192.502(1)
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May 23, 1994

David C. Noren
Washington County Counsel
Public Services Bldg.
155 N. First Ave., Suite 340
Hillsboro, OR 97124

Re: *Petition for Public Records Disclosure Order: Department of Land Conservation and Development*

Dear Mr. Noren:

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 May 9, 1994,[1/] asks the Attorney General to direct the Department of Land Conservation and Development (DLCD) to produce copies of "all documents in the possession of [DLCD] that implicate or analyze the limitations on the rule making authority of LCDC arising out of 1993 Oregon Laws Chapter 792 (HB 3661)." For the reasons that follow, we respectfully deny your petition.

1. **Records Requested**

DLCD has located three records that fall within your request.[2/] Each of these

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[1/] We appreciate your agreeing to extend the time within which this office otherwise would have had to respond to the petition.

[2/] A fourth document, a letter dated February 14, 1994, from Celeste J. Doyle to Brent Curtis, Washington County Planning Department, and Roy Burns, Lane County Planning Department, arguably would come within the scope of your petition. Because you have appended that letter to your petition, we do not consider it in this order.

(continued...)

records was prepared by Celeste H. Doyle, an Assistant Attorney General and legal counsel to DLCD, for purposes of providing legal advice to that state agency client. The general nature of each document, though not the content, is discussed below. See Turner v. Reed, 22 Or App 177, 180 note 3, 182, 538 P2d 373 (1975).

The first record is a January 24, 1994, memorandum to the DLCD director, certain other officials at DLCD and attorneys at the Oregon Department of Justice. It is captioned "LCDC Authority to Regulate Uses in EFU Zones in Marginal Lands Counties". The memorandum was prepared for use in a planned meeting of these officials to discuss pending and potential legal challenges to LCDC's then proposed administrative rules. The memorandum analyzes the relevant provisions in the 1993 legislation and discusses the application of certain court cases.

The second record is a February 3, 1994, memorandum to the same individuals and bearing the same caption. It analyzes court cases, LUBA decisions and previous advice from the Attorney General's office. It also sets out a series of specific legal issues to be discussed during the meeting.

The third record is a confidential letter dated February 14, 1994, and addressed to the LCDC commissioners and the director of DLCD. The letter bears the same caption as the earlier memorandum. It expressly states that it was prepared in anticipation of expected legal challenges by Washington and Lane Counties to the LCDC rules. The letter analyzes the legal arguments in favor and against the LCDC's authority to adopt the rules, and it provides an assessment of the relative strengths and weaknesses of these arguments.

Contrary to assertions in the petition, the records do not contain discussions of LCDC's substantive policy. Rather, they are limited to discussions of legal authority and the assessment of the risks associated with an expected legal challenge to the LCDC rules.

2. Records Pertaining to Litigation

ORS 192.501(1) conditionally exempts from disclosure

[2/] (...continued)

Also, as noted in Celeste Doyle's letter to you dated March 16, 1994, the public comments received by LCDC in its rulemaking proceeding on the proposed rules also might come within your request. These records remain available for your inspection.

> Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur.

The requested records were expressly prepared in response to both pending and anticipated legal challenges to LCDC's proposed rules regulating uses allowed on high value farm land in so called "marginal land counties" such as Washington County. The rules were adopted by LCDC on February 18, 1994. OAR 660-33-020, 660-33-090 and 660-33-120.

When the requested records were being prepared, a Lane County petition for judicial review of the rules was pending before the Oregon Court of Appeals.[3/] That petition challenged the application of LCDC's previous high value farm land rules to marginal land counties. With the adoption of the current rules, that appeal was dismissed by stipulation. However, we understand that Lane County intends to file a new petition for review challenging the current rules.

Similarly, during a meeting prior to the adoption of the current rules, Washington County's planning director informed DLCD and DOJ officials that Washington County was likely to challenge the rules if they were adopted in their then present form.

The exemption does not require that litigation actually have been filed. It is sufficient for the public body to show that litigation is "reasonably likely to occur." This does not mean that litigation must be imminent, only that it be more likely than not. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1993) at 18. In this case, we conclude that litigation is reasonably likely to occur.

The exemption for records pertaining to litigation is conditional. The records must be disclosed if "the public interest requires disclosure in the particular instance." ORS 192.501.

