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

June 7, 2001

Mark J. Makler
Garrettson Goldberg Fenrich & Makler
1313 N.W. 19th
Portland, OR 97209

Re: Petition for Public Records Disclosure Order:
Oregon Department of State Police

Dear Mr. Makler:

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.[1] Your petition, which we received on May 17, 2001,[2] asks the Attorney General to order the Oregon Department of State Police (OSP) to produce a complete copy of the management review conducted at the OSP Southern Regional Dispatch Center (SRDC), beginning in December, 2000. 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).

The management review is a 20-page document consisting of the reviewers' report and several attached documents collectively labeled as a "reference section." By letter dated May 9, 2001, OSP Sergeant David G. Scholten provided your client with portions of the report and the reference section attachments, stating that the remainder

[1] You state that you are petitioning this office on behalf of your client, the Oregon State Police Officers' Association (OSPOA).

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

had been redacted under three Public Records Law exemptions. On advice of counsel, OSP made those redactions based on the exemptions from disclosure for personnel discipline actions (ORS 192.501(12)), personal privacy (ORS 192.502(2)), and internal advisory communications (ORS 192.502(1)).

In response to your petition, we met with Sgt. Scholten and Mike Zanon, Director of OSP's Information and Communications Management Division, to discuss OSP's initial response to your request. Based on that additional review and assessment, OSP has agreed to disclose portions of the report and attachments that it originally withheld in response to your request. Mr. Zanon informs us that OSP will send that material to you. Therefore, we address only those portions of the report and attachments that OSP continues to withhold from disclosure.

1. Internal Advisory Communications

We consider the text redacted from the report under the exemption for 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 if:

(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 (1999) (MANUAL) at 45.

We begin our assessment of whether redacted text in the report is an internal advisory communication by examining the report against the first three elements of the exemption. The persons who prepared the report, who were interviewed for purposes of that report and who received the report were all OSP employees. Therefore, the report is a communication within a public body.

The objectives of the management review are stated on page three of the report:

To identify strengths and weaknesses of the operational aspects of the SRDC such as: management practices, adequacy and reliability of equipment, scheduling, training, competency of staff and morale.

> Another objective was to ascertain the service strengths and weaknesses provided by the SRDC to the customer base and the working relationship with other public safety partners.

Mr. Zanon, who requested the review, informs us that its purpose was to provide administrative and operational information to those in management positions as a basis upon which action can be taken to ensure a high level of service, conformity to rules, regulations, policies and procedures and consistency of operation. *See* OSP Procedural Manual for Management Reviews. We conclude that the report generated by this review is of an advisory nature and preliminary to final agency action.

The text withheld by OSP consists of the reviewers' interpretations of what was told to them, subjective assessments about the operations of the SRDC and the causes of certain events, and recommendations for management action. These portions of the report are not "purely factual."

While the report meets the first three elements of the internal advisory communications exemption, the redacted text is exempt from disclosure only if, "in the particular instance, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure." "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 NEW 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. When balanced against the public interest in disclosure, the degree of the public interest in encouraging frank communication 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 the Governor's office. Therefore, the public interest in advisors' sharing their unrestrained opinions with the Governor about new policy initiatives would be very high. Another variable to be considered when balancing the public 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 47. 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 177.

Mr. Zanon states that the management review is OSP's primary tool for identifying and correcting operational problems within the agency. He also states that OSP believes the redacted text reflects candid, uninhibited opinions, conclusions and recommendations offered by interviewed employees and those personnel who prepared the report. Finally, Mr. Zanon states that OSP believes that if either the interviewed employees or those responsible for preparing the report knew that OSP would disclose the redacted portions of the report to the public such knowledge would have a substantially chilling effect on their willingness to speak frankly in interviews and to fully record information in the report. We find this concern to be credible in light of the subject matter addressed in the redacted text, e.g., morale and leadership.

Because a large part of OSP's mission involves responding to emergency calls for assistance, a regional dispatch center plays an integral role in protecting people's safety and the security of their property. If weaknesses exist in operations at the SRDC and remain unidentified and unresolved, public safety is adversely impacted. Agency officials responsible for the management of the dispatch center rely on candid employee input to assess the strengths and weaknesses of its operations and in determining how best to avoid or correct deficiencies. Therefore, we conclude that the public interest in encouraging frank communication in this particular instance is high.

Balanced against this interest is the public's interest in disclosure. Your petition states an interest in disclosure:

> [A]s the legislature is in session and the budget of the Oregon State Police (OSP), as well as the organization and structure of the OSP are at issue and under consideration, the information sought under this request is disclosable in the interest of the public as it relates to the OSP organization and how the OSP organization can more effectively function and utilize the public money the OSP organization receives.

We recognize the public interest in learning about how effectively OSP functions and utilizes public money. Because the same can be said of any agency's operations, finding this interest to be overriding would render the internal advisory communication exemption meaningless as applied to records created during the course of a management review. While there generally is a heightened interest in OSP because of the public safety nature of its operations, to the extent that a report generated from an OSP management review identifies deficiencies affecting public safety, determining whether the report is exempt from disclosure as an internal advisory communication requires us to decide whether the public has a greater interest in knowing what those deficiencies are or in enabling the agency to identify and correct them. We have not identified such deficiencies in our review of the SRDC report.

In balancing the public interests, we find that the public interest in encouraging frank communication is paramount in this particular instance. The public interest in enabling management personnel at OSP to assess the health of agency operations that

impact public safety for purposes of improving those operations, which OSP has judged it can do most effectively through conducting management reviews, is more significant than sharing the complete results of the SRDC management review with the public. Therefore, we conclude that the redacted portions of the report are exempt from disclosure under ORS 192.502(2). Accordingly, we deny your petition with respect to the report.

2. Personal Privacy

We consider the text redacted from documents in the reference section under the exemption for personal privacy. To be exempt under ORS 192.502(2), information must be personal in nature and its disclosure must constitute an unreasonable invasion of privacy. Even if both those conditions are met, the information is not exempt if "the public interest by clear and convincing evidence requires disclosure in the particular instance." ORS 192.502(2). We have concluded that personal medical information "plainly is 'information of a personal nature,' public disclosure of which ordinarily constitutes an unreasonable invasion of privacy.'" MANUAL at 54. With the presumption being that personal medical information is exempt, to determine if disclosure would be an unreasonable invasion of privacy in a particular instance, we must consider whether facts relevant to the particular situation would cause an ordinary reasonable person to conclude that disclosure would not be highly offensive.

OSP redacted text from a three-page memorandum dated November 26, 2000, with the subject line "Letter of Concern," and a three-page undated, handwritten document labeled "Letter of Concern." The text redacted from both of the "Letter of Concern" documents consists of personal medical information. Reviewing both documents, as well as the report and the rest of the attachments, we find no information that causes us to believe that an ordinary reasonable person would not consider disclosure of the information at issue to be highly offensive. MANUAL at 51. To disclose the redacted medical information would not appreciably inform the public about "the OSP organization and how the OSP organization can more effectively function and utilize the public money the OSP organization receives." Because we find no overriding public interest in disclosure in this particular instance, we conclude that this text is exempt from disclosure as personal private information under ORS 192.502(2). Accordingly, we deny your petition as to this material.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS07911
c: Sgt. David Scholten, OSP