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February 24, 1989

Richard A. Munn
Director
Oregon Department of Revenue
955 Center St. N.E., Room 457
Salem, OR 97310

Richard A. Weill
Attorney at Law
1670 One Main Place
101 S.W. Main St.
Portland, OR 97204-3226

Re: **Petition for Public Records Disclosure Order; Oregon Department of Revenue Records**

Dear Mr. Munn and Mr. Weill:

This letter is the Attorney General's order on Mr. Weill's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on February 15, 1989,[1] asks the Attorney General to direct the Oregon Department of Revenue (DOR) to disclose a copy of the proposed Opinion and Order in the matter of the appeal of Riverglen Properties, DOR Appeal No. 87-2421. For the reasons stated below, we grant the petition.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exceptions. DOR asserts that the proposed order falls within the exemption for internal advisory communications, ORS 192.502(1). That subsection provides:

> "The following public records are exempt from disclosure under ORS 192.410 to 192.505:
>
> "(1) 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 employes of public bodies clearly outweighs the public interest in disclosure;
>
> " * * * *."

The proposed order is a tentative recommendation by the hearing officer on a suggested DOR policy change. Thus, it plainly satisfies four of the key elements of this exemption: (1) It is a communication within a public body; (2) of an advisory nature; (3) covering other than purely factual materials; and (4) preliminary to a final agency determination of policy. We must focus, therefore, on whether DOR can show that "in the particular instance the public interest in encouraging frank communication between officials and employes of public bodies clearly outweighs the public interest in disclosure."

DOR contends that disclosure of the proposed order would inhibit DOR's ability to arrive at a well-considered decision on a matter of agency policy through frank and open communication within the agency in the review process. In support of this contention DOR raises two distinct points.

First, DOR asserts that disclosure of the proposed order would threaten the agency's decisionmaking process by prematurely causing the hearing officer to feel tied to his tentative positions. The draft order concerns a DOR policy decision that has not yet been presented to DOR management for even preliminary review. Disclosure could cause misunderstanding or misrepresentation about the probable outcome of the appeal. At this stage of the process, the hearing officer must continue to maintain an open mind about the resolution of the matter. The policy issue implicated in a proposed order may be the subject of further discussion involving the hearing officer, legal counsel, agency staff and the director. Agency procedures require the hearing officer to consider and respond to comments received from counsel and agency staff before making a final recommendation to the director. It is entirely possible that the proposed resolution of the matter will change. Release of such a preliminary document could impose subtle pressure on the hearing officer to adhere to his stated views, to the detriment of the agency's process for reaching a final decision.

Second, DOR contends that premature disclosure of the proposed order could cause statewide confusion in the administration of the tax laws. Specifically, where a case involves agency appraisal

policy, the premature disclosure of the proposed order could mislead county tax officials on DOR policy, by leading those officials to assume that DOR already has decided to change its policy. DOR is responsible for advising county tax officials on proper appraisal procedures for specific types of property, and thus has a strong interest in preserving clear communications with the counties on those issues. Disclosure of the draft order would compromise this interest.

DOR's case for routine nondisclosure of proposed orders recommending policy changes is strong. In this instance, however, the public interest in nondisclosure is insubstantial, because DOR already has shared with Mr. Weill documents that discuss the proposed order in some detail. That disclosure has undermined DOR's arguments, which otherwise might justify withholding the proposed order under ORS 192.502(1). We conclude, therefore, that the proposed order is not exempt from disclosure. See Letter of Advice dated March 29, 1988, to W. T. Lemman, Executive Vice Chancellor (OP-6217)(exemption inapplicable where agency's partial disclosure of exempt document thwarts policy supporting exemption).

For these reasons, we order DOR to disclose to Mr. Weill a copy of the proposed order he has requested. DOR has seven days in which to comply with this order. ORS 192.450(2).

Very truly yours,

Richard D. Wiseman FOR JAMES E. MOUNTAIN, JR.

JAMES E. MOUNTAIN, JR.
Deputy Attorney General

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[1] We appreciate Mr. Weill's courtesy in allowing us to exceed the statutory deadline for issuing this order.