

IN MY OPINION

SECRECY AND THE PUBLIC TRUST **Restore openness to Oregon** **government**

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In 1974, in the midst of one of the greatest constitutional controversies in American history, President Nixon refused to comply with court orders to turn over White House tape recordings that would eventually undo his presidency.

Nixon claimed these recordings were protected from outside scrutiny by an unqualified presidential privilege of confidentiality. A unanimous U.S. Supreme Court thought otherwise and ordered the tapes released, ruling that even a constitutional executive privilege of confidentiality must at times give way to the greater interests of government. The principle of that landmark decision in *United States v. Nixon*, that absolute secrecy corrodes good government, has reshaped the values of open government in post-Watergate America.

The echoes of that historic Supreme Court case reached Oregon last fall, where, unfortunately, the Oregon Court of Appeals gave a completely different treatment to government secrecy.

Facing allegations of public corruption in 2000, the Klamath County School District hired an attorney to conduct an investigation. Six months later the district issued a terse news release stating that "the charges against the district administrators

are not substantiated and we believe there is clear evidence of no wrongdoing!"

When asked under Oregon's public records laws to provide the underlying documents supporting that conclusion, the school district refused, asserting that, because they had hired an attorney to conduct the investigation, the documents were immune from public disclosure forever, under the principle of attorney-client privilege. The Court of Appeals agreed.

As a consequence of that decision, any government body in Oregon today can shield itself from public scrutiny of an internal investigation of wrongdoing by the simple expedient of involving an attorney. Nor does this shield of secrecy extend merely for the reasonable period necessary to defend itself in litigation or to make sensible policy decisions. It extends forever.

This blanket grant of governmental secrecy from scrutiny by the citizens for whom public officials work is a dangerous and destructive development that can only invite public distrust and cynicism.

The Oregon Legislature has begun debate on laws that seek to restore the governmental openness that Oregonians believed they were afforded by their open public-records laws. Expect lawyers throughout the state to oppose this legislation, especially lawyers from government agencies who stand to benefit from the secrecy provided them by the Court of Appeals decision. The claim will be that the confidentiality of the relationship between an attorney and his client is more important than any other goal of society.

When it comes to lawyers who work for the government, and therefore for the people, that's wrong. We can protect the attorney-client relationship among government lawyers and

the agencies for which they work by establishing a presumption of confidentiality in that relationship. Unlike the current state of the law, however, citizens should be able to petition the courts to overcome that presumption of confidentiality if they can demonstrate a clear and convincing public interest for access to documents. That's the message of *United States v. Nixon*.

Secrecy is sometimes --but seldom --necessary in government, and law enforcement is a prime example of that. There is, however, little justification for absolute and categorical governmental secrecy in the face of a paramount societal interest.

No government agency should be able to wrap its internal investigations in an unqualified and perpetual cloak of secrecy. The Oregon Legislature should come to the same conclusion.