Hon. Arnold Schwarzenegger
Governor's Office
State Capitol
Sacramento, CA 95814
September 3, 2004

RE: SUPPORT OF A.B. 2713 (Pavley) --PUBLIC AGENCY ATTORNEY ACCOUNTABILITY

Dear Governor Schwarzenegger:

I am writing on behalf of Public Employees for Environmental Responsibility (PEER) to express our support for your AB 2713. PEER is a national, non-profit organization representing scientists, law enforcement officers, lawyers and other professionals working within state, federal and local pollution control, land management and wildlife protection agencies. PEER represents approximately 10,000 public servants located within all 50 states.

In our experience, AB 2713 offers a sorely needed measure of protection for government attorneys who are seeking to serve the public interest consistent with the ethical bounds of the practice of law. The bill addresses an anomalous situation for public agency lawyers who, on one hand as civil servants, are explicitly protected by whistleblower protection laws, such as Cal. Government Code 8547 et seq., from occupational reprisal for disclosing improper governmental activity but, on the other hand, are vulnerable to loss of their license or other professional discipline for that same disclosure if the disclosure arises from their role as attorneys within the agency.

AB 2713 resolves this anomaly by directly declaring that government attorneys owe a duty to protect the public-- a duty that may supersede the obligation of confidentiality ordinarily owed to their supervising official or employing agency. The resolution drawn by AB 2713 is appropriate because government lawyers are public servants and should not, as in a private sector setting, owe their paramount duty to the agency official who embodies their nominal "client" at the expense of a clear threat to public health, facilitating a criminal act or any other serious public detriment.

At the same time, AB 2713 is narrowly drawn and based upon time-tested legal definitions. It relies upon the same protections now accorded to all other state professional employees --professionals such as scientists, doctors and engineers who also undergo separate professional licensure as do lawyers.

In addition, I would make the following observations about the bill:

1. AB 2713 Addresses a Common Problem; Not Isolated to One Case

The problem represented by the Cindy Ossias case is not isolated or unique. The very nature of this problem makes it exceedingly rare that such cases even come to public attention. The only way an attorney can air these problems is by risking his or her professional future.

Nonetheless, in PEER's intake process, we see approximately one public agency attorney a month who is struggling with ethical strictures against disclosing or reporting agency misconduct. In the past 24 months alone, four public agency attorneys from California have sought legal advice because they are currently facing a dilemma similar to that which faced Ms. Ossias.

One case that has come to light involves Ann Rapkin, the Chief Counsel for the Connecticut Department of Environmental Protection (DEP). Ms. Rapkin has filed legal claims against DEP leadership concerning matters affecting public health and environmental enforcement. Connecticut, like California, has a very restrictive standard for matters that attorneys may disclose. Consequently, Ms. Rapkin's complaint is under seal.

Another case involves a federal lawyer working for US EPA in a state with attorney disclosure provisions similar to those in California. This attorney wished to disclose EPA's cover-up of conditions at a Superfund site that could have profound public health implications for neighboring communities. This attorney sought advice from his state bar and was told that he could ethically make no disclosure about the problem. The only ethical course of conduct he could pursue, he was officially advised, was to resign from federal service but forever remain silent.

2. AB 2713 Has Precedents in Other Jurisdictions

Across the fifty states and the District of Columbia, there are two general groupings of state bar provisions governing attorney-client confidentiality:

- Twenty-one states, including California, pattern their standards American Bar Association (ABA) Model Rule 1.6 which allows disclosure by a lawyer only to the extent the attorney believes necessary:

> 1. To prevent the client from committing a criminal act the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> 2. To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client , to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client

was involved, or to respond to allegations in any proceeding concerning the lawyer=s representation of the client.

* Twenty seven states allow lawyers to reveal wrongdoing of their clients concerning specified criminal acts, including 2 states with mandatory disclosure rules.

a) *Hawaii*

Virtually no state other than Hawaii makes a distinction between public and private sector lawyers with respect to client confidentiality. The one clear exception is Hawaii, which since 1994 has made provisions similar to those in AB 2713 allowing public agency attorneys to disclose both future and past improprieties. The Hawaii rules were promulgated by their state bar in an effort to restore the aura of integrity to public attorneys following a series of scandals within state government.

b) *Federal Case Law*

The dilemma faced by Ms. Ossias has also surfaced among attorneys serving in the federal government. The thrust of recent developments suggests a growing trend of law toward the proposition that the attorney-client relationship in the public agency setting should not be a shield for criminality. Thus, the Eighth Circuit held that the attorney-client privilege did not apply to a situation in which a criminal grand jury requested documents, in this case from the Clinton White House (In re Grand Jury Subpoena Duces Tecum, 112 F. 3d 910 (8th Cir. 1997).

c) *Bill Affects Lawyers at Federal, State and Local Levels*

AB 2713 quite properly establishes the same standard for governmental attorneys at all levels of government by addressing the issue solely through the dimension of state licensure. Federal and local agency lawyers face the same ethical dilemmas as Ms. Ossias no less than state agency lawyers. Similarly, attorneys embarred in California risk discipline for disclosures regardless of which unit of government employs them.

3. Concerns About Disruptive Impact or "Chilling Effect" Are Misplaced

a) *Absence of Concrete Examples Suggests a Rhetorical Rather Than a Real Concern*

The standard for disclosure employed by AB 2713 has applied to all state employees for more than 20 years. In those decades there has been no

reported case of a state employee disrupting agency operations improperly or inappropriately due to a protected disclosure.

If there has been no such example emanating from all of the various state professional employees in 20 years, it is unclear why extending this same coverage to state lawyers will stop the wheels of government from spinning.

b) *No Evidence of Chilling Effect or Disruption in Other Jurisdictions*

As noted earlier, more than half of the states allow varying levels of disclosure by lawyers both in and out of government. There is no published material suggesting that government works better or differently in states with narrow disclosure rules, such as California, versus states with broader disclosure rules or even mandatory disclosure rules, such as Virginia.

Hawaii has not reported impaired governmental decision-making since 1994 when it enacted similar rules to those in AB 2713.

c) *Premise that Secrecy Benefits Governmental Efficiency is Questionable*

Concerns about managers being chilled from consulting agency lawyers due to fear of disclosure are misplaced. AB 2713 does not permit disclosure of requests for advice or assistance by agency leadership. Instead, AB 2713 allows attorney disclosure of wrongdoing only to the extent necessary to prevent or rectify actual misconduct.

The public's business is best conducted in the open. Recent events underline the clear dangers of agency leaders acting as if their inner doings could not be disclosed. AB 2713 does not destroy the confidential relationship between managers and staff lawyers; the bill merely ensures that a manager cannot abuse confidentiality contrary to the public good.

In closing, AB 2713 stands for the simple principle that public agency lawyers really do work for the public. In PEER's view, a clear declaration of that proposition will only improve the practice of law in the public sector.

Sincerely,

Jeffrey Ruch
Executive Director