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RECEIVED
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DEPT. OF JUSTICE
SALEM, OREGON

May 3, 1999

Richard Marc Tyle, SID #7368390
Oregon State Penitentiary
2605 State Street
Salem, OR 97310

Re: ***Petition for Public Records Disclosure and Fee Waiver Order: Oregon Department of Corrections Records***

Dear Mr. Tyle:

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.[1/] Your petition, which we received on April 12, 1999,[2/] requests the Attorney General to direct the Oregon State Penitentiary (OSP) and the Oregon Department of Corrections (ODOC) to make available to you copies of the following documents:

(1) Your complete inmate file held by your Counselor at OSP.
(2) Your complete records, including your mental health file and disciplinary file, held by the OSP Records Department.
(3) Your complete trust account records, including those reflecting "monies taken for fines," "monies deposited by outside sources" such as family or friends and "monies taken for any other reason" for the time period of January 1991 through March 1999, held by the ODOC Central Trust Office.

[1/] We received from you a letter, two form petitions for public records disclosure orders, a copy of an Inmate Communication Reply form from Central Trust dated March 24, 1999 and an affidavit for deferral of fees and costs. For ease of administration and clarity, we have decided to refer collectively to your submissions as your "petition," and to respond to each of your records requests discussed collectively in your submissions by category.

[2/] We appreciate your courtesy in extending the time for our issuance of the order in this matter.

(4) Your complete records, including those pertaining to your sentencing classifications and your transfers both in-state and out-of-state, held by the ODOC Classification & Transfer Unit.
(5) Your complete records held by the ODOC Inspections Division.
(6) Your complete records, including your mental health file, held by the OSP "Correctional Treatment Services."

For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public records 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 or copying of the record in the office 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 disclosure. ORS 192.450(1). Under these provisions, an agency may be said to have "denied" a request to inspect or to receive a copy of a public record only if the agency receives a proper request for public records. Public Records Order, July 7, 1989 (Baker).

ORS 192.430 authorizes state agencies to adopt reasonable rules and regulations necessary for protecting their records and preventing interference with the regular discharge of the duties of the custodian. Moreover, the Public Records Law permits public bodies to establish and recover fees reasonably 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 requested 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 (MANUAL) (1997) at 11.

Pursuant to these statutes, ODOC has adopted administrative rules, OAR 291-37-020(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.
>
> * * * * *
>
> (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 circumstances warrant.

Your petition states that you have asked OSP and ODOC officials for copies of the above-listed records, but that your requests were denied. Your petition indicates that in those instances where you have received responses to your records requests from ODOC officials, the

reason the records were not provided to you is because you lack funds in your inmate trust account to pay ODOC its fees for making copies of the requested records available to you.

The documents you have submitted to this office as part of your petition are less than clear regarding whether you have requested that these same ODOC officials waive the agency's fees in whole or in part. Nevertheless, ODOC officials have agreed in this instance to treat your "petition" as a request for a fee waiver that has been denied by the agency. Accordingly, we also treat your petition in this instance as seeking review of ODOC's denial of your request for a waiver of its fees in making copies of the requested records available to you. We consider your petition, by category of requests, below, followed by a discussion of the fee waiver issue.

Complete Inmate File Held by Counselor

In your petition, you state that you requested copies of your "complete inmate file" held by your counselor at OSP, but that you were denied copies of the records by Ms. Amy Pinkley-Wernz. We have spoken to Ms. Pinkley-Wernz regarding your petition. She informs us that upon review of her files, she was unable to locate any inmate communication or other request for copies of the records referenced in your petition. She further advises us that she has no recollection of receiving an inmate communication or other request from you, but that had she received one from you she would have returned it to you with her response.

Absent a request for records and a denial of that request by the state agency, the Attorney General has no authority to order OSP to make the records available to you. ORS 192.450(1). Therefore, we deny your petition as to these records as premature.

Complete Records Held by OSP Records Office

Your petition states that you requested copies of your "complete records" held by the OSP Records Department, including your complete mental health and disciplinary files, but that you were denied copies of the records by an unnamed records supervisor at OSP.

We have spoken to Doty Sever, Prison Term Analyst 2 at the OSP Records Office, regarding your petition. Ms. Sever informs us that the institution working file pertaining to you that is maintained by the OSP Records Office includes disciplinary file records, but does not include your mental health file records. Ms. Sever further advises us that she has twice responded to requests for records from you by providing you with specific information you requested, and by sending you written responses notifying you that you lacked any available funds in your inmate trust account to cover the agency's fees for making copies of the requested records available to you.

