JOHN R. KROGER
ATTORNEY GENERAL

MARY H. WILLIAMS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400

September 2, 2009

Kelly Knivila
Stoel Rives LLP
900 SW Fifth Ave, Ste 2600
Portland, OR 97204

Re: Petition for Public Record Disclosure Order
Public Employees' Benefit Board

Dear Ms. Knivila:

This letter is the Attorney General's amended order in response to your petition filed under the Oregon Public Records Law, ORS 192.410 to 192.505. You sent your petition via email at 4:54 PM on Friday, August 21, 2009. On Thursday, August 27, 2009, you agreed to extend the statutory deadline for the Attorney General's response to your petition to September 1, 2009, and we thank you for that courtesy. On September 1, 2009, we issued an order based on our understanding of an agreement we thought had been reached between you and Per Ramfjord of your firm and Assistants Attorneys General Roger DeHoog and Michael Kron. After the close of business on September 1, you sent Mr. Kron an email disagreeing that any such agreement had been reached. As a consequence of that email, we withdraw our order of September 1, 2009 and issue this order in its place.

1. Introduction

In your petition, you ask the Attorney General to order the Public Employees Benefits Board ("PEBB") to disclose certain records to you. Your request to PEBB is related to ongoing litigation between your client, Regence Blue Cross Blue Shield of Oregon ("Regence"), and PEBB. The litigation concerns PEBB's decision to renew a certain contract with Providence Health Plan ("Providence") and not with Regence. Your public records request substantially overlaps with a request for production ("RFP") under the court's civil discovery rules that your law firm, Stoel Rives LLP, served on PEBB on August 6, 2009. For the reasons explained below, we respectfully deny your petition.

During the course of deciding this petition, there were a number of discussions involving you, Mr. Ramfjord, Mr. DeHoog, Mr. Kron, and Assistant Attorney General

Steven Marlowe. Those discussions focused on the overlap between the RFP and the public records requests and on the fact that Regence, PEBB, and Providence are negotiating a stipulated protective order that would reach certain documents within the scope of the public records requests. Through those discussions, you agreed to exclude from the scope of your petition those records that would, in PEBB's good faith view, be subject to the stipulated protective order for possibly proprietary materials that is currently under discussion. As a result, we do not consider such documents at all in the course of resolving your petition. With respect to the overlap between your petition and the RFP, you concurred with our assessment that the two requests are seeking basically the same documents. In addition, a tentative schedule for responding to the RFP was discussed, with the expectation that disclosures would commence on or before September 8, 2009.

Meanwhile, PEBB informs us that it will modify a number of the positions it initially took in response to your public records requests. In light of that willingness on PEBB's part and the circumstances just described, we generally conclude that your petition is premature and deny it on that basis.

Below, we discuss the positions that PEBB has indicated that it will modify with regard to your six requests for public records. Those requests are designated as requests numbers 21, 22, 23, 26, 27 and 28. All of these requests were made on July 13, 2009, except for the last of them, which was made on July 20, 2009. Your petition groups requests 22, 26 and 27 together and discusses requests 21, 23 and 28 separately. We do likewise. In discussing request number 28, we reject one of your arguments on the merits.

2. Request No. 21.

The first request addressed in your petition sought

> Any documents discussing or containing costs for medical services for 2010 and/or 2011 plan year under the proposed Providence statewide ASO contract, including without limitation any discussion of the additional or increased costs to expand the network since PEBB's decision to award the statewide ASO Contract to providence.

Petition at 1.[1] PEBB's response provided a number of documents and noted that "the draft contract renewal was provided to [you]" in response to a prior public records request. The response also stated that "[u]ntil the contract renewal is finalized, it is attorney-client privileged." In your petition, you object that "Communications between two parties to a proposed contract (including drafts exchanged) are not [protected by the lawyer-client privilege]. Neither are communications between PEBB and its consultant *

[1] We cite to the petition to avoid potential confusion that could arise from citing to the actual requests, most of which were dated on the same day. We have compared the quotations in your petition to the language of the actual requests, and see no obvious differences, material or otherwise.

* *." We have confirmed with PEBB that, although its response to you was poorly worded, PEBB either has provided you, or is willing to provide you, with documents responsive to this request. PEBB does not intend to assert the lawyer-client privilege with respect to its contract negotiations with Providence.[2]

3. **Request No. 23**

This request sought

> Any documents discussing or addressing what procurement procedures should be applied to PEBB's 2009 request(s) for proposals and/or quotes issued to Regence and Providence to serve as PEBB's statewide PPO administrator for calendar years 2010 and 2011, including but not limited to any documents discussing whether PEBB's existing procurement policies would allow PEBB to potentially award Providence the contract to serve as PEBB's statewide PPO administrator for calendar years 2010 and 2011.

