THEODORE R. KULONGOSKI
ATTORNEY GENERAL

THOMAS A. BALMER
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400
TDD: (503) 378-5938

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GENERAL COUNSEL
DEPT. OF JUSTICE
SALEM, OREGON

July 11, 1996

Paul Merrell
Attorney at Law
44 West Broadway, Suite 200
Eugene, Oregon 97401

Re: ***Petition for Public Records Disclosure Order: Department of Forestry Records***

Dear Mr. Merrell:

This letter is the Attorney General's order on your petition, filed on behalf of your client, Dean Battersby, for disclosure of records pursuant to the Public Records Law, ORS 192.410 to 192.505. The petition, which we received on June 20, 1996,[1/] asks the Attorney General to order the Oregon Department of Forestry (department) to make available a Benton County (county) file that is being held as an offer of proof in Forest Practices Case No. 94-W0272. We respectfully deny your petition for the reasons discussed below.

1. Records Requested/Background

The records at issue are part of a Benton County complaint file. The documents in this file are complaints made to the county of unsanitary and possibly dangerous conditions on Mr. Battersby's property (mostly having to do with abandoned cars), and county notes on possible actions.

We are informed by Benton County Counsel Candace Haines that, in response to a public records request made directly to the county, the county provided Mr. Battersby with redacted versions of all, or almost all, of the documents in this file. According to Ms. Haines, the only material purposely not disclosed to your client was the name or names of

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[1/] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

the complainant(s) and information from which the identity of the complainant(s) could be determined. Ms. Haines informs us that Mr. Battersby has not pursued his rights under the Public Records Law, ORS 192.460, to appeal to the district attorney the county decision not to disclose information or records from its files.

Mr. Battersby is also a party to the department's Forest Practices Case No. 94-W0272, which involves an alleged violation of OAR 629-24-113(1)(a) by Mr. Battersby for reconstructing a road within 100 feet of a Class I stream without written approval of a written plan. On Mr. Battersby's behalf, you issued a subpoena to the county to produce the unredacted and complete version of the county file for the department's hearing. At the hearing, the hearings officer received the county file from Gordon Brown, a Benton County Environmental Health employee. Accompanying the file was a letter from Richard Appicello, Assistant Benton County Counsel, explaining that the county was releasing the file for use only in the hearing, so that the hearings officer could determine the relevance of the subpoenaed file without disclosure of the redacted/withheld information. After reading this letter, which also explained the contents of the file and the confidential nature of the complainant name(s), the hearings officer declined to admit the file to the hearing record, and instead placed the file in a sealed envelope to be held as an offer of proof.

You have informed Jessica Trenholme, a law clerk with this office, that you are not seeking copies of the entire file, but only those materials in that file that have not been provided to Mr. Battersby by the county. We have compared the documents in the county file with the exhibit file you submitted for the forest practices hearing. In addition to the name(s) of the complainant(s) and information from which the identity of the complainant(s) might be ascertained, the other information or records in the county file that are not contained in your exhibit file are: a memo from Gordon Brown to Bob Wilson at Benton County Environmental Health, four pages of internal county communications, a tax report on Mr. Battersby, a map of the property in question, and two letters addressed to Mr. Battersby.

2. Name(s) of Complainant(s) and Identifying Information

A. ORS 192.502(3) - Information Submitted in Confidence

ORS 192.502(3) exempts from disclosure

> information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

With respect to the name(s) of the complainant(s) and information from which the identity of the complainant(s) might be ascertained, all five elements of this exemption are satisfied. First, the name(s) and identifying information were submitted in confidence to a public body, in this case, the county. We have confirmed that the complainant(s) submitted the information to the county on the condition that the county would not disclose either the name(s) of the complainant(s) or any information from which the identity of the complaint(s) might be ascertained. Second, there is no law requiring such complaints to be made or the complaining witness(es) to submit their name(s).

Third, the information at issue should reasonably be considered confidential. Persons who make complaints about conditions on someone's property often fear harassment or reprisal from the property owner and reasonably want to have their identity kept confidential. Mr. Battersby has no independent means of knowing who made the complaints, and the complainant(s) have not revealed their identity to him.

Fourth, the county has obliged itself in good faith not to disclose the information. According to Ms. Haines, the county keeps the names of complaining witnesses in these types of complaints confidential. Moreover, according to Bob Wilson of the Benton County Heath Department, who dealt with some of the complaints involving Mr. Battersby's property, the county was aware of previous violent threats from Mr. Battersby against certain individuals, and so reassured the complainant(s) that their name(s) would be kept confidential.