Upon further inquiry, Ms. Sever advises us that there are 396 pages in ODOC's institution working file pertaining to you maintained by the OSP Records Office. She advises us that there are likely to be particular records or information contained in the institution working file for which ODOC would claim a statutory exemption from disclosure, but that she would be required to review the file to make that determination. Ms. Sever reiterates to us that pursuant to

ODOC's rules she would conduct the necessary review, and cause the OSP Records Department to make copies of any non-exempt records available to you, upon your prepayment to ODOC of its fees for making available copies of the requested records, or if sufficient funds become available in your trust account to cover these fees.

As discussed above, a public body lawfully may require prepayment of its fees for making copies of public records available. *See* ORS 192.440(3); *see also* Public Records Order, April 7, 1989 (Martin); *and see* MANUAL at 11. Under these circumstances, the OSP Records Office has not denied a request for public records. Accordingly, we have no authority to order OSP to make copies of these records available to you. ORS 192.450(1). We therefore deny your petition as to these records.

Complete Trust Account Records Held by ODOC Central Trust Office

Your petition states that you requested copies of your complete trust account records, including those reflecting "monies taken for fines," "monies deposited by outside sources" such as family or friends and "monies taken for any other reason" for the time period of January 1991 through March 1999, held by the ODOC Central Trust Office, but that you received a response from Central Trust notifying you that copies of records must be paid for in advance.

We have spoken with Linda Olivas, Manager of ODOC's Central Trust Unit, regarding your petition. Ms. Olivas confirms that she responded to your request for trust account records by informing you in writing of ODOC's policy requiring that you prepay to ODOC its costs in making copies of records available to you.

For the reasons discussed above, ODOC has not denied a records request by requiring prepayment of its costs. Accordingly, we have no authority to order OSP to make copies of these records available to you. ORS 192.450(1). We therefore deny your petition as to these records.

Records Held by ODOC Classification & Transfer Unit

Your petition states that you requested copies of your complete records, including those "pertaining to my classifications" and "pertaining to my transfers in-state and out-of-state" held by the ODOC Classification & Transfer Unit, but that you received no response to your request.

We have spoken with Jim Maras, Social Services Manager at the ODOC Classification & Transfer Unit, regarding your petition. Mr. Maras informs us that in response to your request he returned your Inmate Communication Form addressed to "Person in charge of Records" in order that you might direct your request for these records to the OSP Records Office. Mr. Maras further informs us that although records pertaining to your classifications and transfers are maintained in the Classification and Transfer Unit, copies of these records are also maintained in ODOC institution working file pertaining to you in the OSP Records Office. He also advises us that his unit routinely directs inmates to obtain copies of these records directly from the Records Office of the ODOC facility in which the inmate is incarcerated.

ODOC rules require generally that "[i]f the record(s) is not in the location where the request is received, the request will be forwarded to the functional unit manager in the location where the record is situated." OAR 291-37-015(2). Because the records you requested are maintained in the Classification and Transfer Unit, Mr. Maras' failure to address your records request directly arguably fails to comply with the applicable ODOC rules governing release of public records. However, because your request to the Classification and Transfer Unit for records is duplicative of your request for your complete file maintained by the OSP Records Office, and because the OSP Records Office is willing to make copies of your classification and transfer records available to you upon your prepayment to ODOC of the agency's fees for doing so, ODOC has not denied a request for public records.

Accordingly, we have no authority to order ODOC to make copies of these records available to you. ORS 192.450(1). We therefore deny your petition as to these records.

Complete Records Held by ODOC Inspections Division

Your petition requests copies of "any info regarding the investigations unit concerning me" and your complete "Inspections Division Records."

We have spoken to Les Dolecal, Inspector General, regarding your petition. Ms. Dolecal advises us you have sent several written requests to the ODOC Inspector General requesting copies of the following records:

(1) All records pertaining to the October 12, 1998 incident giving rise to disciplinary case number 9810A059A06, including:
  (a) All records pertaining to the investigation of 10/12/98.
  (b) The Full Names and Job title of all staff involved.
  (c) Transcripts of all recorded testimony and witness testimony.
  (d) Any evidence shown to the DA &/or State Police.
  (e) Copy or copies of video evidence.
  (f) Any & All other information pertaining to this case.
  (g) Findings of the investigation, results in the investigation & everything relevant to the incident of 10/12/98.
(2) All records of my DR's from 1/15/91 - 3/18/99.
(3) All records of my hearings from 1/15/91 – 3/18/99.
(4) All records of any investigations involving or concerning Richard Tyle.
(5) Any other information on Richard Marc Tyle from 1/15/91 – 3/18/99.
(6) Copies of all records pertaining to me.
(7) The Unusual Incident Report from 10/12/98.
(8) All attached Memorandums from staff involved.
(9) All attached Memorandums of staff witnessing the incident.
(10) Any other information you would allow me to have copies of.

