HARDY MYERS
ATTORNEY GENERAL

DAVID SCHUMAN
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97310-0506
Telephone: (503) 378-4400
TTY: (503) 378-5938

August 2, 1999

Damon L. Vickers
CUMMINGS GOODMAN FISH & PLATT, P.C.
434 North Evans Street
P.O. Box 17
McMinnville, OR 97128-0017

Re: *Petition for Public Records Disclosure Order: Oregon Occupational Safety & Health Division of the Department of Consumer and Business Services' Records*

Dear Mr. Vickers:

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.[1] Your petition, which we received on July 14, 1999,[2] asks the Attorney General to direct the Oregon Occupational Safety & Health Division of the Department of Consumer and Business Services (OR-OSHA) to make available (1) a memorandum dated December 11, 1996, from the Department of Justice to Peter DeLuca regarding the proposed revision of OR-OSHA's Division 1 Rules, and (2) those portions of the 21 pages that were redacted from the materials provided by OR-OSHA on November 13, 1998 in

[1] The petition was filed on behalf of your client Scott Bennett. It states that the "Petitioner remains concerned that a serious conflict of interest exists in the Attorney General's Office considering this Petition." The stated reasons for that concern are that OR-OSHA asserted the attorney-client privilege as the basis for withholding documents and that the Attorney General's office played an active role in the proposed rule changes that are the subject of the requested documents. We assume from these statements that the factual predicate for the perceived conflict is that the Office of the Attorney General both acts as legal counsel to state agencies, including OR-OSHA, *see* ORS chapter 180, and issues Public Record Orders in response to petitions seeking the disclosure of records of state agencies, specifically OR-OSHA, *see* ORS 192.450(1). Nevertheless, the petition provides no explanation of the legal basis for any contention that these legislatively mandated roles create some type of "conflict of interest" for the Office of the Attorney General. We have examined the potential bases for claims of a conflict of interest and find none that would be applicable to this situation.

[2] We appreciate you extending the time within which the law would otherwise have required us to respond to the petition.

response to the September 22, 1998 Public Records Request.[3] For the reasons that follow, we respectfully deny your petition.

1. Records No Longer in Existence or Cannot be Located

John Hofer, Appeals Manager, OR-OSHA, reviewed the 22 pages of documents with apparent redactions. Mr. Hofer informs us that finding the original copies of these 22 documents was especially difficult because of a clerical error in assembling OR-OSHA's October 29, 1998 response to your public records request in that copies of the original unredacted 22 pages were not retained in a separate location. Rather the original documents were returned to the various employees of the agency. Additionally, at least one employee involved in the process, Jeff Pfeifer, is no longer employed by the agency.

Mr. Hofer informs us that unredacted copies of some of the documents either no longer exist or cannot be located. Specifically, pages 10, 11, 12 and 22 either no longer exist or cannot be located.[4] Although Mr. Hofer can provide no explanation for what might have happened to the documents, we have no reason to believe that the agency intentionally destroyed, misplaced or is concealing these four documents.

We deny your petition as to these four pages because we cannot order the agency to disclose information that does not exist.

2. Unintentional Marks on pages 1, 4 and 6

The copies of pages 1, 4 and 6 of the 22 pages of the materials included portions that were illegible or appeared to redact information. Mr. Hofer informs us that pages 1, 4 and 6 were not intentionally redacted and that OR-OSHA will release legible of each of these pages to you. (The original of page 4 contains no information in the place where your copy had an apparent redaction. This may explain why the agency counted 21 pages with redactions and you found 22 pages.) Because OR-OSHA will disclose this information to you, we deny your petition as moot with respect to this information.

3. Names of Employees

OR-OSHA had blacked out in several places on the 22 pages of redacted materials the names of the employees who prepared the document or who were the source of the information

---

[3] In response to your September 22, 1998, request for records, OR-OSHA released nearly 2,000 pages of records. In its cover letter responding to your request, OR-OSHA noted that 21 pages had material redacted. Because OR-OSHA did not keep copies of the redacted pages, you agreed to provide to this office copies of the 21 pages with redactions. In fact, you provided us with 23 pages, which we have numbered and attached to this order. It appears that page 20, provided by your office, is a duplicate of page 7, thus leaving 22 pages with apparent redactions. We will refer to the documents by page number for convenience.

