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October 2, 1990

Myron B. Katz, Chairperson
Public Utility Commission
Labor & Industries Building
Salem, OR 97310-0335

Harry Esteve
The Register-Guard
975 High Street
P.O. Box 10188
Eugene, OR 97401

Re: **Petition for Public Records Disclosure Order; Public Utility Commission Records**

Dear Commissioner Katz and Mr. Esteve:

This letter is the Attorney General's order on Mr. Esteve's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on September 25, asks the Attorney General to order the Public Utility Commission (PUC) to disclose a copy of the "[d]raft report by the Public Utility Commission and Oregon Department of Energy on the dollar costs of an early shutdown of the Trojan Nuclear Power Plant." For the reasons that follow we grant the petition.

We examine the petition here under unusual circumstances. Although the PUC and the Department of Energy (DOE) publicly released the final version of the joint report on September 27, Mr. Esteve continues to seek a copy of the draft report, which he requested on September 24.[1]

The Public Records Law confers a right to inspect public records of a public body in Oregon, subject to certain exceptions. ORS 192.420. The draft report plainly is a "public record" subject to the Public Records Law:

> "Public agencies often erroneously take the view that preliminary reports or recommendations, containing nothing which justifies nondisclosure, will be withheld until after they are reviewed or acted upon by the recipient. This is improper. The need for further checking of data is also not a valid ground for nondisclosure. Such a document is a public record. Therefore, if an exemption does not apply, a requestor is entitled to see the document or a copy upon request. If, for example, the report is to a board, it may be annoying to the board to read a newspaper story about it before its members receive their copies, but this does not justify any delay in disclosure.
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> "Even before adoption of the Public Records Law, the court held in MacEwan v. Holm, 226 Or 27, 359 P2d 413 (1961), that data collected by a state agency in the course of carrying out a study were subject to inspection before the study was completed. The fact that a record is 'preliminary' is not itself grounds for nondisclosure. See also 38 Op Atty Gen 1761 (1978).
>
> "We also have concluded that preliminary or incomplete working drafts are public records subject to disclosure * * *."

Attorney General's Public Records and Meetings Manual 24-25 (1989) (Manual) (emphasis in original). The issue here is whether any provision in the Public Records Law exempts the draft from public disclosure.

The only arguably applicable exemption is ORS 192.502(1), the exemption for internal advisory communications. This statute exempts:

> "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 communications between officials and employees of public bodies clearly outweighs the public interest in disclosure[.]"

Thus, under this exemption, a public record is exempt from disclosure if:

(1) It is a communication within a public body or between public bodies;

(2) It is of an advisory nature preliminary to any final agency action;

(3) It covers other than purely factual materials; and

(4) In the particular instance, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure.

We have explained the policy underlying this exemption as follows:

> "The central thrust of this exemption is to protect the confidentiality of frank and uninhibited advice and observations a public employe gives to a superior or associate. The test of whether there are grounds for asserting the exemption is whether disclosure would inhibit the employe so as to interfere with the free flow of information and ideas which the agency needs for its efficient operation, as distinguished from mere embarrassment of the employe or agency."

Manual at 24. In analyzing the application of this exemption here, we are mindful that under the Public Records Law the presumption is always in favor of public disclosure. See Manual at 10-11, 12. Exemptions must be narrowly construed, and are to be based on a sufficient showing of justification. Guard Publishing Co. v. Lane County School Dist., 310 Or 32, 39, 791 P2d 854 (1990). The public body has the burden to sustain an exemption. Id., 310 Or at 38.

The draft satisfies the first element of the exemption. The draft was prepared by staff members of the PUC and ODOE,

and was circulated among staff members at both agencies. Consequently, the draft was a communication within a public body and between public bodies.

We also conclude that the draft was "advisory," preliminary to final agency action in releasing the final report. The drafts essentially constituted recommendations on the substance of the final report. These recommendations covered such matters as the appropriate factual and legal assumptions to use in assessing the economic impact of closing Trojan.

Additionally, significant portions of the draft are other than purely factual material.[2] For instance, the draft (as well as the final report) contains discussions of the possible outcome of several legal issues that could arise from the shutdown of Trojan.

