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August 14, 1998

David R. Kluge
Attorney at Law
P.O. Box 55070
Portland, OR 97238

Re: *Petition for Public Records Disclosure Order: Oregon State Bar Records*

Dear Mr. Kluge:

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 August 10, 1998, asks the Attorney General to direct the Oregon State Bar (OSB) to produce "complete" copies of the following records:

(1) The LPRC investigation file including all notes, memos, correspondence, telephone records, and any reports filed with Disciplinary Counsel or the SPRB.

(2) Any requests for additional time made by the LPRC or anyone associated with the LPRC to the SPRB or Disciplinary Counsel.

(3) Minutes of any meeting of the SPRB at which this matter was discussed including the identities of all parties present and any records of any kind submitted or used at said meeting.

(4) Transcripts of any meeting of the LPRC, disciplinary counsel's office, and/or the SPRB relating to this matter.

(5) Any SPRB file including but not limited to notes, memos, correspondence, telephone records and any reports relating to this

matter.

(6) Any Disciplinary Counsels' file including but not limited to all notes, memos, correspondence, telephone records, and any reports relating to this matter.

For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public records 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 materials. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

Your petition states that the OSB's response to your request, a letter from Geoffrey P. Wyatt, OSB Assistant Regulatory Counsel, dated August 5, 1998, was a denial because the OSB refused to provide complete copies of all records requested. Mr. Wyatt's letter states that the OSB would not make available "the analysis portion of communications to or from the Local Professional Responsibility Committee (LPRC) or the State Professional Responsibility Board (SPRB)." We agree that this is a denial of this portion of the requested records and we address this issue below.

Mr. Wyatt's letter also states that the OSB does "not maintain transcripts or verbatim minutes of SPRB meetings, which are closed to the public." Arguably, this is a denial of your request for such records. We have spoken with Jeffrey D. Sapiro, OSB Disciplinary Counsel, who informs us that the OSB does not have any transcripts, tapes or verbatim minutes of SPRB meetings.[1/] This office cannot order an agency to produce records that do not exist. Accordingly, we deny your petition as to such records.

With respect to the analysis portion of communications to or from the LPRC or the SPRB, the OSB claims an exemption from disclosure under ORS 192.502(1). 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

[1/] Mr. Sapiro also informs us that the OSB will provide to you copies of any minutes that do exist.

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

The purpose of this exemption is to encourage frankness and candor in communications within and between governmental agencies and to protect the free flow of observations and advice that the public body needs for its efficient operation. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 40 (1997).

This office has previously considered the application of this exemption to communications between the LPRC, the SPRB and OSB Disciplinary Counsel in the OSB's disciplinary process for attorneys. *See* Public Records Order, March 30, 1989 (Howser/Reimer), a copy of which is enclosed. We concluded that when there is a still-active disciplinary proceeding against an attorney, the OSB's ability to properly discharge its disciplinary responsibilities "would be substantially prejudiced by disclosure of the portions of the requested documents containing analysis of the charges * * * and recommendation on the disposition of those charges." *Id.* at 6. We further concluded that the public interest in knowing what the LPRC, SPRB and Disciplinary Counsel think about a complaint against an attorney during the pendency of the disciplinary proceeding is clearly outweighed by the public interest in encouraging the frank communication among the various arms of the OSB that is needed to ensure that agency's ability to fulfill its disciplinary responsibilities. *Id.* at 7. We find no reason to question the correctness of these earlier conclusions.

Mr. Sapiro informs us that the SPRB has determined that a formal complaint should be filed against you, but that the matter has not yet gone to a hearing. Thus, your petition presents a situation similar to that addressed in our earlier public records order in that the OSB has an active disciplinary proceeding against you and is claiming a exemption for the analysis portion of the LPRC and SPRB communications related to the charges in that proceeding.

We have reviewed the portion of the records for which the OSB claims the exemption in ORS 192.502(1). The records themselves are communications within a public body or between public bodies. Because your case is still pending before the OSB, these communications are preliminary to any final agency determination of policy or action. The portion of the records that OSB claims to be exempt from disclosure is information of an advisory nature and not purely factual material in that it consists of observations, assessments, analysis, advice and recommendations. The public interest in encouraging frank communication between the OSB, LPRC and SPRB as to this disciplinary matter clearly outweighs the public interest in disclosure. Therefore, we find that the analysis portion of the records that the OSB has stated it would not provide to you is exempt from disclosure under ORS 192.502(1). Accordingly, we deny your petition as to this portion of the records because

it is exempt from disclosure under the Public Records Law.[2/]

We do not interpret Mr. Wyatt's letter as a denial of your request for any of the other records you seek. Rather, his letter states that the OSB anticipates it will be able to mail the "public documents and information by August 14, 1998."[3/] Absent a denial of a records request by an agency, the Attorney General has no authority to order disclosure. *See* ORS 192.450(1). Accordingly, we deny your petition as premature with respect to any of the remaining records that are within the scope of your petition.

Sincerely,

/Hardy Myers

HARDY MYERS
Attorney General

Enclosure
c: Jeffrey D. Sapiro, Disciplinary Counsel, Oregon State Bar

[2/] Because we find the analysis portion of the records to be exempt under ORS 192.502(1), we do not consider whether it is also exempt under other provisions of the Public Records Law, such as ORS 192.502(9), which exempts from disclosure information that is confidential or privileged under Oregon law, including attorney-client privileged communications.

[3/] A public body does not deny a public records request merely because it fails to comply with a deadline the requestor seeks to impose. *See* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (MANUAL) 16 (1997). A public body may charge a fee to reimburse it for its actual costs in making records available. *See* ORS 192.440(3). In addition to photocopy costs, such actual costs may include the time spent by personnel in reviewing the records to delete exempt material and supervising a person's inspection of original documents in order to protect the records. MANUAL at 11. A public body may also preliminarily estimate its costs and require prepayment of that estimate before acting on a request. *Id.*