DAVE FROHNMAYER
ATTORNEY GENERAL
STATE OF OREGON

JAMES E. MOUNTAIN, JR.
DEPUTY ATTORNEY GENERAL

# DEPARTMENT OF JUSTICE

Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400

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Thomas C. Howser
607 Siskiyou Boulevard
P.O. Box 640
Ashland, OR 97520

George Riemer
General Counsel
Oregon State Bar
5200 S.W. Meadows Road
P.O. Box 1689
Lake Oswego, OR 97035-0889

**Re: Petition for Public Records Disclosure Order; Oregon State Bar Records**

Dear Mr. Howser and Mr. Riemer:

This letter is the Attorney General's order on Mr. Howser's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition asks the Attorney General to direct the Oregon State Bar (OSB) to disclose specified records compiled in the course of OSB's disciplinary proceeding concerning David H. Leonard:

> "1. All notes, analysis and recommendations of the Local Professional Responsibility Committee (LPRC) investigator and committee in the possession of the Oregon State Bar; and
>
> "2. All records of findings and recommendations of Oregon State Bar General Counsel Susan D. Isaacs and members of the State Professional Responsibility Board having to do with a meeting on February 28, 1987 and any other meetings, wherein the case of David H. Leonard were considered."

Pursuant to ORS 192.470(2) and the Oregon Supreme Court's decision in State ex rel Frohnmayer v. Oregon State Bar, 307 Or 304, ___P2d___ (1989), the OSB has transmitted to us copies of the requested records. For the reasons stated below, we grant the petition in part and deny it in part.

The Public Records Law confers a right to inspect public records of a public body in Oregon, subject to certain exceptions. ORS 192.420. If a public record contains material which is exempt from disclosure together with nonexempt material, it is the duty of the public body to separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. ORS 192.505; Turner v. Reed, 22 Or App 177, 186 n 8, 538 P2d 373 (1975). We conclude in this instance that some of the OSB records that Mr. Howser wishes to inspect contain information that is exempt from disclosure under ORS 192.502(1) and (8).

1. The Records Requested

We have reviewed the OSB records in question. These records fall into several categories.

First, there is a packet of correspondence involving members of the Clackamas/Linn/Marion County Local Professional Responsibility Committee (LPRC), the OSB's then-Assistant General Counsel, and the requestor. The OSB claims no exemption as to these records and, therefore, they must be disclosed.

Second, the records contain 20 pages of what appear to be the LPRC investigator's handwritten notes on his investigation of the complaint against Mr. Leonard. As to the first 19 pages, which contain purely factual materials, the OSB claims no exemption. Those records must be disclosed. The last page, however, contains notes on the LPRC's recommendation regarding the charges against Mr. Leonard. The OSB claims that those notes are exempt under ORS 192.502(1).

Third, there is a February 11, 1987, memorandum from the Clackamas/Linn/Marion County LPRC to the State Professional Responsibility Board (SPRB) concerning the charges against Mr. Leonard. That memorandum consists of several sections of purely factual material (summaries of the investigation, complaint, response to the complaint, and the pending civil

litigation; and the LPRC's findings of fact on the charges), as to which the OSB claims no exemption. Those portions of the memorandum must be disclosed. The memorandum also contains sections entitled "Ethics Analysis" on the three charges; the LPRC's "Disposition" (i.e., recommendation) on those charges; and the LPRC's "Summary," which sums up the LPRC's recommendations. The OSB claims that all of these sections are exempt under ORS 192.502(1).

Fourth, there is a February 18, 1987, memorandum from Susan D. Isaacs, then-Assistant General Counsel, to the SPRB. That memorandum is divided into four sections: "Recommended Action," "Background Information," "Discussion," and "Summary." The OSB claims no exemption as to the "Background Information" and as to approximately eight lines of the "Discussion." Those portions of the memorandum contain purely factual materials and must be disclosed. The OSB asserts that the remainder of the memorandum, containing Ms. Isaacs' analysis of the charges against Mr. Leonard and her recommendation to the SPRB, constitutes exempt internal advisory communications. That memorandum also includes as an attachment Ms. Isaacs' October 21, 1986, memorandum to the SPRB, entitled "Complaint Summary." The OSB claims no exemption as to the first two sections of that memorandum: "Summary of Complaint" and "Summary of Response." Those sections are purely factual and must be disclosed. The OSB, however, claims that the remaining portions of the memorandum--the "Ethics Analysis" and "Recommendation"--are exempt internal advisory communications.

Fifth, there is an August 4, 1987, memorandum from Mary Burns Tomlinson, Assistant General Counsel, to Ms. Isaacs, discussing strategic issues concerning the trial of the charges against Mr. Leonard. The OSB claims that this memorandum is wholly exempt from disclosure both under ORS 192.502(1) and under the attorney-client privilege, ORS 40.225, which is incorporated into the Public Records Law, see ORS 192.502(8).

