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November 23, 1987

Patrick O'Neill
The Oregonian
1320 SW Broadway
Portland, Oregon 97201

Re: Petition for Public Records Disclosure Order; Oregon State Health Division Trauma Hospital Records

Dear Mr. O'Neill:

This letter responds to your November 15, 1987 petition for a public records disclosure order. We respectfully deny your petition.

You ask the Attorney General to order the Oregon State Health Division to disclose information that was recorded by the division's staff and its site survey team, during the course of the division's trauma system hospital designation process, on the following forms:

"1. Hospital Summary Sheet.

"2. Hospital Selection Sheet [containing no notations].

"3. Proposal Review Forms . . .

"4. Summary Review Rating Forms.

"5. Standards Compliance Forms.

"6. Reports of Site Survey Team Findings.

"7. Hospital Selection Sheet [containing notations relating to two designated hospitals]."

The Health Division provided copies of these forms to you, but withheld disclosure of information entered on the forms. You seek to inspect information which the Health Division claims is exempt under the internal advisory communications exception of the Public Records Law, ORS 192.502(1) (1987), former ORS 192.500(2)(a). That law exempts from disclosure:

> "(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 . . . ."

As you are aware, our office reviewed the above-listed documents in their completed form, and previously advised the Health Division that it lawfully could withhold disclosure of the information you now wish to inspect. We adhere to that conclusion. Copies of letters setting forth our advice and describing the above-listed documents with more particularity are enclosed and incorporated by this reference.

In your petition, you identify three reasons why we nevertheless should order the Health Division to disclose the information for which it claimed the internal advisory communication. First, you assert that there has been no showing that the undisclosed information is "other than purely factual." Specifically, you say that the findings of the site survey team (compiled in the Reports of Site Survey Team Findings) ". . . must represent a body of fact." We conclude that the findings are not purely factual.

In this particular instance, the findings are subjective assessments more in the nature of opinions of experts. In this particular instance, the findings were made by health care professionals who were asked to conduct an evaluation in the nature of a peer review study. Because medical and hospital peer review studies generally are based on subjective

impressions of the reviewers, the legislature has accorded some forms of medical peer review a broad protection of confidentiality (see, for example, ORS 41.675), and courts have recognized that public bodies conducting other forms of medical peer review lawfully may exempt much of the compiled information from disclosure under the internal advisory communication exemption. Cf. Bay Area Health District v. Griffin, 73 Or App 294, 299, 698 P2d 1977 (1985) (indicating that a hospital consultant's "subjective observations and recommendations and comments" may be treated as "other than purely factual materials.") Therefore, we conclude that the findings in the site survey team reports qualify for exemption under ORS 192.502(1).

Second, you say that no showing has been made that the public interest in encouraging frank communications between officials and employes of the Health Division clearly outweighs the public interest in disclosure. However, as you are aware, we did advise the Health Division that it would have to make such a showing in order to claim the exemption. The Health Division convincingly has asserted that public disclosure of the information you seek to inspect would have a chilling effect on the division's staff and its survey team in the course of conducting review of hospitals competing for trauma system hospital designation. Public disclosure of staff and survey team assessments reasonably is likely to cause staff and survey team members to be less candid and critical in making evaluations, comments and recommendations. In such circumstances, the Health Division would not obtain the type of subjective assessments that it needs from health care professionals in order to carry out its responsibility to implement the trauma hospital system mandated by the legislature.

Moreover, we believe that, with regard to the materials you wish to inspect, the Health Division would be able to prove that the public interest in encouraging frank communication from its staff and survey team clearly outweighs the admittedly strong public interest in knowing how the division is conducting the trauma hospital designation process. In Bay Area Health District v. Griffin, 73 Or App at 300-301, the Court of Appeals concluded that the presumption in favor of disclosure outweighed evidence to the contrary with regard to a small portion of a public hospital's operating room study; but in ordering that this portion be segregated from the remainder of the report, the court said, "It is clear from the testimony that the plaintiff's ability to conduct future self-critical

review would be severely handicapped if information obtained during the review process were made public." We interpret this remark as judicial recognition that such evidence would have provided a basis for nondisclosure of the other portions the public hospital's study, notwithstanding the public interest in disclosure. And our interpretation is buttressed by the fact that the court in Bay Area Health District (73 Or App at 299 and n.3) suggested that if there had been sufficient evidence in the trial court record showing how hospital study reports are used in public hospital decision-making functions, the court may have held that the particular review report was, by its very nature, categorically exempt from disclosure under the internal advisory communication exemption. See, Turner v. Reed, 22 Or App 177, 187, 538 P2d 373 (1975).

