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January 6, 2015

Steve Bryant
Bryant, Emerson LLP
PO Box 457
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Wendi Kellington
PO Box 159
Lake Oswego OR 97034

RE: November 3, 2014 Deschutes County District Attorney Order

Dear Mr. Bryant and Ms. Kellington:

On January 5, 2014, Mr. Bryant called me on behalf of his client, the City of Sisters. Mr. Bryant requested that I consider withdrawing the November 3, 2014 order ("Order") issued by former Deschutes County District Attorney Patrick Flaherty. The basis for Mr. Bryant's request was his claim that there was a procedural flaw in the processing of Ms. Kellington's petition: specifically, that the District Attorney's Office failed to notify the City of Sisters that Ms. Kellington filed the petition and thus the City of Sisters did not have the opportunity to provide a response to the petition prior to the issuance of the Order. Mr. Bryant argues this failure to notify and provide an opportunity to respond violated ORS 192.470(2).

In response, I reviewed the file, reviewed Oregon's public records law, and, on January 6, 2014, spoke with Ms. Kellington to receive her input. Based on this review, I decide as follows:

- The Deschutes County District Attorney's office failed to notify the City of Sisters of the fact Ms. Kellington filed a petition. This failure to notify prevented the City of Sisters from providing the Deschutes County District Attorney's office with a response prior to D.A. Flaherty issuing the Order. This failure to notify was a violation of ORS 192.470(2).
- The violation of ORS 192.470(2) was not a mere "technical" defect that had no bearing on the content of the Order. In fact, the lack of a response from the City of Sisters resulted in the Order solely addressing an issue not in dispute: whether the records sought were public records and/or subject to an exemption. The actual issue in the case is whether the petitioner was entitled to a waiver of the fee requested by the City of Sisters to process her request (ORS 192.440(6)).

- In response to the Order, Mr. Bryant, on behalf of his client, filed a petition in Deschutes County Circuit Court (City of Sisters v. Wendie Kellington, 14-CV-0919) and that case is pending.
- The Deschutes County District Attorney has no legal authority to withdraw its order and provide an opportunity to the City of Sisters to provide a response to Ms. Kellington's original petition prior to issuing a new order. If I withdrew the Order, the Deschutes County District Attorney's office would be immediately in violation of ORS 192.465(1) which requires a district attorney to issue an order within seven days from the day of receipt of a petition. Ms. Kellington's petition was received by the Deschutes County District Attorney on October 14, 2014.

While I have no legal authority to withdraw the Order, if both parties agree to waive the provisions of ORS 192.465(1) and consent to me withdrawing the order and reconsidering the petition I am happy to do so.

Thank you for your bringing this matter to my attention and for the professional manner in which it was discussed.

Sincerely,

John Hummel
District Attorney