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February 28, 2002

Gregory Perry
7770 NW Canyon
Corvallis, OR 97330

Re: Petition for Public Records Disclosure Order:
Department of Education Records

Dear Mr. Perry:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.401 to 192.505. Your petition, which we received on February 21, 2002, asks the Attorney General to direct the Oregon Department of Education (Department) to provide you copies of the Oregon State Assessment Tests in mathematics and reading (multiple choice tests only) given to 3rd, 5th, and 8th grade students in the years 1996 through 2001. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Any person who is denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.450(1).

You requested the tests from the Department earlier this month. Bill Auty, Interim Associate Superintendent, Office of Assessment and Evaluation, denied your request on the basis that the Department re-uses questions developed for one test in future tests.[1] According to Mr. Auty, the records you seek are tests developed for implementation of the statewide assessment system required by ORS 329.485. Mr. Auty says that the Department does not use a formula for determining the mix of old and new questions for a single test, so that questions appearing on any year's tests have the potential to be re-used in future statewide assessments.

[1] After denying your request for copies of the tests, Mr. Auty informed you that you could review the tests at the Department's offices. Because the Public Records Law requires a records custodian to "furnish [a] reasonable opportunity to inspect or copy" a public record, ORS 192.440, the Department's offer to review the requested records without being able to obtain copies does not alter its denial of your request for purposes of the Attorney General's review responsibilities.

Unless the public interest requires disclosure in the particular instance, ORS 192.501(4), in part, exempts from disclosure: "Test questions, scoring keys, and other data used to administer a licensing examination, employment, *academic* or other examination or testing procedure before the examination is given and if the examination is being used again" (emphasis added). Because the records that you seek are academic examinations, they fall within the exemption in ORS 192.501(4).

"The obvious purpose of this exemption is to protect the integrity of examinations administered by various public bodies * * *. Information used to administer the test is confidential until the test has been given. Examination information remains confidential if the test will be reused." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETING MANUAL (AG'S MANUAL) at 34 (2001). Mr. Auty informs us that releasing copies of questions used in tests from 1996 through 2001 would compromise the integrity of the statewide assessment system. Based on his explanation of the way in which the Department re-uses questions from prior tests, we agree with Mr. Auty's conclusion about disclosure compromising the integrity of the testing system.

Because ORS 192.501(4) is a "conditional exemption," the tests are exempt from disclosure "unless the public interest requires disclosure in the particular instance." *See* AG'S MANUAL at 26. Therefore, it is necessary to "conduct a careful balancing of confidentiality interests against public disclosure interests" to determine whether the tests are exempt from disclosure. AG'S MANUAL at 23. In your petition you express concern about the "potential for test rigor to change over time," and assert that "[f]or the public to have full confidence in the state's assessment program, its [sic] important that these tests be available to scrutiny by individuals outside the Oregon Department of Education."

With regard to "test rigor," Mr. Auty informs us that the Department reviews test questions both before and after tests are administered and calibrates test difficulty to a common scale to insure that any differences in average test scores are the result of differences in student achievement rather than variations in test difficulty. Moreover, according to Mr. Auty, test rigor could not be evaluated solely from information contained in the tests you seek.

Balanced against the threat to the integrity of the assessment system by disclosure of the tests, we conclude that the public interest does not require disclosure in this instance. Therefore, we find that the requested records are exempt from disclosure under ORS 192.501(4) and therefore deny your petition.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS09701
c: Bill Auty, Oregon Department of Education