KBC

HARDY MYERS
ATTORNEY GENERAL

PETER D. SHEPHERD
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400
TTY: (503) 378-5938

October 24, 2005

Kyle Iboshi
KGW-TV
1501 SW Jefferson
Portland, Oregon 97201

Lois Williams, Disclosure Officer
Oregon Department of Revenue
955 Center Street, NE
Salem, Oregon 97301

Re: Petition for Public Records Disclosure Order:
Oregon Department of Revenue Records

Dear Mr. Iboshi and Ms. Williams:

This letter is the Attorney General's order on Mr. Iboshi's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Mr. Iboshi's petition, received October 12, 2005, asks the Attorney General to order the Department of Revenue (Department) to disclose "[a]ll records reported to the Oregon Department of Revenue under the Jenkins Act * * * include[ing] * * * names of those who made interstate tobacco purchases, their addresses, their purchase history, and other sales and purchase records." For the reasons that follow, we grant in part and deny in part Mr. Iboshi's 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. The law requires generally that the custodian of public records furnish proper and reasonable opportunities for their inspection or copying in the office of the custodian. ORS 192.430. If a state agency denies a request for disclosure of records, the requestor may petition the Attorney General for review of the denial. ORS 192.450(1).

Background

We spoke with Ms. Williams, the Department's Disclosure Officer, about Mr. Iboshi's petition. The requested records include lists and copies of invoices of sales to individual Oregon consumers who have purchased cigarettes over the internet. The information in the records primarily consists of the consumer's name and address, along with the type and quantity of cigarettes purchased. The invoices contain additional information such as the price, date of order, and account number. Sellers are required to submit the information to the Department under the Jenkins Act. 15 USC §§ 375 – 378. Nearly identical to the Jenkins Act with respect to reporting requirements is the Delivery Sales Act, ORS 323.700 – 323.730, passed by the 2003 Oregon Legislature.[1] The former requires reporting on the sales of all tobacco products whereas the latter applies to reporting of sales. *Compare* ORS 323.721 and 15 USC § 376.

The Department's October 6, 2005, letter denying Mr. Iboshi's request, which was attached to his petition, expresses uncertainty about whether "new legislation passed in 2003 affects the confidentiality of this material." Ms. Williams told us that the "2003 legislation" being referred to in the Department's letter is the Delivery Sales Act. For the reasons that follow, we conclude that the Delivery Sales Act does not authorize the state to withhold from public inspection any records otherwise subject to compelled disclosure under the Public Records Law.

1. Delivery Sales Act

The Public Records Law exempts from disclosure "records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." ORS 192.502(9). This exemption incorporates into the Public Records Law other state statutes that make records confidential or privileged. The terms of the Delivery Sales Act itself do not address the issue of confidentiality. However, other statutes relevant to taxation do. The Department's concern as expressed in its denial letter is whether the records received under the Delivery Sales Act are made confidential by another tax statute.

ORS 314.835 makes it unlawful for Department officers or employees to disclose "any particulars" set forth or disclosed in any report or return required "under a law imposing a tax upon or measured by net income," in the administration of local taxes, or in the administration of the statutes governing the elderly rental assistance program. The records submitted by sellers of cigarettes under either the Jenkins Act or the Delivery Sales Act do not constitute "reports or returns" required by a law imposing a tax that is either on or measured by net income. Neither the Jenkins Act nor the Delivery Sales Act imposes a tax. Each imposes an obligation upon certain sellers of specified products to submit to the Department records reflecting their sales to Oregon consumers. Therefore, ORS 314.835 does not prohibit disclosure of the requested records.

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[1] The Delivery Sales Act states that "[a] person that satisfies the requirements of 15 U.S.C. § 376 is deemed to meet the requirements of this section." ORS 323.721(3).

Under ORS 323.403 the disclosure prohibitions in ORS 314.835 also apply to "the determination of taxes, penalties and interest under ORS 323.005 to 323.482 (the Cigarette Tax Act). However, neither the Jenkins Act nor ORS 323.721 are incorporated into ORS 323.005 to 323.482. ORS 323.595 applies the confidentiality provisions of ORS 314.835 to records concerning the taxation of tobacco products other than cigarettes. While ORS 323.595 was amended by the 2003 bill containing the Delivery Sales Act, HB 2368, the amendment did not extend the terms of that statute to the reporting requirement of ORS 323.721.

For these reasons, we conclude that the noted confidentiality requirements for certain tax records do not apply to cigarette sales records submitted to the Department under either the Jenkins Act or the Delivery Sales Act. Also, we have not identified any provision of federal law prohibiting disclosure of records submitted to the Department under the Jenkins Act.[2]

We briefly review three bases for exemptions from disclosure in the Public Records Law that may apply to the requested records.

2. Personal Privacy

The Public Records Law exempts certain personal information from disclosure. ORS 192.502(2):

> Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure 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. *Jordan v. MVD*, 308 Or 433, 440-42 (1989). The exemption is not intended for the benefit of the public body. Only personal information which would constitute an unreasonable invasion of privacy if publicly disclosed is protected under this exemption. An invasion of privacy would be unreasonable if "an ordinary reasonable person would deem [it] highly offensive." *Id.* at 442-43.