[4] Mr. Hofer informs us he intends to continue to search for the documents. If the documents are located, this office will supplement this order as appropriate.

contained in it. John Hofer informs us that OR-OSHA will release this information to you. Because OR-OSHA will disclose this information to you, we deny your petition as moot with respect to this information.

4. Information Redacted from Pages 13, 14, 15, 16, 19 and 21

Upon review of the redacted portions of pages 13, 14, 15, 16, 19 and 21, OR-OSHA has agreed to release the first and third redacted portions of page 13, all of the redacted portions of page 14 except the second redacted portion following the word "Justification,"and all of the redacted portions of pages 15, 16, 19 and 21. Because OR-OSHA will disclose this information to you, we deny your petition as moot with respect to this information.

5. Exempt Records or Information

We have reviewed the remaining materials sought by the petitioner and conclude that they are exempt from disclosure based on ORS 192.502(9), attorney-client privilege, or ORS 192.501(1), internal advisory communication. We discuss each of these exemptions below.

a. Attorney-Client Privilege, ORS 192.502(9)

ORS 192.502(9) exempts from disclosure "public records or information the disclosure which is prohibited or restricted or otherwise made confidential or *privileged* under Oregon law." (Emphasis added.) This exemption is unconditional in that it is not subject to any public interest balancing test.

Pursuant to the Oregon Evidence Code OEC Rule 503 (codified as ORS 40.225), communications between a lawyer and his or her client made "for the purpose of facilitating the rendition of professional legal services" are privileged. The legal services covered by the privilege are not confined to representing a party in litigation and are broader than simply providing legal advice. *State ex rel Oregon Health Sciences University v. Haas*, 325 Or 492, 504, 942 P2d 261 (1997). The privilege will apply when the general purpose in hiring a lawyer concerns legal rights and obligations. *United States v. Chen*, 99 F3d 1495, 1501 to 1502 (9th Cir 1996); *see also United States v. Roe*, 96 F3d 1294 (9th Cir 1996) (investigation in fact-finding by attorney falls within attorney-client privilege).

The privilege in OEC 503 extends beyond just the direct attorney-client communications, but also includes communications: (a) between the client or the client's representative and the client's lawyer or representative of the lawyer, (b) between the client's lawyer and the lawyer's representative, (c) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, (d) between representatives of the client or between the client and a representative of the client, and (e) between lawyers representing the client. OEC Rule 503(2)(a)-(e).

(i) Memorandum to Peter DeLuca

The December 11, 1996 memorandum from this office to Peter DeLuca, Administrator of OR-OSHA, was a confidential communication between that client's lawyer and the client, which was not intended to be disclosed to third persons. The purpose of the communication was to render professional legal services to the client. Accordingly, we find that this memorandum is privileged under OEC Rule 503.

In the petition, you state that any otherwise potentially applicable attorney-client privilege has been waived because "OR-OSHA's own notice of proposed rulemaking specifically referred to the communications with the Department of Justice as the basis for at least some of the proposed rule changes." You further contend that "many of the pages provided to you appear to provide the rationale for the proposed changes."

ORS 183.335(2)(b)(C) requires that an agency's notice of rulemaking include a statement of the need for the rule and how the rule meets that need. State agencies necessarily operate in a legal environment and regularly take action pursuant to advice received from legal counsel. The mere reference in the agency's rulemaking notice to the fact that the Department of Justice suggested changes to the rule does not constitute a waiver of the attorney-client privilege with respect to the underlying legal advice.

OEC Rule 511 (ORS 40.280) defines waiver of a privilege by voluntary disclosure. This statute provides in relevant part:

> A person upon whom 40.225 to 40.295 confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication.

Here, the agency has not voluntarily disclosed any significant part of the matter or the communication. By stating that it has received advice from the Department of Justice, the agency is merely acknowledging the fact that the agency has sought legal services to assist the agency in understanding its legal obligations and rights. We are aware of no cases suggesting that merely acknowledging the receipt of legal advice constitutes waiver of the attorney-client privilege. Although several of the pages of records provided to you by OR-OSHA state various rationales for changes made in the proposed rule, those statements do not disclose any significant part of the attorney-client privileged communication, but rather the analysis of the agency's own staff. Thus, these statements by staff do not waive the attorney-client privilege for the memorandum from legal counsel to Peter DeLuca.

