

July 26, 2006

James C. Wallace  
1635 Rio Vista Way S.  
Salem, OR 97302

Re: Petition for Public Records Disclosure Order:  
*Public Employees Retirement System Records*

Dear Mr. Wallace:

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 July 20, 2006, asks the Attorney General to order the Public Employees Retirement System (PERS) to disclose "the DOJ opinion written for OSGP regarding implementation of trading restrictions referenced in the November 10, 2004, OSGP Advisory Committee Meeting Minutes, attached, and requested by Kathleen Beaufait at that meeting."<sup>1</sup> Gay Lynn Bath, Deferred Compensation Manger, denied your request for copies of "[a]ll AG Opinions regarding authority of OSGP to implement restrictions on participant transfers" on the grounds of "client-attorney privilege" by a letter to you dated February 16, 2006. For the reason that follows, 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. Any person denied the right to inspect or to receive a copy of a public record may petition the Attorney General to determine whether the record may be withheld from inspection. ORS 192.450(1).

ORS 192.502(9) unconditionally exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." Communications between a lawyer and client are privileged

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<sup>1</sup> "OSGP" is the Oregon Savings Growth Plan. It is administered by PERS pursuant to ORS 243.401 to 243.507.

under Oregon law. ORS 40.225 (OEC 503).<sup>2</sup> Disclosure of a record that is exempt from disclosure under the Public Records Law by the public body that holds the record waives the exemption. *Springfield School District # 19 v. Guard Publishing Co.*, 156 Or App 176, 182-83, 967 P2d 510 (1998). Disclosure of a summary of a report may act as a waiver of the privilege if the information contained in the summary is equivalent to the privileged information. *Oregonian Publishing v. Portland School Dist. No. 1J*, 152 Or App 135, 142-43, 952 P2d 66 (1998), *aff'd on other grounds*, 329 Or 393, 987 P2d 480 (1999).

There is no indication that PERS/OSGP disclosed to anyone any advice or summary of advice from the Department of Justice relevant to your request. The November 10, 2004, meeting minutes that you attached to your petition says, "Beaufait requested a copy of the DOJ opinion written for OSGP regarding implementation of trading restrictions." There is no indication that any such advice ever was provided to Ms. Beufait, other members of the Advisory Committee or anyone else, and there is no indication any opinion from the Department of Justice concerning trade restrictions ever was discussed at any meeting of the OSGP Advisory Committee.<sup>3</sup> Mere mention of the possible existence of a letter of advice from attorney to client is not sufficient to act as a waiver of the attorney-client privilege. For this reason we deny your petition.

Sincerely,

PETER D. SHEPHERD  
Deputy Attorney General

AGS18186  
c: Paul Cleary, PERS Executive Director  
Gay Lynn Bath, Deferred Compensation Manager

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<sup>2</sup> The Conference Committee commentary to ORS 40.280 (OEC 511) restricts waiver of communications privileged under ORS 40.225 by stating that "[a] person, merely by disclosing a subject which the person has discussed with an attorney \* \* \*, does not waive the applicable privilege; the person must disclose part of the communication itself in order to effect a waiver."

<sup>3</sup> Even if such advice had been provided to members of the Advisory Committee, that would not constitute a waiver of the privilege. The Advisory Committee was created by the legislature to advise the Public Employees Retirement Board "on policies and procedures and such other matters as the board may request." ORS 243.505. As such, the Committee is a state agency within the meaning of ORS 183.310(1), albeit one that acts solely in an advisory capacity to another agency. Consequently, any provision of attorney-client privileged information to the Committee is not a disclosure to the public but is, rather, use of the information by the client.