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June 4, 2004

Andrea R Meyer
American Civil Liberties Union
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P.O. Box 40585
Portland, OR 97240

Re: Petition for Public Records Disclosure Order: OLCC Records

Dear Ms. Meyer:

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 May 25, 2004, asks the Attorney General to direct the Oregon Liquor Control Commission to make available a draft report relating to OAR 845-006-0335.[1] OLCC, through Assistant Attorney General Charlie Ferrari, voluntarily provided the draft report with the exception of approximately 2 ½ pages on May 28, 2004. OLCC further supplemented its response on June 2, 2004, when Assistant Attorney General Ferrari provided a redacted version of the remaining 2 ½ pages of the draft report on behalf of OLCC. That same day, we received a revised petition from you dated June 1, 2004, seeking production of the remaining 2 ½ pages of the draft report.[2] Therefore, this order will address your petition as to the portions of the draft report that OLCC continues to withhold from disclosure. For the following reasons, 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. If a

[1] We appreciate you extending the time within which the law would have otherwise required us to respond to your petition.

[2] In your revised petition received June 2, 2004, you also request that we review OLCC's response to your request for a fee waiver or reduction. Because that issue was not raised in your May 25 petition, we will issue a separate order addressing the fee waiver in the time allowed by statute.

public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

OLCC has denied your request to fully disclose the draft report on the basis that the redacted portions are exempt from disclosure under ORS 192.502(1) as internal advisory communications. The Public Records Law exempts from disclosure communications within a public body "of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action." ORS 192.502(1). A public record is exempt from disclosure as an internal advisory communication to the extent that:

(a) it is a communication within a public body or between public bodies;
(b) it is of an advisory nature preliminary to any final agency action;
(c) it covers other than purely factual materials; and
(d) in the particular instance, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure.

ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2004) (MANUAL) at 53.

We begin our assessment of whether the redacted text in the report constitutes an internal advisory communication by examining the report against the first three elements of the exemption. The redacted text is contained in the draft report's final two sections, captioned "Summary of Comments" and "Presiding Officer Summary and Recommendation." It is manifest that the draft report is an internal communication within a public body. The circulation page shows it was a draft intended for circulation among OLCC's executive management.

The draft report is also "of an advisory nature preliminary to any final agency action." We have conferred with Judith Bracanovich, Director of Administrative Process for OLCC, regarding these materials. She explained that the draft report was intended as the precursor to a final report that would have been provided by Commission staff to the Commissioners prior to the Commissioners making a final decision on the rule. The report generally provides the Commissioners with staff's recommendation based on its review and analysis of the issue.

Our review of the redacted text reveals that it does not comprise purely factual materials. The redacted portion of the "Summary of Comments" section represent a selective presentation of information that is integrally bound up with the internal advisory process. The drafter's selection and emphasis of information in this section is strongly tied to the policy positions the drafter is recommending. The redacted sections of the "Presiding Officer Summary and Recommendation" represent the author's subjective

weighing and assessment of the information submitted to the Commission and the author's policy recommendations following from that assessment.

Thus, the remaining issue is whether the public interest in encouraging frank communication clearly outweighs the public interest in disclosure. The internal advisory communication exemption is designed to encourage frankness and candor in communications within or between governmental agencies. "Frank" communication is that which is "marked by free unrestrained willing expression of * * * opinions, or feelings without reticence, inhibition, or concealment." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) at 903. A consideration when balancing the public's interests is the extent to which disclosure would "chill" either an employer's willingness to ask for candid input from employees or employees' willingness to state their opinions without inhibition. Records revealing frank communication are exempt only if an agency can make "a strong showing of a 'chilling effect'" resulting from disclosure. MANUAL at 53. In other words, in balancing the public interests, we must determine the extent to which agency personnel in a particular instance would refrain from an unrestrained exchange of other than purely factual information if they knew that the communication would be subject to public disclosure. Any chill in frank communication caused by the fact that disclosure would result in potential embarrassment of the agency or individual employees "is not sufficient, in and of itself, to overcome the presumption favoring disclosure." ***Coos County v. Dept of Fish & Wildlife***, 86 Or App 168, 173, 739 P2d 47 (1987). Also, when balanced against the public interest in disclosure, the degree of the public interest in encouraging frank communications may vary according to the relationship of the communication to the work of the government.

With regard to the redacted text, we conclude that the public interest weighs against disclosure. As noted above, Ms. Bracanovich explained that the draft report was intended as the precursor to a final report generally provided by Commission staff to the Commissioners prior to the Commissioners deciding a particular issue, and would have provided the Commissioners with staff's recommendation based on its review and analysis of the issue. The issue in this case involved OAR 845-006-0335, also known by some as "the minor entertainer rule." The minor entertainer rule has been the subject of much media attention and has spawned litigation. In this case, the Commissioners made a decision on the rule before staff had finalized its report. Ms. Bracanovich states that the report therefore had no bearing on the Commission's decision. Disclosure of the redacted portion of the report will not, therefore, inform the public about the Commission's decision-making process. It would, on the other hand, deter the Commission's staff from freely in the future providing the Commission with a frank evaluation of evidence about rulemaking proceedings.

The circulation sheet and the nature of the handwritten comments suggest the agency's intent to develop and formulate a policy or position taking various factors into account. Ms. Bracanovich states that the redacted portions of the draft report and handwritten comments reflect the kind of thoughtful and professional analysis that is

possible only where the contributors are free to express their candid, uninhibited opinions and views. Under these circumstances, disclosing the redacted material would run counter to the intent of the exemption.

For the foregoing reasons, we conclude that the redacted portions of the draft report are exempt from disclosure under ORS 192.502(1). Accordingly, we deny your petition to compel disclosure of the redacted portions of the draft report.

Sincerely,

Peter D. Shepherd
Deputy Attorney General

c: Judith Bracanovich, Oregon Liquor Control Commission
PDS:AGS14142