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October 5, 2012

Michelle Cole
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

Derrick Gasperini
Oregon Department of Revenue
955 Center St. NE
Salem, OR 97301-2555

Re: Petition for Public Records Disclosure Order:
Oregon Department of Revenue
DOJ File # 150800/GA0069-12

Dear Ms. Cole:

The Department of Revenue's issuance of a multi-million dollar refund based on a fraudulent tax return led to an understandable demand to know how it could have occurred and what steps the Department took to address the issues. It is undeniable that the public has a compelling interest in expecting a high level of competence from its Department of Revenue ("DOR") and a right to a degree of transparency in the event of high-profile system failures like this one. However, the public also has a compelling interest in protecting the integrity of the Department and its processes in order to minimize the chance of future attempts to "game" the system. It is important to place this public records request in the context of the broader issues. On the one hand, DOR has disclosed a significant amount of information, including the information it already has provided the media, the results of an internal audit and testimony before a legislative committee. In evaluating your request and considering the public interest in obtaining even more information than what DOR has previously provided, we consider what this additional information would add and weigh that against what harm it could cause to the integrity of the state's system.

Ms. Cole's petition asks the Attorney General to review unredacted "reports" of the Oregon Department of Revenue ("DOR"), to determine whether DOR's redactions to the

documents it disclosed are consistent with our disclosure order dated August 15, 2012. The petition asks us to reconsider our decision in the August 15, 2012, public records order that DOR was not required to disclose the section manager's name and to consider whether several categories of redactions were appropriate. For the following reasons, we adhere to our prior decision that the section manager's name need not be disclosed, and we conclude that, except for data on the total number of returns filed annually, DOR's redactions to the disclosed records comply with our prior order.[1] To the extent we have determined some redactions should not have been made, DOR has agreed to provide that information. Accordingly, we deny the petition.

Background

In our previous order, we concluded that the personnel discipline actions and supporting material you requested from DOR are exempt from disclosure under ORS 192.501(12), with two exceptions: (1) the position held by each sanctioned employee at the time of the conduct resulting in the discipline, and (2) the sanction imposed on the employee holding each position. We also expressly concluded that DOR was not required to disclose the names of the disciplined employees.

In addition, we noted that any information in the personnel discipline records that relates to internal DOR processes, to the extent that information could be used to unlawfully disrupt or interfere with its services, is conditionally exempt from disclosure, under ORS 192.501(22). DOR is also not required to disclose any information made confidential by ORS 314.835, which is unconditionally exempt under ORS 192.502(9)(a).

An exemption from disclosure under the Public Records Law allows, but does not require, nondisclosure of the record. *Colby v. Gunson*, 224 Or App 666, 675, 199 P3d 350 (2008). Although the materials you requested are exempt under ORS 192.501(12) (with the two exceptions noted above), our prior order anticipated that DOR might comply by providing redacted documents. For that reason, the prior order specified that, if DOR chose to make redactions under ORS 192.501(22) and/or ORS 192.502(9)(a), The Oregonian could challenge those redactions in a new petition.

DOR has chosen to follow that course. In the current petition, Ms. Cole challenges many of DOR's redactions. Ms. Cole asks the Attorney General to review the redactions to documents disclosed by DOR to determine whether those redactions are consistent with our prior order.

The additional pertinent statutory exemptions

First, ORS 192.501(22) conditionally exempts from disclosure information that would allow a person to identify areas of vulnerability that would permit unlawful disruption to or

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[1] We appreciate Ms. Cole's courtesy in allowing us an additional three weeks to respond to the petition.

interference with public services.[2] ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2012) at 51. Any information in the requested records that pertains to DOR's confidential internal processes is exempt under ORS 192.501(22), unless the public interest in disclosure outweighs the public interest in protecting those services from unlawful disruption or interference.

Second, ORS 192.502(9)(a) unconditionally exempts: "Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." ORS 314.835(1) makes certain information ("particulars") obtained from a tax report or return confidential.[3] Such particulars include, but are not limited to, "a taxpayer's name, address, telephone number, Social Security number, employer identification number or other taxpayer identification number and the amount of refund claimed by or granted to a taxpayer." ORS 314.835(2)(b). In our previous review of the requested documents, we determined that they contained information that may be subject to ORS 314.835(1), and thus unconditionally exempt under ORS 192.502(9)(a).

