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January 17, 2001

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 8, 2001, asks the Attorney General to direct the Oregon State Police (OSP) to "provide a full, unabridged copy" of a facsimile transmission from G. Jerry Russell to Commander Beverlee Venell and Superintendent Ron Ruecker.[1] Your petition also asks the Attorney General to direct OSP to provide "any and all other documents" responsive to your request for access to written communications made by Russell while he was a temporary OSP employee. 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 facsimile transmission from Russell to Superintendent Ruecker and Commander Venell dated May 7, 2000, but redacted the paragraph on page three. Lt. Fred Douthit has advised us that, in addition to its original disclosure, on January 12, 2001, OSP provided you another copy of the

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

facsimile transmission that disclosed a portion of the paragraph on page three. Also, Lt. Douthit has informed us that in his review of OSP records he has found no additional records responsive to your request. Consequently, we deny your petition as moot, except with respect to the portion of page three of the facsimile transmission that OSP continues to withhold from disclosure. The remainder of this order addresses only that redacted record.

OSP concluded that the portion of page three of the record that it continues to withhold is exempt from disclosure as an internal advisory communication. Under ORS 192.502(1) the following are exempt as internal advisory communications:

> 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 communications exemption, a public record is exempt from disclosure if it meets all of the following criteria:

(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.

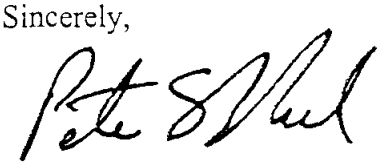
The record at issue is a communication from Russell to two OSP officials. At the time Russell made the communication he was a temporary OSP employee assigned to the Superintendent's office to perform duties related to the Chemical Stockpile Emergency Preparedness Program (CSEPP). The communication in the record that OSP withheld from disclosure, containing Russell's observations of the CSEPP, was preliminary to final OSP determination of policy or action. Hence, the redacted portion of the record satisfies the first and second criteria of the internal advisory communications exemption.

The third criterion 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. We have reviewed an unredacted copy of the record and conclude that there is no factual material contained in the redacted portion of the document. In other words, OSP has disclosed to you all factual portions of the record.

Finally, to meet the fourth criterion of the internal advisory communications exemption, in the particular instance the public interest in frank communication must clearly outweigh the public interest in disclosure. At the time the record in question was written, Russell was a temporary OSP employee reporting to the Superintendent regarding the operation of the CSEPP. It is imperative that a person in Russell's position be able to share candid observations of the CSEPP with the Superintendent and others within OSP whose responsibilities are affected by those observations. If such communications were public, obtaining candid input from OSP staff in positions such as that held by Russell would be more difficult. Stifling this type of communication would negatively impact the ability of OSP personnel to fulfill job responsibilities and could threaten the effectiveness of OSP operations.

Accordingly, we find that disclosure of the communication at issue here would have a substantial chilling effect on OSP staff and that the public interest in encouraging frank communications within OSP clearly outweighs the interest in disclosure. Because we find that each of the elements of ORS 192.502(1) is met with respect to the portion of the record withheld by OSP, we conclude that this portion of the record is exempt from disclosure under ORS 192.502(1). Therefore, we deny your petition.

Sincerely,



PETER D. SHEPHERD
Deputy Attorney General

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