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August 9, 2004

Todd Davilla
SID #8982895
Oregon State Correctional Institution
3405 Deer Park Drive SE
Salem, OR 97310-9385

Re: Petition for Public Records Disclosure Order: Board of Parole and Post-Prison Supervision Record

Dear Mr. Davilla:

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 August 2, 2004, asks the Attorney General to direct the Board of Parole and Post-Prison Supervision (Board) to make available "DOJ file No. 255-001-GG0890-02", cited by the Board in its Statement of Need and Justification of the temporary administrative rule amendment of OAR 255-075-0079.[1] For the reasons that follow, we respectfully 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. The law requires generally that the custodian of public records furnish proper and reasonable opportunities for

[1] In your letter dated July 8, 2004 to the Board you requested "a copy of the document relied upon for the proposed adoption of [OAR 244-075-0079]. That document is cited as: **Formal advice from the Department of Justice regarding the board's authority to sanction offenders. DOJ file No. 255-001-GG0890-02.**" (Emphasis in original). Your petition to this office dated July 27, 2004 requests the Attorney General to order the Board to produce "DOJ file No. 255-001-GG0890-02". We treat your current request to this office as a request for the document relied upon for the adoption of OAR 255-075-0079, the only record you requested from the Board in your July 8, 2004 letter. If, instead, you are requesting the Attorney General to order the Board to produce the actual Department of Justice file, then that request is denied for at least two reasons. First, the Board does not possess the records responsive to your request, and second, the request is premature as you have not requested this record from the Board.

their inspection or copying in the office of the custodian. ORS 192.430. Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from disclosure. ORS 192.450(1).

We have reviewed the materials sought and conclude that they are exempt from disclosure based on ORS 192.502(9) and the attorney-client privilege. ORS 192.502(9) exempts from disclosure "public records or information the disclosure which is prohibited or restricted or otherwise made confidential or *privileged* under Oregon law." (Emphasis added.) Oregon Evidence Code Rule 503, codified as ORS 40.225, provides in turn that communications between a lawyer and his or her client made "for the purpose of facilitating the rendition of professional legal services" are privileged. The legal services covered by the privilege are not confined to representing a party in litigation and are broader than simply providing legal advice. *State ex rel Oregon Health Sciences University v. Haas*, 325 Or 492, 504, 942 P2d 261 (1997). The privilege will apply when the general purpose in hiring a lawyer concerns legal rights and obligations. *United States v. Chen*, 99 F3d 1495, 1501 to 1502 (9th Cir 1996); *see also United States v. Roe*, 96 F3d 1294 (9th Cir 1996) (investigation in fact-finding by attorney falls within attorney-client privilege).

Michael Washington, the Board's chair, has confirmed to us that the advice letter from this office referenced by DOJ File No. 255-001-GG0890-02 in the Board's Statement of Need and Justification for the temporary rule amendment of OAR 255-075-0079 was a confidential communication between that client's lawyer and the client, which was not intended to be disclosed to third persons. The purpose of the communication was to render professional legal services to the client. Accordingly, we find that this advice letter is privileged under OEC Rule 503.

We turn to the question of whether the Board waived the privilege with regard to this advice. You contend that "[i]n announcing by its notice the reliance on this document as a basis for the agency action, the Board invites review by interested persons who contest the temporary rules, and waive the ability to exempt review of the record."

OEC Rule 511 (ORS 40.280) provides that a person waives the privilege conferred by OEC Rule 503 "if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of *any significant part* of the matter or communication." (Emphasis added.) An agency's mere acknowledgement that it relied partly on a communication from counsel to formulate a rule or amendment to a rule does not constitute disclosure of a significant part of the communication itself.

In sum, we conclude that the advice letter from the Department of Justice to the Board, identified by reference to DOJ File No. 255-001-GG0890-02 is a privileged communication under OEC Rule 503, and is therefore exempt from disclosure under ORS 192.502(9). We

further conclude that the Board did not waive the privilege by acknowledging its receipt of and reliance on the advice contained in that communication. For these reasons, we deny your petition to compel disclosure of this record.[2]

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

PDS:gvk/AGS14365
c: Michael R. Washington, Chair, Board of Parole and Post-Prison Supervision

[2] In his July 14, 2004 letter denying your records request, Chair Washington cited ORS 192.502(1), the "internal advisory communications" exemption, as a basis for the denial. Because we conclude that the advice letter is exempt from disclosure as a privileged attorney-client communication, we need not address whether ORS 192.502(1) would also apply.