The dispositive issue, then, is whether "in the particular instance the public interest in encouraging frank communication between officials and employes of public bodies clearly outweighs the public interest in disclosure." ORS 192.502(1). Both the PUC and ODOE assert that the public interest in nondisclosure here clearly prevails. They note that the report was the product of scholarly work by members of the agency staffs. This is the type of work, we are told, that in the staff members' academic fields would not be publicly released before undergoing thorough peer review. The agencies suggest that release of such preliminary work--in which the drafters may set out novel and untested ideas for hard scrutiny--could subject the drafters to criticism injurious to their professional reputations. Accordingly, we are told, staff members' knowledge that such drafts would be open to public inspection could frustrate the agencies' future ability to obtain the type of scholarly work involved here. This is particularly true where, as here, staff members have been asked to think creatively and explore all options.

We acknowledge the strength of this concern under the law. The Public Records Law, however, does not permit us to examine this issue in the abstract. Rather, the agency must make an individualized showing of justification for the exemption, tailored to the contents of the specific records. See Guard Publishing Co. v. Lane County School Dist., supra, 310 Or at 34; ORS 192.505 (duty to segregate exempt from nonexempt information).

The agencies have attempted to make this individualized showing here. They point out that the type of creative thinking asked of their employees on this project was different from and more difficult than their employees' ordinary work. In our view, however, this justification sweeps too broadly. It could be asserted in almost any context involving public employees who are hired for and work in fields of sophisticated and technical expertise. To accept this argument, therefore, would broaden the internal advisory communication exemption beyond what we believe to be the legislature's intent, as construed and applied in Bay Area Health District v. Griffin, 73 Or App 294, 698 P2d 977 (1985), and Coos County v. Ore. Dept. of Fish and Wildlife, 86 Or App 168, 739 P2d 47 (1987). The agencies also note that the report was a cooperative project between two agencies. Although we agree that the law should encourage such projects, ORS 192.502(1) gives no greater protection to interagency communications than to communications within an agency.

Here, review of the "public interest" element of ORS 192.502(1) is complicated by the fact that the requestor, and the public generally, already have access to the final report. To the extent that the public already effectively has access to the contents of the draft report--that is, that the draft report and final report contain essentially the same material--there is no remaining public interest in nondisclosure. See Public Records Order, February 24, 1989, Weill (where agency already had revealed documents that discussed draft order in detail, public interest in nondisclosure of draft was insubstantial).

The contents of the draft report differ in some respects from the contents of the final report. Neither agency, however, has explained how revealing any of these specific differences publicly could cause the type of public harm feared by both agencies.

Moreover, we find it significant that the report concerns the possible economic effects of a controversial ballot measure. That fact heightens the public interest in disclosure of information potentially relevant to the voters' decision. We hold this view notwithstanding that some of this information may not have garnered a consensus within the agencies.

In sum, keeping in mind the presumption favoring disclosure, we must conclude that the draft report is not exempt under ORS 192.502(1). Thus, we grant Mr. Esteve's

petition, and direct the PUC to disclose the draft report. The PUC has seven days from the date of this order in which to comply. ORS 192.450(2).

Sincerely,

PAMELA L. ABERNETHY
Special Counsel to the
Attorney General

PLA:RDW/cm/9853a
c: David Yaden, Director
Department of Energy
625 Marion Street, NE
Salem, OR 97310

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[1] We express no opinion on whether the Public Records Law required disclosure of the draft report before release of the final report; that question is moot. There may, however, be strong justifications for nondisclosure of a draft before the public release of a final report--for instance, interference with an agency's ongoing work--that vanish once a final report is publicly disclosed. See Attorney General's Public Records and Meetings Manual 25 (1989).

[2] The report also contains some purely factual materials, such as definitions of terms and descriptions of the contents of studies produced by the Northwest Power Planning Council and the Bonneville Power Administration. Even if we were to conclude that some parts of the draft are exempt, these factual portions, as well as introductory sections, would have to be segregated and disclosed.