Ms. Dolecal advises us she has responded to two of your requests by providing you with the findings of the investigation into the incident of October 12, 1998, and the full names and job titles of the people interviewed as part of the investigation into the incident. Ms. Dolecal further advises us that she has responded to your other requests by notifying you that the ODOC Inspections Division is willing to make copies of the other records you have requested available to you upon prepayment to ODOC of the agency's fees for making copies of those records. Ms. Dolecal informs us that ODOC is likely to assert an exemption from disclosure, in whole or in part, under ORS 192.502(5) as to the videotape you have requested; however, ODOC cannot make a determination regarding the application of this exemption without first reviewing the videotape. Ms. Dolecal advises us that she is sending to you a memorandum informing you that the ODOC Inspections Division is willing to review the videotape upon your prepayment to ODOC of its costs in reviewing the videotape, segregating the exempt portions of the videotape, if any, from the non-exempt portions and making a copy of the non-exempt portions of the videotape available to you.

The ODOC Inspections Division has provided you with some of the information you have requested. Because the Inspections Division is willing to make copies of its remaining records available to you upon your prepayment to ODOC of its fees, save and except any portion of the requested videotape for which ODOC will claim a disclosure exemption, and for the reasons previously discussed in our order, ODOC has not denied your request for these records. We therefore deny your petition as to the information/records you have already been provided as moot. We deny your petition as to the remaining records you have requested from the Inspections Division because there has been no denial.

Complete Records Held by OSP Counseling and Treatment Services

Your petition requests copies of your complete "Correctional Treatment Services Records including mental health file." We have spoken to Dr. Gary Field, Director of Counseling and Treatment Services at OSP, regarding your petition. Dr. Field informs us you sent a written request to Dr. Field seeking "certified copies" of your "Complete Psychiatric Record" and "Mental health counseling & treatment services file."

Dr. Field advises us he has approved your records request and that you should receive copies of those records within a few days. We have also spoken to Barbara Dover, Office Specialist I at the OSP Medical Records Department, regarding your petition. Ms. Dover informs us that she has received Dr. Field's approval of your records request and she is currently processing your request. Ms. Dover advises us that your inmate trust account will be debited for the costs of making those copies available to you.[3/] *See* OAR 291-037-0020(5).[4/]

[3/] Ms. Dover further informs us that you sent a written request to the OSP Medical Records Department seeking your complete medical records and any other records pertaining to you that are being held by the Medical Records Department. Ms. Dover advises us that she provided you with copies of your complete medical file, excepting your mental health records. Ms. Dover states your inmate trust account was debited for the costs of making those copies available to you.

[4/] OAR 291-037-0020(5) states:

Because OSP has agreed to make available to you copies of the requested records, we deny your petition as to these records as moot.

Fee Waiver or Reduction

ORS 192.440(4) and (5) allow for a waiver or reduction of fees and a process for petitioning from unreasonable denials of fee waivers or reductions in connection with requests for access to public records under the Public Records Law. Under the statute, a custodian of public records may furnish copies without charge, or at a substantially reduced fee, if the custodian determines that the waiver or reduction in fees "is in the public interest because making the record available primarily benefits the general public." ORS 192.440(4).

In your petition, you state that you require copies of the requested ODOC records "for legal reasons as I am persuing (sic) Court Action for Violations of OARs, of My Civil Rights, & for being Subjected to Assault at the hands of Correctional Officers." In applying the public interest standard contained in ORS 192.440(4), we have concluded that a requestor's private interest in litigation is alone insufficient to require a fee waiver. *See* MANUAL at 14. Because your petition fails to identify or demonstrate any interest other than your private interest in obtaining copies of records in furtherance of contemplated litigation, ODOC has not unreasonably denied a request for fee waiver in this instance. *Id.* Accordingly, under these circumstances we respectfully deny your petition insofar as it seeks an order requiring ODOC to grant you a waiver of its fees for making copies of the requested records available to you.

Sincerely,



DAVID SCHUMAN
Deputy Attorney General

AGS02121
C: Les Dolecal, ODOC Inspector General
Jim Maras, Social Services Manager, ODOC Classification & Transfer Unit

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> (5) Indigent inmates need not be charged fees immediately for inspection and/or duplication of an inmate's own records if the request is for the inmate's own medical, dental, or psychiatric records; however, in all such cases inmates' trust accounts will be debited to recover costs when funds become available in the inmates' accounts

Pursuant to this rule, ODOC has provided a means for inmates to receive copies of medical, dental or psychiatric records pertaining to them and maintained by ODOC *without* first prepaying the agency's fees. Instead, as to these records, ODOC rules permit an inmate's account to be debited to recover the agency's costs for making copies of the records available when funds become available.

Linda Olivas, Manager, ODOC Central Trust Unit
Dr. Gary Field, OSP Director of Counseling and Treatment Services
Barbara Dover, Office Specialist I, OSP Medical Records Department
Ms. Amy Pinkley-Wernz, OSP Counselor
Doty Sever, Prison Term Analyst 2, OSP Records Office