Finally, there is a February 3, 1989, memorandum from Jeffrey D. Sapiro, Disciplinary Counsel, to the SPRB. That memorandum contains Mr. Sapiro's analysis of the trial panel's decision on the charges against Mr. Leonard, and Mr. Sapiro's recommendations concerning review of the trial panel's decision by the Oregon Supreme Court. The OSB claims that the memorandum is wholly exempt from disclosure under the attorney-client privilege.

We turn now to the application of the claimed exemptions.

2. Internal Advisory Communications

ORS 192.502(1) exempts:

> "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."

Under this statute, a public record is exempt from disclosure if (1) it is a communication within a public body or between public bodies; (2) it is of an advisory nature preliminary to any final agency action; (3) it covers other than purely factual materials; and (4) in the particular instance, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure.

As already noted, the OSB asserts that some of the requested records are internal advisory communications partially or entirely exempt from disclosure under ORS 192.502(1). The portions as to which OSB claims this exemption contain analysis by the LPRC, Assistant General Counsel and Disciplinary Counsel of the charges against Mr. Leonard, and recommendations on the disposition of those charges. All of these portions satisfy the first three elements of the ORS 192.502(1) exemption set forth above. The issue here is whether "in [this] particular instance the public interest in encouraging frank communication between officials and employes of public bodies clearly outweighs the public interest in disclosure." Id.

The OSB contends that maintaining the confidentiality of the records as to which it claims exemption is essential for the OSB's discharge of its disciplinary functions. For the reasons that follow, we concur.

The claimed exemption rests on the respective roles of the LPRC, the SPRB, and Disciplinary Counsel in the disciplinary process, and the need for frank communications in that process. An LPRC, created pursuant to ORS 9.532(1) and OSB Rule 2.3(a)(1), has the duty

> ". . . to investigate promptly all matters submitted to it by the SPRB or Disciplinary Counsel. Whether or not a majority of the membership of an LPRC are of the opinion that there is probable cause for a disciplinary proceeding by the Bar, a written report with the specific findings and recommendations of the LPRC shall be made promptly to the SPRB by the LPRC."

OSB Rule 2.3(a)(2). See also OSB Rule 2.5(e)(LPRC investigations and reports). The SPRB, created pursuant to ORS 9.532(2) and OSB Rule 2.3(b)(1),

> ". . . shall supervise the investigation of complaints, allegations, or instances of alleged misconduct on the part of attorneys and act on such matters as it may deem appropriate."

OSB Rule 2.3(b)(2). Further:

> "The SPRB shall have the authority to dismiss complaints, allegations or instances of alleged misconduct against attorneys, refer matters to Disciplinary Counsel or LPRCs for investigation, issue admonitions for misconduct, refer matters to the State Lawyers Assistance Committee, or institute disciplinary proceedings against any attorney."

OSB Rule 2.3(b)(3)(A). When the SPRB receives the LPRC's report on its investigation:

> "The SPRB shall evaluate the complaint based on the LPRC's report and the report of Disciplinary Counsel to determine whether probable cause exists to believe misconduct has occurred. The SPRB shall either dismiss the complaint, have it investigated further, admonish the attorney, or approve the filing of a formal complaint against the attorney."

OSB Rule 2.5(f)(1). If the SPRB determines that a formal complaint should be filed against an attorney, it instructs Disciplinary Counsel to appoint Bar Counsel for that purpose. OSB Rule 2.5(h).

The OSB argues that the LPRCs, the SPRB and Disciplinary Counsel [1] must be free to communicate candidly their analysis of the charges against an accused attorney and their dispositional recommendations in order to perform their respective functions in the OSB's disciplinary process. Fear that these communications could be disclosed to an accused attorney and used, for instance, for unintended strategic purposes during a disciplinary proceeding would deter the LPRCs, the SPRB and Disciplinary Counsel from giving the frank and uninhibited opinions essential to the SPRB's decision on the appropriate course of action under the OSB's rules of procedure.

We conclude that, in this instance--a still-active disciplinary proceeding against an attorney--the OSB's ability properly to discharge its disciplinary responsibilities would be substantially prejudiced by disclosure of the portions of the requested documents containing analysis of the charges against Mr. Leonard and recommendations on the disposition of those charges. The public interest in allowing the LPRC, SPRB, and Disciplinary Counsel to exchange frank comments and recommendations concerning proposed disciplinary action would be significantly undermined if Mr. Leonard could obtain access to these candid analyses, strategies and recommendations during the pendency of the disciplinary proceeding.

