

November 10, 2000

Don S. Simpson  
3035 Edison Road NE  
Silverton, OR 97381

Joe Brewer, Administrator  
Building Codes Division  
Department of Consumer and Business  
Services  
1535 Edgewater NW  
Salem, OR 97310

Re: *Petition for Public Records Disclosure Order*  
*Building Codes Division Records*

Dear Mr. Simpson and Mr. Brewer:

This letter is the Attorney General's order on Mr. Simpson's petition for disclosure of records under the Oregon Public Records Law, ORS 194.410 to 192.505. The petition, which we received on October 26, 2000,<sup>1</sup> asks the Attorney General to direct the Building Codes Division (BCD) to make available "a copy of summary report prepared for the City of Silverton." For the reasons that follow, we grant the 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. ORS 192.420. The law requires generally that the custodian of public records furnish proper and reasonable opportunities for inspection and copying of the record. ORS 192.430. If a public record contains exempt and nonexempt material, the custodian of the record 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. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975). Any person denied the right to inspect or to receive a copy of any public

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<sup>1</sup> We appreciate Mr. Simpson's extending the time within which the law would have otherwise obligated us to respond.

record of a state agency may petition the Attorney General to review the record to determine if it may be withheld from public inspection. ORS 192.450(1).

We first consider whether BCD is the custodian of the record that is the subject of the petition, and then we review the Public Records Law exemptions that might apply to that record.

## **1. Custodian of Records**

ORS 192.410(1)(b) defines “custodian” for purposes of the Public Records Law as:

A public body mandated, directly or indirectly, to create, maintain, care for or control a public record. “Custodian” does not include a public body that has custody of a public record as an agent of another public body that is the custodian unless the public record is not otherwise available[.]

The “summary report” identified in Mr. Simpson’s petition is a memorandum entitled Review of the Building Department Silverton (Report). This Report stemmed from a complaint made to BCD concerning the Building Department of the City of Silverton (the City). BCD and the City entered into an agreement for BCD to review and verify the accuracy of records and information provided by the City and to work jointly with the City to prepare a final response to BCD concerning the inspection program of the Silverton Building Department. Pursuant to its authority under ORS chapter 455, BCD assigned its employees to conduct the review and to prepare a report to be provided to the City. The Report is the document produced by the BCD employees.

The Department of Consumer and Business Services, through BCD, has a statutory mandate to regulate the building inspection programs of municipalities, which includes a duty to review their procedures and program operations. ORS 455.150(11)(c). BCD was acting under this authority in conducting the review and preparing the Report. Having created the Report pursuant to its regulatory authority, BCD also has a duty to maintain, care for and control the Report prepared by its employees. Accordingly, we conclude that BCD is the custodian of the Report under ORS 192.410(1)(b).

## **2. Records Pertaining to Litigation**

ORS 192.501(1) conditionally exempts from disclosure:

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. This exemption does not apply to litigation that has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation[.]

The purpose of this exemption is to place governmental bodies on an even footing with private parties before and during court litigation. The exemption applies to records “compiled or acquired by the public body for use in on going litigation or \* \* \* litigation [that] is reasonably likely to occur.” *Lane County School District No. 4J v. Parks*, 55 Or App 416, 420, 637 P2d 1383 (1981). Moreover, the exemption applies only to records developed or compiled for use in the litigation and not to records collected in the ordinary course of the public body’s business, even if those records subsequently become relevant to litigation. *Id.* at 419-20.

BCD is not a party to any pending complaint, nor is there evidence that such litigation is reasonably likely to occur. The Report was not prepared in conjunction with any pending litigation,<sup>2</sup> but by agreement between BCD and the City. Concern that litigation may occur in the future is too speculative and remote to implicate this exemption.

### **3. Personnel Discipline Actions**

ORS 192.501(12) conditionally exempts:

A personnel discipline action, or materials or documents supporting that action[.]

