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October 21, 2002

Gregory A. Hartman
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Re: *Petition for Public Records Disclosure Order*:
Oregon Public Employees Retirement System Records

Dear Mr. Hartman:

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 October 9, 2002,[1] asks the Attorney General to order the Oregon Public Employees Retirement System (PERS) to disclose the following records:

> All opinion letters furnished to the PERS board or its agents by the Attorney General's office or by other legal counsel which were the basis for the board's and staff's determination to develop the sequential modeling system * * *.
>
> Minutes as well as tape records from any executive sessions of the PERS board held pursuant to the executive session provisions of ORS 192.660(1) in which the advice given by the Attorney General on this subject was discussed or in which any other discussions took place involving the sequential crediting model.

For the reasons that follow, we respectfully deny your petition.

You included as an attachment to your petition a copy of the June 18, 2002 letter by which the PERS Executive Director denied your records request. The denial cites three bases for concluding that the requested opinion letters are exempt from disclosure: the records are internal advisory communications, the records were prepared by legal counsel in anticipation of "potential, and actually threatened, litigation," and the records are confidential communications

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

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between PERS legal counsel and the PERS Board. Similarly, the denial states that the requested records of executive session meetings are exempt as "direct communications between the PERS Board and its legal counsel on the subjects identified as exempt" with regard to the opinion letters.

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 may petition the Attorney General to determine whether the record may be withheld from inspection. ORS 192.450(1). We begin our analysis of whether the requested PERS records may be withheld from inspection by considering their nature as confidential communications protected by the attorney-client privilege.

The Public Records Law exempts from disclosure records that are "made confidential or privileged under Oregon law." ORS 192.502(9). The attorney-client privilege, codified at ORS 40.225, provides a "client" with the "privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client" if the communications are between parties specified in the statute. We agree with the statement in your petition that there is an attorney-client relationship between PERS and the Department of Justice (Department). This relationship is based on the fact that PERS is an agency of the state that is governed by a board, the members of which are appointed by the Governor subject to confirmation by the Senate, and administered by a director and staff, ORS 238.630 and 238.645, and the Attorney General is charged with providing legal services to the state, its departments and officers. *See, e.g.*, ORS 180.060(5) and 180.220(1)(b). Thus, under the terms of ORS 40.225, PERS may claim as privileged communication between an Assistant Attorney General employed by the Department and the PERS Board or staff that is made for the purpose of facilitating the rendition of professional legal services.

Steve Rodeman of PERS has identified two records maintained by the agency that are responsive to your request for opinion letters, both of which were provided by the Department. These records were provided to PERS for the purpose of rendering professional legal services. PERS also maintains records of two executive sessions of the PERS Board that are responsive to the second portion of your request. During the executive sessions at issue the PERS Board and staff discussed legal advice provided by the Department about the sequential crediting model, and application of that advice. An Assistant Attorney General was present at, and participated in, each of the two sessions. Like the opinion letters, the records of these discussions constitute privileged communications under ORS 40.225. *See, e.g., State ex rel OHSU v. Haas*, 325 Or 492, 942 P2d 261 (1997) (applying privilege to discussion by OHSU employees involving receipt and application of legal advice). To the extent that discussions during the executive sessions

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pertained to matters other than the sequential crediting model, they concerned matters also covered by the attorney-client privilege.

In your petition, while admitting there is an attorney-client relationship between PERS and the Department, you claim that this relationship "extends to plan beneficiaries and * * * cannot be asserted to prevent those beneficiaries from receiving these [requested] documents." In support of this conclusion you cite the PERS Board's fiduciary relationship to the members of PERS, and, citing federal case law, you make the following statement:

> Although beneficiaries may not [be] considered full fledged "clients" of the board's attorney, they do possess some of the privileges associated with the attorney client relationship. At least in regard to the disclosure of information, the board cannot rely on the attorney-client relationship to conceal information from plan beneficiaries.

For the following reasons, we disagree with your assessment of the relationship of PERS members and the Department as it relates to interpretation of the attorney-client privilege codified in Oregon statute.

First, Oregon law explicitly creates an attorney-client relationship between the State of Oregon (acting, in the present case, through the PERS Board) and the Attorney General. ORS 180.210 provides that the Attorney General is the "chief law officer for the state and all its departments." Law prohibits the Attorney General from providing advice to persons other than state officials. ORS 180.060(3)(a). The law directs the Attorney General to provide service to agencies and directs agencies to receive service from the Attorney General. ORS 180.060(5); ORS 180.230. Neither has any choice; the relationship is defined by statute, not by contract. Individual beneficiaries simply are not within the scope of the attorney-client relationship defined by these statutes. As public officers receiving advice from the Attorney General, the administrators of PERS have the authority to assert the attorney-client privilege as against any request from outside the scope of the attorney-client relationship.

