HARDY MYERS
ATTORNEY GENERAL

PETER D. SHEPHERD
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400
TTY: (503) 378-5938

July 10, 2001

Randy Tucker
Legislative Affairs Director
1000 Friends of Oregon
534 SW Third Avenue, Suite 300
Portland, OR 97204

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

Dear Mr. Tucker:

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. You asked the Governor's Legal Counsel, Danny Santos, to provide you a copy of the state's "Measure 7 Implementation Plan" (Plan). On May 10, 2002, Department of Administrative Services (DAS) responded to your request by providing you a copy of portions of the Plan. It withheld five sections of the Plan under ORS 192.502(1), which exempts from disclosure certain internal advisory communications of a public body. You ask the Attorney General to order DAS to disclose the five sections of the Plan, sections 8 through 12, that it has not already provided to you. 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. If a 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).

In response to your petition, we met with David Hartwig of the DAS Risk Management Division to discuss DAS's initial response to your request. Based on that additional review, DAS has agreed to disclose three sections of the Plan (sections 8, 11 and 12) that it originally withheld in response to your request. Mr. Hartwig informs us that DAS will send that material to

you. Therefore, we address only those portions of the Plan that DAS continues to withhold from disclosure.

Internal Advisory Communications

We consider the remaining two sections of the Plan that DAS continues to withhold from disclosure under the exemption for internal advisory communications. The Public Records Law 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." ORS 192.502(1). A public record must meet the following criteria to be exempt from disclosure as an internal advisory communication:

(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 (2001) (MANUAL) at 50.

We begin our assessment of whether the two withheld sections of the Plan are internal advisory communications by examining those sections against the first three elements of the exemption. As indicated in Section 1 of the Plan, which DAS has already disclosed to you, DAS decided to develop a plan for processing claims that could be filed if Ballot Measure 7 (2000) becomes effective.[1] Responsibility for development of an implementation plan was assigned to a team consisting of employees of DAS and other state agencies. The withheld sections of the Plan were developed and drafted by this team of state agency employees. Accordingly, the records at issue memorialize communications "within a public body or between public bodies."

The two sections of the Plan subject to this order are Section 9, Funding Sources, and Section 10, Legislative Issues. In those sections, the implementation team listed potential sources for funding the costs of administration and payment of Measure 7 claims, and legislative changes to Measure 7 that the team identified might be beneficial to claims administration and payment. We are informed by Mr. Hartwig that the team prepared the records for use by DAS policy makers who would determine whether any of the presented possibilities should be developed into legislative concepts. The concepts were in fact presented to DAS decisionmakers for their consideration. Accordingly, the records are comprised of concepts that are of an advisory nature and preliminary to any agency action. We have reviewed the records. They consist of ideas and proposals instead of factual information. In summary, the first three elements of the internal advisory communication exemption apply to the withheld records. The remaining question is whether, in this instance, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure.

[1] The people approved Ballot Measure 7 in November 2000. The Circuit Court for Marion County declared the Measure unconstitutional and enjoined it from taking effect. Appeal of that decision is pending in the Oregon Supreme Court.

"Frank" communication is that which is "marked by free unrestrained willing expression of facts, opinions or feelings without reticence, inhibition, or concealment." WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1993) at 903. The internal advisory communication exemption recognizes that the public has an interest in encouraging public employees to engage in frank communication. 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), *citing* ***Turner***, 22 Or App at 177. 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. For example, frank and candid policy discussions are central to the functions performed by many public bodies and officers, such as the Governor. We anticipate that the public interest in advisors sharing their unrestrained opinions with the Governor about new policy initiatives would usually be very high.

The DAS implementation team developed funding and legislative ideas that it believed could benefit the state's administration and payment of Measure 7 claims. Because the team understood that DAS management would consider its ideas and determine which, if any, to pursue, the team was free to propose any idea, regardless of the response any concept might elicit from supporters or opponents of Measure 7. In essence, the development of these lists was a brainstorming discussion of potential policy initiatives, the type of discussion that is at the core of government policy making.

The public has a substantial interest in encouraging frank communication of this type, because in this manner state agencies are able to develop concepts that they believe ultimately will benefit the public, discarding possibilities only after full consideration. We believe that such communications would be self-censored or "chilled" by state employees if the employees had to be concerned about political or other ramifications to themselves or their agencies resulting from disclosure of the results of preliminary brainstorming efforts.

You state a public interest in disclosure of the withheld records in your petition:

> How the state intends to implement the ballot measure, with its potentially broad and sweeping consequences, is of critical importance to the citizens of the state and to public interest organizations. This information needs to be available to the public in a timely manner, especially given the likelihood that the official response to a possible Supreme Court ruling upholding the measure will occur on a very short timeline[.]

In this case, disclosure of the withheld records will not tell the public how the state intends to implement Ballot Measure 7, since the records are preliminary to decisionmaking and do not reflect how the state intends to proceed. In fact, disclosure of the withheld records could be contrary to the public interest to the extent that disclosure could create confusion about the state's implementation plans. Given the clear public interest in encouraging frank communication in this instance, we conclude that interest outweighs the public interest in disclosure.

Accordingly, we deny your petition with respect to Sections 9 and 10 of the Plan because those sections contain internal advisory communications that are exempt from disclosure under ORS 192.501(1). Because DAS has agreed to disclose to you the remaining three sections of the Plan that are the subject of your petition, we deny the petition as moot as to those sections.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS10470
c: David Hartwig, DAS Risk Management