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January 15, 1997

Nonalee Burr
2825 Surf Court NE
Salem, OR 97305

Jerry Freshour
Deputy Administrator
Board on Public Safety Standards
and Training
550 N. Monmouth Avenue
Monmouth, OR 97861

Re: ***Petition for Public Records Disclosure:***
Board on Public Safety Standards and Training Records

Dear Ms. Burr and Mr. Freshour:

This letter is the Attorney General's order on Ms. Burr's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on December 30, 1996,[1/] asks the Attorney General to direct the Board on Public Safety Standards and Training (BPSST) to produce a copy of the background investigation report conducted in connection with Ms. Burr's application for employment at BPSST. For the reasons that follow, we grant the petition in part and deny the remainder of the petition.

The Public Records Law confers a right to inspect public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. However, the Attorney General may order a state agency to disclose records only if the agency has denied a request for public records. *See* ORS 192.450(1). The petition states that Ms. Burr requested and was denied the records by Jeri Hemmer, Personnel Manager at BPSST. Ms. Hemmer confirms that she denied Ms. Burr's records request.

The record at issue was generated because BPSST requested the Oregon Department of State Police (OSP) to assign one of its personnel to conduct a background investigation on Ms. Burr, who had applied for a position at BPSST as an Accounting Technician. OSP

assigned Senior Trooper Lynn Hillman, a retired Lt. Colonel with OSP, to conduct the background investigation on Ms. Burr. In the course of conducting this background investigation, Senior Trooper Hillman spoke to prior employers of Ms. Burr. These employers included both private employers and public employers, who provided employment references about Ms. Burr's work record with them. On December 18, 1996, Senior Trooper Hillman submitted to Ms. Hemmer his written background investigation report regarding Ms. Burr.

We have reviewed Senior Trouper Hillman's investigation report. That report states that two citizens who owned or were employed by a private business requested that their references in whole or in part be afforded confidentiality. Senior Trooper Hillman confirmed for us that these two citizens requested that the information they submitted regarding Ms. Burr's employment with their private business be kept confidential in whole or in part. Senior Trooper Hillman informed us that these citizens did not request that the identity of their business or certain factual information such as the duration and duties of Ms. Burr's employment be kept confidential. Senior Trooper Hillman also stated that the two citizens agreed to provide information about the details of Ms. Burr's separation from their employment and their evaluation of Ms. Burr's work only if this information would be kept confidential from Ms. Burr.

Oregon's Public Records Law, ORS 192.410 to 192.505, operates under a strong presumption of disclosure. ***Guard Publishing Co. v. Lane County School Dist.***, 310 Or 32, 37, 791 P2d 854 (1990). ORS 192.420 provides that "[e]very person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." Such exemptions are to be narrowly construed, in a manner that promotes simple, quick and largely uniform application and that furthers the general rule favoring disclosure. *Id.* The public agency bears the burden of justifying exemptions from disclosure. ORS 192.490(1).

The two exemptions upon which BPSST relies are found in ORS 192.502(1) and (3). ORS 192.502 provides in relevant part:

> The following public records are exempt from disclosure under ORS 192.410 to 192.505:
>
> (1) 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.

* * * * *

(3) 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.

1. ORS 192.502(3) - Information Submitted in Confidence

We turn first to the exemption provided by ORS 192.502(3) for information submitted to a public body in confidence. The purpose of this exemption is to encourage citizens to provide relevant information voluntarily to public bodies, with some reasonable assurance that the information will be kept confidential. OREGON ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 47 (1995).

There are five tests in this exemption, each of which must be met for the exemption to apply. These five tests are:

1. The exemption applies only to information that is submitted voluntarily when the informant is under no legal obligation, by statute, rule, contract or otherwise, to provide the information.

2. The public body must be in a position to show that the information was of a nature that reasonably should be kept confidential.

3. The public body must show that it has obliged itself in good faith not to disclose the information.

4. The person must have, in fact, submitted the information in confidence.

5. Disclosure must cause harm to the public interest.

The references regarding Ms. Burr to which ORS 192.502(3) is relevant were submitted to Senior Trooper Hillman by Richard LeFor, the private employer, and Amy LeFor, his employee. The references meet the first test under this exemption because they were given voluntarily by citizens who had no legal obligation to provide the information.

