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October 19, 1989

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Betty J. Reynolds
Executive Director
Oregon Government Ethics Commission
155 Cottage Street, N.E.
Salem, OR 97310

Re: **Petition for Public Records Disclosure Order; Oregon Government Ethics Commission Records**

Dear Mr. DiLorenzo and Ms. Reynolds:

This letter is the Attorney General's order on Mr. DiLorenzo's petition (on behalf of Senator C.T. "Cub" Houck) for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on October 12, 1989, asks the Oregon Government Ethics Commission (OGEC or commission) to disclose a variety of records relating to a complaint by Mr. Larry Salchenberger of ethics law violations by Senator Houck. One of the records at issue--a draft of the minutes of the OGEC's September 12, 1989, meeting on that complaint--already have been disclosed. As to the remaining records we grant the petition in part and deny it in part.

1. Complainant's Home Address and Telephone Number

OGEC has denied disclosure of the complainant's home address (the commission has no record of Mr. Salchenberger's current home telephone number) on the grounds that the address is personal and private information and was submitted in

confidence. See ORS 192.502(2), (3). For the reasons that follow, we agree that the address is exempt from disclosure.

ORS 192.502(2) exempts from disclosure

> "[i]nformation of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy."

Ordinarily, home addresses do not fall within this exemption. See, e.g., Kotulski v. Mt. Hood Comm. College, 62 Or App 452, 660 P2d 1083 (1983). However, when a person "reasonably considers his home address to be private and takes steps to ensure that it remain so 'outside the context of and prior to the public records request,' the address may be personal within the meaning of the exemption." Guard Publishing Co. v. Lane County School Dist., 96 Or App 463, 470, 774 P2d 494, rev allowed (1989) (quoting Jordan v. MVD, 93 Or App 651, 655, 763 P2d 420 (1988), rev allowed 307 Or 571 (1989)).

Here, Mr. Salchenberger has treated his home address as personal and private by obtaining an unlisted telephone number. We also understand that he provided his home address to the OGEC in confidence. Therefore, that information is "personal" under ORS 192.502(2). Mr. DiLorenzo has not shown that public disclosure of Mr. Salchenberger's home address would not be an unreasonable invasion of privacy. Nor do we have any evidence suggesting that the public interest by clear and convincing evidence requires disclosure in this instance. We conclude, therefore, that the address is exempt from disclosure under ORS 192.502(2).[1]

2. Internal Memoranda

Confusion has arisen concerning precisely which documents the OGEC has withheld from disclosure. OGEC investigator Mr. Mark Wisneski apparently told Mr. DiLorenzo that the commission withheld four or five internal memoranda containing Mr. Wisneski's thoughts. Upon further inquiry, we have determined that only three documents are at issue. One was compiled in part by Mr. Wisneski, and two by Ms. Reynolds. We discuss each separately.

OGEC relies on ORS 192.502(1) for its claim of exemption. That statute exempts from disclosure

> "[c]ommunications 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."

The first document in question is a June 26, 1989, memorandum from Mr. Reynolds to Chris Pryor. That memorandum is a cover memorandum describing materials that were attached to the memorandum. The paragraph numbered "3" and the two following paragraphs concern the complaint against Senator Houck. We see nothing in those paragraphs that satisfies ORS 192.502(1). Nearly all of the information in those paragraphs is purely factual and, therefore, is specifically excluded from the exemption. The one portion that could be considered "advisory"--a statement that "customary OGEC procedures will be followed"--is not the type of "frank communication" protected by the internal advisory communication exemption. Accordingly, that memorandum must be disclosed.

The second document contains excerpts from the tapes of OGEC's September 12, 1989, meeting. Because the OGEC already has disclosed to Mr. DiLorenzo copies of the tapes of that meeting, there is no basis on which to claim an exemption for the excerpts. Those excerpts must be disclosed.

That document also contains some marginal notations, apparently prepared by Mr. Wisneski. From our review of these notations we see no "frank communications" of the type we concluded were exempt from disclosure in previous public records orders. See Public Records Order, October 21, 1988 (Best) (sensitive internal PUC staff memoranda evaluating strengths and weaknesses of pending administrative proceeding); Public Records Order, March 30, 1989 (Howser) (memoranda from Local Professional Responsibility Committee to State Professional Responsibility Board containing analysis and recommendations concerning pending bar disciplinary proceeding). Accordingly, the document in its entirety must be disclosed.

Finally, the OGEC withheld an undated document, marked "Confidential," prepared by Mr. Reynolds. That document, which contains approximately one-half page of text, was prepared for the OGEC and candidly evaluates the strengths and weaknesses of the evidence supporting the charge against Senator Houck. We understand that the OGEC may reopen its inquiry on that charge. From our review of that document we conclude that it contains advisory materials preliminary to a final agency determination. Disclosure would deter OGEC staff from giving the frank opinions essential to the OGEC's decision on the appropriate disposition of ethics complaints. As Mr. DiLorenzo notes, there is a substantial public interest in disclosure. Nonetheless, we conclude that in this particular instance the public interest in disclosure is clearly outweighed by the public interest in encouraging frank communication between OGEC staff and the commission. Moreover, the purely factual portions of the memorandum are inseparable from the advisory portions. Accordingly, the OGEC may withhold the document in its entirety under ORS 192.502(1).

In sum, the OGEC may withhold Mr. Salchenberger's home telephone number, and the undated advisory memorandum prepared by Ms. Reynolds. The commission must disclose the remaining documents. ORS 192.450(2) affords the OGEC seven days from the date of this order in which to comply.

Sincerely,

PAMELA L. ABERNETHY
Special Counsel to the
Attorney General

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[1] Because we resolve the petition on this basis, we need not address the application of ORS 192.502(3).