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February 16, 2010

Brian D. Rendon
SID # 7481201
3405 Deer Park Dr. S.E.
Salem, OR 97310

Re: Petition for Public Records Disclosure Order:
Board of Parole and Post-Prison Supervision Records

Dear Mr. Rendon:

This letter is the Attorney General's Order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on December 4, 2009, asks the Attorney General to order the Board of Parole and Post-Prison Supervision ("Board") to produce a "Formal Advice Letter from DOJ regarding the Board's Authority to offenders, DOJ File No. 255-001-GG089002." For the following reasons, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Any person who is denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.450(1).

In its response to your request, the Board stated that "[w]e have reviewed the requested record and have determined that the record is a confidential communication from the Board's attorney subject to the attorney-client privilege under ORS 40.225. Accordingly, the record you have requested is exempt from disclosure under ORS 192.502(9)(a), and we deny your request."

ORS 192.502(9) unconditionally exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." Confidential communications between a lawyer and client "for the purpose of facilitating the rendition of professional legal services" are privileged under Oregon law. ORS 40.225 (OEC 503). A person upon whom ORS 40.225 to 40.295 confer a

privilege waives the privilege if the person voluntarily discloses or consents to disclosure of any *significant part* of the matter or communication. ORS 40.280 (OEC 511). Consequently, disclosure of the record itself waives the privilege. *Springfield School District # 19 v. Guard Publishing Co.*, 156 Or App 176, 182-83, 967 P2d 510 (1998). Moreover, disclosure of a summary of a report may act as a waiver of the privilege if the information contained in the summary is equivalent to the privileged information. *Oregonian Publishing v. Portland School Dist. No. 1J*, 152 Or App 135, 142-43, 952 P2d 66 (1998), *aff'd on other grounds*, 329 Or 393, 987 P2d 480 (1999).

You contend that the lawyer-client privilege does not apply to the advice letter, either because the advice was never intended to be confidential or because the Board has waived the privilege. You base both of these contentions on the fact that when the Board adopted temporary administrative rule OAR 255-075-0079 in June 2004, it referred to the advice letter in the "Documents Relied Upon" section of the Statement of Need and Justification ("Statement of Need"), describing it as "[f]ormal advice from the Department of Justice regarding the Board's authority to sanction offenders. DOJ File No. 255-001-GG0890-02."

You first contend that by "informing the public that the Board relied on that formal advice letter to adopt the rule," "[t]he Board has relayed [that information] to outsiders" and "divulged [it] to third persons," meaning that it cannot be considered confidential. We disagree. In two public records orders issued soon after the Board's adoption of the temporary rule, we denied similar petitions for disclosure of this advice. Public Records Order, August 9, 2004, Wilson; Public Records Order, August 9, 2004, Davilla (copies attached). Michael Washington, the Board's chair at the time the advice was provided, confirmed to us that the advice letter was a confidential communication between the Board's lawyer and the Board, which was not intended to be disclosed to third persons, and that the purpose of the communication was to render professional legal services to the client. We therefore concluded that the letter was privileged under OEC Rule 503, and we adhere to that conclusion here.

You next contend that even if the communication was intended to be confidential, the Board's statement constitutes a waiver of privilege under OEC 511. As noted above, waiver only occurs with voluntary disclosure of any "significant part" of the communication. As we observed in our 2004 orders, "[a]n agency's mere acknowledgement that it relied partly on a communication from counsel to formulate a rule or amendment to a rule does not constitute disclosure of a significant part of the communication itself." PRO (Wilson) at 2, PRO (Davilla) at 2.

We do not believe that ORS 183.335(5)(d), to which you cite in your petition, compels a different result. That statute requires an agency adopting a temporary rule to include "[a] list of the principal documents, reports or studied, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule, and *a statement of the location at which those documents are available for public inspection.*" (Emphasis added.) You contend that "[i]n relying on the formal advice from the DOJ to adopt OAR 255-075-0079, in then citing that document as a basis on which that rule was being adopted, and in ORS 183.335(5)(d)'s expressly declaring that the agency needed to state where those documents are available for public

inspection, the Board has 'voluntarily disclose[d] . . . [a] significant part of the matter or communication.'"

Privilege is waived only by voluntary disclosure or voluntary consent to disclosure. Compelled disclosure does not waive any privilege under the terms of OEC 511. The Board has not actually disclosed the advice you request. Nor has the Board subjectively consented to disclosure of the advice you request – the Board states that it did not intend to permit examination of the advice when it listed the advice in its Statement of Need. We might nevertheless find a waiver of the privilege if any reasonable person would have understood both:

(1) that the Board was not compelled to list the advice on its Statement of Need; and

(2) that the effect of listing the advice would be to permit public inspection of the advice.

However, a reasonable person could have come to different conclusions with respect to each of these propositions. With regard to the first proposition, if an agency has actually relied on the advice of its attorney, ORS 183.335(5)(d) could reasonably be construed to *compel* the agency to list that advice in the statement of need. Such a reasonable perception of compulsion would preclude the conclusion that the agency's act was voluntary. With regard to the second proposition, it is not clear that the provisions of ORS 183.335(5)(d) are intended to override privileges or other confidentiality protections. Moreover, the form on which the Board actually listed the advice you are seeking did not even mention the possibility of public access to the listed documents. We see no objective reason why the Board was required to understand that listing this advice in its Statement of Need would require public disclosure of the advice.

We emphasize that we are not purporting to determine whether the Board was actually compelled to list legal advice on its Statement of Need. Nor are we deciding whether ORS 183.355(5)(d) creates a public right of access apart from that conferred by the Public Records Law. Our authority under ORS 192.450 is limited to application of the Public Records Law. That law exempts from disclosure documents that are protected by the lawyer-client privilege. ORS 192.502(9). We find that the record you are seeking is privileged and that the privilege has not been waived. As a result, we respectfully deny your petition.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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Enclosure
c: Jeremiah Stromberg, Board of Parole and Post-Prison Supervision