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February 9, 2000

Mr. Andrew Schneiderman
P.O. Box 9284
Portland, Oregon 97207

RE: *Petitions for Public Records Disclosure Order:*
Department of State Police Records
Portland Police Bureau Records

Dear Mr. Schneiderman:

This letter is the Attorney General's order on your petitions for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. We received two petitions on January 18, 2000.[1/] The first petition asks the Attorney General to direct the City of Portland, Oregon Bureau of Police Personnel Division to make available a report to the Bureau of Police hiring selection committee regarding eligibility for hire, as well as documents obtained by the background investigator. The second petition asks the Attorney General to direct the Oregon Department of State Police (OSP) to make available a report to the OSP hiring selection committee regarding your eligibility for hire and the documents obtained by the background investigator to write such a report. As discussed more fully below, we deny the first petition for lack of jurisdiction, and we deny the second petition because OSP has agreed to make some of the records available to you and because we find the remainder of the records to be exempt from disclosure.

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. If a public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975). Any person who is denied the right to receive copies of a public record of a

[1/] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

state agency may petition the Attorney General to review the record to determine if it was properly withheld from disclosure. ORS 192.450(1).

Petition #1 – Portland Police Bureau Background Reports and documentation

The first petition requests the Attorney General to order the City of Portland, Oregon Bureau of Police Personnel Division and its employees to provide you with certain records. Because the Portland Police Bureau is not a state agency, the Attorney General does not have jurisdiction to order it to disclose its records.[2/] *See* ORS 192.450(1). Accordingly, we respectfully deny this petition for lack of jurisdiction.

Petition #2 -- OSP Background Reports and Documentation

The second petition requests the Attorney General to order the OSP Sworn Processing and Training Center and its employees to provide you with a "report to the OSP hiring selection committee regarding eligibility for hire" as well as "all documents obtained by the background investigator to write such a report." After you applied for employment with OSP in the spring of 1999, OSP conducted a background investigation. OSP routinely conducts background investigations on applicants, which are separated into two parts: "primary" and "partial" investigations. A "primary" investigation is conducted by an OSP trooper in the location where an applicant is currently residing, working or attending school. A "partial" investigation is conducted by OSP personnel in the location(s) where an applicant has resided, worked, attended school, undergone military service or indicated individuals providing references reside. Concerning your application, there is a "primary" investigation report dated October 9, 1999, and "partial" investigation reports dated August 5, 1999, August 9, 1999, and September 9, 1999.

Below, we address each of the investigation reports and documents obtained to write those reports, and we consider the exemptions from the Public Record Laws' disclosure mandate that are potentially relevant to those records.

A. Primary Background Investigative Report

We address the primary background investigation report first and then the various documents referenced in the report: a memorandum dated July 6, 1999, military records, employment history, list of references, letters obtained from the Portland Police Bureau file, and credit record.

[2/] When a public body other than a state agency has denied a records request, the district attorney of the county in which the public body is located has jurisdiction to review the denial. ORS 192.460.

1. Memorandum Dated October 9, 1999

The Primary Background Investigation Report is a five-page memorandum from Trooper Susan Klages to Sergeant Glenn R. Chastain dated October 9, 1999. ORS 192.502(1) exempts from disclosure:

> Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

This exemption is designed to encourage frank, uninhibited and candid communications within or between public bodies. OREGON ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (MANUAL) 40 (1997). To qualify for the exemption from disclosure in ORS 192.502(1), the public record must meet all four of the following tests:

1. It is a communication within or between public bodies.

2. It is advisory in nature and preliminary to an agency decision or action.

3. It is nonfactual in nature.

4. In the particular situation, the public interest in furthering frank and candid communications clearly outweighs the public interest in disclosure.

The Primary Background Investigative Report contains your name, the name of the investigator, the name of the person to whom the report was sent, and the name of the investigator's supervisor who reviewed the report. The report also briefly summarizes your credit history, military record, employment history, application records from the Portland Police Bureau and criminal history checks. To the extent this summary is purely factual, it is not exempt from disclosure under ORS 192.502(1).

The report also contains the investigator's subjective assessment of the background information that was obtained and a recommendation concerning your suitability for hire. The portion of the report consisting of the subjective assessment and recommendation meets the first three criteria of the exemption. It is a communication within a public body, i.e., from Trooper Klages to the OSP hiring committee; it is advisory in nature and preliminary to OSP's final decision whether to make an offer of employment to you; and it is a subjective evaluation and opinion concerning the information obtained by the investigation – rather that the factual details.

