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

April 3, 1995

VIA FACSIMILE TO 503-224-0101

Lars Larson
KPTV NEWS
P.O. Box 3401
Portland, OR 97208

Re: ***Petition for Public Records Disclosure Order: Children's Services Division Records***

Dear Mr. Larson:

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 March 29, 1995, asks the Attorney General to direct the Children's Services Division (CSD) to produce copies of "written recommendations, memos, or other writing as defined by the Public Records Law relating to possible action against CSD employees involved in the so-called 'Whitehead' case in Aloha." For the reasons that follow, we respectfully deny your petition.

As we understand your records request, and subsequent petition, you seek records relating to possible disciplinary action against CSD employees. ORS 192.501(13) conditionally exempts[1/] records of a "personnel discipline action, or materials or documents supporting that action[.]" This exemption covers only completed disciplinary actions in which a sanction was imposed. *See **City of Portland v. Rice***, 308 Or 118, 775 P2d 1371 (1989).

When a person seeks records concerning a disciplinary matter that is not yet complete, we have stated that "an agency may postpone action on the request until the personnel matter is finally resolved, in order to determine whether those records are exempt." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1993) (hereinafter "MANUAL") at 27. This interpretation of the statute is consistent with

---

[1/] The exemption in ORS 192.501(13) is conditional because it exempts records "unless the public interest requires disclosure in the particular instance." You have not identified, and we are not aware of, any public interest in the records sought that would affect our analysis or conclusions in this order.

ORS 192.430, which requires a custodian of public records to furnish a reasonable opportunity to inspect or copy records. It is entirely reasonable for an agency to delay responding to a records request until the agency has the facts necessary for it to determine whether an exemption applies. In this case, an essential fact is whether discipline is being imposed. Until that decision is made, it is impossible to determine whether records relating to "possible action" against employees are exempt from disclosure.

Consequently, it is also impossible to segregate the nonexempt records from the records that are exempt, for purposes of disclosing the nonexempt records. Depending upon whether discipline is imposed, none, some or all of the records relating to possible action against employees may be exempt as records of discipline action or materials or documents supporting such action. Thus, the agency's reasonable time to respond to a request for records within the scope of ORS 192.501(13) commences when the personnel matter is finally resolved. Any "contrary reading of ORS 192.501(13) effectively would eviscerate the exemption, by compelling the disclosure of records that later could be exempt from disclosure." MANUAL at 28. The agency's reasonable time to respond also includes the time needed to consult with legal counsel about the disclosure of records that appear to be exempt in whole or in part, and to obtain the assistance of counsel in segregating exempt and nonexempt records. *See* MANUAL at 12.

In your petition, you state that on March 29, 1995, Floyd Smith, CSD's public information officer, declined to grant or deny your records request. Paul Drews, CSD Deputy Administrator, informs us that at the time of your request, CSD had not yet made a decision concerning disciplinary action against the CSD employees involved in the "Whitehead" case. Under those circumstances, the agency cannot be considered to have denied your records request.

Absent a denial of a records request by an agency, the Attorney General has no authority to order disclosure. *See* ORS 192.450(1). Accordingly, we deny your petition as premature.[2/]

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the Attorney General

ESH:jpl/LARSON.PRO

[2/] Today, you have informed us by telephone that Floyd Smith denied your records request on Friday, March 31. If you choose to file a petition on that denial, it would be helpful if you would provide us with your understanding of the public interest in the records sought so that we can take that information into consideration in evaluating any records exemptions that may apply to the records.