As Ms. Cole requests, we have reviewed the unredacted reports to determine whether DOR's redactions comply with the prior order, *i.e.*, whether they come within one of the two statutory exemptions above. We address each of the redactions Ms. Cole questions, in turn.

Specific redactions

1. Information already in the public domain

Ms. Cole questions DOR's redaction of the name of the taxpayer and the amount of the refund associated with the fraudulent tax return on the ground that it is already in the public domain. We agree that the name and amount are already available to the public. Indeed, DOR itself included the amount of the refund in a press release that it issued on July 25, 2012

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[2] ORS 192.501(22) exempts, in pertinent part:

> Records or information that, if disclosed, would allow a person to:
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> * * * * *
>
> (b) Identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the service provided by the public body.

[3] ORS 314.835(1) provides, in pertinent part:

> Except as otherwise specifically provided in rules adopted under ORS 305.193 or in other law, it shall be unlawful for the Department of Revenue or any officer or employee of the department to divulge or make known in any manner the amount of income, expense, deduction, exclusion or credit or any other particulars set forth or disclosed in any report or return [required under state tax laws.]

(available at http://www.oregon.gov/dor/NEWS/Pages/072512internal-audit.aspx). However, DOR informed us that the source of that number in that press release was a publicly available record, while the taxpayer's tax return is the source of any mention of the taxpayer's name or amount of the refund that has been redacted from the disclosed documents. Release of information from a tax return, even when that same information is available from another, publicly available source, is prohibited.

ORS 314.835 prohibits DOR from "divulg[ing] or mak[ing] known in any manner * * * *any* * * * particulars * * * in *any* report or return[,]" "[e]xcept as otherwise *specifically provided* in rules adopted under ORS 305.193 or in other law[.]" (Emphasis added.) In a long series of opinions, the Attorney General has interpreted the prohibition in ORS 314.835 strictly. For example, in 34 Op Atty Gen 669 (1969), the Attorney General was asked whether the State Tax Commission could disclose information from tax returns to the State Public Welfare Commission. The Attorney General wrote: "It is seen that the answer to your questions will depend upon to what degree the legislature has 'specifically provided by law' for information to be divulged from income tax reports or returns, so as to not fall within the prohibition of ORS 314.635 [*sic*]." 34 Op Atty Gen 669. (Emphasis in original). The opinion adhered strictly to the text of ORS 314.835, explaining:

> We must remember the basic policy behind legislation providing for secrecy in the case of tax returns. As we noted in Opinions of the Attorney General, 1948-1950, pp. 261, 262:
>
> > "'* * * This act constitutes the state's compact and pledge to the taxpayer that his tax return shall be kept inviolate, confidential and privileged, and not disclosed to any one, nor in any manner, except as specifically authorized by the act itself, and will be used only for the purposes specifically provided.' * * *"
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> Also, as noted, strong statutory penalties are provided where information from an income tax report or return is divulged except where "specifically provided by law."

34 Op Atty Gen 669, *quoting* 24 Op Atty Gen 261 (1949).[4] (Emphasis in original.) Thus, a taxpayer's income tax return is confidential. An individual's interest in controlling the dissemination of confidential information "does not dissolve simply because that information

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[4] The 1949 Attorney General opinion concerned the "secrecy provision" of section 110-1635, O. C. L. A., as amended by section 13, chapter 353, Oregon Laws 1947, which provided, in pertinent part:

> 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the commission, any deputy, agent, auditor or other officer or employe, to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return required under this act. * * *

may be available to the public in some form." *U.S. Dept. of Defense v. Federal Labor Relations Authority*, 510 US 487, 500, 114 S Ct 1006, 1015 (1994).

In 41 Op Atty Gen 455 (1981), the Attorney General again applied the "clear language of the prohibition" in adhering to a prior determination that ORS 314.835 prohibited the State Tax Commission from divulging to the public "the names of taxpayers who had paid the 100 percent fraud penalty and the particulars contained in tax returns." *See* 32 Op Atty Gen 182 (1965) (ORS 314.835 "makes no distinction between the particular of the taxpayer's name and the particular of the amount of any item of income or deduction or other information entering into the computation of the tax, or the amount of the tax itself.").

