192.502(2) performance appraisal

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May 25, 1994

Pamela A. Mattson
Director, Employment Department
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David Laine
P.O. Box 224
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Re: *Petition for Public Records Disclosure Order: Employment Department Branch Manager Performance Appraisal*
DOJ File No. 471-010-GA0003-94

Dear Ms. Mattson and Mr. Laine:

This letter is the Attorney General's order on Mr. Laine's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on May 17, 1994,[1/] asks the Attorney General to direct the Employment Department to make available for inspection the "most recent job related performance evaluation of Randy McCorkle, Manager of the Tillamook Local Office" of the Employment Department. For the reasons that follow we grant the 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. If a public record 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, 538 P2d 373 (1975).

[1/] We appreciate Mr. Larsen's granting us an extension of one extra day to issue this order.

1. Personal Privacy Exemption

ORS 192.502(2) exempts private personal information from disclosure requirements of the Public Records Law. This provision exempts:

> Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof 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.

There are two threshhold requirements that must be met before this exemption can potentially be applicable. The first determination that must be made is whether the information is of a "personal nature." Notwithstanding the previous opinion, 41 Op Atty Gen 437, April 14, 1981, which was cited by Mr. Laine from page 81 of the Attorney General's Public Records and Meetings Manual (1993), the test for determining whether the information is of a "personal nature," established in Jordan, requires determining whether the information sought is specific to one individual. Clearly, information contained in a performance appraisal is specific to the individual being evaluated. It is therefore information of a "personal nature."

The second determination to be made under the exemption is whether disclosure of the performance appraisal of an individual would constitute an unreasonable invasion of privacy. The type of evaluation sought to be disclosed in this case consists of 21 performance areas using a five-part rating system ranging from "unacceptable" to "outstanding." In addition, each performance area also includes a narrative discussing employee performance in that area. The evaluator is required to identify and describe employee achievement, effectiveness, creativity, innovation, demonstration of leadership ability, strengths and deficient performance. The information contained in such an appraisal is very sensitive and disclosure of such information could lead to employee embarrassment. The Employment Department concluded that disclosure of the appraisal would constitute an

unreasonable invasion of privacy, and we agree. The disclosure of an employee's performance appraisal would constitute an invasion of privacy that an ordinary reasonable person would deem highly offensive. Cf. Jordan, supra, 308 Or at 442.

Thus, both requirements for threshold entitlement to an exemption from disclosure are met. The information is of a personal nature and disclosure would constitute an unreasonable invasion of privacy. This does not end the inquiry, however. The law still requires disclosure if the public interest, by clear and convincing evidence, requires disclosure in the particular instance. We weigh whether the public interest requires disclosure by examining the public interest in disclosure and the public interest in nondisclosure.

There is a clear public interest in citizens knowing how public employees are performing their duties. See Jensen v. Schiffman, 24 Or App 11, 554 P2d 1048 (1976). The degree of public interest varies with the responsibilities of the employee. These responsibilities may be measured in a variety of ways, including examination of the substantive nature of the work of the employee in question and the nature and level of responsibility of that individual.

In a prior public records disclosure order we responded to a request to inspect the performance evaluations of social service supervisors employed in the Western Region of the Children's Services Division. Public Records Order dated July 28, 1992 (Owen). In that order we concluded that the evaluations should be released, but with all names and other identifying information redacted. In analyzing the public interest in disclosure of the evaluations, we noted that social service workers occupy positions involving a great deal of responsibility regarding the lives of children for whom services are provided; that failure to provide effective services can result in irreparable harm to a child; that a social service supervisor is responsible both for insuring that these services are provided by social service workers on a prompt and professional basis and for planning, developing and directing the provision of these services; and that the substantive nature of the social service supervisor's work involves the care and protection of children, one of the core concerns of any society.

In analyzing the public interest in nondisclosure of the supervisors' evaluations, we noted that social service supervisors are fairly low in the agency's hierarchy and that the public interest in disclosure of their performance evaluations would be less than the interest in disclosure of the evaluation of a top manager of the agency; that subjecting employee performance evaluations to disclosure would have a widespread negative effect on the morale of agency employees generally as well as morale of those whose evaluations are disclosed; that dissemination of candid discussion of individual supervisors' strengths and weaknesses to

coworkers, peers and subordinates would be disruptive to the agency in providing services to children and could subject the supervisors to embarrassment and ridicule; and that a probable long-term effect of disclosure would be less candid appraisals of employees by their supervisors.

Determining the public interest in disclosure involves weighing such competing concerns. In weighing the public interest in disclosure against the public interest in nondisclosure, we conclude that the public interest requires disclosure in this particular instance.

First, although the public interest in the proper performance of the work of the Tillamook Branch Office may not be as great as the public interest in providing services to children, the public interest in proper performance of the manager of the Tillamook Branch Office is nevertheless significant. The branch manager here is the manager of only a small office, with no subordinate supervisors and only five employees. Nevertheless, he is the manager of that office, and his actions and attitudes have a significant effect in determining the manner in which the office provides services to the public. Thus, the public has a definite interest in knowing how well he, as a branch manager, is performing his management functions. This interest is over and above any interest that the public might have in knowing how well a rank and file employee performs his or her job.

Second, although disclosure of any less than positive comments might be embarrasing to the branch manager, the Public Records Law generally does not provide an exemption to avoid embarrassment for public officials. The law specifically recognizes an exemption only for an employee's completed disciplinary action where a sanction was imposed, ORS 192.501(13); it does not protect state employees from embarassment because of deficiencies in job performance that fall short of actions resulting in discipline. See City of Portland v. Rice, 308 Or 118, 775, P2d 1371 (1989).

Finally, even though we recognize that disclosure may have the effect of causing department evaluators to be less candid in their appraisals, and that this is a significant concern to the agency, we do not believe that this can tip the balance against the public interest in disclosure in this instance. Cf. Coos County v. Oregon Department of Fish and Wildlife, 86 Or App 168, 173, 739 P2d 47 (1987) ("Any 'chilling effect' that disclosure may have on future communications within the agency because of potential embarrassment to the agency or its employes, is not sufficient, in and of itself, to overcome the presumption favoring disclosure.").

On balance, we find that the public interest in nondisclosure is not as great as the public interest in disclosure. As the court stated in Jensen, "any privacy rights that public officials have as to the performance of their public duties must generally be subordinated to the right of the citizens to monitor what elected and appointed officials are doing on the job." 24 Or App 17. Accordingly, we conclude that a performance evaluation which describes how well an agency branch manager is performing his duties is not exempt from disclosure under ORS 192.502(2). A citizen's right to know this information prevails over the public interest in nondisclosure.

For the foregoing reasons we grant Mr. Laine's petition and order disclosure of the requested record. However, two items under the category of "Performance Prioritizes" do not describe how the manager has performed his duties. These items describe the branch manager's personal aspirational goals for the coming year. We find no overiding public interest in disclosure of this personal invasion, and we direct the agency to redact that material when the evaluation is produced for inspection.

The Employment Department has seven days from the date of this order in which to comply. ORS 192.450(2).

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the
Attorney General

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