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DEPARTMENT OF JUSTICE

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December 31, 2002

Nick Budnick
Willamette Week
822 S.W. 10th Ave.
Portland, OR 97205

Re: *Petition for Public Records Disclosure Order*
Department of Human Services Records

Dear Mr. Budnick:

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 10, 2002, asks the Attorney General to direct the Oregon Department of Human Services (DHS) to produce the following categories of records:[1]

> I would like copies of any comments, discussion, notes, analysis or observations regarding the rules on heavy metals in fertilizers that were recently proposed by the Oregon Department of Agriculture. Specifically, I would like everything:
>
> received or sent by Dr. Higginson, Mr. Kast, and/or staff at the agencies they oversee.
>
> sent or received by employees at any and all branches of the Department of Health Services and Department of Human Services.
>
> I would like this request to include e-mails and other electronic correspondence as well as any non-correspondence. It doesn't matter to me whether this correspondence was sent between employees within the agency or with outside groups, or other agencies such as DEQ or ODA.

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

> Obviously, I am particularly interested in any pertinent correspondence sent or received by the staff members charged with reviewing the rules, who I believe include Michael Holcomb, Michael Heumann and Ken Kauffman.

In a subsequent e-mail exchange with Assistant Attorney General Rhea Kessler, you clarified the scope of records, explaining that you seek only records received or generated by Barry Kast, Grant Higginson, Michael Holcomb, Michael Neumann and Kenneth Kaufman. For the reason that follows, 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 inspection or copying of the record 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). Under these provisions, an agency may be said to have "denied" a request to inspect or to receive a copy of a public record only if the agency receives a proper request for public records. Public Records Order, July 7, 1989 (Baker).

DHS provided you with several documents responsive to your request, but, by letter faxed to you on December 1, 2002, denied your request with regard to the remaining records, stating:

> The remainder of the records responsive to your request are exempt from disclosure under ORS 192.502(1), internal advisory communications. This exemption protects communications within or between public bodies which are advisory to any final agency action and which concern other than purely factual matters.
>
> ORS 192.502(1) exempts from disclosure:
>
> > Communications within a public body or between public bodies 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. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

We have conferred with Dr. Grant Higginson, Director of the Health Services Division of DHS. Dr. Higginson has informed us that DHS has decided not to assert the internal advisory communication exemption with regard to the records you have requested. DHS is completing the collection and review of the records responsive to your request and will provide you with copies no later than ten days after the date of this order. Because DHS has agreed to provide copies of the requested documents, we respectfully deny your petition as moot.

Sincerely,

Stephanie Striffler
Special Counsel to the Attorney General

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c: Grant Higginson, M.D., M.P.H., Department of Human Services