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September 26, 1986

Gene Maudlin
Public Utility Commissioner
Commissioner's Office
Labor & Industries Building
Salem, Oregon 97310

John W. Stephens
Attorney at Law
510 Park/Washington Building
519 S.W. Park Avenue
Portland, Oregon 97205

Re: Citizens' Utility Board Request for Order of Disclosure of Public Records (Dated September 5, 1986)

Gentlemen:

This letter responds to the Citizens' Utility Board's petition for an Attorney General's order directing the Public Utility Commissioner to disclose, pursuant to the public records disclosure law (ORS 192.410 et seq.), a particular document in the custody of the Commissioner. The Citizens' Utility Board's petition was dated September 5, 1986, and was received by the Department of Justice on September 8, 1986. By agreement of counsel, the time for responding to the petition was extended to September 26, 1986. For the reasons discussed below, we direct the Public Utility Commissioner to disclose the document that is the subject of the Citizens' Utility Board's petition.

The document sought to be disclosed is a memorandum, dated December 20, 1985, to the Public Utility Commissioner from Assistant Attorney General John H. Socolofsky. In the petition for an order of disclosure, Mr. Stephens, the attorney for the Citizens' Utility Board, states that he inspected this document on August 15, 1986, but was

denied a copy of the memorandum at that time. An August 27, 1986 letter to Mr. Stephens from Assistant Commissioner William DuValle states that a secretary in the Commissioner's office did not make a copy of the memorandum for Mr. Stephens because a question arose as to whether the memorandum was a public record exempt from disclosure requirements. The August 27, 1986 letter further states that the Commissioner determined that the memorandum was a public record exempt from disclosure under the Public Records Law. The Commissioner thus denied the Citizens' Utility Board's request for disclosure.

In its ensuing petition to the Attorney General, the Citizens' Utility Board contends that the Public Utility Commissioner waived any prerogative to claim that the assistant attorney general's memorandum was exempt from disclosure because Mr. Stephens reviewed the memorandum on August 15, 1986, when he was granted permission to review the Commissioner's file in a particular case, PUC Docket No. UP 30. The Commissioner, on the other hand, contends that the memorandum is exempt from disclosure under ORS 192.500(2)(a).

We have reviewed the memorandum sought to be disclosed, the case law decision cited in the Citizens' Utility Board's petition, and the Commissioner's claim of exemption. The petition does not set forth sufficient facts upon which to base a finding of a waiver. The decision cited by the petitioner, Cooper v. Department of the Navy, 594 F2d 484 (5th Cir 1979), is neither controlling nor persuasive; it is distinguishable from this case both on its facts and on its law. The issue of waiver need not be developed further, however, because we conclude that the memorandum that is the subject of the petition is not exempt from disclosure by virtue of ORS 192.500(2)(a).

ORS 192.500(2)(a) exempts some types of interagency communications from the disclosure generally required by the Public Records Law. It exempts:

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

This exemption, however, is narrow and conditional:

> " . . . the 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 clearly outweighs the public interest in disclosure."

The petitioner seeks disclosure of a communication between public bodies of an advisory nature that covers other than purely factual materials; the memorandum to the Public Utility Commissioner contains an assistant attorney general's comments on, and a legal assessment of, a draft order prepared by the Public Utility Commissioner. The memorandum was a communication preliminary to a final agency action; the Commissioner entered a revised final order after he received the assistant attorney general's comments on the prior draft order. Disclosure, nevertheless, is required because in this particular instance, the Commissioner has not demonstrated that the public interest in encouraging frank communications between the Attorney General's office and the Commissioner (the interest to be served by nondisclosure) clearly outweighs the public interest in disclosure. Said another way, the Commissioner has not carried his burden of showing that his agency's incidental right to be free from unreasonable interference with its operation clearly outweighs the public's interest in knowing how the Public Utility Commissioner is carrying out his official functions. See MacEwan v. Holm, 226 Or 27, 45-46, 359 P2d 413 (1961).