The second test was met because the information requested by BPSST and for which confidentiality was requested was an employment reference regarding Ms. Burr, and an employment reference is information that the legislature has itself recognized as confidential.[2/] The third test was met because Senior Trooper Hillman made a good faith commitment to the two citizens that he would keep confidential the information for which confidentiality was requested. It was only after receiving this assurance from Senior Trooper Hillman that the two individuals provided information regarding Ms. Burr's performance on the job, thus satisfying the fourth test.

We turn to the fifth requirement, that the disclosure must cause harm to the public interest. Here Ms. Burr seeks disclosure of references regarding her employment so that she can determine if "something has been falsified somewhere in my background and have the opportunity to correct any errors." In *Gray v. Salem-Keizer School District*, 139 Or App 556 (1996), the court analyzed a similar request for materials to which access was denied as exempt under ORS 192.502(3). In the particular circumstances of that case, the court ordered disclosure because it was possible by redacting to disclose the substance of the statements without identifying their sources. Therefore, the court was able to require disclosure of the statements while preserving the confidentiality of their sources.

With respect to the references at issue here, Richard and Amy LeFor do not object to disclosure of their identities, but they do not want the contents of certain of their statements revealed. Moreover, it is not possible to "sanitize" their statements because in evaluating Ms. Burr's work, they referred to specific events and decisions, the substance of which necessarily would reveal who had made those particular statements. Thus, the solution devised by the court in *Gray* to permit disclosure, that of deleting identifying material, will not permit disclosure here while still preserving the confidentiality requested by the citizens.

In granting plaintiff's access to the redacted references, the court in *Gray* considered the plaintiff's view that the public interest is served by permitting him to verify or challenge the accuracy of the reference information, thus ensuring unbiased, fair and informed hiring decisions by public agencies. 139 Or at 565. The court decided that "the public interest would not suffer, but would be served, because disclosure of ***non-source-identifying*** material would reduce the potential for basing hiring decisions on secret, unrebuttable allegations or innuendo." *Id.* at 566 (emphasis added).

When the disclosed information would, by its very substance, identify the source of the reference, however, the issue becomes whether the interest in enabling the individual to correct or verify the information overrides the public body's need to have the most candid information available to it when it makes decisions to hire an applicant. If the public body was to be deprived of such candid assessments because it could not assure citizens that their

assessments would be kept confidential, the public interest would suffer the loss of a frank appraisal of a candidate's suitability for public employment.

To order disclosure in this situation would abrogate the agency's commitment to citizens who provide employment references to maintain the confidentiality of the information they submit. The result would be that, in seeking employment references for potential state employees, the state could never commit to the citizens providing those references that the information provided would be kept confidential. Such a result would render meaningless the exemption in ORS 192.502(3) when the state seeks employment references from private employers and makes a record of that reference. Such a result would have a negative affect on the state's ability to gather candid information about a person seeking employment with the state and thus could hinder informed hiring decisions, which are some of the most important decisions about employment that any employer makes.

In weighing the competing aspects of the public interest, we believe that in the present situation, when the identity of the source of the reference cannot be adequately protected by deleting the name or other identifying information, the overriding public interest in obtaining candid and complete references requires the promise of confidentiality to be kept. Keeping the promise in this case does nothing more than place the prior employer on the same footing when giving employment reference to a public employer as when giving references to prospective employers in the private section.[3/] Keeping the promise also addresses the prior employer's reasonable fear of litigation discussed below.

We find that the public interest would suffer by disclosure in this instance. Accordingly, we conclude that the information submitted by Richard and Amy LeFor in confidence meets each of the elements of ORS 192.502(3). This information is exempt from disclosure.

2. ORS 192.502(1) - Advisory Communications Within or Between Public Bodies

The second exemption we consider is ORS 192.501(1), which exempts from disclosure nonfactual communications of an advisory nature between or within public bodies that are made preliminary to final action. This exemption does not apply unless the public body shows that the public interest in frank communication among agency employees and officials 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 37 (1995). Such communications will be disclosed, however, if the public interest in disclosing these

communications outweighs the public interest in the exchange of these subjective, candid discussions between public employees.

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 investigation report that Ms. Burr seeks contains the subjective evaluations of her work performance provided by three state agencies that employed her in 1995 and 1996 as a temporary employee through the St. Vincent de Paul Employment Services. These subjective evaluations of Ms. Burr's work performance, which were communicated from personnel of the state agencies previously employing Ms. Burr to BPSST through Senior Trooper Hillman's background investigation, meet the first three criteria of the exemption. They are communications between state agencies; they are advisory in nature and preliminary to BPSST's final decision whether to make a final offer of employment to Ms. Burr; and to the extent that such communications address the source's opinions and subjective evaluations of Mr. Burr's work performance rather than the factual details of her employment, such as dates of employment, position title and duties, they are nonfactual in nature.