You are requesting the records in question because you anticipate that Washington County, in the course of future land use proceedings, will need to determine whether LCDC's rules are valid. Specifically, OAR 660-33-090 and 660-33-120 prohibit certain uses on high value farm land that are allowed by the County's existing land use regulations. Under ORS 197.646, the LCDC rules are directly applicable to the County. The County believes, however, that LCDC rules are invalid under ORS 215.304 because they are

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[3/] We do not read the term "litigation" to be limited to trial court proceedings. To the contrary, we understand it to have its common meaning and include all legal proceedings. Accordingly, the term encompasses appellate review of a rule or administrative decision.

inconsistent with the underlying statutes. You believe that the analysis in the requested records might be useful to the County as it makes this land use decision.[4/]

Thus, the only identified public interest in disclosure of the requested records is the potential benefit that the legal analysis contained in those records might provide to the County as it makes its anticipated determination regarding the validity of the LCDC rules. However, this benefit is quite limited. The legal advice LCDC received when it adopted the rule is immaterial to the validity of the rules. The validity of the rules is strictly a legal issue; they either are or are not consistent with the underlying statutes. Similarly, the underlying legal authorities discussed in records are either already known to the County or are available with a modest amount of legal research.

On the other hand, the public interest in keeping the records confidential is substantial. The Public Records Law recognizes that public bodies are generally entitled to the same rights to effective legal representation that are available to private parties. This includes the right to keep confidential attorney-client communications and attorney work product pertaining to litigation. Lane County School District v. Parks, 55 Or App 416, 420, 637, P2d 1383, rev den, 293 Or 103 (1982); Public Record Order, June 25, 1982, Zaitz, at 3. In the absence of such protection, public bodies would be unfairly disadvantaged in litigation by having the legal analysis and strategies of their attorneys available to any person who requests such records, including the opposing party. Alternatively, the public bodies and public attorneys would be required to communicate orally and keep no written attorney work product. Such practices would be risky, inefficient and ultimately injurious to the public.

We conclude that the requested records are exempt from disclosure under ORS 192.501(1) as records pertaining to litigation.

3. Internal Advisory Communications

The records in question also fall within the provisions of ORS 192.502(1). This exemption applies to communications within a public body or between public bodies to the extent the records are (1) advisory in nature, (2) cover other than purely factual materials, and (3) are preliminary to a final agency determination of policy or action. Here, the records provide the state agency with legal advice. They do not cover factual materials.

[4/] We note that the County does not claim it does not know whether LCDC intends for the rules to apply to Washington County. That question was answered in the affirmative during rule making proceedings.

And they were prepared exclusively in anticipation of LCDC taking an action, i.e., adopting administrative rules.

This exemption is conditional. Records that are otherwise covered must be disclosed "unless the public body shows that in the particular instance the public interest in encouraging frank communication * * * clearly outweighs the public interest in disclosure." Id.

In this instance we find that the public interest in frank communications between DOJ attorneys and high ranking DLCD officials is substantial. The records in question were prepared to assist DLCD officials and DOJ attorneys analyze and understand LCDC's legal authority and the relative legal risks of a proposed agency action. Clearly, if state officials cannot discuss in writing the legal ramifications of a major agency action without the writings becoming public, frank written discussion would necessarily be reduced. In this situation, it would be substantially more difficult for DLCD to perform its statutory mission of promoting coordinated statewide land conservation and development and for DOJ attorneys to perform their statutory responsibility to provide legal representation to state agencies and officials. ORS 180.060, 180.220 and 197.045(4).

We do not find it to be significant that LCDC has now adopted the administrative rules. This exemption does not, by its terms, expire upon the agency's final determination of policy of action. Instead, the records need only have been a "communication" that was "preliminary" to the final agency determination. In this case, the public interest in encouraging frank communication between DLCD and DOJ on a matter in which litigation is reasonably likely to occur continues to clearly outweigh any public interest in disclosure of those records.

We note that this is not a situation were the exemption from disclosure is sought because of the potential for embarrassment of agency employees. See Coos County v. Oregon Department of Fish and Wildlife, 86 Or App 168, 173, 739 P2d 47, rev den, 304 Or 186 (1987). To the contrary, we believe that these records are more like the subjective evaluations and recommendations to grant parole found to be exempt in Turner v. Reed, supra, at 190, because disclosure would necessarily chill frank written communications. See also Public Record Order, March 30, 1989, Howser, at 7 (communications of Oregon State Bar Officials relating to disciplinary proceedings); Public Records Order, October 21, 1988, Best (analysis and recommendations of the PUC staff relating to contested case proceeding).

4. Conclusion

For the reasons stated above, we conclude that the records you request are exempt from disclosure under ORS 192.501(1) and 192.502(1). Accordingly, we deny your petition.[5/]

Sincerely,

THOMAS BALMER
Deputy Attorney General

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c: Richard Benner, DLCD

[5/] The records in question are also confidential attorney-client communications. See ORS 40.225. You allege in your petition that the attorney-client privilege was waived. Because we conclude that the records are exempt from disclosure under ORS 192.501(1) and 192.502(1), we need not address the exemption under ORS 192.502(8) for records that are privileged under ORS 40.225, or the issue of waiver. The fact that this issue is not addressed should not be construed as a determination that the privilege was waived.