We find no basis to determine that the privilege has been waived.[5] Accordingly, we conclude that the memorandum of December 11, 1996, from the Department of Justice to Peter DeLuca regarding the proposed revision of Division 1 Rules is privileged under OEC Rule 503, and therefore exempt from disclosure under ORS 192.502(9). For these reasons, we deny your petition to compel disclosure of this record.

(ii) Redacted Pages

Four places on the 22 pages containing redacted materials recite or directly reflect the professional legal advice given by the Department of Justice to OR-OSHA. This text is located in the first and sixth paragraphs of page 7 (duplicate of page 20), the seventh paragraph of page 9 and the bottom of page 23. As such, these portions of the records are a communications between representatives of the client made for the purpose of facilitating the rendition of professional legal services to the client. *See* OEC Rule 503(2)(d). For the reasons stated above, we find that these portions of the requested records are privileged under OEC Rule 503 and that the privilege has not been waived. Therefore, we also find these portions of the records exempt from disclosure under ORS 192.502(9) and deny your petition as to them.

b. Internal Advisory Communications, ORS 192.502(1)

Aside from material that OR-OSHA has agreed to disclose and the attorney-client privileged materials discussed above, the remaining redacted material on pages 13 and 14 consists of the OR-OSHA staff's analysis of the draft proposed rules. The staff analysis was redacted on the basis that it constituted internal advisory communications. ORS 192.502(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 find that the redacted staff analysis meets each of the four elements stated in the first sentence of this exemption. It is part of a communication within a public body in that each redaction is in a communication from one OR-OSHA employee to another. It is of an advisory nature in that each redaction is the employee's opinion as to the reasons that a particular change in the rules should or should not be adopted. The redacted information is not purely factual; OR-

[5] The Oregon Court of Appeals has held that an agency may waive an exemption to disclosure under the Public Records Law. *See Oregonian Pub. Co. v. Portland School Dist. No. 1J*, 144 Or App 480, 925 P2d 591 (1996), *modified and adhered to* 142 Or App 135, 142, 952 P2d 66, 70 (1998), *rev allowed* 327 Or 173 (1998). Here, the primary element identified by the court for waiver of a Public Records Law exemption, public disclosure of the information, is not present. Moreover, with respect to attorney-client privileged communications, we believe a court would find that the explicit statutory provisions for waiver of the privilege in OEC Rule 511 would control over the general principles articulated by the court for waiver of a Public Records Law exemption.

OSHA has already disclosed all of the factual materials in the documents. It is preliminary to final agency determination of policy or action in that the communication was preliminary to OR-OSHA's final rulemaking action; in fact, OR-OSHA has not yet completed its rulemaking.

Although these four elements of the exemption are met, the exemption in ORS 192.502(1) is conditional. Records must be disclosed unless the agency shows that in the particular instance the public interest in encouraging frank communication between the agencies' employees clearly outweighs the public interest in disclosure.

We find that with respect to the remaining information on pages 13 and 14, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure. Here, the public interest in frank communications between agency employees and their administrator is substantial. Pages 13 and 14 contain frank communication in the form of the employee's speculation about the implications or impact of the rule provisions. Agencies, such OR-OSHA, rely heavily on the expertise and observations of their employees to critique their programs and the administrative rules that define the programs. If the employees cannot discuss in writing their individual opinions on the ramifications of proposed rules without the writings becoming public, use of agency staff's expertise in drafting rules would more difficult and might even be discouraged. Disclosure of these communications would inhibit the employees' frank statements so as to interfere with the free flow of information and ideas that the agency needs when assessing its rules and contemplating potential rulemaking to advance its statutory mission. Moreover, failure to protect such information from disclosure would likely cause agencies to direct their employee not put in writing their opinions about perceived deficiencies in existing rules or potential rules. This would deprive the agency of valuable resources concerning the effectiveness of existing rules, the effect of proposed rules and the possible design of new rules.

By comparison, the public interest in disclosure is minimal because the draft Proposed Rules are published as part of the rulemaking process and any rationale for the exercise of rulemaking may be expressed by the agency in its Statement of Need. *See* ORS 183.335(2). The public has a diminished interest in the views and opinions of agency personnel that are not adopted by the agency in the exercise its rulemaking authority.

For these reasons, we conclude that the redacted portions page 13 and 14 are exempt from disclosure under ORS 192.502(1), and we therefore deny your petition to compel disclosure of this material.

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

AGS02642
c: Peter DeLuca, Administrator, DCBS/OR-OSHA
John Hofer, Appeals Manager, DCBS/OR-OSHA