The issue is whether in this particular instance the public interest in encouraging the frank and uninhibited exchange of subjective evaluations of an applicant's work history from a former state employer to a prospective state employer is clearly outweighed by Ms. Burr's interest in learning the contents of these opinions about her work so that she can determine if "something has been falsified somewhere in my background and [I can] have the opportunity to correct any errors."

In conducting the background investigation on behalf of BPSST, Senior Trooper Hillman contacted the state agencies that had previously employed Ms. Burr as a temporary employee in 1995 and 1996 before she applied for employment at BPSST.[4/] These three state agencies are the Department of Agriculture, the Office of the Secretary of State and the Director's Office of the Department of Human Resources. Senior Trooper Hillman spoke to one person at the Department of Agriculture, two persons at the Office of the Secretary of

State, and one person at the Department of Human Resources. We were able to contact all of these persons except the source at the Department of Human Resources. All sources contacted informed us that they knew that Senior Trooper Hillman was acting on behalf of another state agency, BPSST, in gathering information about Ms. Burr's employment history with their own state agency and that the trooper would communicate that information to BPSST. All sources understood that the information that they were sharing with BPSST through Senior Trooper Hillman was in the nature of an employment reference. The background investigation itself shows, and the sources confirm, that they provided Senior Trooper Hillman with a mixture of factual details about Ms. Burr's employment as well as each source's subjective opinion about her work performance on the job.

Two of the sources were adamant in informing us that they would have been inhibited in providing to Senior Trooper Hillman their frank and candid opinions regarding Ms. Burr's employment if they had believed that he would disclose their opinions to Ms. Burr. Both sources stated that they would not have provided Senior Trooper Hillman with their subjective evaluations of Ms. Burr's work performance if they had believed it would have been disclosed to her. One of these sources stated that the source desired to give BPSST the most honest evaluations that she could because she believed that she had received less than candid evaluations in the past from other state agencies and that, as a result, her agency had not made the best employment decisions.

Although the third source was less adamant in her feelings of inhibition, she also stated to us that she only provided her subjective evaluations to Senior Trooper Hillman when he probed beyond a written recommendation about Ms. Burr and enquired further for her opinions about Ms. Burr's performance on the job. It was upon this probing enquiry that the source tried to be, as she described it, "as honest as she could be" about her evaluation of Ms. Burr's employment. This source expressed no discomfort with providing to Ms. Burr the information in the letter of reference that the source gave to Senior Trooper Hillman, but expressed significant discomfort with the disclosure of her subjective evaluation of Ms. Burr's work, which the source believed had been given to Senior Trooper Hillman in confidence for BPSST's use.

The source for the Department of Human Resources, who we were unable to contact, provided a statement to Senior Trooper Hillman that was almost entirely factual except for a single sentence in which the source provided a positive opinion about Ms. Burr's work. Because we were unable to contact this source to determine the particular circumstances of his interview with Senior Trooper Hillman, and because the substance of the reference does not appear to be sensitive, we do not consider the information from this source for exemption.

The exemption provided by ORS 192.502(1) requires a balancing of the public interest in disclosure against the public interest in frank and candid communications between public bodies as employers. The public has an interest in state agencies exchanging in an uninhibited manner their candid evaluation of their experiences with the work of a prospective employee. To constrain frank evaluations from state employers would ensure in some circumstances the selection of a candidate with prior state employment who is less well qualified than other applicants who do not have prior state employment. It may also result in the employment of individuals who are not qualified at all. The public has a significant interest in the selection of a person for public employment who is well qualified for the position and whose prior public employment has been successful. That public interest in frank evaluations of the prior public employment would be greatly hampered if the prior employers refused to speak for fear of involving themselves in litigation as a result of their comments.