Lastly, the public interest would clearly suffer if the names of the witnesses who make this type of complaint or other information identifying such witnesses were disclosed. Disclosure would discourage citizens from making good faith reports of unsafe or dangerous situations or behavior of which they have become aware, thus impairing the public welfare. *Cf.* Public Records Order, July 10, 1995 (Cecil) (denying disclosure of name of person who complained to Division of Motor Vehicles about petitioner's driving).

Accordingly, we conclude that the name(s) of the complainant(s) and any information from which the identity of the complaint(s) might be ascertained is exempt from disclosure under ORS 192.502(3), at least so long as that information remained in the hands of the county.

B. ORS 192.502(9) - Transferred Records

We next consider whether the exempt status of the records changed when the entire county file was provided by the county to the Department of Forestry. ORS 192.502(9) exempts from disclosure:

> Public records or information described in [ORS 192.502], furnished by the public body originally compiling, preparing, or receiving them to any other public officer or public body in connection with performance of the duties of the recipient, if the considerations originally giving rise to the confidential or exempt nature of the public records or information remain applicable.

Again, all elements of the exemption are met. The county, which originally received the information, furnished it to the department's hearings officer in connection with that officer's duties, i.e., receiving information subpoenaed by a party to a hearing. The considerations that originally gave rise to the confidential nature of the file remain applicable. The public interest in accepting complaints submitted in confidence and protecting that confidence has not changed.

Although you subpoenaed the county file for the department's hearing, the hearing officer did not accept that file as evidence for the hearing record. Instead, the hearing officer placed it into a sealed file to be held as an offer of proof. Thus, the confidentiality of the complainant(s)' identity has not been breached. Additionally, the department has not used that information in its proceeding.

We conclude that the department's possession of the information does not affect the applicability of the original exemption in ORS 192.502(3), and ORS 192.502(9) continues that exemption for the materials in the hands of the department.

C. ORS 192.501(3) - Criminal Investigatory Materials

In a letter to Candace Haines dated March 29, 1996, you asserted that the records you seek constitute the report of a crime which is not exempt from disclosure under ORS 192.501(3) as criminal investigatory materials, but required to be disclosed by that statutory provision.[2/] ORS 192.501(3) exempts from disclosure, unless the public interest requires disclosure in the particular instance:

[2/] You also asserted in your letter to Ms. Haines that the records in question are "exculpatory materials that should have been provided to Mr. Battersby by the District Attorney's office as part of the mandatory Brady v. Maryland disclosure when Mr. Battersby was prosecuted for having an animal at large and when he was arrested and jailed on the menacing charge, later dropped. *See generally,* ORS 135.805-.873." The obligation of the District Attorney to make such disclosures is not a matter within the jurisdiction of this office under the Public Records Law.

> Investigatory information compiled for criminal law purposes. The record of an arrest or ***the report of a crime shall be disclosed*** unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim. * * * *

(Emphasis added.) The "report of a crime" includes the identity of and biographical information concerning the complaining party. *Id.*

Pam Hediger, Benton County Deputy District Attorney, informs us that Mr. Battersby was cited on a criminal menacing charge, which was based on a complaint filed directly with the Benton County District Attorney. Ms Hediger further informs us that, although she was aware of the existence of a county complaint file, she never saw it, never discussed its contents, and believes that file is "irrelevant to the menacing complaint." Accordingly, we conclude that the county file that is in the possession of the department does not contain investigatory information compiled for criminal law purposes or the report of a crime within the meaning of ORS 192.501(3) and, therefore, ORS 192.501(3) does not compel disclosure of the records at issue.

3. Other Information in County File

Ms. Hanes informs us that the county believed it had disclosed to Mr. Battersby all information from its file other than the name(s) of the complainant(s) and information from which the identity of the complainant(s) could be ascertained and, therefore, the county has no objection to the department's disclosure of those other records to you. Based on the county's lack of objection to disclosure of such records, Sandy Middleton, Civil Penalties Specialist for the department, informs us that the department has agreed to make available to you copies of any information or documents in the county file other than the name(s) of the complainant(s) and identifying information that the Attorney General has determined to be exempt from disclosure.

Because the department has agreed to disclose the nonexempt records to you, the Attorney General has no authority to order disclosure of such records. *See* ORS 192.450. Therefore, with respect to these records, we deny your petition as moot.

4. Conclusion/Order

The name(s) of the complainant(s) and identifying information contained in the requested records are exempt from disclosure under ORS 197.502(3) and 197.502(9). Disclosure of that information is also not compelled by ORS 192.501(3). Accordingly, with respect to that information, your petition is denied.

The department has agreed to disclose to you the remaining materials not contained in your exhibit file, which may or may not have been previously disclosed to you by the county. Accordingly, with respect to this information, your petition is denied as moot.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the Attorney General

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c: Sandy Middleton, Civil Penalties Specialist, Department of Forrestry