Petition at 3. PEBB's response first states that "[t]he documents provided to [you] in response to [prior public records requests] constitute PEBB's complete public record." PEBB goes on to state that "Documents and/or analysis are within the scope of this request (PR 23) but may be exempt from disclosure as internal advisory communications that are preliminary to final agency action. *See* ORS 192.502(1)." Your petition observes that this addition "appears to admit that additional documents exist and have been withheld" on the basis of the possible applicability of the internal advisory exemption. We agree that PEBB's statement creates that implication. However, PEBB informs us that it is not withholding any documents responsive to this request on the basis of the internal advisory exemption.

4. **Requests Nos. 22, 26 and 27.**

In ascending numerical order, these requests sought

> Any document containing or referencing communications between Providence and PEBB regarding Regence's protest, appeal, request for reconsideration, potential petition for review of or dissatisfaction with PEBB's April 21, 2009 decision to award Regence the statewide ASO contract with PEBB.
>
> Any documents relating to PEBB's decision to award [Providence] a new contract to serve as the administrator for PEBB's statewide preferred provider organization for calendar years 2010 and 2011 ("Providence Statewide ASO Contract".)

---

[2] Of course, PEBB may wish to assert the privilege with respect to any legal advice it obtained relating to those negotiations.

> Any documents related to PEBB's decision not to award Regence a new contract to serve as the administrator for PEBB's statewide preferred provider organization plan for calendar years 2010 and 2011.

Petition at 5. With respect to the first request, PEBB stated that it did not have responsive documents because PEBB did not decide to award Regence the statewide ASO contract. With respect to the second request, PEBB stated that it did not have responsive documents because it did not award Providence a new contract, but instead renewed an existing contract with Providence. With respect to the final request, PEBB stated that it did not have responsive documents because it did not deny Regence a new contract, but instead declined to renew an existing contract with Regence.

Your petition essentially objects that PEBB's interpretation of these requests was unduly narrow and that PEBB understood what was meant by the requests. PEBB now informs us that it is willing to overlook the specific wording in these three requests, and interpret the requests to reach documents pertaining to its decisions not to renew its relevant contract with Regence and to renew its relevant contract with Providence. However, PEBB's willingness to do so should not be understood to endorse the position that the decision to contract with Providence was a "new contract" or that the decision not to contract with Regence was a decision not to award a "new contract."

5. Request No. 28

The final request addressed by your petition sought

> Any documents relating to PEBB Board Meetings held after April 21, 2009, including but not limited to agenda, meeting minutes and materials submitted to or reviewed by the PEBB board in preparation for or during the course of these meetings.

Petition at 6. PEBB's reply stated that the materials were available via PEBB's website. PEBB also took the position that it was not required to provide materials relating to the July 21, 2009 board meeting because your request was dated July 20, 2009. You object that your request was broad enough to reach materials that are not available via PEBB's website. Petition at 7. PEBB informs us that it agrees with your position, and that it is working on making available to you the additional records that are responsive to your request through the RFP.

You also specifically claim that PEBB should be required to provide you with the minutes of the PEBB Board's July 21, 2009 meeting. PEBB declined to do so because the relevant public records request was made on July 20, 2009. We cannot agree that PEBB was required to provide those records to you in response to your request. "A public body is required to make available for inspection and copying (subject to applicable exemptions) only those records that exist at the time of the request." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) at A-1. We deny your petition on the merits

insofar as it seeks an order compelling PEBB to disclose documents that PEBB did not have at the time of your request.

PEBB acknowledges, however, that your request encompasses documents related to the July 21, 2009 meeting that were already in PEBB's possession on July 20, 2009, and states that it will make those records available to you through the RFP process. Moreover, PEBB's intent to respond to your public records request through the RFP process may have the practical consequence of providing you with access to the relevant records generated after July 20, 2009. Regardless of whether that is actually the case, the Public Records Law does not require a public body to honor an ongoing request for records. Your petition is denied on the merits insofar as it is based on PEBB's statements indicating that it would not provide records generated after July 20, 2009 in response to your public records request on that date.

6. Conclusion

We conclude that your petition must be respectfully denied. Although PEBB's initial responses to your requests appear to refuse each request, at least in part, PEBB has now reconsidered a number of its positions. Moreover, with the forthcoming response to the RFP, it is clear that PEBB actually intends to make many documents responsive to your various requests available for your inspection. To the extent that PEBB intends to provide the documents to you, you have not been denied the opportunity to inspect the responsive records, and we deny your petition partly on that basis. *See* ORS 192.450(1) ("any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General"); *see also* Public Records Order, July 10, 2009, Cloran (request not denied when agency was attempting to obtain records for purposes of disclosing them, notwithstanding previous statements indicating that request could not be fulfilled).

We recognize that PEBB's response to the RFP may withhold some documents from your inspection. However, we do not currently know which documents will be withheld, and we cannot know whether you will claim that any of PEBB's decisions are inconsistent with the Public Records Law. As a consequence, your petition is premature with respect to whatever responsive documents PEBB may withhold in responding to the RFP. If PEBB withholds documents that you believe you are entitled to inspect under the Public Records Law, you are free to renew your petition.

Your petition is respectfully denied.

Sincerely,

DAVID E. LEITH
Associate Attorney General

DM1595221
c: Joan Kapowich, Public Employees Benefit Board