In sum, release of information contained in tax returns is generally forbidden by ORS 314.835. A violation of that statute is a Class C felony. Despite the fact that the taxpayer's name and the amount of the refund have been published (see http://www.oregonlive.com/politics/index.ssf/2012/06/human_error_to_blame_in_2_mill.html), no exception applies that would allow DOR to provide that information to the media or anyone else when DOR's source of that information is a tax return. In the absence of an express statutory authorization to release information from the return, we decline to order DOR to do so.

2. Description of disciplinary action on first page of three letters

The petition states that "DOR also appears to have redacted the 'following action' on the cover sheets in some cases but not others." We reviewed the unredacted versions of the documents and determined that DOR did not make any such redactions. Rather, on one of the disciplinary letters, DOR included on the cover page the word "Action" followed by a short description of the action, and DOR did not redact that line in the documents disclosed to petitioner. On the cover page of one of the other letters, DOR included the word "Action," which is included in the documents provided to petitioner. The unredacted version of that document has nothing else on that line. On the unredacted cover pages of the other two letters, there was no analogous line..

3. Names of undisciplined state workers

Our review of the unredacted documents confirms that DOR redacted the names of some undisciplined employees. Ms. Cole asserts that the names of DOR employees are not private facts, are not subject to the exemption for DOR's confidential internal processes, and would not lead to the identification of a disciplined employee.

We disagree. Disclosing the names of undisciplined DOR employees mentioned in the disciplinary records would facilitate identification of the disciplined employees, thereby defeating the intent of our prior order concluding that the disciplinary records generally were exempt under ORS 192.501(12), subject only to two categories of information that we ordered DOR to disclose. Redaction of only the disciplined employees' names may be sufficient initially to protect their identities from the general public, but disclosure of the names of other employees mentioned in the disciplinary records would facilitate attempts to contact those employees in order to obtain the names of the disciplined employees. Moreover, disclosure of the names of

undisciplined coworkers' would make it more likely that individuals working at DOR could identify the disciplined employees. At the least, it would be apparent which employees in the Suspense Unit were *not* disciplined in this matter.

In addition, disclosure of the names of coworkers who are named in the disciplinary records could have a chilling effect on employee participation in agency disciplinary investigations. Disclosure of their names could make them targets of ridicule and could subject them to attempts by the media and others to determine the names of the disciplined employees. In our experience, employees who participate in agency internal disciplinary investigations generally assume that their participation is confidential. This expectation is reasonable in light of ORS 192.501(12) and the fact that the vast majority of disciplinary records are exempt from disclosure. The protection afforded by the exemption in ORS 192.501(12) is not limited to protection of the person who is the subject of discipline from ridicule and harassment from the general public.[5]

In sum, requiring DOR to release the names of other employees who are mentioned in the disciplinary letters would contradict our prior order allowing DOR not to disclose unredacted versions of the letters and instead requiring disclosure only of certain portions of those letters. The exemption in ORS 192.501(12) applies to the entire disciplinary record; it does not require a line-by-line redaction of only *some* of the information in the record. DOR has not waived the exemption applicable to the disciplinary records by voluntarily disclosing more than our order required. The names of the disciplined employees' coworkers are integral to the disciplinary letters, because the disciplined employees are entitled to notice of the specific facts leading to the disciplinary action.

We conclude that no public interest would be served by disclosing the names of those other employees, nor does Ms. Cole identify any such public interest. The public interest Ms. Cole asserted initially in seeking the disciplinary records is "helping the public understand how its government failed to protect it from a costly fraud and how the agency has held public officials to account for errors." Certainly, the public's interest in disclosure encompasses the public's interest in information about the manner in which public business is conducted, *see Guard Publishing Co. v. Lane County School Dist.*, 96 Or App 463, 468–69, 774 P2d 494 (1989), and the right of the public to "monitor what * * * appointed officials are doing on the job," *Jensen v. Schiffman*, 24 Or App 11, 17, 544 P2d 1048 (1976). But we do not see how

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[5] Each of the disciplinary reports contains a position description, and one of those includes an organization chart. DOR redacted all of the employee names on that document. DOR has informed us that this organization chart has never been made available to the public, and that one reason that it does not disclose such documents relates to the nature of its business and the risks inherent in it. Certain DOR employees are permitted not to use their names in the conduct of their business on behalf of DOR, instead identifying themselves only by a first name and a number. In light of the fact that "revenuers" historically have been at risk when performing their duties, and because disclosure of the names of persons who happen to be on the same organization chart as the names of the disciplined employees would not assist the public in knowing how DOR addressed the issues presented by the fraudulent refund, we conclude that DOR's redaction of the names on the organization chart is consistent with ORS 192.501(12).