In assessing the competing public interests, we first assess the need for confidentiality in the particular instance, and we then determine the weight of the public's need to know about a particular official action. In this particular instance, at this particular time, the need to preserve the confidentiality of the December 20, 1985 memorandum appears to be relatively weak.

Here, the assistant attorney general's memorandum sets out the state's legal position with regard to a draft order involving facts and legal issues that themselves were matters of public record in a file made available to the petitioner. Disclosure of the memorandum is sought

after the filing of a revised order, rather than prior to entry of the order when a colorable argument might be made that disclosure would interfere with agency work-in-progress. Furthermore, although prior disclosure of the memorandum to the petitioner does not necessarily constitute a waiver of an exemption from the disclosure requirements of the Public Records Law, prior disclosure is a factor to be taken into account in assessing the need for confidentiality. Here the prior disclosure diminishes the weight of the public interest in encouraging frank communications because the assistant attorney general is less likely to feel inhibited by a renewed disclosure of a previously revealed memorandum.

Moreover, it is evident that disclosure of the assistant attorney general's legal evaluation at one point in a PUC proceeding does not necessarily compromise his performance of his role at subsequent stages, because it is his responsibility at all stages of a proceeding to present the state's legal position, while PUC staff develops and presents agency policy matters. In this particular instance, it does not clearly appear that disclosure of the December 20, 1985 memorandum would or should discourage effective communications between the Commissioner and the Attorney General's office.

On the other side of the public interest scale, the public's need to know seems relatively substantial. In assessing the public interest in disclosure of interagency advisory communications, preliminary to final action, we determine the relationship between the communication sought to be disclosed and any final action. The public's interest in knowing how a particular decision was made is stronger than its interest in learning about an official's thoughts and ideas, in merely formative stages, that may never be implemented. The memorandum at issue here is more closely related to impending final agency action than to merely introductory agency processes. Correspondingly, the public interest in disclosure of the memorandum is strong. On balance, the public interest in disclosure is not clearly outweighed, in this particular instance, by the public interest in nondisclosure.

The petition of the Citizens' Utility Board is granted, and the Attorney General hereby directs the Public Utility

Commissioner to disclose to the Citizens' Utility Board the memorandum at issue in this matter. If you have any further question, please do not hesitate to contact me.

Very truly yours,

James E. Mountain Jr

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

JEM/js

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September 19, 1986

John W. Stephens
Attorney at Law
510 Park/Washington Building
519 SW Park Avenue
Portland, Oregon 97205

Re: Citizens Utility Board Request for Order of Disclosure of Public Records (Dated September 5, 1986)

Dear Mr. Stephens:

This letter confirms our telephone conversation of this date, wherein you agreed to a second extension of time within which the Attorney General must respond to your request for an order directing the Public Utility Commissioner to disclose a memorandum to the Commissioner from Assistant Attorney General Jack Socolofsky, dated December 20, 1985.

A response to your request would have been due on September 19, 1986. You agreed to an extension of time to September 26, 1986.

Thank you for your professional courtesy.

Sincerely,

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

JEM:cm

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September 15, 1986

John W. Stephens
Attorney at Law
510 Park/Washington Building
519 SW Park Avenue
Portland, Oregon 97205

Re: Citizens Utility Board Request for Order of Disclosure of Public Records (Dated September 5, 1986)

Dear Mr. Stephens:

This letter confirms our September 12, 1986 telephone conversation. You agreed to an extension of the time within which the Attorney General must respond to your request for an order directing the Public Utility Commissioner to disclose a memorandum to the Commissioner from Assistant Attorney General Jack Socolofsky, dated December 20, 1985.

A response to your request would have been due on September 15, 1986. You agreed to an extension of time to September 19, 1986.

Thank you for your professional courtesy.

Sincerely,

James E. Mountain Jr.

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

JEM:cm