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May 2, 1989

Marveita Redding
Executive Assistant to the Director
Oregon Department of Agriculture
635 Capitol Street, NE
Salem, OR 97310-0110

Nickolas Facaros
2592 Friendly Street
Eugene, OR 97405

Re: **Petition for Public Records Disclosure Order: Oregon Department of Agriculture Records**

Dear Ms. Redding and Mr. Facaros:

This letter is the Attorney General's order on Mr. Facaros' petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on April 21, 1989,[1] asks the Attorney General to direct the Oregon Department of Agriculture (department) to disclose "all records contained in a file on the fungicide Tilt that has within it and among others the appended records." The appended records referred to are: (1) a state telephone message form dated 10/20 (no year indicated) to Chris (no last name indicated) from Gary Orr of Ciba-Geigi Company; (2) a letter dated November 22, 1988, from state Senator Mae Yih to United States Senator Mark Hatfield concerning the seizure of grass seed pellets; and (3) a page of unidentified handwritten notes containing columns of figures. Mr. Facaros obtained the appended records under his request for the department's records on the use of fungicides on grass seed crops. For the reasons stated below, we grant the petition in part, and deny it in part.

The Public Records Law confers a right to inspect public records of a public body in Oregon, subject to certain exceptions. ORS 192.420. If a public record contains material that is exempt from disclosure together with nonexempt material,

the public body must separate the materials and make the non-exempt material available for examination if it is reasonably possible to do so while preserving the confidentiality of the exempt material. ORS 192.505; Turner v. Reed, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

We have reviewed the files containing the documents to which Mr. Facaros refers. We conclude that some of the requested records contain information that is exempt from disclosure under ORS 192.502(7).

1. Disclosure Prohibited by Federal Law

ORS 192.502(7) exempts from disclosure "any public records or information the disclosure of which is prohibited by federal law or regulations." Under this provision, a public record is exempt from disclosure if federal law prohibits its disclosure. We have reviewed the department records in question. One of the records contains documents the department received from the federal Food and Drug Administration (FDA) concerning an FDA investigation of a violation of 21 USC § 331(a). That statute prohibits the introduction or delivery into interstate commerce of any food that is adulterated or misbranded. Violators are subject to a fine, imprisonment or both. 21 USC § 333(a). The documents include FDA investigation reports, an internal FDA memorandum concerning the investigation, a federal prosecutor's letter concerning the investigation, and copies of pleadings filed in federal district court.

21 CFR §§ 20.1 to 20.119 (1987) govern disclosure of FDA records. Section 20.84 provides:

> "Data and information otherwise exempt from public disclosure may be disclosed to Food and Drug Administration consultants, advisory committees, state and local government officials commissioned pursuant to 21 USC 372(a) and other special government employees for use only in their work with the Food and Drug Administration. Such persons are thereafter subject to the same restrictions with respect to the disclosure of such data and information as any other Food and Drug Administration employee."

The Oregon Department of Agriculture is commissioned under 21 USC § 372. Hence, the department is subject to the same restrictions on disclosure of the FDA documents at issue here as the FDA would be.

21 CFR § 20.64(d)(1) governs disclosure of FDA law enforcement investigation records. It provides in relevant part:

> "No such record is available for public disclosure prior to the consideration of regulatory enforcement action based upon that record's being closed, except as provided in §20.82 [limited discretionary disclosure by the FDA Commissioner]. The Commissioner will exercise his discretion to disclose records relating to possible criminal prosecution pursuant to §20.82 prior to consideration of criminal prosecution being closed only very rarely and only under circumstances that demonstrate a compelling public interest."

This provision and 21 CFR § 20.84, read together, prohibit disclosure of FDA law enforcement records contained in the department's files until the federal case is closed or until the FDA Commissioner authorizes their disclosure under 21 CFR § 20.84.

The federal prosecutor handling the case to which the FDA documents pertain informs us that prosecution is still pending. To our knowledge, the FDA Commissioner has not authorized disclosure of the information under 21 CFR § 21.64(d)(1). We conclude, therefore, that federal law prohibits disclosure of the FDA investigation reports, the FDA internal memorandum and the federal prosecutor's letter. Consequently, those records are exempt from disclosure under ORS 192.502(7).

Copies of the federal district court pleadings are not part of the FDA law enforcement investigation records. We are aware of no federal provision that prohibits their disclosure. Nor are they exempt from disclosure under any other state law. The department, therefore, must allow Mr. Facaros to inspect those pleadings.