knowing the names of other DOR employees and coworkers of the disciplined employees would promote those interests. On the contrary, making public the names of employees who cooperated with DOR's internal investigation is against public interest, in that it could make it more difficult to conduct similar investigations and insure candid input during investigations of how public business is being conducted. Any interest the public might have in knowing the identities of the other employees' named in the disciplinary records does not outweigh the interests in nondisclosure.

4. Hiring dates

DOR has told us that the agency redacted the hire dates of the disciplined employees because the hire dates could be used to identify the disciplined employees. For the reasons discussed above, we agree that disclosing the hire dates, in whole or in part, could make it more likely for the public—and particularly the smaller community of DOR employees—to identify the disciplined employees. Knowing those dates is not essential to the public's understanding how DOR officials discharge their public duties. We perceive no public interest in knowing the hire dates or the promotion dates of the disciplined employees. Accordingly, those dates remain exempt under ORS 192.501(12) and need not be disclosed.

5. DOR's confidential internal processes

Ms. Cole questions DOR's redaction of information about agency processes, asserting that the redactions are "heavy-handed." We have reviewed the unredacted documents, and we conclude that DOR's redactions are warranted under ORS 192.501(22).

DOR informs us that its intent in preparing the redacted documents, consistent with its intent in releasing a redacted version of its internal audit report titled "Suspense Process Review," dated June 11, 2012, was to provide the public as much information about its processes related to the fraudulent tax return as it could without disclosing any key business processes that might be useful to persons seeking to defraud the State of Oregon. To that end, DOR has disclosed in the Suspense Process Review that there are "nearly two hundred computer edits that lead to a tax return suspending from processing for further review," (p. 1), that there is something called an "Over-limit" edit (pp. 2, 5) and that there are multiple levels of review (pp. 4-5). In the redacted records DOR disclosed in response to our order dated August 15, 2012, DOR made similar disclosures. It referred to edits generally, but not to the names or descriptions of the edits, what triggers an edit, numbers of returns that have edits, or references to specific actions taken in response to an edit.[6]

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[6] The Suspense Process Review states that "[t]he computer system suspends over 10% of the returns processed." That statement may appear to indicate how many returns are suspended, but it does not address whether or how many returns are suspended by some other process. Also, we note that the term "over limit" is redacted in four places in the documents subject to the petition. We do not order DOR to eliminate those redactions and provide those pages to the petitioner, however, because the existence of something called an "over limit edit" is already known and re-disclosure of that same information would not advance the public interest in understanding how DOR addressed the problems exposed by the processing of the fraudulent return.

DOR treats all of these business processes as highly sensitive. Even within DOR, the only employees who are aware of this information are those with a business need. The majority of employees within the Personal Tax and Compliance Division, as well as most employees in other DOR divisions, do not have this information. DOR informs us that the reason this information is sensitive is that disclosure of it, in whole or in part, would provide information that persons who seek to exploit vulnerabilities of the system could use to their advantage and to the detriment of the State of Oregon. We agree with DOR that disclosure of the redacted items, individually or in aggregate, creates an increased risk to the system that is not offset by the public interest in knowing how DOR responded in this particular case. The additional details would only minimally contribute to the public's understanding of how DOR conducts public business. But those additional details could aid those persons seeking to defraud the State of Oregon. On balance, the public interest is better served by the leaving in place the redactions in order to maximize the protection of the state's revenue system.