Furthermore, in balancing the competing public interests to which you refer in your petition, we are guided by the legislature's weighing of those interests in analogous situations. In our November 4, 1987 letter of advice to the Health Division, we catalogued the analogous statutes that insulate medical peer review records with a protective seal of confidentiality. We do not conclude that trauma hospital designation records are confidential merely because they are similar to other types of records that are deemed confidential by statute. The Oregon Supreme Court's decision in Portland Adventist Hospital v. Sheffield, 303 Or 197, 735 P2d 371 (1987) expressly eschews that type of analysis. We conclude, however, that for the purpose of evaluating the relative weights of the competing public interests in this case, under the internal advisory communication exemption, the public policy of the State of Oregon, as determined by the legislature, is that the societal interest in nondisclosure of medical and hospital peer review information may substantially outweigh the public interest in disclosure. We believe such a situation is presented in this case.

Your third point is that the internal advisory communication exemption should not be applied to communications from the site survey team because the survey team members are not "employes" of the Health Division. By its statutory terms, the internal advisory communications exemption applies to certain preliminary advisory communications "within a public body." ORS 192.502(1). The statute further describes the term "within a public body" when it states that the exemption is conditional upon a showing that the public interest in encouraging frank communication "between officials and employees of public bodies" clearly outweighs the public

interest in disclosure. ORS 192.502(1). We conclude that under the particular circumstances of this case, and for the purposes of application of the Public Records Law, the site survey team's subjective evaluations constitute communications "within" the Health Division.

We acknowledge that the site survey team members are not state "employees," as that term is used in laws generally addressing aspects of state employment relations. That fact does not necessarily resolve the issue for purposes of other laws. For example, by contract, the site survey team members were deemed to be agents of the state for purposes of tort liability coverage under the Oregon Tort Claims Act. The reasons that justify treating these agents of the Health Division in the same manner as division officers and employes for tort liability purposes provide the legal basis for determining that the communications between the division and its site survey team are communications within the division for purposes of the Public Records Law.

In Samuel v. Frohnmayer, 82 Or App 375, 728 P2d 97 (1986), Sup. Ct. rev. den., 303 Or 261 (1987), the Oregon Court of Appeals held that a person who performed certain investigatory functions at the request of the Workers' Compensation Department should be afforded the same tort liability coverage given board officers and employes. The person performed peer review of chiropractic billings. The court concluded that the person was an agent who was entitled to officer/employe treatment under either of two theories. First, the department exercised a substantial amount of control over the investigation. Second, the person performed the investigation on behalf of the department rather than merely for the department. Under these circumstances, the work of the peer review investigator was deemed to be the work of the state agency.

Similarly, in the trauma system hospital designation process, the work of the site survey team was the work of the Health Division. As the documents disclosed to you clearly show, the division exercised tight control over the site survey team's schedule, investigatory process, areas of inquiry, and scope of investigation. Moreover, it is clear that the site survey team performed a delegated, staff-like function rather than a mere assistance service. Under the particular circumstances presented here, the site survey team operated as a body within the Health Division, and its communications with the division should be treated in the same manner as the

division staff's communications with division decisionmakers. This interpretation of "within a public body," albeit reached in construing an exemption, is consistent with a liberal interpretation of the terms "public body" and "public record," as those terms are to be applied in determining the scope of the disclosure requirements of the Public Records Law.

For all the above-stated reasons, we respectfully decline to order the Health Division to disclose the information it withheld under the internal advisory communications exemption. If you have any questions, please give me a call.

Very truly yours,

James E. Mountain Jr.

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

JEM:cm
Enclosure
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