The issue then is whether in this particular instance the public interest in encouraging the communication of a frank and candid opinion from the OSP investigator to the hiring committee is clearly outweighed by your interest in learning the contents of that opinion. The public has an interest in a state agency's getting a completely candid and uninhibited evaluation of a prospective employee, and recommendation concerning his or her hire. If such communications were subject to disclosure, the investigator would likely be less candid and forthright in evaluating the information obtained about the prospective employee, particularly information that might reflect negatively. As a result, a candidate who is less well suited than other applicants might be hired by the agency. An individual might even be hired who is not suited at all. In this particular instance, you applied for a public law enforcement officer position, where a poor hiring decision could impact the safety of other police officers and the public, or might affect public confidence in law enforcement. Because of the significant public interest in OSP's selection of a person for employment who is best suited for the position, OSP must be able to obtain the most candid information available, and its investigators must be able to express their frank, and even blunt, opinions and recommendations unhampered by a concern that the communication may be disclosed to the applicant.

Weighed against this public interest in frank evaluations is the interest in "ensuring unbiased, fair and informed hiring decisions by state agencies" rather than ones based upon inaccurate or false information. *See Gray v. Salem-Keizer School District,* 139 Or App 556, 565 (1996). This too is a public interest as individuals should not be barred from state employment due to what the court in *Gray* identified as "secret, unrebuttable allegations or innuendo." *Id.* at 566. Both of these interests are of significant weight, and the problem of balancing them to determine which is greater is not one of easy resolution.

We resolve the competing public interests in favor of non-disclosure of the investigator's subjective assessment and recommendation. As noted above, the *Gray* court concluded that the public has an interest in enabling an unsuccessful applicant to verify or challenge the accuracy of information in order to ensure that the agency makes a fair, informed and unbiased hiring decision. In this case, this interest is satisfied by disclosure of the factual material contained in the Primary Background Investigation Report and the supporting documents. The investigator's assessment and recommendation consists of conclusions drawn from that factual information. The investigator is part of the decision-making process of the hiring agency. Both the public's interest in encouraging frank communication from the investigator to the hiring committee and in ensuring unbiased, fair and informed hiring decisions is preserved by disclosing the factual information contained in the report, but not the opinions and recommendations based on those facts.

Accordingly, we find that any subjective assessments drawn by the investigator from the background information and her recommendation are exempt from disclosure under ORS 192.502(1). We deny your petition as to such portions of the Primary Background Investigation Report. As to the remainder of the report, Lieutenant Fred Douthit informs us that OSP will disclose it to you.

2. Referenced Memorandum dated July 6, 1999

The Primary Background Investigative Report makes reference to a "memorandum dated July 6, 1999, to Lt. G.A. Gregg." Lt. Douthit informs us that this memorandum was sent from Sergeant Glenn Chastain to Lieutenant Gregg requesting that the primary investigation be conducted. This memorandum is a "template" document for which Sgt. Chastain merely fills in the date, the person to whom it is sent, and the date the report is due. Lt. Douthit further states that the actual document sent from Sgt. Chastain to Lt. Gregg no longer exists. The Attorney General cannot order an agency to disclose a document that does not exist.

The "template" document itself is available, however, and is subject to disclosure. Lt. Douthit informs us that OSP will disclose the template document to you.

3. Military History

The primary background investigator reviewed your military history and referenced it in the investigative report. ORS 192.502(2) exempts:

> Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

The purpose of this exemption is to protect the privacy of individuals from unreasonable invasion. This exemption is not intended to benefit the public body; rather it is protective of the person about whom the record pertains. Even though files containing personal information generally are exempt form public inspection, there is no ground under this section of the law to deny an individual access to *his or her own* file. MANUAL at 45. In reviewing your military record we note that it contains medical information complied on you during your service with the United States Army. Although such information is normally exempt from disclosure to third parties, you are both the requestor and the subject of this information. We therefore conclude that your military record is not exempt under ORS 192.502(2).

We also consider whether your military record is exempt under ORS 192.502(8). This provision exempts:

> Any public records or information the disclosure of which is prohibited by federal law or regulations.

Many federal laws and regulations prohibit or regulate the disclosure of particular records. To claim this exemption, public bodies must be able to point to a specific federal law or regulation that prohibits disclosure. We have contacted Major Teresa Peterson of the Oregon Military Department, Army National Guard Personnel and been informed that although disclosure of military records are regulated under the Federal Privacy Act, there is no federal law restricting the re-disclosure of military records once a public body obtains them from the federal government. We therefore conclude that your military records are not exempt under ORS 192.502(8).

