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DEPARTMENT OF JUSTICE

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July 6, 1982

Leslie L. Zaitz
The Oregonian
1320 S. W. Broadway
Portland, Oregon 97201

Dear Mr. Zaitz:

This constitutes the order of the Attorney General in response to your petition dated June 28, 1982, for disclosure of public records. You request us to order the Department of Economic Development to make available for inspection the report on the Attorney General's investigation of Warren H. Merrill.

This report is a public record, and its disclosure is required upon request unless an exemption from the requirement can be found in ORS 192.500. Three exemptions are possibly applicable. They are ORS 192.500(1)(a), records relating to litigation or potential litigation; 192.500(2)(a), preliminary and advisory intergovernmental communications; and 192.500(2)(h), which lists other statutes under which disclosure is prohibited or restricted.

Any report as the result of an investigation is potentially, and at least arguably, within the potential litigation exemption of ORS 192.500(1)(a). This exemption does not apply, however, "if the public interest requires disclosure in the particular instance."

The report which you seek is also clearly preliminary and advisory, within the language of ORS 192.500(2)(a), but a balancing test is also applicable there, and the scales to be used are weighted in favor of disclosure.

The third exemption which we consider is under ORS 192.500(2)(h), which incorporates ORS 40.225 to 40.295. Those statutes include the lawyer-client privilege set forth in ORS 40.225. ORS 40.225(2) makes it clear that the privilege belongs to the client. The client may waive the privilege (ORS 40.280) but the lawyer cannot. If the privilege is not waived, the exemption is absolute: neither the preliminary language of ORS 192.500(2) nor paragraph (h) itself contains any language providing for a balancing test. If the lawyer-client privilege is applicable, the Attorney General cannot consider whether or not the information should be disclosed in the public interest, but must deny your petition.

The investigation report which you seek to have disclosed was prepared by this office at the request of its client, the Department of Economic Development. It is our work product and our legal advice to our client. It is clearly within the attorney-client privilege under ORS 40.225, and thus exempt from disclosure under ORS 192.500(2)(h).

You point out that the Department of Economic Development previously disclosed another investigation report concerning Mr. Merrill furnished to it in August 1981 by this office. The subject matter of that previous report differs from the subject matter of the current report, and its voluntary disclosure does not waive the privilege as to the current report.

In view of our conclusion as to ORS 192.500(2)(h) and 40.280, it is unnecessary for us to further consider ORS 192.500(1)(a) and (2)(a). Your petition is denied.

Sincerely,

Stanton F. Long
Deputy Attorney General

SFL:JAR:nh
cc: Douglas Carter
William F. Hoelscher