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Threatened/endangered species

June 22, 1993

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Re: Petitions for Public Records Disclosure Order:
Department of Forestry Records
DOJ File No. 629-200-0093

Gentlemen:

This letter is the Attorney General's order on your petition for disclosure of public records under the Oregon Public Records law, ORS 192.410 to 192.505. Your petition, which we received on June 15, 1993, asks the Attorney General to direct the Department of Forestry (department) to make available the completed marbled murrelet survey forms for three specific locations. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. See ORS 192.420. If a public record contains exempt and nonexempt material, the public body must 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.[1/] Turner v. Reed, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

The Department of Forestry denied your request for completed marbled murrelet survey forms on grounds that the survey forms are exempt from disclosure pursuant to ORS 192.501(14). That statute provides:

> The following public records are exempt from disclosure under ORS 192.410 to 192.505, unless the public interest requires disclosure in the particular instance:
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> * * * * *
>
> (14) Information developed pursuant to ORS 496.004, 496.172 and 498.026 or ORS 496.192 and 564.100, regarding the habitat, location or population of any threatened species and endangered species[.]

The records you have requested fall under the terms of ORS 192.501(14). The marbled murrelet is listed by the United States Fish and Wildlife Service as a threatened species, pursuant to the federal Endangered Species Act of 1973, as amended, and on its face your request is for information regarding murrelet habitat, location and population developed pursuant to ORS 496.172. Accordingly, the statutory exemption applies, and the information need not be disclosed "unless the public interest requires disclosure in the particular instance."

Your petition identifies two reasons why the exemption should not apply in this case. First, you suggest that "the Department of Forestry has not met its burden of proving that the public interest does not require disclosure of the records." In responding to a public records request initially, an agency must correctly apply the Public Records Law and its exemptions. However, at that point, the agency has no "burden of proof" because it is making the decision rather than presenting or proving a case before an outside decisionmaker. ORS 192.450 comes into play only after a petition is filed with the Attorney General for a disclosure order. As we discuss below, we believe that the department has met the burden of establishing that the public interest in confidentiality for the information you request outweighs the public interest in disclosure.

Your second argument for disclosure of the completed survey forms is that the Forest Conservation Council "can give assurances that the records will not be publicized." You explain that the Forest Conservation Council is a reputable environmental group that tries to preserve species in Oregon; your request to the Department of Forestry described in greater detail your analyses of forest management

decisions and listed several public agencies that have found your expertise to be useful. As a general rule, the reason for a request to inspect records "is of little relevance," Turner v. Reed, supra, 22 Or App at 180, n 2, but here your organization's interest and expertise may be some evidence of public interest in disclosure. Id.

Your letter also refers to an Attorney General's opinion, 38 Op Atty Gen 1761 (1978), which states that, even if an exemption applies, a public body may determine that the public interest neveheless justifies some sort of conditional disclosure, pursuant to a stipulation with the recipient.[2/] You suggest that disclosure to the Forest Conservation Council is appropriate, because the council is willing to stipulate that it will not publicize the survey forms.

We conclude that your offer of such assurances does not require the Department of Forestry to disclose the records in question. As we noted in our 1978 opinion, a public body has no means to enforce a stipulation not to publicize records. Neither the Department of Forestry nor the Attorney General has the means to evaluate the reliability of nondisclosure promises tendered by the wide range of individuals and organizations that seek access to records covered by the exemptions in ORS 192.501.

Ensuring nondisclosure of information about the location and habitat of threatened species (in this case, the marbled murrelets) is the very purpose of ORS 192.501(14). Contrast Turner v. Reed, supra, 22 Or App at 192 (no public interest in protecting confidentiality of documents when only harm from disclosure would be embarrassment to public officials). The department advises us that once information about the habitat or location of endangered species is known, it is nearly impossible to protect the animals from disturbance or harm, because the department cannot control how or to whom the information is disseminated by the recipient. With regard to murrelets, many Oregon citizens resent the birds' protected status, and there is a real danger that some persons would try to harm them.[3/] In addition, although knowledge of murrelet biology is limited, it is known that they are unusually shy and easily disturbed by humans. Especially during the nesting season, when they lay one egg, often in precarious locations, they are vulnerable to upset and disturbance by curious, well-intentioned humans as well as those who do intend to harm them.

In deciding what the public interest requires in this case, we are mindful of the statutory policy favoring disclosure and the Court of Appeals' admonition that "disclosure decisions should be based on balancing the public interests favoring disclosure against those public interests favoring confidentiality, with the presumption always being in favor of disclosure." Turner v. Reed, supra, 22 Or App at 187.

We accept for purposes of discussion your representation that the Forest Conservation Council's analyses of forest management practices serve the public interest. It does not follow, however, that the public interest requires disclosure of information pertaining to threatened and endangered species whenever the requestor credibly describes an intention to contribute to the public discussion about a topic of public importance.

If the department releases the completed murrelet survey forms to the Forest Conservation Council, it will have little or no justification for withholding the same records from other groups seeking to use the information to analyze forest management decisions. Even if it were possible to limit disclosure to one or a small number of interested parties, however, protecting the marbled murrelet habitat and nesting site would be impossible if the information were further disclosed to the general public or some portion of it. As noted above, the Department of Forestry would have no way to enforce any promise not to re-disclose the information in question.

Because nondisclosure is essential to carrying out the statutory policy of protecting threatened and endangered species, we conclude that the public interest does not require disclosure in this instance. Accordingly, we deny your petition to compel disclosure.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the
Attorney General

ESH:ALV:JSL:tmt/JGG07095
c: Marti Way, Department of Forestry