Lt. Douthit informs us that OSP has agreed to disclose these military records to you. Accordingly, we deny your petition as moot with respect to these records.

5. Employment Record and References

The employment records and references that are mentioned in the primary investigator's report consist of the information that you provided to OSP. Lt. Douthit informs us that the primary investigator did not obtain or create any other records concerning your employment or references when preparing her report.

6. Portland Police Bureau Records

The primary background investigator reviewed the employment application file that the Portland Police Bureau (PPB) had for you and photocopied four documents. With the exception of these four documents, OSP has no records from the PPB file. The documents obtained by OSP are three letters that you wrote – to Captain Merrill, Chief Moose and Mayor Katz – and a response you received from Mayor Katz. None of these letters are exempt from disclosure. Lt. Douthit informs us that OSP will disclose them to you.

7. Credit Report

The primary background investigator also reviewed a copy of your credit history that OSP obtained from Equifax Credit Information Services. Lt. Douthit informs us that OSP will disclose the Equifax report to you.

B. Partial Background Investigative Reports

There are three partial background investigation reports. We discuss each of these and any documents obtained by the investigator to write these reports. The same analysis of ORS 192.502(1) that is discussed above with respect to the primary background investigative report applies to any reports by the investigators who conducted partial background checks on your application for employment.

1. Memorandum Dated August 5, 1999

The memorandum dated August 5, 1999, is a one-page report from Senior Trooper Roy S. Panter to Sgt. Chastain. Although it is a communication within a public body that is preliminary to OSP's final decision whether to make an offer of employment, it does not meet the other conditions for an exemption under ORS 192.502(1). Lt. Douthit informs us that OSP will disclose this document to you.

This report references a "Memorandum by Glenn R. Chastain, Sergeant, Dated July 12, 1999 requesting partial background investigation." Lt. Douthit informs us that this memorandum was the standard referral requesting that the partial investigation be conducted. As with the referral for the primary investigation, this memorandum is a "template" document for which Sgt. Chastain merely fills in the date, the person to whom it is sent, and the date the report is due. Lt. Douthit states that the actual document sent from Sgt. Chastain no longer exists. The Attorney General cannot order an agency to disclose a document that does not exist. The "template" document itself is available, however, and is subject to disclosure. Lt. Douthit informs us that OSP will disclose the template document to you.

The only other referenced document is the Employment History sheet, which is part of your employment application. This document contains only information that you provided to OSP. Lt. Douthit informs us that OSP will provide a copy of this document to you, if you wish.

2. Memorandum Dated August 9, 1999

The memorandum dated August 9, 1999, is a one-page report from Senior Trooper Panter to Sgt. Chastain. One phrase within this document, which is a communication within a public body, meets each of the tests for exemption from disclosure under ORS 192.502(1). It is nonfactual, advisory in nature and preliminary to OSP's final decision whether to make an offer of employment. In addition, it reflects a frank communication. Lt. Douthit informs us that OSP will disclose this document to you, with the exception of the one phrase that we find to be exempt from disclosure under ORS 192.502(1).

3. Memorandum Dated September 9, 1999

The memorandum dated September 9, 1999, is a six-page report from Trooper Erin E. Reyes to Sgt. Chastain that contains factual information concerning contacts with employment references, military history, court records and agency records. As with the primary background investigative report, this report contains the subjective opinion of the investigator concerning your suitability for hire. Such subjective evaluations and recommendations meet the internal advisory communications exemption in ORS 192.502(1) and are exempt from disclosure. Accordingly, as to this information, we deny your petition. Lt. Douthit informs us that OSP will disclose the remainder of the report to you

The September 9th memorandum is supported by two types of information: references and information obtained from the Law Enforcement Data System. We discuss each of these below.

a. References

Information from your references appears in two places in the OSP records: (a) on questionnaires completed by the references, and (b) in the September 9th memorandum summarizing personal interviews the investigator had with some of the references. The questionnaire is a standard form used by OSP. One side of the questionnaire asks a number of questions about the applicant, including how the reference knows the applicant; the reverse side of the questionnaire asks references to respond to a number of questions by checking the appropriate response of "Yes," "No," and "I don't know."

ORS 192.502(4) exempts from disclosure:

> Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

In previous public records orders,[3/] we have stated that the purpose of this exemption is to encourage individuals to voluntarily provide relevant information to a public body, with some reasonable assurance that the information will be kept confidential. MANUAL at 52.

