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May 5, 1999

Gordon Byrd, SID #6456614
Eastern Oregon Correctional Institution
2500 Westgate
Pendleton, Oregon 97801

RE: *Petition for Public Records Disclosure Order*
Oregon Department of Corrections Records

Dear Mr. Byrd:

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. Your petition, which we received on April 28, 1999, asks the Attorney General to direct the Oregon Department of Corrections (ODOC) to make available to you copies of the following records:

1. A copy of "notice of hearing" to disciplinary hearing 9903-J218;

2. A copy of disciplinary report No. 9903-J218;

3. A transcript of the taped record of disciplinary hearing 9903-J218;

4. A copy of the "final order" on disciplinary hearing 9903-J218;

5. All major misconduct reports in Gordon Eugene Byrd, 6456614 working file from January 1st, 1983 to the time of response;

6. All final orders to level I and II misconduct reports in Gordon Eugene Byrd's 6456614, working file from January 1st, 1983 to time of response;

7. All grievances in Lieutenant Elton Mendenhall's file;

8. A copy of Gordon Eugene Byrd, 6456614 medical file from January 1st, 1997 to the time of response;

9. A copy of rules governing prohibited inmate conduct (OAR 291-105-0005 through 291-105-0073) Rule No. 105, Tab No. 22. Up to date;

10. A copy (up to date) of rules governing Segregation (OAR 291-11-005 through 291-11-070) Rule No. 11, Tab No. 39;

11. A copy (up to date) of rules governing Release of records (OAR 291-37-005 through 291-37-025) Rule No. 37, Tab No. 15;

12. Any documents, memorandums, and special reports concerning misconduct hearing 9903-J218.

Your petition states that you asked for the above records several times between March 20, 1999 and April 22, 1999, and that your requests were denied by the Director and Assistant Director of ODOC and by the Superintendent and Assistant Superintendent of EOCI.

We have been informed by Norma Land, Executive Support Specialist for ODOC, that ODOC received two letters from you between March 20, 1999 and April 22, 1999. On April 7, 1999, you wrote to Assistant Director S. Frank Thompson regarding an alleged debt being applied to your account before the order from the hearings officer became final. Mr. Thompson forwarded your letter to the Superintendent of EOCI for consideration. ODOC received another letter from you on April 15, 1999, concerning making copies for legal work. On April 28, 1999, Mr. Thompson again forwarded your letter to the EOCI Superintendent for consideration. We discuss EOCI's response to your requests below.

The Public Records Law confers a right to inspect 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 copying of the record in the officer 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).

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. The Public Records Law permits public bodies to establish and recover fees reasonable 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 request records in order to delete exempt material. *See* ORS 192.440(3); *see also* Public Records Order, April 7, 1989 (Martin). Public bodies may preliminarily estimate charges for responding

to a records request and require prepayment of the estimated charges before acting on the request. *See* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1997) (MANUAL) at 11. ORS 192.440(4) authorizes a public body to waive or reduce its fees for making records available, provided that the waiver or reduction of fees is in "the public interest because making the record available primarily benefits the general public.[1/]

Pursuant to these statutes, ODOC has adopted administrative rules, OAR 291-37-0020(3)(b), and (7), which provide in pertinent part:

> (3)(b) No inspection and/or duplication of record(s) is authorized until payment has been received.
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> * * * * *
>
> (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 the circumstances warrant.

1. Notice of Hearing, Disciplinary Report and Final Order on Disciplinary Hearing No. 9903-J218

Wade Scrogham, EOCI Hearings Supervisor, informs us that you have been provided a copy of items #1, #2 and #4, the notice of hearing, disciplinary report and final order on disciplinary hearing No. 9903-J218, in accordance with ODOC rules. Because you have received copies of these documents, we deny your petition as to items #1, #2 and #4 as moot.

2. Misconduct Reports, Final Orders, Other Documents related to Disciplinary Hearings and Copies of Rules

In a Grievance Response Form dated April 19, 1999, Mr. Scrogham informed you that you may have access to copies of items #5, #6, #9, #10, #11 and #12, the misconduct reports, final order and other documents related to formal disciplinary hearings, including the ODOC rules, at your own expense, pursuant to ODOC rules.

