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August 21, 2012

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

Derrick Gasperini
Oregon Department of Revenue
955 Center Street NE
Salem, OR 97310

Re: Petition for Public Records Disclosure Order:
Oregon Department of Revenue
DOJ File # 150800-GA0060-12

Dear Ms. Cole and Mr. Gasperini:

This is the Attorney General's order on Ms. Cole's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Her petition, which we received on August 1, 2012, asks the Attorney General to direct the Oregon Department of Revenue ("DOR") to make available:

> [A] copy or copies of the contents of personnel and disciplinary records The Oregonian has requested in connection to the recent $2.1 million fraud[.]

For the reasons that follow, we respectfully grant Ms. Cole's petition in part and deny it in part.[1] DOR must disclose the positions held by the disciplined employees at the time of the conduct resulting in the discipline and the sanction imposed on each employee, but DOR is not required to disclose the employees' names. DOR is not required to disclose any information that relates to internal DOR processes, to the extent that information could be used to unlawfully disrupt or interfere with its services, or any information made confidential by ORS 314.835.

DISCUSSION

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

[1] We appreciate Ms. Cole extending the time in which the law would otherwise have required us to respond.

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).

In this case, DOR asserted the ORS 192.501(12) exemption for "personnel discipline actions" when it declined to provide the information Ms. Cole requested.

1. The requested records are conditionally exempt under ORS 192.501(12).

ORS 192.501(12) conditionally exempts from disclosure "[a] personnel discipline action, or materials or documents supporting that action[.]" The exemption applies to a completed disciplinary action when a sanction is imposed. *City of Portland v. Rice*, 308 Or 118, 123, 775 P2d 1371 (1989). The purpose of the exemption is to protect a public employee from ridicule for having been disciplined. *Oregonian Publishing Company v. Portland School District No. 1J*, 144 Or App 180, 925 P2d 519 (1996), *modified*, 152 Or App 135, 952 P2d 66 (1998), *aff'd on other grounds*, 329 Or 393, 987 P2d 480 (1999). Such records are exempt from disclosure "unless the public interest requires disclosure in the particular instance." ORS 192.501.

DOR confirmed that there are four completed disciplinary actions that imposed a sanction in this matter. Thus, find that the requested materials are exempt from disclosure under ORS 192.501(12), unless the public interest requires disclosure in this particular instance. *See* ORS 192.501.

2. The requested records are conditionally exempt under ORS 192.501(22).

ORS 192.501(22) exempts, in pertinent part:

> Records or information that, if disclosed, would allow a person to:
>
> * * * * *
>
> (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.

ORS 192.501(22) was enacted to protect the delivery of the state's public services. Public Records Order, March 10, 2000 (Suo/Mayes). It exempts from disclosure information that would allow a person to identify areas of vulnerability that would permit unlawful disruption to or interference with public services. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2012) at 51.

DOR has informed us that the requested materials contain sensitive information about DOR's internal processes, as they outline in detail what steps in the processes the individual employees failed to perform adequately. Disclosure of those processes would allow a person to identify areas of structural or operations vulnerability—as the criminal fraud that was committed by the taxpayer in this instance demonstrates. Disclosure of that information would permit future unlawful disruption of or interference with DOR's services. Accordingly, 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.

3. The public interest requires disclosure of part, but not all, of the requested records.

Because the exemptions under ORS 192.501(12) and (22) are conditional, we balance the public's interest in disclosure against the interests in nondisclosure; the presumption remains, however, in favor of disclosure. *In Defense of Animals v. OHSU,* 199 Or App 160, 175, 112 P3d 336 (2005). 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); *see also City of Portland v. Anderson,* 163 Or App 550, 554, 988 P2d 402 (1999) (public had interest in confirming integrity of public official), *and Oregonian Publishing,* 144 Or App at 187 (alleged misuse and theft of public property by public employees was a matter of "legitimate" and "significant" public interest).

Ordinarily, a disciplinary sanction and the documents supporting that action are matters of primary significance to the employer and employee, with little relevance to the public interest. Routine employee discipline does not meet the public interest test. Public Records Order, April 14, 1995 (Mayes); Public Records Order, November 26, 1990 (Nealy/Hogan). In assessing the public interest in disclosure, we have previously considered the position of the employee within the state agency, the basis for the discipline action, and the extent to which the information has already been made public. Public Records Order, April 14, 1995 (Mayes).

For example, we determined that the public had a strong interest in knowing how the Motor Vehicles Division handled the matter of a public employee criminally charged with misusing a public office for financial gain and in furtherance of a criminal conspiracy. Public Records Order, November 26, 1990 (Nealy/Hogan). In that instance, the information sought substantially overlapped information that had already been made public.

