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April 29, 1994

Keith A. Stubblefield
Rules and Procedures Manager
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Oregon State Correctional Institution
3405 Deer Park Dr., S.E.
Salem, OR 97310

Gail A. Rothrock
277 N.E. Palomar Ct.
Hillsboro, OR 97124-6725

Re: **Petition for Public Records Disclosure Order**
Department of Corrections

Dear Messrs. Stubblefield and Rothrock:

This letter is the Attorney General's order on Mr. Rothrock's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on March 28, 1994,[1/] asks the Attorney General to direct the Oregon Department of Corrections (ODOC) to disclose:

1. All background investigation reports and notes compiled during the investigation of Gail A. Rothrock, regarding fitness for employment with the Department of Corrections.

2. The names of all references supplied by the applicant, Gail A. Rothrock, who were contacted as a part of the background investigation.

[1/] We wish to acknowledge your courtesy in permitting us to exceed the statutory seven-day deadline for issuance of this Order.

For the reasons stated below, we grant the petition in part, deny it in part, and in part declare it to be moot.

We have reviewed the Department of Corrections' file concerning Mr. Rothrock's employment application, and we find that the following types of documents therein come within the scope of Mr. Rothrock's request:

A. Mr. Stubblefield (ODOC's Rules and Procedures Manager, and the person who contacted the former employers) made notes, mostly in the margin, on three pages of ODOC form # PD 100, the employment application form submitted by Mr. Rothrock. These are the pages which begin with a page entitled "Background Information Sheet" and which list prior employers, names of supervisors, etc. Mr. Stubblefield's notes make those pages come within the scope of Mr. Rothrock's requests.

B. ODOC form (2154Q) entitled "APPLICANT CHECKLIST".

C. ODOC form (no form #) entitled "DEPARTMENT OF CORRECTIONS CENTRALIZED CORRECTIONAL OFFICER INTERVIEW PANELS", to which is appended another form entitled "WRITTEN EXERCISE" and some additional pages containing the interview panel's notes of Mr. Rothrock's answers.

D. ODOC forms (no form #) entitled "Employment Verification".

E. ODOC form (no form #) entitled "BACKGROUND INVESTIGATION RESULTS".

The Department of Corrections now agrees that the documents described in paragraphs A, B and C above are public records and are not exempt from disclosure. ODOC will send copies thereof to Mr. Rothrock forthwith, and to that extent the matter is moot. The Department contends, however, that some or all of the information contained in the documents described in paragraphs D and E is exempt as confidential, a subject which requires discussion at some length below.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exceptions. ORS 192.420. If a public record contains material which is exempt from disclosure together with nonexempt material, it is the duty of the public body to 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. 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). Mr. Rothrock's petition raises the issue whether the records sought fall within the exemption from disclosure set out in ORS 192.502(3).

ORS 192.502(3) exempts from disclosure:

> 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.

In order to determine the applicability of the exemption in the present instance, we must examine the nature of the documents and of the information recorded thereon, and the circumstances under which it was communicated to the Department, and then analyze how that fits the elements of the exemption quoted above. We will begin with the forms mentioned in paragraph D, the documents entitled "Employment Verification". These reflect the notes Mr. Stubblefield made while contacting by telephone several of Mr. Rothrock's prior employers, to wit:

1. Washington County Corrections - contacted Sheriff Jim Spinden;

2. State of Washington, Corrections Center - contacted Curt Snyder;

3. State of Washington, Correction Center - contacted Judith Ikerd;

4. Marion County Jail - contacted Ted Johnson;

5. Yamhill County Corrections - contacted Chris Schlegel;

6. Marineland - contacted Paul Lawrence;

7. Phoenix Security - contacted Bobby and Michel Clay.

The Department does not claim that any confidential relationship existed with respect to the communications with Marineland, item 6 above. As for items 2 and 3, Curt Snyder of the State of Washington Correction Center did demand confidentiality but then did not respond to the more confidential parts of the "Employment Verification" form despite being sent a Waiver form (i.e., Mr. Rothrock's authorization for former employers to release information). Consequently, those "Employment Verification" forms are not claimed to be exempt, and those will also be released forthwith pursuant to Mr. Rothrock's request. As to the other four employers, however, ODOC would withhold the "Employment Verification" forms on the ground that the information recorded thereon was submitted in confidence and qualifies as exempt from disclosure.