As to the questionnaire, we find that the first four elements of ORS 192.502(4) have been met for three of the references. First, the questionnaire asks the reference if he or she requests that the interview and the information revealed be kept confidential. In this case, three of the individuals who provided the information in response to OSP's questionnaire did so on the condition that the information would be kept confidential. (The other two individuals did not request confidentiality. Therefore, none of the information provided by them is exempt from disclosure under ORS 192.502(4).)

Second, that information was not required by law to be submitted. The references responded voluntarily to OSP's request for information.

Third, the information itself is the type of information – an individual's opinion of another person's attributes and suitability for a job – that is generally considered confidential. The OSP questionnaire asks references to reveal, among other things, the applicant's possible shortcomings, the applicant's ability to cope with stress, the applicant's use of illegal drugs or narcotics and history in engaging in acts of violence, if any, and the applicant's demonstration of judgment and decision-making skills. Because a reference's candid opinions about the applicant

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[3/] Public Records Order, July 17, 1997 (Wilker); Public Records Order, January 16, 1998 (Flagg-Miller).

may interfere with an existing personal or professional relationship, either because the statements are not wholly supportive of the individual seeking employment or because the statements may be misconstrued by that individual, this is the type of information that should reasonably be considered confidential.

Fourth, OSP obliged itself in good faith not to disclose the information. The questionnaire says in bold print: "Confidentiality Statement: Your statement will be treated as confidential information upon your request as subject to the Oregon Public Records Law (ORS 192.502 Section 3)."[4/] By this statement, OSP obliged itself in good faith not to disclose the information provided by the reference if confidentiality was requested.

The final test under ORS 192.502(4) is whether the public interest would suffer by disclosure. There are two public interests that must be balanced where employment references are concerned: The public interest in ensuring unbiased, fair and informed hiring decisions by public agencies and the public interest in preventing a chilling effect on the willingness of individuals to provide candid information about the applicant if they knew that the information they provided would be disclosed to the applicant. *Gray v. Salem-Keizer School District*, 139 Or App 556.

As a matter of public policy, the legislature has established minimum qualifications for employment as a sworn member of the Oregon State Police. ORS 181.260(1)(b) specifically requires that Oregon State Police officers be of good moral character. The legislature has also recognized that in order to be minimally qualified as a public safety officer, an individual must be morally fit. ORS 181.640(1)(a). These standards, as minimum standards, set the floor. In addition, courts have long recognized that police officers are held to a higher standard of conduct by virtue of their duties and status in the community. This higher standard is required in order to ensure that public safety and property is protected, and also in order to promote public confidence and trust in law enforcement.[5/] In light of these policies, a law enforcement agency has a direct need to obtain the most frank information available regarding an applicant for employment, regardless of the nature of the information. Disclosing employment reference information after promising confidentiality to either private citizens or previous private employers would discourage those private individuals from submitting good faith reports about a candidate's suitability for employment as a law enforcement officer. Thus, the public interest in preventing a chilling effect on the provision of candid information will generally outweigh the public interest in disclosure of reference information.

[4/] We note that while the questionnaire cites to ORS 192.502(3), that section was renumbered to ORS 192.502(4) in 1997. The OSP forms have not been updated to reflect that numeric change.

[5/] *See, e.g., State of Montana v. Schnittgen*, 992 P2d 500 (Mont 1996); *Harris v. City of Colorado Springs*, 867 P2d 217 (Colo App 1993).

In *Gray*, however, the court concluded that both of the public interests could be met – the chilling effect of disclosure eliminated – if any information that would identify the source of the references was deleted. 139 Or at 565-66. In this case, we do not believe that it is possible to redact the source-identifying information from the front of the questionnaire because the responses to the questions on the front of the form could provide clues to the identify of the particular reference source. Additionally, one of the forms has been completed in the handwriting of the reference, which may be identifiable. With respect to the reverse side of the questionnaires, however, we believe that redaction of the source-identifying information is possible. Disclosing the references' responses on the reverse side of the questionnaires, which consisted of the references checking "Yes," "No," or "I don't know" to a number of different questions, would not permit identification of the reference. We believe that, in the present situation, deleting the identify of the reference from the bottom of the form can adequately protect the public interest in obtaining candid and complete references while also allowing the applicant to ascertain that the hiring decision was not based on secret, unrebuttable allegations or innuendo.

Accordingly, we find that the fifth element of the exemption in ORS 192.502(4) has been met as to the front of the questionnaire, but that it has not been met as to the reverse side of the questionnaire so long as the identifying information is redacted. Therefore, we conclude that for the three individuals who requested confidentiality, the front of the questionnaire is exempt from disclosure under ORS 192.502(4), and we deny your petition as to those responses.