We have also concluded that the public interest required disclosure of disciplinary actions taken by the Oregon State Police against two law enforcement officers for federal game law violations. Four facts increased the public interest in disclosure and decreased the public employees' privacy expectations: the employees were law enforcement officers with supervisory responsibilities; the basis for the discipline resulted in criminal prosecutions and sanctions; the criminal proceedings were completed; and the criminal allegations and disposition were made public. Public Records Order, January 27, 1992 (Moody). Likewise, we have found that the public interest in disciplinary records of a law enforcement officer charged with instruction about standards of moral fitness, for conduct incompatible with those standards, outweighed the officer's expectation of privacy. Public Records Order, October 11, 1996 (Foster/Bennett).

In contrast, we denied a petition to compel the Executive Department to disclose records pertaining to the termination of three high level management officials who were not dismissed as a result of a criminal investigation or for reasons that resulted in criminal prosecution and sanction. In addition, the reasons for the disciplinary action had not been made public. Therefore, we

concluded there was no overriding public interest in depriving the former state employees of their privacy surrounding the reasons for their discipline. Public Records Order, April 29, 1993 (Haas). We have also found no overriding public interest (only the labor union's private interest) in disclosure of information supporting disciplinary sanctions against two Oregon State Police officers. Accordingly, that information was exempt from disclosure under ORS 192.501(12). Public Records Order, July 3, 1995 (Garretson). We have also determined personnel discipline records were exempt when the discipline was unrelated to the asserted public interest of student safety. Public Records Order, July 30, 2007 (Aho).

In Public Records Order, April 14, 1995 (Mayes), we concluded that, although the matter for which the public employees received a sanction was widely publicized, the disciplinary records requested by the petitioner were routine discipline matters. The agency had already disclosed the names of the disciplined employees. We concluded that the agency's general disclosure of the sanctions imposed against the disciplined employees satisfied the public interest in the case while protecting the public employees from ridicule. Consequently, the requested materials were exempt from disclosure.

The records at issue concern routine employee discipline actions, based on the employees' errors in manually reviewing tax returns. No criminal prosecutions or sanctions resulted from the conduct for which the employees were disciplined, and there was no evidence of collusion. The employees did not violate ethical or moral standards that their official positions exemplified. On the other hand, the conduct for which the employees were disciplined resulted in a widely publicized criminal fraud by a taxpayer, with significant costs to the state.

The public interests Ms. Cole asserts include "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." We conclude that no public interest would be served by releasing the names of the four public employees. But the public has a strong interest in learning how DOR and, in particular, its management personnel, have been accountable for the mistakes that were made.

In addition, DOR has already disclosed the fact that the error occurred in the Suspense Unit of the department's Personal Tax and Compliance Division, which is charged with reviewing tax returns that appear to contain errors or fraud. The agency has disclosed that several internal controls were not working as they should, and that four employees (two line staff and two managers) were disciplined for not following departmental policy and procedure in processing and reviewing the fraudulent tax return. DOR has also disclosed that one employee was demoted and the other three received other disciplinary action.

In view of those considerations, we conclude that DOR must disclose the positions held by the employees who were disciplined and what sanction the agency imposed on each of them. To that extent, the public interest outweighs the employees' interests protected by ORS 192.501(12).

But the public interest would suffer by disclosure of DOR's internal processes and how the employees' errors and failure to follow procedures combined to allow the fraud to go undiscovered in this instance. Accordingly, we conclude that DOR is not required to disclose any information in the personnel discipline records that is exempt under ORS 192.501(22).

4. The unconditional exemption under ORS 192.502(9)(a) and state tax law may apply.

ORS 192.502(9)(a) 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) 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.]

As used in ORS 314.835, "particulars" includes, but is 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 review of the requested documents, we have determined that they include information that may be subject to ORS 314.835(1), and thus unconditionally exempt under ORS 192.502(9)(a). Thus, to the extent the requested records include information made confidential by ORS 314.835, that information is unconditionally exempt and must be separated from nonexempt information. ORS 192.505.

CONCLUSION

In summary, we grant Ms. Cole's petition in part and deny it in part. The personnel discipline actions and supporting material she requested are exempt from disclosure under ORS 192.501(12), except for (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. DOR is not required to disclose the names of the disciplined employees. In addition, 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 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 exempt under ORS 192.502(9). If DOR complies with this order by redacting the exempt information, The Oregonian may challenge those redactions in a new petition.

Sincerely,

Mary H. Williams
Deputy Attorney General

MHW:nog/JUSTICE-#3600572