Only completed disciplinary actions when a sanction is imposed, and materials or documents that support that particular disciplinary action, fall within the scope of this exemption. The policy underlying this narrowly construed exemption is to “protect[ ] the public employee from ridicule for having been disciplined but does not shield the government from public efforts to obtain knowledge about its process.” *City of Portland v. Rice*, 308 Or 118, 775 P2d 1371 (1989).

The Report includes factual information about one or more employees of the Silverton Building Department. Whether or not the Report contains material that might support personnel discipline action, any such action would be by the City and not by BCD. Nevertheless, because the exemption is intended to protect public employees from ridicule, this exemption might apply to the Report in BCD’s hands if BCD had the Report only in connection with a personnel investigation of City employees who were working out of BCD offices. *See* Public Records Order, February 11, 1994 (Hackler) (investigation of alleged sexual harassment by community college employee exempt in hands of Department of Correction where Department had report only because employee worked at corrections facility).

As discussed above, however, in conducting the review and creating the Report, BCD was acting pursuant to its statutory duty under ORS 455.150 to regulate the building inspection programs of municipalities. The Report documents the activities of BCD in carrying out its regulatory responsibilities, the primary purpose of which is not to investigate or correct

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<sup>2</sup> The exemption does not apply to administrative proceedings, such as contested case hearings. Nor does the fact that an administrative proceeding may lead to litigation justify claiming the exemption. ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL (1999) at 25.

employee misconduct. Consequently, the exemption under ORS 192.502(12) does not apply to the Report in BCD's hands.

#### **4. 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.

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 information and ideas that the public body needs for its efficient operation. Under this exemption, a public record is exempt from disclosure if it meets all of the following criteria:

- It is a communication within a public body or between public bodies;
- It is of an advisory nature preliminary to any final agency action;
- It covers other than purely factual materials and
- In the particular instance, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure.

The first criterion requires the communication to occur within a public body or between public bodies. The Report satisfies the first criterion. It is a communication within BCD, i.e., it is a memorandum from two BCD employees, Richard Welcome and Virginia Grosso, to another BCD employee, Allen Aschim, who was acting as BCD's liaison with the City. The Report is also a communication between public bodies, i.e., it was written with the understanding that BCD would send it to the City, and BCD did so.

The second criterion requires that the communications be advisory in nature and preliminary to any final agency action. In their Report, the BCD employees advised both BCD and the City about the interviews they conducted, their review of various records and their assessment of the information obtained. The Report is advisory and is preliminary to final agency determination of policy or action by either BCD or the City as to the City's inspection program.

The third criterion of the exemption requires the record to contain "other than purely factual materials." If the communication contains factual material together with the advisory recommendations, then the agency is under a duty to segregate the factual material and make it available for inspection. The Report contains mostly factual information obtained from interviews and documents provided by the City. But the Report also contains some nonfactual

statements reflecting the BCD employees' analysis or assessment of the information gathered. Those portions of the Report that are not purely factual come within the third criterion.

Finally, in the particular instance, the public interest in encouraging frank communications must clearly outweigh the public interest in disclosure. BCD has advised us that those limited portions of the Report that contain analysis and assessment by BCD employees do not consist of the type of frank communication that this exemption is intended to protect. Accordingly, the Report does not meet the fourth criterion.

Because we find that all four of the elements of ORS 192.502(1) are not met, we conclude that the Report is not exempt from disclosure under ORS 192.502(1).

For the reasons discussed above, we conclude that the Report is not exempt from disclosure under the Public Records Law. We therefore grant Mr. Simpson's petition and order BCD to disclose the requested record. BCD has seven days from the date of this order in which to comply.<sup>3</sup> ORS 192.450(2).

Sincerely,

PETE SHEPHERD  
Special Counsel to the Attorney General

AGS05878

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<sup>3</sup> BCD may charge Mr. Simpson a fee to reimburse the agency for its actual cost in making such records available, including its photocopy costs and the time spent by agency personnel in reviewing the records. *See* ORS 192.440(3).