[1/] ORS 192.440(4) provides:

> (4) The custodian of any public record may furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public.

In applying the public interest standard contained in this statute, this office has concluded that a requestor's private interest in litigation is insufficient to require a fee waiver. *See* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 14 (1997).

Mark Schachtsick, Program Services Manager for EOCI, states that you were informed in a Grievance Response Form dated April 28, 1999, that your request to photocopy legal documents was denied by Library Coordinator Holman because the requested photocopies are not required by the court or procedural rule. The Oregon Department of Corrections (ODOC) has adopted administrative rules, OAR 291-139-0040(5)(c), which provides in pertinent part:

> (c) An inmate without sufficient funds in his/her trust account to cover the costs of duplication at the time of request will be provided supplies necessary (i.e., paper and carbon paper) to hand duplicate or type the material. The library coordinator may authorize the photocopying of exhibits or other legal documents for an indigent inmate if the inmate demonstrates the duplication cannot be accomplished by use of carbon paper and is required by the court or procedural rules.

According to Ms. Holman, court rules do not require a photocopy of the documents you seek, but would permit filing of hand-duplicated documents with the court. You have not shown that photocopies of the requested legal documents are required by a court or procedural rule. Thus, the ODOC rules do not require EOCI to provide copies of these records to you without payment of the agency's costs of making the records available. OAR 291-37-0020(3)(b), 291-139-0040(5)(c).

As noted above, a public body may require payment of its fees for making copies of public records available. An agency does not deny a public records request merely by requiring prepayment of those costs. Under these circumstances, EOCI has not denied a request for items #5, #6, #9, #10, #11 and #12. Accordingly, this office has no authority to order EOCI to make copies of the records available to you. We therefore deny your petition as to these records.

3. Transcript

We have spoken to Tammy Schachtsick of the EOCI Program Services Office regarding item #3, a transcript of the taped record of disciplinary hearing 9903-J218. Ms. Schachtsick informs us that her office has not prepared a transcript of that proceeding. This office cannot order an agency to produce records that do not exist. *See* MANUAL at 5. Because you seek a document that does not exist, we deny your petitioner with respect to item #3.

4. Grievances in Lieutenant Mendenhall's File

With respect to item #7, grievances in Lieutenant Elton Mendenhall's file, we have spoke with Linda Murgo, Personnel Manager for EOCI. She has informed us that grievances are not placed within an employee's personnel file. Marian Giles, Management Assistant to the EOCI Superintendent, has confirmed that the agency does not maintain grievance files for specific employees; rather, grievances are placed in the file of the inmate making the grievance. Because

there are no grievances in Lt. Mendenhall's files, we deny your petition with respect to item # 7. This office cannot order an agency to produce records that do not exist.[2/]

5. Medical Records

We are informed by Heather Villanueva, Manager of Health Services for EOCI, that you have not made a written request for item #8, a copy of your medical file.[3/] The Attorney General has authority to order disclosure of public records under the Public Records Law only when the records have first been requested from, and denied by, a state agency. Since you have not requested these records, the agency has not denied any request. Accordingly, we deny your petition as to item #8 as premature.

Sincerely,

STEPHANIE L. STRIFFLER
Special Counsel to the Attorney General

HFL:ALV/GEN17396.DOC
c: Mark Schachtsick, Program Services Director, EOCI
Heather Villanueva, Manager of Health Services, EOCI
Linda Murgo, Personnel Manager, EOCI
Wade Scrogham, Hearings Supervisor, EOCI

[2/] If any grievances have been filed with respect to Lt. Mendenhall, the records you seek may be contained in the files of the inmates who filed the grievances. We understand that that EOCI does not cross-reference such information between inmate grievances and personnel. Therefore, such records could only be located by doing a search through each inmate file.

[3/] When an inmate has no funds available, the inmate's trust account may be debited to recover the costs of inspection and duplication of records in the inmate's own medical file. *See* OAR 291-37-020(5).