For the information to be exempt, each of the statutory elements of the exemption in ORS 192.502(3) must be satisfied. These are:

(a) The Information must have been submitted in confidence;

(b) The information must have been submitted voluntarily and not otherwise required by law to be submitted;

(c) The information must be of a type which should reasonably be considered confidential;

(d) The public body obliged itself in good faith not to disclose the information; and

(e) The public interest would suffer by disclosure.

Note that elements (a) and (d) above demonstrate that ORS 192.502(3) requires not only that the requested information have been submitted in confidence, but also that the agency receiving the information (in this case ODOC) obligated itself in good faith not to disclose the information. We are satisfied that these requirements were met in respect to its conversations with the four employers noted above, i.e., the three Sheriffs' offices and Phoenix Security. Moreover it is quite clear that element (b) was also satisfied. The information was submitted on a voluntary basis, in that former employers have no statutory obligation to respond to inquiries of this type - a point well demonstrated by the State of Washington's failure to respond to the confidential inquiries even after being sent the requested waiver.

Not all of the information on these forms, however, is of a type which reasonably should be considered confidential, the element shown as item (c) above. For example, the

forms call for Mr. Stubblefield to verify with the former employer the fact that Mr. Rothrock did in fact work there, and the duties of his employment. There is nothing in the nature of such information which either party to such a telephone conversation could reasonably consider confidential. This is purely factual information, being confirmed.

However, the numbered lines of this form call for information of a more sensitive or subjective nature, regarding problems that may have arisen in the former employee's employment performance, or for the former employer's evaluation of the person's performance, abilities, personality or eligibility for rehire. These are subjects which a former employer could be justifiably reluctant to discuss without an assurance of confidentiality. In the instances of these four former employers we believe that an agreement of confidentiality did exist on the part of both ODOC and the former employers, and that the information would not have been provided to ODOC if the employers were not confident of that. Consequently, we conclude that these four forms are partially exempt. The documents may be furnished pursuant to Mr. Rothrock's request, but without the information representing responses to the inquiries on the numbered lines.

The last element of the statutory exemption requires an assessment whether the public interest would suffer by disclosure. In this instance, we agree with ODOC that it would. At stake is the Department's ability to confirm information provided by, and to gather assessments as to the character of, persons who are applying for a type of employment in which selection of the wrong person could do great harm to society. ODOC must be able to make its hiring decisions based upon information that is as accurate and complete as it can get. If a chill is placed upon this particular source of information, and former employers become reluctant to respond despite assurances of confidentiality, ODOC might make poor hiring decisions and place inappropriate personnel in security positions. This could well jeopardize public safety. Security is the nature of this employment and we conclude that security is necessary in this part of the information gathering process. We conclude, in this instance, that the public interest in protecting ODOC's ability to communicate on a confidential basis with former employers of applicants for security positions outweighs the interests in disclosure.

Lastly, with reference to the form entitled "Background Investigation Results," this one-page form constitutes Mr. Stubblefield's summary of the other documents. Much of the prior discussion applies to it with equal effect. To the extent that the information thereon represents a memorialization of the information from non-confidential documents or of the purely factual information from the partly confidential forms, such as confirmation (or lack thereof) of the prior employment dates and duties, to that extent the information should be segregated and disclosed. However, to the extent that the information on this form represents statements provided confidentially by Phoenix Security or any of the three

sheriffs' offices in response to the inquiries on the numbered lines of the "Employment Verification" forms, we conclude that it is exempt and should not be disclosed.

Accordingly, we grant the petition for disclosure as to the above described parts of the forms entitled "Background Investigation Results" and "Employment Verification," relating to the responses on behalf of Phoenix Security and the three Oregon counties, and we deny the petition insofar as it seeks information from the numbered lines of the Employment Verification forms and as such information has been carried forward onto the "Background Investigation Results". With respect to the other documents sought in the petition, documents which the Department of Corrections will be furnishing voluntarily to Mr. Rothrock, we declare the petition moot.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the
Attorney General

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