Disclosing the information contained in the requested records will inform a person as to the names and addresses of the consumers who purchased cigarettes from the reporting seller, and the brand(s) and quantities purchased by each. 15 U.S.C. § 376, ORS 323.721 (2). Standing alone, a person's name and address typically are not protected under ORS 192.502(2). Because Jenkins Act records will identify a person as someone who purchases cigarettes, recipients of the information may draw the conclusion that the consumer is a smoker. However, it is difficult to see how disclosure of the fact that someone smokes, or chooses to purchase cigarettes through

[2] Under ORS 192.502(8), federal prohibitions create an exemption from disclosure under the Public Records Law.

mail order, would constitute an unreasonable invasion of privacy within the context of contemporary culture.

Oregon law requires that persons making delivery sales of cigarettes and other tobacco products include the following "clear and conspicuous statement" in the shipping documents "TOBACCO: OREGON LAW PROHIBITS SHIPPING TO INDIVIDUALS UNDER 18 AND REQUIRES THE PAYMENT OF ALL APPLICABLE TAXES." ORS 323.718(1)(a) (emphasis in original). Assuming that a seller may display this information so that it is visible, along with the consumer's name and address, on delivered packages, it would appear that the legislature contemplated that a purchaser's name and address, and the fact that the purchaser is purchasing tobacco would be disclosed publicly.[3]

We conclude that disclosure of the records requested by Mr. Iboshi would not constitute "an unreasonable invasion of privacy" within the meaning of ORS 192.502(2).

3. Trade Secrets

The confidential nature of trade secrets is addressed both within and apart from the Public Records Law. They are conditionally exempt from disclosure under ORS 192.501(2):

> "Trade secrets" as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it[.]

In addition, the Uniform Trade Secrets Act (UTSA) protects:

> [I]nformation, including a drawing, cost data, **customer list**, formula, pattern, compilation, program, device, method, technique or process that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to the public or to any other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

ORS 646.451(4) (emphasis added). The UTSA provides for damages if a trade secret is "misappropriated," which includes disclosure of the information in certain circumstances. ORS 646.461(2)(d).

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[3] Quantity information is not required to be displayed. *See* ORS 323.718.

The cigarette sales information submitted to the Department under the Jenkins Act (or the Delivery Sales Act) may have value due to the fact that it identifies those consumers in Oregon to whom a particular person sells cigarettes. However, whether that information would qualify as a trade secret under either statutory scheme would also depend on how those submitting the information have treated it, *e.g.*, have they made reasonable efforts to maintain its secrecy. We have asked personnel at the Departments of Justice and Revenue whether companies submitting data to either agency under the Jenkins Act (or the Delivery Sales Act) have asserted that such data is a trade secret or otherwise have purported to impose restrictions on the public dissemination of the data. In correspondence with the Department of Justice, one company did *request* a commitment that the Department would not release the information to persons other than parties to the particular litigation. The Department of Justice declined to make the requested commitment and the company nevertheless submitted the data. Moreover, during the course of deliberations about Mr. Iboshi's petition, the Department of Justice informed the company's legal counsel of the pendency of the petition. The company has not replied in any way; specifically, the company has not objected to the possibility that information would be publicly released as a result of the petition. The Departments are aware of no other claim for confidentiality made by any entity submitting data under the Jenkins Act or the Delivery Sales Act.

We do not find a basis upon which to treat the requested records as constituting information exempt under either ORS 192.501(2) or ORS 192.502(9) pursuant to the terms of the UTSA.

4. Criminal Investigations

Finally, the Public Records Law conditionally exempts from disclosure "[i]nvestigatory information compiled for criminal law purposes." ORS 192.501(3). The Oregon Court of Appeals has interpreted the criminal investigatory exemption as applying to "information compiled in investigations connected with pending or contemplated prosecutions * * * because disclosure likely would interfere with law enforcement proceedings." THE ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2004) at 33. The Department is cooperating with the Department of Justice and the Oregon State Police in a criminal investigation to which some of the requested records are pertinent.[4] Assistant Attorney General Donna Maddux, a member of the Criminal Justice Division, has told us that disclosure of these records would interfere with the investigation and therefore jeopardize any eventual prosecution.

Because ORS 192.501(3) is a conditional exemption, records are exempt "unless the public interest requires disclosure in the particular instance." AG'S MANUAL at 28. Neither Mr. Iboshi's request of the Department nor his petition articulates the public's interest in disclosure of the requested records. While their disclosure may provide the public with insight as to the numbers of Oregon consumers purchasing cigarettes via mail order and the number of businesses

[4] Under ORS 192.501(3), it is not necessary that a public record have originated as part of a criminal investigation to qualify for exemption from disclosure.

providing that service, we have not discerned an interest that would require disclosure of records pertinent to an investigation of criminal wrongdoing.

Therefore, to the extent that the requested records have been compiled by a law enforcement agency as part of a criminal investigation, they are exempt from disclosure.

Conclusion

Requested records that have been compiled by a law enforcement agency as part of a criminal investigation are exempt from disclosure, and Mr. Iboshi's petition as to such records is denied. We grant his petition with regard to all other records responsive to his request and order the Department to disclose those records within seven days from the date of this order. ORS 192.450(2).

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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