Our comments in the October 21, 1988, Public Records Order (Best) apply equally here:

> "This request readily contrasts with cases in which the Oregon Court of Appeals has rejected claims of exemption under the 'internal advisory communication' exemption. For instance, in Bay Area Health District v. Griffin, 73 Or App 294, 698 P2d 977 (1985), the court held that the records were not exempt because the source of the non-factual material in dispute was not frank communications. 73 Or App at 300. Our detailed review of the documents here persuades us that portions of those documents did result from frank

> communications of the type protected by ORS 192.502(1). Nor is this a case, such as Coos County v. Ore. Dept. of Fish and Wildlife, 86 Or App 168, 739 P2d 47, rev den 304 Or 186 (1987), in which the interest in confidentiality is merely the avoidance of potential embarrassment to the agency or its employes. See 86 Or App at 173. Rather, the portions of the documents that we have concluded are exempt result from frank communications that go to the heart of the agency's regulatory functions."

Id. at 4.

We recognize the public's interest in knowing what the LPRC, SPRB and Disciplinary Counsel think about a complaint against an attorney. In this instance, however, we conclude that the public interest in disclosure is clearly outweighed by the public's interest in encouraging frank communication among the various arms of the OSB to effectuate the OSB's accomplishment of its disciplinary responsibilities.

3. Privileged Communications

ORS 192.502(8) exempts:

> "Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law."

This provision incorporates into the Public Records Law various prohibitions, restrictions, and privileges that exist elsewhere in Oregon law.

The relevant privilege here is the attorney-client privilege, ORS 40.225. Two of the records at issue fall within this privilege. First, the August 4, 1987, memorandum from Mary Burns Tomlinson, Assistant General Counsel, to Susan D. Isaacs, then-Assistant General Counsel, contains communications between lawyers representing the OSB "made for the purpose of facilitating the rendition of professional legal services to the client." ORS 40.225(2)(e). Second, the February 3, 1989, memorandum from Jeffrey D. Sapiro, Disciplinary Counsel, to the SPRB is a communication directly from lawyer to client constituting the lawyer's rendition of professional legal

services to the client. ORS 40.225(2)(a).[2] Because these memoranda are confidential communications under the attorney-client privilege, they are exempt from disclosure under the Public Records Law. ORS 192.502(8).

4. Conclusion

We conclude that some of the OSB records that Mr. Howser wishes to inspect contain information exempt from disclosure under ORS 192.502(1) and (8). The exempt materials are:

(1) One page of handwritten notes regarding the LPRC's recommendation on the charges against Mr. Leonard--ORS 192.502(1);

(2) Portions of the February 11, 1987, memorandum from the LPRC to the SPRB entitled "Ethics Analysis" on the three charges, "Disposition" on each charge, and "Summary"--ORS 192.502(1);

(3) Portions of the February 18, 1987, memorandum from Susan D. Isaacs to the SPRB entitled "Recommended Action," "Discussion" (except for the first four sentences), and "Summary"--ORS 192.502(1);

(4) Portions of the October 21, 1986, memorandum from Susan D. Isaacs to the SPRB (attached to the February 18, 1987, memorandum) entitled "Ethics Analysis" and "Recommendation"--ORS 192.502(1);

(5) The entire August 4, 1987, memorandum from Mary Burns Tomlinson to Susan D. Isaacs--ORS 192.502(1), (8); and

(6) The entire February 3, 1989, memorandum from Jeffrey D. Sapiro to the SPRB--ORS 192.502(8).

Other information in the records, however, is "purely factual material" and not exempt from disclosure. Therefore, the Attorney General grants Mr. Howser's petition in part. The OSB must separate the exempt and nonexempt material and make the nonexempt material available for inspection by Mr. Howser. We understand that the OSB is completely willing to do so. ORS

192.450(2) affords the OSB seven days from the issuance of this order in which to comply.

Respectfully submitted,

JAMES E. MOUNTAIN, JR.
Deputy Attorney General

JEM:RDW:cm
5446a
cc: Jeffrey D. Sapiro
Disciplinary Counsel
Oregon State Bar
5200 S.W. Meadows Rd.
P.O. Box 1689
Lake Oswego, OR 97035-0889

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[1] In late 1987, the functions previously performed under the title "General Counsel" were divided between "General Counsel" and "Disciplinary Counsel." On November 10, 1987, the OSB's rules were amended to reflect that change. The OSB informs us that, at all relevant times, Ms. Isaacs and Ms. Tomlinson performed functions that now would be assigned to Disciplinary Counsel.

[2] Because the internal advisory communications exemption would exempt only portions of this document, the OSB relies principally on the attorney-client privilege, which renders the entire document confidential.