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September 25, 1987

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Re: Petition for Public Records Disclosure Order

Dear Susan and Tom:

I write to advise you of the status of the Attorney General's review of Tom's petition for an order directing the State Bar to disclose certain Bar disciplinary action records.

When the Attorney General's office received Tom's petition on September 15, 1987, I notified Susan, in her capacity as the Bar's Assistant General Counsel, of this fact pursuant to ORS 192.470(2). That section of the Public Records Disclosure Law requires such notification. It also requires the public body, whose records are the subject of a disclosure petition, to transmit a copy of the records in issue, " . . . together with a statement of [the public body's] reasons for believing that the public record should not be disclosed." The statute also provides that the Attorney General may consent to the public body's disclosure of " . . . the nature and substance of the public record to the Attorney General," in lieu of transmission of documents.

When I notified Susan by phone of our receipt of Tom's petition, I asked for a description of the nondisclosed records and the Bar's reasons for nondisclosure. Susan said she would be more comfortable communicating with me by letter, with a copy to Tom, because our communication by phone might be regarded as an ex parte contact prohibited by Bar disciplinary

rules. I said that the Public Records Law expressly prompts the Attorney General to act on a disclosure petition in seven days (ORS 192.450(1)), but we have interpreted the law as allowing a petitioner to consent to an extension of time for our action on the petition. Susan said she would send a statement of the Bar's position to me as soon as possible taking into account the fact that the Bar Convention would be held during the seven day period.

I then called Tom to ask if he would consent to an extension of time for the Attorney General's action on the petition in light of Susan's preference to proceed by written communications and the timing conflict with the Bar Convention that all three of us were attending. Tom gave his consent.

I received Susan's written statement of the Bar's position on September 22, 1987. In her letter, Susan described the nondisclosed information and the public records disclosure exemptions on which the Bar relied, but Susan also questioned the authority of the Attorney General to review the Bar's refusal to disclose public record information. After reviewing that letter, I determined that the Attorney General's office needed to review the public record information that was not disclosed to Tom in order to determine whether the Bar had fully complied with the Public Records Disclosure Law.

On September 24, 1987, I telephoned Susan and requested copies of the public record information that was not disclosed to Tom. I said that her position, that the Attorney General lacked authority over Bar public records matters, probably had a bearing on my request. Susan again said that she would be more comfortable addressing my request and assertion of the Attorney General's authority in written communications copied to Tom. Specifically, she referred to me Disciplinary Rule DR 7-110(B) which provides:

> "In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except:
>
> "(1) In the course of official proceedings in the cause.

> "(2) In writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer.
>
> "(3) Only upon adequate notice to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer.
>
> "(4) As otherwise authorized by law or by Section A(4) of Canon 3 of the Code of Judicial Conduct."

I told Susan that I would research the ex parte contacts law.

While I research the question whether DR 7-110 applies in this context, I want to keep this matter moving, if at all possible. I therefore write to both of you, and I ask of Susan that the Bar make available to the Attorney General the public record information that was not disclosed to Tom.

The Attorney General's authority for making this particular request is ORS 192.470(2), discussed above. The Attorney General's authority to invoke ORS 192.470 and to review petitions for disclosure regarding records of the Oregon State Bar is ORS 9.010.

In very express terms, ORS 9.010(1) provides:

> " . . . The bar is subject to the following statutes applicable to public bodies: . . . ORS 192.410 to 192.500 . . . ."

ORS 192.410 to 192.500 are, of course, the Public Records Disclosure Laws. A specific statute in this series of laws, ORS 192.450(1), grants the Attorney General the authority to review denials of disclosure of public records "of a state agency."

For the purposes of the Public Records Disclosure Laws, ORS 192.410(1) defines "public body" as <u>including</u> any state agency and any public agency of this state, and ORS 192.410(2) defines "state agency" as <u>including</u> "every state officer, department, division, bureau, board and commission." These inclusive definitional terms are terms of illustration, not

limitation. As used in the Public Records Law, the terms "public body" and "state agency" also include the Oregon State Bar, which is characterized in ORS 9.010(1) as " . . . a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon." See, Frohnmayer v. SAIF, 294 Or 570, 577, 660 P2d 1061 (1983) (holding that SAIF, a public corporation, was included within a statute referring to state departments, commissions, bureaus, offices thereof, officers, boards and heads of departments or institutions).

In short, the Attorney General has authority to review petitions for disclosure of public records of the Bar. The Bar therefore should comply with ORS 192.470(2) by promptly transmitting to the Attorney General a copy of public record information not disclosed to the petitioner in this case, particularly because "[t]he burden is on the agency to sustain its action." ORS 192.450(1).

Thank you both for your consideration of this letter. I ask that any responses or comments to this letter be submitted to me within seven days.

Sincerely,

Jim

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

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