ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDERICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4400

January 23, 2019

VIA EMAIL ONLY: baldwin_atty@embarqmail.com

Russell Baldwin
P.O. Box 1242
Lincoln City, OR 97367

Re: Petition for Public Records Disclosure Order
Oregon Judicial Department
DOJ File No. 198040-GA0006-19

Dear Mr. Baldwin:

This letter is the Attorney General's order responding to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received January 16, 2019, asks the Attorney General to order the Oregon Judicial Department (OJD) to disclose approximately one page of an e-mail redacted from records disclosed to you by OJD. For the reasons discussed below, we respectfully deny your petition.

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(1). The law is a disclosure law, and exemptions from disclosure must be express. When a public record contains both exempt and nonexempt information, the public body must separate and disclose the nonexempt material. ORS 192.338. Any person denied the right to inspect or to receive a copy of a public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.411(1). The agency carries the burden to sustain any such denial. *Id.*

We contacted Tim Lewis, OJD Staff Counsel, regarding your petition. He explained that OJD disclosed more than 570 pages of e-mails to you in response to your records request. The only material OJD withheld from disclosure was the portion redacted from the e-mail at issue here. Mr. Lewis explained that the redacted material consists of an internal advisory communication that is exempt from disclosure under ORS 192.355(1).

ORS 192.355(1) exempts from disclosure:

> 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 employees of public bodies clearly outweighs the public interest in disclosure.

We have previously observed that "[t]he central thrust of this exemption is to protect the confidentiality of frank and uninhibited advice and observations a public employee gives to a superior or associate." *Attorney General's Public Records and Meeting Manual* at 67 (2014) ("*Manual*"). To determine whether the exemption is available, we assess whether disclosure will inhibit communications among employees "so as to interfere with the free flow of information and ideas that the public body needs for its efficient operation." *Id.* A public record is exempt from disclosure under ORS 192.355(1) only if it meets all of the following criteria:

1. It is a frank 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.

We have reviewed the redacted material in this case and conclude that it clearly satisfies the first two criteria. The e-mail is a frank communication between a circuit court judge and the Pro Tem Manager of OJD's Office of the State Court Administrator. The redacted material is advisory in nature and preliminary to a decision regarding the assignment of a new judge to an ongoing case. Specifically, the e-mail conveys the judge's candid observations and assessments of various aspects of the case to facilitate the appointment of a qualified replacement.

With respect to the third criterion, we identified a small amount of redacted material that appears to be purely factual. Mr. Lewis explained that – consistent with our prior guidance – this non-advisory material was redacted because disclosure would effectively disclose the substance of a communication that is otherwise exempt under ORS 192.502(1). *See Manual* at 67 (it may be appropriate to redact a communication that is not advisory in itself, if disclosing that communication would effectively disclose the substance of an exempt communication). We observe that the redacted factual information is intertwined with the judge's assessment and is used to support the judge's advice to the Pro Tem Manager. Given the particular context in which the factual material appears in the e-mail, we are satisfied that disclosing it would effectively reveal the substance of an otherwise exempt communication. And taken as a whole, the redacted communication does cover other than purely factual material. We therefore conclude the redacted material satisfies the third criterion.

Regarding the final criterion, Mr. Lewis argues that the public interest strongly favors nondisclosure in this instance. He asserts that disclosing the redacted material will have a substantial chilling effect on a judge's willingness to share frank and candid assessments about particular cases that require the assignment of new judges. This, in turn, would impair OJD's ability to make informed decisions regarding the assignment of suitable judges. Mr. Lewis acknowledges a general public interest in transparency regarding the appointment of judges. But he notes that in many cases the public has a greater interest in the assignment of the most suitable judges. He argues that this is such a case and that withholding the redacted information better serves the public interest. In contrast, he argues that disclosing the redacted information would do little to promote the public's general interest in transparency. Finally, although the burden is on OJD to justify its withholding of material, Mr. Lewis observes that your petition does not mention the public's interest in disclosure in this instance.

Under the circumstances, we conclude that the redacted material also satisfies the final criterion of the internal advisory communications exemption. The public has a considerable interest in the appointment of trial judges to facilitate fair and efficient operation of the trial courts – a matter of substantial public concern. Disclosure threatens to chill uninhibited judicial assessments and advice regarding individual cases in the future. This chilling effect would result in less-informed appointment decisions, which could, in turn, detract from the efficient operation of the courts. In contrast, our review of the redacted material reveals that the public interest in disclosure is relatively low in this particular instance. Your initial records request appears to have been driven by your personal interest in particular cases, and not any general public interest. Accordingly, we conclude the public interest in encouraging frank communications within OJD clearly outweighs the public interest in disclosure of the redacted information in this case.

For the foregoing reasons, we conclude the redacted material is an OJD internal advisory communication that is exempt from disclosure under ORS 192.355(1). We therefore respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn:nog/DM9404475
c via email only: Tim Lewis, OJD