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December 9, 2004

Jim Redden
Portland Tribune
620 SW Fifth Avenue, Suite 400
Portland, OR 97204

Re: *Petition for Public Records Disclosure Order*:
Secretary of State, Archives Division, Records

Dear Mr. Redden:

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 December 2, 2004, asks the Attorney General to direct the State Archivist to produce copies of the following records:

> 1. All records that have not been released to date related to the investigation into the murder of Oregon Corrections Director Michael Francke and allegations of misconduct or illegal activities involving former Assistant Attorney General Scott McAlister;
> 2. This request[] includes but is not limited to all previously unreleased documents from the Warden Commission and all documents sent to the Corrections Ombudsman by the Warden Commission and included in the boxes of files known as 93A[-]024.

For the reasons that follow, we 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. Any person denied the right to inspect or to receive a copy of a public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.450(1).

Layne Sawyer, Archives Manager for the State Archives, responded to your request in a letter dated November 23, 2004. Your petition states that her letter denied your request. We

consider the Archives response to your request, first in relation to your specific request for records of the Corrections Ombudsman, and then in relation to the remainder of your request.

Corrections Ombudsman records

In her November 23rd letter, Ms. Sawyer denied your request for records included in the boxes of files known as accession 93A-024, based on advice from counsel that those records are confidential under ORS 423.430(2) and therefore exempt from disclosure under ORS 192.502(9). All of the accession 93A-024 records were transmitted to the Secretary of State, Archives Division, by a letter from the Corrections Ombudsman dated June 28, 1991. That letter provides, in pertinent part:

> The files herein contain confidential information relevant to the investigations of the Department of Corrections by the Corrections Ombudsman's Office.

This statement informed the Secretary of State that the Ombudsman used all of the files at issue to conduct investigations.

The Corrections Ombudsman is empowered, among other things, "to investigate, on complaint or on the ombudsman's own motion, any action by the Department of Corrections" or its employees, ORS 423.420(1), and,

> To undertake, participate in or cooperate with persons and agencies in such * * * inquiries * * * as might lead to improvements in the functioning of the Department of Corrections.

ORS 423.420(6). When the Ombudsman undertakes these duties, he or she must:

> Treat confidentially *all matters* and the identities of the complainants or witnesses coming before the ombudsman.

ORS 423.430(2) (emphasis added).

The Ombudsman's June 28, 1991, letter brings the requested records within the scope of ORS 423.430(2) by identifying them as being "relevant to the investigations of the Department of Corrections by the Corrections Ombudsman's Office." Moreover, to the extent that the Ombudsman created or compiled any of the requested records in relation to his participation in or cooperation with an "inquiry" that might have led to improvements in the functioning of the Department of Corrections, the records are confidential under the same statute, because either an investigation under ORS 423.420(1) or an inquiry under ORS 423.420(6) are "matters * * * coming before the ombudsman" that must be treated confidentially under ORS 423.430(2).

ORS 192.502(9) exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon

law." The records contained in the boxes known as accession 93A-024 are confidential under ORS 423.430(2) and, therefore, exempt from disclosure under ORS 192.502(9).

Remainder of requested records

While your petition is specifically addressed to the accession 93A-024 records, it also asks for "all records that have not been released to date" related to the investigation of Michael Francke's murder and allegations about Scott McAlister, including "all previously unreleased documents from the Warden Commission." In her November 23rd letter, Ms. Sawyer advised you that records responsive to your request may be contained in the files of former Governor Neil Goldschmidt, as well as in records from the Attorney General's office held at Archives. Her letter states that you "are welcome to visit the Archives to access those records we have in our custody." Ms. Sawyer's letter also states that members of Governor Kulongoski's legal staff are reviewing 10 boxes of legal counsel records included in former Governor Goldschmidt's files.

A public body has "a 'reasonable' time to respond to a records request, in which it may determine whether requested records are exempt from disclosure." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2004) at 9 (AG'S MANUAL). A public body may consult with its legal counsel about whether requested records are exempt from disclosure. *Id.* When records are transferred from one public body to another, the current custodian may also consult with the transferring public body as to possibly applicable exemptions. *Id.* at 79 referring to ORS 192.502(10).

The records referenced by Ms. Sawyer in her November 23rd letter are records of former Governor Goldschmidt's administration. The former Governor is no longer a state officer and therefore not a public body with which the State Archives may confer under ORS 192.502(10) in responding to a request for records. Instead, the office of Governor, now held by Governor Kulongoski, is the public body with which State Archives may confer. State Archivist Roy Turnbaugh told us that the Archives is consulting with the current Governor's staff specifically in regard to legal counsel records from the former administration pursuant to advice from this office that the current Governor is the state officer with the authority to decide whether to disclose records that are covered by the attorney-client privilege as stated in ORS 40.225 and therefore exempt under ORS 192.502(9).

We conclude that the reasonable time in which the State Archivist must respond to your November 22nd request accommodates time needed to confer with Governor Kulongoski's legal staff about the exempt status of records identified as legal counsel records of former Governor Goldschmidt's administration. We talked to David Reese, Governor Kulongoski's Deputy General Counsel, who told us that the review by the Governor's office of records potentially responsive to your November 22nd request is not yet complete. He also told us that there is very limited staff who can review the records. Considering the amount of time between your November 22nd request and today's date, and taking into account the limited staff from the

Governor's office available to review the records, we conclude that the State Archives has not constructively denied your request.[1]

In summary, in regard to records transferred to the State Archives by the Corrections Ombudsman, your petition is denied because the records are confidential under ORS 423.430(2) and therefore exempt from disclosure under ORS 192.502(9). Because the State Archives has not denied your request for any other records, the remainder of your petition is denied as premature.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS14786
c: Roy Turnbaugh, State Archivist

[1] Mr. Reese also told us that you inquired with the Governor's office directly about accessing the records being reviewed, which remain in the custody of the State Archives. He said that you specified an interest in records held in particular boxes from the inventory of the former Governor's records (boxes 87, 89 to 94, 101 and 102). Mr. Reese told us that, in responding to your inquiry, he would inform you that the current Governor's staff will complete its review of the records in the specified files by the end of next week, December 17th, notify the State Archives as to the records, if any, it considers exempt from disclosure, and update you at that time as to the records' availability for your review.