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Mateusz Perkowski
1400 Broadway St. NE
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Matt Shelby
Communications Strategist
Department of Administrative Services

Re: Petition for Public Records Disclosure Order
Oregon Department of Administrative Services
DOJ File No.: 107065-GA0128-16

Dear Mr. Perkowski and Mr. Shelby:

This letter is the Attorney General's order responding to Mr. Perkowski's October 25, 2016, petition for disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505. His petition asks the Attorney General to order the Oregon Department of Administrative Services (DAS) to produce the applications for the position of director at the Oregon Department of Agriculture, and related documents.

We respectfully deny the petition so that DAS can reconsider its decision to deny access to these records. As discussed below, DAS relied on prior advice from this office that the names of nonfinalist applicants are exempt from disclosure under ORS 192.502(2) because disclosure would harm those applicants' current employment relationships. However, Oregon's appellate courts have made clear that asserting this exemption requires an individualized showing; therefore, DAS must making this showing for each of the applications it asserts the exemption over.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions contained in ORS 192.501 to 192.505. *See* ORS 192.420(1). Any person denied the right to inspect or to receive a copy of a 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). The agency carries the burden to sustain any such denial. *Id.*

The petition shows that DAS denied Mr. Perkowski's records request based on ORS 192.502(2), which exempts from disclosure "information of a personal nature . . . 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." In doing so, DAS relied on previous orders and advice from this office holding that the names of nonfinalist candidates are exempt from disclosure.[1] *E.g.*, Public Records Order, Aug 6, 2010, Rosenthal (names of nonfinalist candidates for director of athletics at Southern Oregon University); Letter of Advice to W.T. Lemman, Oct 13, 1988 (OP-6248), at 4–7 (names of nonfinalist candidates for president of a state university). This previous advice found that disclosing nonfinalists' names would be an unreasonable invasion of privacy because these applicants' current employment relationships would be threatened. Rosenthal, at 2–3; Lemman, at 6.

While we continue to believe that disclosing nonfinalists' names may often be an unreasonable invasion of privacy because of the likely detrimental consequences to existing employment relationships, public bodies must apply public records exemptions in a manner consistent with decisions of Oregon's appellate courts. The Oregon Supreme Court has indicated that, in order to invoke the personal privacy exemption at issue here, a public body must make individualized justifications for the information it withholds. Specifically, the Oregon Supreme Court held that a public body's blanket policy to withhold the names and addresses of replacement coaches during a teachers' strike did not meet the requirements of ORS 192.502(2) because the public body was required to "act on an individual, case-by-case basis." *Guard Publ'g Co. v. Lane County Sch. Dist. No. 4J*, 310 Or 32, 39 (1990). The court added that the information was not exempt "absent an individualized showing of justification for exemption." *Id.* at 40.

Therefore, in order for DAS to meet its burden under ORS 192.502(2) to withhold nonfinalists' names, it must make an individualized showing for each applicant: relevant evidence would typically be whether the applicant opposes disclosure of this information—for example, because disclosure would harm that applicant's current employment relationship or cause some other significant harm. DAS must then give Mr. Perkowski an opportunity to either show that disclosure would not be an unreasonable invasion of privacy or that the public interest by clear and convincing evidence requires disclosure. *Guard Publ'g*, 310 Or at 39–40. We think that under usual circumstances a requester will not be able to meet the high *clear and convincing evidence* burden: there is a lesser public interest in knowing the names of applicants not selected as finalists, especially when disclosure would threaten those applicants' current employment relationships and thus discourage applicants from applying in the first place. But the fact that we think public bodies will often be able to make this showing does not excuse them from doing so on an individualized basis.

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[1] Matt Shelby at DAS explained to us that once the finalists for the position are selected, DAS will publicly disclose the finalists' names.

Because this order departs from our previous advice, we think it appropriate to provide DAS the opportunity to either produce the requested records or obtain the information necessary to make an individualized showing for each applicant. Therefore, we respectfully deny Mr. Perkowski's petition at this time.

Sincerely,

Frederick M. Boss
Deputy Attorney General

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