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Re: Petition for Public Records Disclosure Order
Lane County
DOJ File No.: 137048-GA0001-22

Dear Mr. Stoneburg and Ms. Cooper:

This letter is the Attorney General's response to Mr. Stoneburg's petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. His petition asks the Attorney General to order Lane County (the "County") to disclose all applications it has received for a County Counsel position. For the reasons discussed below, we deny Mr. Stoneburg's petition in part and grant it in part.

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(1). The law is a disclosure law, and exemptions from disclosure must be express. Any person denied the right to inspect or to receive a copy of a public record of a public body other than a state agency may petition to the District Attorney in the county where the record is located to determine if it may be withheld. ORS 192.415(1)(a).[1] The public body carries the burden to sustain its actions. ORS 192.411(1).

The County informs us that it received five applications for the County Counsel position that consisted of each candidate's contact information and their resume. However, the County explained, four of the candidates have withdrawn from consideration and the County has now cancelled the recruitment. The County asserts that all of the information supplied by the candidates is exempt from disclosure under ORS 192.355(2) and 192.355(4). The former

[1] Due to a conflict of interest, the Attorney General is acting for the Lane County District Attorney in issuing this order. *See* ORS 180.240 (Attorney General has same powers as the district attorneys).

provision, commonly referred to as the personal privacy exemption, permits public bodies to withhold information of a personal nature if disclosure would constitute an unreasonable invasion of privacy, unless the party seeking disclosure demonstrates by clear and convincing evidence that the public interest requires disclosure in a particular instance. ORS 192.355(2). The later provision, often referred to as the confidential submissions exemption, permits public bodies to withhold information submitted to a public body in confidence that is not required by law to be submitted, where the information submitted should reasonably be considered confidential, the public body obliged itself in good faith not to disclose the information, and when disclosure would cause harm to the public interest. ORS 192.355(4).

In support of its position, the County cites prior orders and advice issued by this office in which we concluded that public bodies were permitted to withhold information under the personal privacy and confidential submissions exemptions that would reveal the identities of nonfinalist candidates for various public positions, where disclosure would threaten the candidates' current employment relations or harm other interests, and thereby discourage qualified candidates from applying for such positions in the future. *See, e.g.,* Public Records Order, Nov 1, 2016, Perkowski; Public Records Order, Aug 6, 2010, Rosenthal; and Letter of Advice to W.T. Lemman (OP-6248) (Oct 13, 1988). However, the County acknowledges, public bodies are required to make an individualized showing for each candidate that the information it intends to withhold is exempt. *See* Public Records Order, Nov 1, 2016, Perkowski at 2-3 (citing *Guard Publ'g Co. v. Lane County Sch. Dist. No. 4J*, 310 Or 32, 29 (1990). The individualized determination requirement is typically satisfied by providing evidence that the candidate opposes disclosure because it would harm the candidate's current employment relationship or cause some other significant harm. *Id*. In this case, the County explained that each candidate was required to check a box on the application acknowledging that "Resumes are kept highly confidential and shared only with the hiring manager for the opportunity you are applying for." The County also provided us with records demonstrating that three of the candidates expressly requested that their applications remain confidential.

Consistent with the reasoning in our prior orders, we find that the County has met its burden of demonstrating that the applications from the three candidates who expressly requested confidentiality are exempt from disclosure under both exemptions. We find that the candidates' requests for confidentiality adequately demonstrate that disclosing their applications would constitute an unreasonable invasion of privacy within the meaning of the personal privacy exemption. And we believe that disclosure under these circumstances would harm the public interest within the meaning of the confidential submissions exemption because it may discourage qualified candidates from applying for such positions. *See* Letter of Advice to W.T. Lemman at 7; and Public Records Order, Aug 12, 1988, Dean. The fact that the recruitment has been cancelled in this instance does not affect our analysis – publicly disclosing that a particular individual applied for a position that is no longer available risks the same harms as discussed in our prior orders. And Mr. Stonebridge has not offered clear and convincing evidence that the public interest requires disclosure of those applications in this instance. We are not aware of any heightened public interest in the applications, and we believe the cancellation of the recruitment substantially diminishes any general interest the public may have in them at this time. We therefore respectfully deny Mr. Stonebridge's petition with respect to those three applications.

We find that the County has not met its burden of demonstrating that the two remaining applications are exempt under the personal privacy exemption. Although neither candidate expressly requested confidentiality, the County relies on the fact that each acknowledged that the County would treat their application as confidential. The County argues that, because they understood that their application would be held in confidence, it is appropriate to infer that each candidate would consider the disclosure of their application to be an unreasonable invasion of privacy. If such a generalized inference were allowed under the public records law, it would have the effect of establishing a blanket policy that applications would be made exempt under personal privacy exemption by simply providing assurances of confidentiality to applicants. As discussed above, however, such blanket policies are not permitted under the public records law – the application of the personal privacy exemption to employment applications requires public bodies to make an individualized determination for *each* candidate as to whether disclosure would constitute an unreasonable invasion of privacy. *See* Public Records Order, Nov 1, 2016, Perkowski at 2-3; *Guard Publ'g Co. v. Lane County Sch. Dist. No. 4J*, 310 Or at 29 (blanket policies of non-disclosure are antithetical to the legislative intent reflected in the public records law). As to the two remaining applications, there is no indication that the County made the required individualized determination that their disclosure would constitute an unreasonable invasion of privacy. To the contrary, the County offered anecdotal evidence that one of the candidates expressed no concern about the prospect that his candidacy would be publicly disclosed. We therefore conclude that the two remaining applications are not exempt under the personal privacy exemption.

For similar reasons, we also find that the County has not met its burden of demonstrating that the remaining applications are exempt under the confidential submissions exemption. The available record demonstrates that the County obliged itself in good faith not to disclose the applications, and we have previously concluded that such applications are of a nature that reasonably should be kept confidential. *See* Letter of Advice to W.T. Lemman at 7; and Public Records Order, Aug 12, 1988, Dean. And the candidates were not otherwise required by law to submit their applications. However, there is no evidence from which we can conclude that: (a) either candidate submitted their application on the condition that it would be kept confidential, or (b) that disclosing the applications would cause harm to the public interest. Both conditions must be satisfied for the confidential submissions exemption to apply. *See* ORS 192.355(4); and *Attorney General's Public Records and Meetings Manual* at 103 (2019) ("[t]here are no less than five conditions that must be met for the exemption to apply * * *"). We therefore conclude that the two remaining applications are not exempt from disclosure under the confidential submissions exemption in this instance.

For the foregoing reasons, we conclude that the County has not sustained its burden of demonstrating that the two remaining applications are exempt from disclosure under either of the cited exemptions. We therefore grant the petition with respect to those applications and order the County to disclose them to Mr. Stoneburg. The County has seven days within which to comply or announce its intention to seek judicial review. ORS 192.411(2). Consistent with the requirement to separate exempt and nonexempt material, the County may redact material within the applications that it determines is exempt from disclosure. ORS 192.338. If Mr. Stoneburg

wishes to challenge those redactions, he may submit a new petition. For the reasons discussed above, we respectfully deny the remainder of Mr. Stoneburg's petition.

Sincerely,

Frederick M. Boss
Acting Deputy Attorney General

ACF:pjn/