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DEPARTMENT OF JUSTICE

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

April 26, 1988

Lars Larson
KPTV 12
735 SW 20th Place
Portland, Oregon 97208

Re: Request for Public Records Disclosure Order
Clackamas County Circuit Court

Dear Lars:

This letter responds to your April 19, 1988 petition for a public records disclosure order of the Attorney General. You ask the Attorney General to order the Clackamas County Circuit Court Clerk to make available for your inspection "proofs of service of Grand Jury subpoenas filed with the Clackamas County Clerk of the court since March 1, 1988."

For the three reasons stated below, we respectfully deny your petition.

First, as you have informed us, the Clackamas County Circuit Court Clerk does not have custody of the proofs of service you wish to inspect. The proofs of service were not filed with the clerk. Those records are in the custody of the Clackamas County District Attorney.

Second, although the Public Records Law requires the "custodian" of nonexempt public records to make the records available for public inspection (ORS 192.430), the Records Law expressly provides that the Attorney General has no authority to review the nondisclosure decisions of elected officials such as the Clackamas County District Attorney. ORS 192.480.

Third, the criminal and civil procedure laws you cite in your petition do not compel the conclusion that the court clerk should be deemed to be a custodian of proofs of service of grand jury subpenas. Although the criminal procedure code provides that "proof of the service [of a subpena] is made in the same manner as in the service of a summons" (ORS 136.595(1)), the civil procedure rule you rely upon (ORCP 7.F.(1)) relates to the "return" of a summons, not to the separate procedure of making a proof of service of summons.

ORS 136.595(1) incorporates the rules of civil procedure regarding the making of proof of service of summons which are stated in ORCP 7.F.(2), as distinguished from the procedural rule for return of summons to the clerk which is stated in ORCP 7.F.(1). ORCP 7.F.(2) says that "[p]roof of service of summons . . . shall be made as follows. . . ", and then goes on to outline formal requirements for certificates of persons who serve summons. See ORCP 7.F.(2)(a)(i) and (ii).

In short, ORS 136.595(1) addresses only the form of a proof of service of a subpena, not the filing of such a record. Consequently that statute forms no basis for concluding that the circuit court clerk should have custody of proofs of service of grand jury subpenas.

We acknowledge that ORCP 7.F.(1) directs that a summons be promptly returned to the clerk "with proof of service," but that "return" procedure historically has been distinguished from the making of a proof of service. See Deady Code, Civil Code § 53 (relating to return of summons) and § 60 (relating to proof of service by affidavit or certificate), at 151, 154 (1862); and Deady Code, Criminal Code § 311, at 495 (1864) (the antecedent of ORS 136.595(1)). Current law continues to make that distinction. For example, ORCP 7.F.(4) separately refers to the making of proof of service and the filing of proof of service in the disjunctive. We conclude that the distinction between a "return" of a summons and the making of proof of service of summons is real and significant.

And we believe that our conclusion does not lead to an anomalous result. A district attorney reasonably may be deemed a proper custodian of a record such as a proof of service of a grand jury subpena, in performing the district attorney's statutory responsibility to "attend upon" the grand jury. ORS 8.670.

Respectfully submitted,

James E. Mountain Jr

JAMES E. MOUNTAIN, JR.
Special Counsel to the
Attorney General

JEM:cm
cc: The Honorable James O'Leary, Clackamas County District Attorney
R. William Linden, Jr., State Court Administrator
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