Despite the qualified privilege the law provides employers who give employment references, *see* ***Wattenburg v. United Medical Laboratories***, 269 Or 377, 380 (1974), the policy usually followed by Oregon employers, in both the public and private sectors, is to give no information to a prospective employer about the job candidate except the position formerly held, the highest salary earned and the period of the individual's former employment. This "name, rank and serial number" policy is used by employers to protect themselves from litigation.[5/] In 1995, the legislature sought to encourage employers to abandon this defensive policy and to speak candidly with prospective employers about job candidates. Or Laws 1995, ch 330, § 1, codified as ORS 30.178. However, the privilege for speaking remains qualified, and, to avoid litigation, many employers continue to provide no information.

As noted previously, the legislature in ORS 652.750(1)(b) excluded from the definition of personnel records "confidential reports from previous employers" and thus recognized that employment reports from prior employers should be accorded protection from access by the employee.

Weighed against the public's interest in frank evaluations of the employment of prior public employees is the public's interest in "ensuring unbiased, fair and informed hiring decisions by state agencies" rather than ones based upon inaccurate or false information. *See Gray*, 139 Or App at 565. This too is a significant 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.[6/]

Because ORS 192.502(1) requires that each disclosure be either granted or denied "in the particular instance," we review the subjective evaluations in the information provided by the representatives of these public bodies. Our review reveals that much of each reference consists of factual information disclosable to Ms. Burr. The subjective evaluations and opinions about Ms. Burr's work, some of which were quite positive and some of which were less than positive, are at issue here. These were the assessments of Ms. Burr's work for which confidentiality was expected. All appear to be frank and candid opinions about her work and as such are the sort of forthright evaluations most prospective employers seek and value. Consistent with the conventional wisdom of employers generally, these evaluations would not have been given if their disclosure had been expected.

In reviewing the information provided to Senior Trooper Hillman by the Department of Agriculture and the Office of the Secretary of State, we conclude that the public interest in encouraging frank and candid exchanges between public bodies of the subjective evaluations and opinions about Ms. Burr's prior employment with those public bodies clearly outweighs the public's interest in disclosure in this particular instance. Accordingly, we find the frank, subjective information provided by the Department of Agriculture and the Office of the Secretary of State to be exempt from disclosure under ORS 192.502(1).

3. Conclusion

As discussed above, we conclude that some portions of the background investigation report that Ms. Burr wishes to inspect contain information exempt from disclosure under ORS 192.502(1) and (3). The following materials are exempt from disclosure:

1. All paragraphs describing the interview with Richard LeFor, except the first paragraph.

2. All paragraphs of describing the interview with Amy LeFor, except the first paragraph.

3. The third paragraph describing the interview with Madge Barker, Department of Agriculture Accounts Payable Revenue Supervisor, with the exception of the first sentence, the third sentence through the words ". . . on a project," and the last two sentences, which are not exempt.

4. The second paragraph of the description of the interview with Cynthia Griffin, Executive Assistant to the Secretary of State.

5. The second paragraph describing the interview with Mike Greenfield, Deputy Secretary of State, with the exception of the fourth sentence, which begins "The applicant recognized . . . ," and the last sentence of that paragraph, which are not exempt.

As to the above portions of the report, which we find to be exempt from disclosure, we deny Ms. Burr's petition. The remainder of the information in the report is not exempt from disclosure, either because it was not submitted in confidence by citizens or because it was provided by a state agency, but is "purely factual material." As to this material, we grant Ms. Burr's petition and order BPSST to disclose the nonexempt portions of the report.[7/] BPSST has seven days from the date of this order in which to comply. ORS 192.450(2).

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

DS:JOH:RSW:AV:jpl:JAA021F7

[1/] We appreciate Ms. Burr's extending the time within which the law would have otherwise obligated us to respond to her petition.

[2/] *See* ORS 652.750(1)(b) which specifically excludes from the definition of personnel records "confidential reports from previous employers."

[3/] References between private employers are not subject to the disclosure requirements of the Public Records Law; a record provided by a private employer may not become a public record. *See* ORS 652.750(1)(b) and Public Records Order, August 6, 1987, Larsen.

[4/] Unlike her employment with the three state agencies in 1995 and 1996, with which Ms. Burr was placed in a temporary capacity by St. Vincent de Paul Employment Services, Ms. Burr applied for a permanent full-time position at BPSST.

[5/] In some cases, employer liability has been based on the former employer's decision to discuss only the positive aspects of the person's employment, thereby creating a false impression ultimately resulting in injury to a third party when the candidate was hired. *See, e.g.,* ***Randi W. v. Livingston Union School District***, 49 Cal Rptr 2d 471 (5th Dist 1996).