

November 21, 2007

Allen W. Van Dyke
P.O. Box 5385
Bend, OR 97708

Re: *Petition for Public Records Disclosure Order*
Oregon Department of Justice Records

Dear Mr. Van Dyke:

You have requested that the Attorney General direct Department of Justice (DOJ) staff to provide you with a complete copy of a particular investigative report. We received your request via facsimile on November 14, 2007. The report you are seeking relates to complaints that you raised about the conduct of various persons at the Oregon Department of Fish & Wildlife (ODFW). It was prepared by DOJ investigator Art Ebelmesser. You previously requested the same report from Mr. Ebelmesser, and on November 8, 2007 you received a written denial of your request. Therefore, the Attorney General is treating your letter as a petition for disclosure of records under the Oregon Public Records Law, Oregon Revised Statutes (ORS) 192.410 to 192.505. This letter constitutes the Attorney General's order with respect to that petition. ORS 192.450. For reasons that follow, your petition is respectfully denied.

The Public Records Law confers a right to inspect records of Oregon public bodies, subject to certain exemptions and limitations. *See* ORS 192.420. Any person who is denied the right to inspect or receive a copy of any public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.450(1). The law favors disclosure, and agencies must show that there is a proper basis if records are withheld. ORS 192.490(1).

Assistant Attorney General Michael C. Kron has reviewed the report that you requested, along with a copy of the complaint that you filed with the Oregon Bureau of Labor and Industries (BOLI). That complaint is still being considered by the Federal Equal Employment Opportunity Commission (EEOC). Following Mr. Kron's review, we have determined that the

report you are requesting is protected by the lawyer-client privilege. It is exempt from disclosure under ORS 192.502(9).

ORS 192.502(9)(a) establishes an exemption for “[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.” We have previously ruled that this exemption incorporates the various privileges contained in the Oregon Evidence Code, including the lawyer-client privilege, ORS 40.225.¹ In a previous decision, we held that an investigative report prepared at the behest of a DOJ attorney was protected from disclosure by the lawyer-client privilege. The report was prepared as part of the legal services provided by DOJ, and the agency receiving the report had not waived the lawyer-client privilege with respect to the subject matter of the report.²

We conclude that the same factors are present in this case. The report was prepared by DOJ, acting as attorneys for ODFW; it is our work product. Your complaints to BOLI and EEOC alleged improper comments by ODFW personnel to prospective employers. The investigative report directly concerns those allegations, and was ordered in response to the administrative proceedings that you initiated to air them. ODFW has not waived the lawyer-client privilege with respect to the report. Applying the analysis that we have previously applied to such circumstances, the report that you request is protected by the lawyer-client privilege and therefore not subject to mandatory disclosure under Oregon’s Public Records Law.

Nevertheless, our inquiry does not end with that conclusion. A recent amendment to ORS 192.502(9) has narrowed the context in which the lawyer-client privilege applies to public records requests. Senate Bill 671 (2007) created ORS 192.502(9)(b). That addition reads as follows:

[ORS 192.502(9)(a)] does not apply to factual information compiled in a public record when:

- (A) The basis for the claim of exemption is [the lawyer-client privilege];
- (B) The factual information is not prohibited from disclosure under any applicable state or federal law, regulation, or court order and is not otherwise exempt from disclosure under [Oregon’s Public Records laws];
- (C) The factual information was compiled by or at the direction of an attorney as part of an investigation on behalf of a public body in response to information of possible wrongdoing by the public body;
- (D) The factual information was not compiled in preparation for litigation, arbitration, or an administrative proceeding that was reasonably likely to be initiated or that has been initiated by or against the public body; *and*

¹ Public Records Order, July 6, 1982, Zaitz; Public Records Order, March 30, 1989, Howser.

² Public Records Order, July 6, 1982, Zaitz.

(E) The [client] has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction.

(Emphasis added.) As a result of this amendment, the attorney client privilege no longer provides an absolute shield against requiring disclosure of public records.³ Disclosure of factual material can be compelled despite the attorney client privilege if all of the factors listed in subsections (A) through (E) above are present.

Although the report you are seeking contains factual material, we conclude that it was "compiled in preparation for * * * an administrative proceeding * * * initiated * * * against the public body." The investigation was ordered on August 16, 2007. That was nearly one month after BOLI received your complaint against ODFW on July 17, 2007. Assistant Attorneys General Kathryn Logan and Frank Connell confirm that the administrative proceedings that you initiated against ODFW were the reason for the investigation. As a result, the factor listed in subsection (D) of ORS 192.502(9)(b) is not present, and the lawyer-client privilege is preserved.

It also appears that the factor listed in subsection (E) is absent. There is no indication that ODFW has made a public statement with respect to the factual matter contained in the investigative report.

We need not determine whether the factors listed in subsections (B) and (C) are present. Because the investigative report was prepared in anticipation of litigation, it does not fall within the exception to the lawyer-client privilege created by ORS 192.502(9)(b). As a result, it remains protected from mandatory public records disclosure by ORS 192.509(9)(a). The fact that ODFW has not publicly waived the lawyer-client privilege with respect to the investigative report compels the same conclusion. Therefore, we respectfully deny your petition.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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³ *Compare*, Public Records Order, July 6, 1982, Zaitz, stating that "If the lawyer-client privilege is applicable, the Attorney General cannot consider whether or not the information should be disclosed in the public interest, but must deny your petition."