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June 11, 1987

Alice Dale
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1127 25th Street SE
Salem, Oregon 97309

Re: Public Records Petition: PROD 5 Study

Dear Ms. Dale:

This letter responds to your June 4, 1987 petition for an Attorney General's public records disclosure order. The petition asks the Attorney General to direct the Executive Department to produce copies of the "PROD 5 Study of the Employment Division. . ." For the reasons set forth below, we respectfully deny the petition.

The Executive Department of the State of Oregon commissioned the Oregon State University Productivity Center to survey Employment Division employes as part of the Executive Department's management review of the Employment Division. The Executive Department and the Productivity Center administered a "PROD 5" survey questionnaire to Employment Division employes with an instruction that "[c]confidentiality and anonymity of employee responses is assured." The Productivity Center compiled and analyzed the responses in a seven-hundred page PROD 5 Study which then was used by the Executive Department in preparing an April 7, 1987 report entitled "Department of Human Services Employment Division Management Review." The results of the PROD 5 Study were summarized in the April 7, 1987 report. We conclude that the PROD 5 Study is exempt from mandatory disclosure requirements, pursuant to a specific provision of the public records law.

ORS 192.500(2)(a) exempts from otherwise mandatory disclosure:

> "Communications within a public body or between public bodies of an advisory nature to the extent they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. . . ."

We recognize that this exemption is qualified by the additional language of ORS 192.500(2)(a):

> " . . . 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;"

We conclude that the Executive Department may withhold disclosure of the PROD 5 Study, because this particular public record satisfies the pertinent statutory tests for exemption from disclosure.

The PROD 5 Study is a communication within a public body or between public bodies. The Study is based upon communications by Employment Division employes to Executive Department management, executive staff of the Employment Division, and Oregon State University (OSU) consultants. The study itself is presented as a communication from OSU's Productivity Center to the Executive Department.

The PROD 5 study is of an advisory nature preliminary to final agency action. The Study analyzed employe responses and comments on agency self-evaluation questionnaires for the Executive Department's subsequent use in preparing and presenting the April, 1987 "Management Review Report."

The PROD 5 Study covers other than purely factual materials. The Study analyzes subjective responses and comments on employe questionnaires in narrative, statistical and graphic formats and contains excerpts of many subjective comments of Division employes. The Study contains the Productivity Center consultants subjective comments and recommendations.

Finally, it is demonstrably clear that, in this particular instance, the public interest in encouraging frank communication outweighs the public interest in disclosure. The public interest in allowing the Executive Department to obtain candid comments from Employment Division employes about

division operations and their own productivity for use in a management review report, is great. To encourage the candor needed for a meaningful study, the Executive Department and its consultant, the Productivity Center assured confidentiality and anonymity to employes who responded to the survey. Indeed, the employes' responses, comments and identities would be exempt from disclosure under another subsection of the public records law. ORS 192.500(2)(c) (exempting from required disclosure reasonably confidential information submitted voluntarily and in confidence to a public body that obliges itself in good faith not to disclose the information). Moreover, disclosure of the PROD 5 Study presently is sought in an atmosphere of conflicting claims by management and employe representatives about potential future misuse of information contained in the advisory study.

It thus appears that the ability of the Executive Department and the Employment Division to conduct future self-critical reviews "would be severely handicapped" if the PROD 5 Study of the Employment Division were made generally available for inspection. Cf. Bay Area Health District v. Griffin, 73 Or App 294, 300, 698 P2d 977 (1985). Although the court in that case held that a portion of a public agency's self-evaluation study was not exempt from disclosure under ORS 192.500(2)(a), because that portion was not based upon candid communications, the court recognized that the public interest in public agencies obtaining candid self-evaluations would be compromised by disclosure of other portions of a consultant's study based on employe comments. The PROD Study is comprised of analysis and excerpts of employe responses and comments, and its wholesale disclosure would be contrary to the public interest identified in the Bay Area Health District case. See also briefs filed by the state in Coos County v. Oregon Department of Fish and Wildlife, 83 Or App 696, ___ P2d ___ (1987) (aff'd. without opinion), Sup. Ct. rev. pending.

On the other hand, we do recognize the interest of the public in knowing what its government's employes think about their jobs. Here, however, that public interest is met to large extent by the availability of the summary of the PROD 5 Study in the April, 1987 Management Review Report prepared by the Executive Department. We also note that the Executive Department has offered to make the PROD 5 Study available for inspection by a representative of the Oregon Public Employees Union under procedures designed to assure confidentiality of employe responses and comments. On balance, the public interest in non-disclosure of the PROD 5 Study clearly outweighs the interest in its wholesale disclosure.

We conclude that the PROD 5 Study is exempt from disclosure under ORS 192.500(2)(a). The petition for a public records disclosure order is denied.

Respectfully submitted,

James E. Mountain Jr.

JAMES E. MOUNTAIN, JR.
Special Counsel to the
Attorney General

cc: Fred Miller, Director, Executive Department
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