As noted at the outset, DOR has disclosed information about how it is addressing the shortcomings exposed by its processing of a fraudulent tax return. The redacted disciplinary records DOR disclosed pursuant to our order included the position held by each sanctioned employee at the time of the conduct at issue and the sanction imposed on each employee. In addition, DOR disclosed portions of the records that describe the multi-level review process that was in place and its failure in this case. The Suspense Process Review that was made available to the public describes various issues identified by the internal audit team, its recommendations and management's responses, including changes already made and in process. Together, those documents provide a picture of internal controls that failed during the processing of a fraudulent tax return and the agency's remedial actions in response to that failure. Disclosure of the details of DOR's business processes would not serve the public interest in understanding that event and the agency's response to it. To the contrary, public disclosure of those details, details that are known only to limited persons within DOR, would provide information that persons seeking to defraud the State of Oregon could use for that purpose.[7]

During our comparison of the records disclosed by DOR with the unredacted records, we identified a few items that were redacted on the basis that they disclosed business processes that should not have been redacted. These are, first, the total numbers of personal income tax and corporate excise and income tax returns. Those aggregate numbers are available in reports published by DOR and available on its website at http://www.oregon.gov/DOR/STATS/Pages/statistics.aspx. In addition, we discovered that DOR disclosed two numbers on one page of the position description of one of the disciplined employees that it redacted on the prior page. DOR has agreed to provide petitioner with revised versions of the pages containing this information, with the redactions of this information removed.

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[7] DOR has informed us that, since public disclosure of the criminal prosecution resulting from the filing of the fraudulent return, DOR has experienced an increase in attempts to obtain similar, albeit smaller, fraudulent refunds. This illustrates that disclosure of additional details about how DOR's business processes work could lead to additional attempts to take advantage of those known processes.

6. Name of section manager

We have reconsidered, and we adhere to, our decision that no public interest would be served by releasing the name of the section manager.

In the petition, Ms. Cole asserts that "[m]anagers are held to a higher standard than line workers," citing to *City of Portland v. Anderson*, 163 Or App 550, 554, 988 P2d 402 (1999). Respectfully, we disagree that *City of Portland* stands for the general proposition. Nor do we think the opinion in *City of Portland* requires disclosure of the name of the section manager. In that case, the Court of Appeals concluded that the public had a legitimate interest in confirming the integrity of a high-ranking police officer and his ability to enforce the law evenhandedly. The police investigation that resulted in discipline concluded that the police officer had engaged in sexual conduct through an escort service that may have served as a front for prostitution. The court concluded that the information in the discipline records bore materially on the officer's integrity and on the risk that its compromise could affect the administration of his duties. Therefore, the public interest compelled disclosure, and ORS 192.501(12) did not apply.

The circumstances here are not analogous to those in *City of Portland*. None of the disciplined employees is a high-ranking official of DOR whose integrity and ability to enforce the law evenhandedly is a matter of public interest. Therefore, the particular factors leading to the result in *City of Portland* are not present in this instance. What is more, the factor that the disciplined employee is a high-level management official does not take the employee out of the protection of the exemption in ORS 192.501(12). Public Records Order, April 29, 1993 (Haas).

Certainly the public has an interest in knowing that DOR employees can properly perform their duties and that they have the highest integrity. The Suspense Process Review and the redacted disciplinary records disclose that there were some management shortcomings, including that employees who become managers in units in which they have little or no experience may lack the requisite expertise to perform reviews required of the person in that position. That discussion, together with the fact that there is no indication in the redacted documents that any of the issues that led to the processing of the fraudulent return resulted from any malfeasance, demonstrates that the issues had to do with proper training and execution of duties, not integrity.

In short, your petition suggests no overriding public interest in knowing the name of the disciplined section manager. Therefore, we respectfully deny your request to alter our prior conclusion that DOR need not disclose the section manager's name.

Conclusion

To summarize, the intent of the August 15, 2012, public records order is as stated in the order itself: the employee discipline records are exempt from disclosure under ORS 192.501(12), with two exceptions. DOR was ordered to disclose the position held by each sanctioned employee at the time of the conduct resulting in the discipline and the sanction imposed on the employee holding each position. As contemplated in the prior order, DOR has chosen to disclose

the employee discipline records with redactions. Having reviewed the unredacted documents, we conclude that DOR's redactions are, for the most part, warranted under ORS 192.501(12), 192.501(22), and 192.502(9)(a) and ORS 314.835. Because DOR has agreed to provide petitioner with revised versions of those pages containing information that DOR has disclosed elsewhere but that was redacted from the documents previously provided to petitioner (consisting of total numbers of returns received by DOR annually and two numbers on one page of the position description of one of the disciplined employees that were redacted on the prior page we respectfully deny the petition.

Sincerely,

Mary H Williams

MARY H. WILLIAMS
Deputy Attorney General

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