On the reverse side of the questionnaire, only the identifying information is exempt. The remainder is not exempt from disclosure. Lt. Douthit informs us that OSP will release the entire questionnaire for those individuals who did not request confidentiality and the reverse side of the questionnaire for the other three individuals, except for the identifying information at the bottom of the form.

As for the investigator's summary of the personal interviews, all of the information contained in the September 9th memorandum consists of information from persons who requested confidentiality. We find that it would not be possible to adequately redact the source-identifying portions of this summary while disclosing the remainder. Accordingly, we conclude that this information is exempt from disclosure for the same reasons that the front of the questionnaires completed by references who requested confidentiality is exempt. We deny your petition as to this information.

b. Law Enforcement Data System Information

The September 9th memorandum indicates that the investigator reviewed records obtained through the Law Enforcement Data System (LEDS), which contains Department of Motor Vehicle (DMV) records, criminal offender information, if any, and non-criminal offender information, such as weapons permits. In your case, only DMV records and non-criminal offender information exist.

ORS 192.502(8) exempts from disclosure any public records or information if the disclosure is prohibited by federal law or regulations. ORS 192.502(9) exempts from disclosure any public records or information "the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law."

(1) Department of Motor Vehicle Records

The federal Driver's Privacy Protection Act (DPPA) and corresponding Oregon statutes restrict the disclosure of personal information obtained in connection with a motor vehicle record. 18 USC § 2721; ORS 802.175 to 802.191. Under these statutes, the Oregon Department of Transportation (ODOT) is prohibited from disclosing such personal information except to persons authorized to receive the information under 18 USC § 2721(b) and ORS 802.179. Among those authorized to receive such information is a government agency for use in carrying out its governmental functions. 18 USC § 2721(b)(1); ORS 802.179(1). A government agency may redisclose personal information obtained from ODOT only to persons authorized to received the information under 18 USC § 2721(b) and ORS 802.179. 18 USC § 2721(c); ORS 802.181.

We understand that the investigator reviewed a computer printout of your driving record as a part of his report. In a recent public records order,[6/] we concluded that the computer printout is a "motor vehicle record" for purposes of the DPPA. ODOT could disclose that record to OSP for OSP's use in carrying out its governmental function. We view actions undertaken by OSP in conducting comprehensive background checks of applicants for employment with OSP as part of its governmental function. OSP may not redisclose this computer printout to you, however, unless necessary to carry out its law enforcement responsibilities or unless you are authorized to receive that information under 18 USC § 2721(b) and ORS 802.179.

18 USC § 2721(b)(13) and ORS 802.179(12) permit disclosure of personal information in motor vehicle records to a person who requests the information if the requester provides a written, notarized statement of permission from the individual whose personal information is requested. We believe that the notary requirement is to ensure that the permission to disclose the records has actually been given by the person whose records are being requested. We do not believe that a notarized statement is required when the subject of the records requests a copy of his or her own records and that person's identity is properly established. In this case, you are requesting your own personal information and OSP has no doubt as to your identity. Accordingly, we conclude that OSP's disclosure of this information to you is not prohibited by state or federal law. Lt. Douthit has informed us that OSP will disclose the DMV records to you.[7/]

(2) Computerized Criminal Justice Records

[6/] Public Records Order, November 5, 1999 (Bedsole).

[7/] Because we find that you are authorized to receive this information under ORS 802.179(12) and 18 USC §2721(b)(13), we do not determine in this order if giving an individual his or her own personal information from a motor vehicle record constitutes a disclosure or redisclosure of personal information under the state or federal law.

Computerized criminal justice information such as criminal offender histories and noncriminal offender information such as concealed weapons licenses are kept in the LEDS system. Criminal offender information is confidential under Oregon law and is exempt from disclosure except when the information is requested pursuant to certain statutory procedures. ORS 181.540(1)(c).[8/] However, non-criminal offender information such as concealed weapons licenses is also maintained on the LEDS system. In the present case, the information the investigator reviewed was non-criminal offender information. Lt. Douthit informs us that OSP will disclose the LEDS non-criminal offender information to you.

In sum, to the extent that the information you seek is exempt from disclosure under ORS 192.502(1) and 192.502(4), we deny your petition as to that information. As to the remainder of the information, we deny your petition as moot because OSP has agreed to disclose it to you.

Sincerely,

STEPHANIE L. STRIFFLER
Special Counsel to the Attorney General

AGS04082
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[8/] *See* Public Records Order, July 17, 1997 (Wilker), Public Records Order, May 17, 1995 (Hasty); Public Records Order, December 4, 1992 (Seitz).