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Leslie I. Zaitz
Staff Writer, *The Oregonian*
Press Room 43
Capitol Building
Salem, OR 97310

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

Dear Mr. Zaitz:

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 January 25, 2001, asks the Attorney General to direct the Oregon State Police (OSP) to "provide a full, unabridged copy" of an email message dated January 6, 2000, from Ms. Myra Lee, the Director of the Office of Emergency Management (OEM), to Commander Beverlee Venell of OSP. 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 request for records, OSP provided you a copy of a three-page printout of the email message from Ms. Lee to Cmdr. Venell, but redacted portions of the material on page 1 and all of the material on page 2.[1] OSP concluded that the redacted portions of the email are exempt from disclosure as an internal advisory communication. Under ORS 192.502(1) the following are exempt as internal advisory communications:

[1] Page three of the email was blank. OSP did not redact anything from that page.

> 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.

The purpose of this exemption is to permit and encourage frankness and candor in communications within or between public bodies. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1999) 45. Under the internal advisory communication exemption, a public record is exempt from disclosure if it satisfies all of the following elements:

(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;

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

First Element

The record at issue is a communication from Ms. Lee, in her capacity as Director of OEM, to Cmdr. Venell. OEM is an office within OSP. Hence, as you state in your petition, the record satisfies the first element of the internal advisory communication exemption in that it is a communication within OSP.

Second Element

The second element requires that the redacted material be "of an advisory nature preliminary to any final agency action." In your petition, you assert that the email is not advisory, did not precede any final agency action, and was not shared up the line of command.

Ms. Lee's email was written approximately one week after the public warning system for the Chemical Stockpile Emergency Preparedness Program (CSEPP) was accidentally activated at the end of 1999. At that time, Ms. Lee was involved in oversight of the CSEPP. Subsequent to the alarm activation, OSP had to decide how to respond to the incident and the public concern that it raised. The redacted portions of Ms. Lee's email contain her candid assessment of the potential administrative consequences resulting from the accidental alarm activation. Ms. Lee's assessment was advisory in nature in that it provided the recipient with Ms. Lee's views about issues relevant to decisions to be made within OSP.

The recipient of Ms. Lee's email, Cmdr. Venell, was in the chain of command between Ms. Lee and the Superintendent and, therefore, was in a position to provide advice to the Superintendent and others regarding the CSEPP. Lt. Fred Douthit of OSP has confirmed that Cmdr. Venell was involved in discussions at OSP regarding how to respond to the CSEPP situation. Therefore, even if Cmdr. Venell was the only OSP official to receive Ms. Lee's email,

it informed Cmdr. Venell's subsequent participation in discussions with the Superintendent or others in the chain of command. For these reasons, we conclude that the redacted portions of the email were both of an advisory nature and preliminary to final agency action and that they therefore satisfy the second element.

Third Element

The third element of the internal advisory communication exemption requires that the record contain other than purely factual materials. If the communication contains factual material together with the advisory communication, then the agency must segregate the factual material and make it available for inspection if it can do so without disclosing the advisory communication. You assert in your petition that "Lee's observations of the climate and process in CSEPP do amount to factual materials" and that "her observations would be considered expert testimony."

We agree that Ms. Lee's "observations of the climate and process in CSEPP" are factual materials. We have reviewed an unredacted copy of the record and conclude that OSP has disclosed Ms. Lee's factual observations to you. In the redacted portions of the email, unlike in the disclosed sections, Ms. Lee provides her assessment of the potential administrative consequences resulting from the accidental alarm activation. Unlike observations of actions and events, Ms. Lee's candid assessment reflects her opinion and judgment and does not constitute "factual material." Whether Ms. Lee's assessment would constitute expert testimony in a court of law is irrelevant to a determination under the Public Records Law of whether the communication contained in the redacted portions of her email is other than purely factual.

Fourth Element

Finally, to satisfy the fourth element of the internal advisory communications exemption, the public interest in frank communication must clearly outweigh the public interest in disclosure in the particular instance. In your petition, you characterize the public interest in disclosure as "understanding why this program has been such a failure" and state that "Lee's material is critical to that understanding." We assume that your reference to "this program" is to the CSEPP. You also assert that frank communication did not demonstrably advance the CSEPP program[2] and question its need for "continued secrecy."

The public has a legitimate interest in understanding the causes contributing to the success or failure of the CSEPP. Ms. Lee's email, however, does not set out those causes. Rather, the email contains Ms. Lee's perspective on how the accidental alarm activation could

[2] In determining the applicability of ORS 192.502(1) to a record, we must assess the importance of preserving frank communication within a public body in relation to the public body's ability to advance its programmatic goals. However, our responsibility does not include, and is distinct from, determining in hindsight if a particular instance of engaging in frank communication measurably advanced the success of an agency program. The purpose of the internal advisory communication exemption is to permit and encourage frankness and candor in communications within or between public bodies. To strip such communication of its confidentiality if the agency cannot prove that a particular communication contributed to the success of agency efforts would essentially defeat the purpose of the exemption by removing from agency personnel the expectation that their candid assessments will be protected.

affect administrative aspects of the CSEPP. Disclosure of one person's opinion and judgment as to future events would do little to enhance the public's understanding of the success or failure of the CSEPP.

On the other hand, the public's interest in encouraging frank communication within OSP in circumstances such as those encountered after the 1999 CSEPP alarm activation is served by preserving the confidentiality of Ms. Lee's email. For example, communications such as Ms. Lee's email help to protect public safety by providing agency decision makers with the perspective of those who have been closely involved with the program at issue. In addition, as you note in your petition, a number of government entities are involved in the CSEPP. It is important to the success of the CSEPP that these entities work cooperatively. Ms. Lee's email reflects her opinion on issues that she has chosen to share with OSP officials but not with those other entities. Disclosing the redacted portions of the email could impact OSP's ability to work as part of a cooperative effort, and, in turn, affect the future success of the CSEPP. Lt. Douthit advises us that OSP Deputy Superintendent William Paden has concluded that failure to protect the redacted portions of Ms. Lee's email would threaten this type of communication in the future because agency employees would be reluctant to put in writing their opinions about sensitive issues within an operation or program.

We have carefully reviewed Ms. Lee's email and conclude that any insight it might provide to the public as to the success or failure of the CSEPP is outweighed by the public interest in preserving the ability of decision makers within OSP to receive the candid perceptions and assessments of their subordinates and colleagues that allow them to make informed decisions about how to address and resolve issues as they arise. We believe that to order disclosure in this instance would seriously hinder OSP's ability to deal with situations such as the 1999 CSEPP alarm activation, thereby threatening the efficiency and effectiveness with which OSP could execute its responsibilities regarding the CSEPP and other programs. As you point out in your petition, operation of the CSEPP affects public safety. Therefore, the public has a very significant interest in OSP executing its responsibilities for the program. Weighing these considerations, we conclude that the public interest in encouraging frank communications within a public body in this particular circumstance outweighs the interest in disclosure.

Because we find that each of the elements of ORS 192.502(1) is met with respect to the portions of the record withheld by OSP, we conclude that redacted portions of the record are exempt from disclosure under ORS 192.502(1). Therefore, we deny your petition.

Sincerely,

Peter D. Shepherd

PETER D. SHEPHERD
Deputy Attorney General

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