2. Trade Secrets

Also included in the records we reviewed is a packet of materials pertaining to the "Mini Modified Luke Method." This is a laboratory method for determining Tilt levels in feed pellets. The department withheld these documents on April 19, 1989, because department staff handling Mr. Facaros' request believed that the method had been derived from trade secret information supplied by a chemical manufacturer. ORS 192.501(2) exempts trade secrets from disclosure unless the public interest requires disclosure in a particular instance.

The administrator of the department's Lab Services Division informs us that the staff's understanding was mistaken. The department obtained the Mini Modified Luke Method from the FDA's Laboratory Information Bulletin. Although the bulletin is not publicly circulated, no state or federal law exempts the bulletin from disclosure. The department, therefore, must allow Mr. Facaros to inspect records concerning the Mini Modified Luke Method.

3. Supplemental Petition

On April 26, 1989, Mr. Facaros filed an addendum to his April 21, 1989, petition. In the addendum he requested:

> "2. All records regarding enforcement actions on or about Oct. 14, 1988, relating to Tilt residues, whereby Hersh Pendell called seven separate pellet mills, requesting that shipments of certain grass seed products or by-products be halted (These records are possibly within Pendell's files);
>
> "3. 'Sampling data' (time collected and analyzed, business/place sample taken from, commodity sampled, and level of Tilt residues found) upon which action noted in item 2, supra, was based (Records disclosed so far show prior sampling for Tilt was conducted 10 months earlier, which doesn't make sense);
>
> "4. 'Sampling data' for samples 2732 and 2741, if related to Tilt residues;
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> "5. 'Sampling data' showing Tilt residues at 8 parts per million (referred to in Pendell's Oct. 27, 1988, interoffice memo to Kirby; and
>
> "6. Records showing hourly wage of each person who searched for records for whose search time I have been charged."

We have reviewed department files and find that they contain none of the records Mr. Facaros requests in paragraphs 2, 3, 4 and 5 of his addendum. The department informs us that it took no enforcement action on or about October 14, 1988. Consequently, no sampling was done and no records exist.

The department already has provided Mr. Facaros with a copy of the laboratory form for Sample 2732. It is the only

"sampling data" included in the records. The form for Sample 2741 concerns filbert hulls. It is not contained in any grass seed file. Because Mr. Facaros requested only grass seed records, the department did not disclose this form.

The department informs us that there is no laboratory report showing Tilt residues at 8 parts per million (ppm). That result was an unrecorded preliminary laboratory result. The final laboratory result was 5.8 ppm. It appears on the October 27, 1988, memorandum from Dr. Michael Wehr to Dr. William Wright. The department has previously given Mr. Facaros this document.

The department has compiled the requested information on the hourly wage for each person who searched for records and intends to send the information to Mr. Facaros this week.

4. Conclusion

The FDA law enforcement investigatory records Mr. Facaros has requested are prohibited from disclosure under federal law and, therefore, exempt from disclosure ORS 192.502(7). Other records he has requested do not exist, or already have been disclosed. Accordingly, we deny the part of Mr. Facaros' petition relating to these records.

Copies of the FDA's federal district court pleadings, and materials on the Mini Modified Luke Method, which the department previously withheld, must be disclosed. The department also must disclose records on the hourly wage of persons for whose time in searching for records Mr. Facaros has been billed. The Attorney General, therefore, grants the petition in part. The department must separate the exempt and nonexempt materials and make the nonexempt material available for inspection. ORS 192.505. Department of Justice attorneys will work with the Department of Agriculture staff to identify the portions of the records that may be excised. ORS 192.450(2) affords the Department of Agriculture seven days from the date of this order in which to comply.

The department may require Mr. Facaros to pay its actual costs in making the records available, including staff time necessary to locate documents and provide disclosure. ORS 192.440(2); 44 Op Atty Gen 239, 241 (1984) (Attorney General's Public Records and Meetings Manual).

Under OAR 603-01-145(3), the Department of Agriculture requires that a requestor pay applicable fees before or at the time department records are furnished. The department informs us that Mr. Facaros has not yet paid the applicable fees for records already provided to him. The department may withhold the records required to be released under this order until Mr. Facaros pays all applicable fees.

Sincerely,

PAMELA L. ABERNETHY
Special Counsel to the
Attorney General

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[1]We appreciate Mr. Facaros' courtesy in allowing us to exceed the seven-day deadline for issuing public records orders.