall have access to the books, documents, papers, and records of the Contractor

which are directly pertinent to the specific contract for the purpose of making audit, examination, excerpts and transcripts.

We do not read this provision to give Treasury officials access to the documents you seek, because those documents apparently are irrelevant to any of the purposes listed in that provision. Accordingly, those documents are not "public records."

For the reasons stated above, we respectfully deny your petition.

Sincerely,

for PAMELA L. ABERNETHY
Special Counsel to the
Attorney General

PLA:RDW:RWM:cfs
Enclosures
c: (w/out enclosures)
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