ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: February 9, 2016

TO: Senator Michael Dembrow
Chair, Senate Committee on Workforce and General Government

FROM: Judith A Giers, Deputy Chief Counsel
Chief Counsel's Office

Paul Garrahan, Attorney-in-Charge
Natural Resources Section

SUBJECT: SB 1579 – Forced Disclosure of Agency Legal Advice

OVERVIEW

The Department of Justice has both practical and legal concerns about SB 1579. Our main concern is that the bill will fundamentally undermine the attorney-client relationship between our agency clients and our attorneys, and interfere with our ability to communicate fully and frankly with our agency clients. That full and frank discussion is critical to our ability to provide accurate and comprehensive legal advice to agencies – without it, the state's legal exposure will increase very significantly.

We are also concerned that the bill will increase the cost of legal advice, and that the bill will generate needless litigation over whether the summary of advice required by this bill is adequate. In any such litigation, our full legal advice will be disclosed, destroying any attorney-client privilege that might theoretically have survived the disclosure of the summary.

The Bill Fundamentally Undermines Attorney-Client Privilege

SB 1579 fundamentally undermines the right of Oregon's agencies to choose when to reveal the advice provided by their lawyers. Attorney-client privilege is waived when the client "voluntarily discloses or consents to disclosure of any significant part of the matter or communication." ORS 40.280; OEC Rule 511. Under any interpretation, providing a "summary" of legal advice would disclose a significant part of the matter or communication, waiving the attorney-client privilege.

Once the privilege is lost, all attorney-client information related to the rule or order will be eligible for disclosure – under the Public Records Law (which currently exempts records containing privileged communications), and in any lawsuit against the state agency.

Loss of Confidentiality will Hamper Full and Frank Communication

We have grave concerns about how the loss of the right to confidential communication will affect our ability to provide full and frank advice to our clients. Our advice rarely contains a simple a thumbs-up or thumbs-down on proposed agency action. We usually analyze a number of different options or scenarios that an agency might choose, evaluating the legal and practical risks of each choice. Agencies are often operating in a grey area where all available options pose some legal risk. It is our job to point out those risks *to our clients,* but if we know that our analysis of the legal risks will be disclosed, that may cause us to limit our discussion to avoid providing a legal roadmap to opponents of agency action. If we are asked to summarize advice, we will be forced to do so in anticipation of litigation. Rationally, a "summary" which will be used adversely in court actions must necessarily be treated as more of a memorandum protecting against legal challenge. This document will be expensive to generate.

Agencies will Avoid Asking for Advice.

More importantly, if agencies know that our advice will be disclosed they are less likely to ask for it – both because it will expose them to the risk of challengers who now will be in possession of DOJ's advice, and also because DOJ advice will be more expensive since we will have to generate a detailed, pre-litigation summary in addition to the original advice. That is not an inconsiderable expense when one understands that often an agency will work with their DOJ lawyer for months on new or amended rules. Summarizing all the advice given orally, by email, and in writing (sometimes in the form of "red-line" comments to draft rules) will be a substantial project in and of itself, and will significantly add to the agency's legal costs.

PRACTICAL ISSUES

What does a "summary" look like? The language around the summary requirement in the bill is vague. The bill does not define what a "summary" of legal advice should contain or provide any guidance about how detailed or comprehensive it should be. For instance, is "DOJ approved this change to the language of the rule" an adequate summary?

New collateral challenges. This bill provides rule or order challengers with an entirely new procedural defect to complain about. Failure to "substantially comply" with the summary requirement is a basis to challenge the rule. ORS 183.335(11)(a) and ORS 183.482(8)(b)(c). A challenger could contest the validity of a rule or order because the agency failed to substantially comply with the summary requirement if the summary provided is not detailed enough *in the challenger's opinion.*

This will open the state up to all sorts of litigation over the adequacy of the summary of DOJ advice as to challenged rules and orders. Courts decide "substantial compliance", so eventually courts will tell us whether our summaries substantially comply. This will lead to litigation over an entirely collateral issue – not whether the agency's rule is statutorily authorized, or reasonable, but instead whether the summary of DOJ's advice about the rule is

adequate. This will be an excellent avenue for challengers seeking to delay implementation of agency rules through purely technical challenge.

Added expenses for legal advice. This new ground for challenge will add legal expenses for both creating summaries and defending them. This is especially acute in relation to agency orders. The word order means "any agency action expressed orally or in writing directed to a named person or named persons, other than employees, officers or members of an agency." ORS 183.310(6)(a). It includes anything an agency does that affects particular individuals, including businesses; e.g., every permit issued is an order. For some programs, DOJ has been providing advice for years or decades, and that advice is relied upon generally to support agency authority to issue its orders, such as permits. Agencies would incur significant expense to summarize all such legal advice, but an agency's orders would be subject to nullification if that was not done.

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