



DEPARTMENT OF JUSTICE

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Salem, Oregon 97301-4096  
Telephone: (503) 378-4400

May 24, 2010

Honorable Ted Ferrioli  
Senate Republican Leader  
900 Court Street NE, S-323  
Salem, OR 97301

Dear Senator Ferrioli,

I am writing in response to your letters to me dated May 5, 2010, and May 17, 2010, requesting documents from the Oregon Department of Justice related to former Special Counsel Brent Foster, as well as your letter to Majority Leader Richard Devlin, dated May 18, 2010, on the same topic. I appreciate your continued commitment to ethics and transparency in government and look forward to working closely with you in this matter. This letter addresses (1) concerns you have raised about the integrity of legal advice provided by the Oregon Department of Justice; (2) the Department's response to misconduct by Brent Foster; and (3) your requests for public records.

I. Integrity of DOJ Advice

In your letter to Senator Devlin, you expressed concern that the regulatory process with respect to various liquefied natural gas (LNG) proposals may have been tainted by "political machinations." Associate Attorney General David Leith and I have personally supervised the formulation of the Department of Justice's legal advice with respect to all significant LNG issues. This advice has been based on state and federal law. If Mr. Foster gave unauthorized legal advice, we trust that Judge Koch's review, discussed below, will identify any such deviations. Moreover, parties who believe state government has not properly applied the law may, of course, challenge the state's legal positions in court.

II. Response to Foster Resignation

As you know, Mr. Foster resigned from the Oregon Department of Justice on April 20, 2010, after admitting that he misrepresented his role in the taking of water samples in the case of *Oregon v. Ryan/Hood River Juice*. In response to Mr. Foster's admission, I have taken the following two steps.



First, I referred Mr. Foster's case to the Marion County District Attorney to determine whether Mr. Foster's conduct in the *Ryan* case violated Oregon criminal statutes. That referral took place on April 20, 2010, the day Mr. Foster informed me of his misconduct and resigned. The purpose of the referral was to insure that a thorough criminal investigation was conducted by an independent prosecutor. That investigation is ongoing.

Second, I have asked Judge Dale Koch, former Presiding Judge of the Multnomah County Circuit Court, to conduct a comprehensive and independent review of Mr. Foster's work at the Department of Justice, beginning with his work on LNG. Judge Koch will have unfettered access to DOJ documents and personnel. Judge Koch will report his findings to me, which I will publicly disclose. Judge Koch's review has two goals: (1) to identify and refer any evidence of criminal wrong-doing to the Marion County District Attorney; and (2) to refer any evidence of ethical impropriety to the Oregon State Bar. This independent review by a respected member of the Oregon bench will insure that any misconduct by Mr. Foster will be uncovered and exposed.

### III. Records Request in Letter to Senator Devlin

In your letter to Senator Devlin dated May 18, 2010, as well as comments to the media that day, you requested that I disclose sixty four specific emails with respect to LNG that I have declined to disclose in response to prior records requests by fellow legislators and others. These documents are covered by attorney-client privilege held by parties other than the Department of Justice or the State of Oregon pursuant to the "common interest" provisions of ORS 40.225(2)(c). Though I am eager to comply with your request, and have asked other parties to waive their privilege, Oregon law does not give me the power to compel other parties to waive their privilege. Disclosure of these records by the Department of Justice absent such waiver would be a serious legal and ethical violation. Needless to say, my commitment to the rule of law prevents me from doing so. Please be advised that my staff has reviewed these documents and they do not contain any evidence of legal or ethical impropriety by Mr. Foster. In addition, these documents will be reviewed by Judge Koch as part of his independent review.

### IV. Records Request Dated May 5, 2010

Your letter dated May 5, 2010 requests disclosure of two categories of public records: (1) correspondence sent or received by Foster "dealing with Liquefied Natural Gas (LNG) and/or the Bradwood Landing Project" and (2) correspondence "sent to Columbia Riverkeeper or received from Columbia Riverkeeper by former Special Counsel Brent Foster."

We have conducted a preliminary review and believe that there are approximately 3000 documents responsive to your request. These documents will be reviewed and all documents that can be disclosed without violating Oregon law will be sent to you. Because I believe your request is in the public interest, I will waive the fee for this review. If some records cannot be disclosed, due to the existence of legal privileges or

other legal prohibitions, Judge Koch will determine as part of his review whether those records contain any evidence of criminal, legal or ethical wrongdoing and disclose such wrongdoing to the public. Disclosure of these records will be done as quickly as possible.

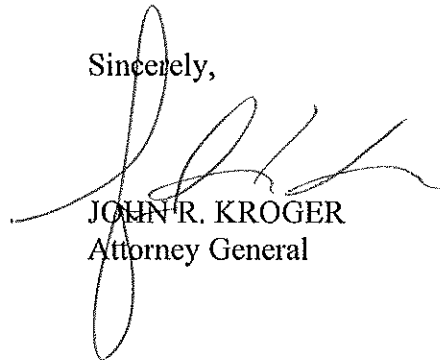
V. Records Request dated May 17, 2010

In your letter dated May 17, 2010, you made a further request for “[a]ll emails sent or received by Special Counsel Brent Foster while employed by the Oregon Department of Justice.” We have determined that there are an additional 21,500 documents responsive to your request.

Because we are ethically required to review each document prior to disclosure to prevent violation of attorney-client privilege, the cost of the legal review required to comply with this unprecedented disclosure of over 20,000 legal documents is likely to be in excess of \$80,000.<sup>1</sup> I have arranged a meeting with you, currently scheduled for Monday, May 24, 2010, to discuss payment for this request.

I appreciate your keen interest in this matter. Department of Justice lawyers must comply with the highest ethical standards. Your commitment to that standard is to be commended.

Sincerely,



JOHN R. KROGER  
Attorney General

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<sup>1</sup> The Marion County District Attorney’s Office is investigating Mr. Foster’s conduct. Before we disclose any additional records, Mr. Beglau’s office has asked for the opportunity to determine whether release would potentially compromise its ongoing investigation. My office will comply with that request, as the exemption from disclosure codified at ORS 192.501(3) permits. My cost estimate does not include the cost to Mr. Beglau’s office of reviewing the requested records for its separate purposes. Although we would strive to work together as efficiently as possible while preserving the integrity of the ongoing investigation, I do not see how your request could avoid imposing a significant burden on the Marion County District Attorney.