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July 28, 1992

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Joan Fraser, Manager
Office of Employee Services
Children's Services Division
198 Commercial Street SE
Salem, Oregon 97310

Re: Petition for Public Records Disclosure Order; Children's Services Division Supervisors' Merit Evaluations

Dear Ms. Owen and Ms. Fraser:

This letter is the Attorney General's order on Ms. Owen's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Ms. Owen's petition,[1] which we received on July 21, 1992, asks the Attorney General to order Children's Services Division (CSD) to provide to her copies of all CSD supervisors' merit evaluations and how they were recently scored. For the reasons stated below, we respectfully deny the petition in part and grant the petition in part.

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[1]In a telephone call on July 22, 1992, with Assistant Attorney General Lawrence Young, Ms. Owen limited her request for evaluations to those evaluations of casework supervisors and social service supervisors in CSD's Western Region. The CSD Office of Employee Services advises that the position classification of casework supervisors no longer exists, and that employees who were in that position are now called social service supervisors.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. ORS 192.420. If a public record contains material that is exempt from disclosure together with non-exempt material, it is the duty of the public body to separate the materials and make the non-exempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. ORS 192.505; Turner v. Reed, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

Disclosure, not exemption, is the rule under the Public Records Law. Exemptions from disclosure must be narrowly construed and the burden is on the public body claiming the exemption to demonstrate that the exemption is both legally and factually justified. Guard Publishing Co. v. Lane County School Dist., 310 Or 32, 37, 791 P2d 854 (1990).

We have examined carefully whether some or all of the performance evaluations are exempt from disclosure under the exemptions relating to personal privacy and personnel discipline action.

I. Personal Privacy Exemption

ORS 192.502(2) exempts private personal information from the disclosure requirements of the Public Records Law. The statute 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[.]^C

ORS 192.502(2).

The purpose of this statute is to protect the privacy of individuals from unreasonable invasion. Jordan v. Motor Vehicles Division, 308 Or 433, 441, 781 P2d 1203 (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.

The first determination that must be made is whether the information is of a "personal nature." The test for determining this, 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 therefore is considered 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 consists of an evaluation of ten performance factors using a five-part rating system ranging from "unacceptable" to "outstanding." The scoring was for the purpose of ranking supervisors in the event that layoffs are necessary. In addition, each evaluation also includes a narrative section discussing employee performance under each of the ten performance factors. For each performance factor, evaluators are required to identify and describe the accomplishments and results achieved by the employee and address deficiencies or problem areas. The information contained in such an appraisal is highly sensitive, and disclosure of the information could lead to employee embarrassment and ridicule. CSD concluded that disclosure of performance appraisals would constitute an unreasonable invasion of privacy, and we agree.

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. That does not end the

inquiry, however, for 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 versus the public interest in non-disclosure.

There is a clear public interest in citizens knowing how public employees are performing their official duties. See Jensen v. Schiffman, 24 Or App 11, 544 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 in which, in this case, both the supervisors and the supervised employees are engaged, and determination of the nature and level of responsibility of both the supervisors and the supervised individuals.

This request is for performance evaluations of social service supervisors in CSD's Western Region. A social service worker is responsible for administering, coordinating and providing a variety of social services to children and their families to assure the physical, mental and emotional well being of children. This is a very sensitive position, and involves a great deal of responsibility regarding every aspect of a child's life. A failure to provide the effective services can result in irreparable harm to a child which may follow and affect the child throughout his or her adult life. 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 social services.

However, it should also be kept in mind that social service supervisors are fairly low in the CSD management hierarchy. There is considerably less public interest in disclosure of their performance appraisal than there would be in the disclosure of the performance appraisal of a top manager in the division.

The substantive nature of social service supervisors' work involves the care and protection of children, one of the core concerns of any society. Because of the type of responsibility that a social service supervisor has, and the level of responsibility that a supervisor has in making sure that the system is working as well as it can work, the public has a substantial interest in knowing how these individuals as a class are performing their public duties.

The public also has a substantial interest in non-disclosure. If personnel evaluations are subject to disclosure, there will be widespread negative effect on employee morale which will affect the entire agency, not just those employees whose performance appraisals are disclosed. The evaluation process is by its nature designed to be candid about an employee's strength and weaknesses. To have evaluations discussing those traits disseminated to coworkers, including peers and subordinates, would be highly disruptive to the agency in its attempts to protect and provide services to children. Employees could be subject to embarrassment and ridicule. Aside from the immediate effects of such disclosure, there would be long-term effects as well. Supervisors in all probability would be less candid in their appraisal of subordinates, and the quality of services provided to the public could suffer as a result.

Determining the public interest in disclosure involves weighing the competing concerns. We are asked in this request for disclosure of a number of performance appraisals, as opposed to the performance appraisal of one individual. The level of public interest in knowing how these employees as a class are performing their duties is high, but the adverse effects caused by disclosure are also high, and the public has an interest in that as well. On balance, we conclude that the evaluations should be released but with all names and other identifying information redacted. Any other information concerning the health, marital status, credit history, financial status and other similar personal information not directly related to job performance should also be redacted. In this manner, the public can review how employees as a class

are performing their duties, while avoiding some of the negative effects that disclosure of performance evaluations is bound to have.

II. Personnel Discipline Action Exemption

Other portions of the records which Ms. Owen has requested to inspect may fall with the provisions of ORS 192.501(13). That statute provides:

> The following public records are exempt from disclosure under ORS 192.410 to 192.505 unless the public interest requires disclosure in the particular instance:
>
> * * * * *
>
> (13) A personnel discipline action, or materials or documents supporting that action;

ORS 192.501(13).

This exemption covers only completed disciplinary actions where a sanction was imposed. See City of Portland v. Rice, 308 Or 118, 775 P2d 1371 (1989). However, CSD has been advised by this office that it should postpone disclosure of information on any pending personnel disciplinary matter until the personnel matter is finally resolved. At that point, the Division will be able to determine whether the records are exempt under ORS 192.501(13). Attorney General's Public Records and Meetings Manual at 20-21.

III. Conclusion

For the reasons stated above, we conclude in this particular instance that the names and other identifying information, as well as other personal

information, should be withheld from disclosure under the personal privacy exemption of ORS 192.502(2). Other information relating to completed and ongoing discipline actions should also be withheld under the personnel discipline action exemption of ORS 192.501(13). We order disclosure of the remainder of the social service supervisor performance evaluations for CSD's Western Region, and the instructions as to how evaluations are to be scored. Because of the two exemptions discussed above, it will be necessary for CSD staff to review each evaluation prior to disclosure in order to redact names and other identifying information, personal information and employee discipline material.

A public body may charge for its actual costs of making the records available. ORS 192.440(3). Under OAR 412-02-205, CSD may charge for the actual cost of staff time to search, glean and edit the records. The minimum hourly charge for staff time will be $8.00. Copying costs will be charged at $.10 per page. Additional charges may be made to cover any Attorney General review or consultation required by CSD.

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

Sincerely,

Amy Veranth
Opinions Coordinator
General Counsel Division

AV:cm
c: Mary Greenlee, Personnel Officer, Children's Services Division
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