Contrary to the suggestion in your letter, we see nothing in this conclusion that calls into question the propriety of the Attorney General's continued representation of the State of Oregon as to administration of the Public Employee Retirement Fund. Indeed, the statutes require continued representation in the manner described above.

Second, even if the Attorney General's representative responsibilities were thought to be the same as those undertaken by a private attorney contracted to provide advice to a fiduciary, we believe your analysis of the applicable law to be flawed. Many, if not all, of the cases that have found a "fiduciary exception" to the attorney-client privilege for communications between a

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trustee and the trustee's attorney have been decided in relation to a privilege established by common law, so that courts have "consider[ed] themselves free * * * to create exceptions to the privilege." *Wells Fargo Bank v. Superior Court*, 22 Cal.4th 201, 207, 990 P.2d 591, 594, 91 Cal.Rptr.2d 716, 721 (2000). In contrast, Oregon's attorney-client privilege has existed as a statute since 1862. *State ex rel. North Pacific Lumber v. Unis*, 282 Or 457, 462, 579 P2d 1291 (1978). The text of the statutory privilege belies the existence of a fiduciary exception. The statute states that a client may assert the privilege to protect communications "[b]y the client or the client's lawyer to a lawyer representing another in a matter of common interest." ORS 40.225(2)(c). Under this provision, one may argue that the PERS Board may *choose* to share the Department's advice regarding PERS administration with a lawyer representing the beneficiaries, and that those communications would be privileged with regard to other persons. However, there is nothing in the text of the privilege *requiring* the PERS Board to make such a disclosure. The statute specifies five categories of exceptions to the privilege. ORS 40.225(4). None of them vitiates the privilege between a client and a lawyer when the client seeks legal advice about its actions as a fiduciary to third parties.

The Oregon Supreme Court has characterized Oregon's statutory privilege as being "declaratory of the common law." *State ex rel. North Pacific Lumber*, 282 Or at 462 *citing State ex rel. Hardy v. Gleason*, 19 Or 159, 23 P 817 (1890). On that basis, the court's practice has been to "construe] the statute in light of the underlying policies which it is intended to serve." *Id.* The Oregon State Bar has stated that an attorney employed by a trustee of an employee benefit plan administered under ERISA "is counsel for the trustee and not the beneficiaries." OSB Formal Op No. 1991-119 at 5. In explaining this position, the Bar stated that "[a]lthough there is some limited ERISA case law to the contrary from other jurisdictions, we do not believe that these cases are either well-reasoned or consistent with the Oregon approach to representation of fiduciaries." *Id.* at 5-6. While the hypothetical providing the context for the Bar's analysis involves a plan beneficiary suing the trustee, the analysis does not appear in any way to be restricted to situations where litigation is either pending or anticipated. Moreover, the Oregon Court of Appeals subsequently stated that it agreed with the Bar's opinion and found the rationale "persuasive." *Roberts v. Fearey*, 162 Or App 546, 553, 986 P2d 690 (1999). In *Roberts*, a successor trustee sued the former trustee's attorney for malpractice on behalf of the trust and its beneficiaries. Citing the Bar's opinion, the court held that "when an attorney undertakes to represent a fiduciary, he or she represents only the fiduciary and does not, at the same time, maintain an attorney-client relationship with those to whom the fiduciary-client owes a duty."[2] *Id.*

[2] *Roberts* does not involve communications between the Department and PERS. We note that a court in another state has held specifically that communications between the Attorney General and the board of trustees of the public employees' retirement system are privileged and not subject to disclosure to the system's beneficiaries under the state's public records law. *Board of Trustees of Public Employees' Retirement Fund of Indiana v. Morley*, 580 NE2d 371 (Ind. Ct. App., 1991).

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Based on the text and judicial interpretation of Oregon's attorney-client privilege, we conclude that there is not a fiduciary exception to the privilege. Therefore, the records that you requested from PERS are exempt from disclosure under ORS 192.502(9). Accordingly, we deny your petition.[3]

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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c: James Voytko, PERS Executive Director
Steve Rodeman, PERS Government Relations

[3] Because we find the records to be exempt from disclosure on the basis of the attorney-client privilege, we do not reach the applicability of the additional exemptions cited in PERS' denial, namely those for records pertaining to litigation and internal advisory communications. Therefore, at this time we offer no opinion about the applicability of these exemptions to the requested records.