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October 26, 1994

Michael C. Zusman
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Attorneys at Law
30th Floor, Pac West Center
1211 S.W. Fifth Avenue
Portland, OR 97204-3730

Re: Petition for Public Records Disclosure Order:
Oregon Department of Justice, Charitable Activities Section

Dear Mr. Zusman:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505.[1/] Your petition, which we received on October 19, 1994, asks the Attorney General to direct the Department of Justice, Charitable Activities Section, to make available the identity of a complainant who filed a complaint related to Eltel Belau, including an unredacted letter of August 3, 1994, which purportedly discloses the identity of the complainant.[2/] For the reasons that follow, we respectfully deny your 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, 186 n 8, 538 P2d 373 (1975).

[1/] Your petition was filed on behalf of your client, Lily Ulitech, President, Eltel Belau Corporation, who made the original public records request.

[2/] This agency has previously provided your client with a redacted copy of the August 3 letter.

1. Confidential Submission Exemption

ORS 192.502(3) exempts information submitted in confidence from the disclosure requirements of the Public Records Law. This provision 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[.]"

The agency must be able to present evidence that there was a condition or understanding at the time the information was provided that the information would be held in confidence. Sadler v. Oregon State Bar, 275 Or 279, 550 P2d 1218 (1976). This exemption clearly does not apply if the public agency requests that information be submitted in confidence to avoid embarrassment to itself.

2. Discussion

A review of the Charitable Activity Section's Eltel Belau investigative file shows that the complainant initially approached the agency with a written request for confidentiality. This request for confidentiality was repeated in at least one subsequent letter providing additional information to the agency's investigator. The agency investigator, Kirk Harvey, wrote at least one memo to the file reciting the complainant's expectation of confidentiality. Mr. Harvey's closing letter of August 3, 1994, confirmed, ". . . we will make every attempt to keep your identity confidential." Mr. Harvey advises that this written statement confirms his oral understanding with the complainant and that he had regularly communicated this understanding to the complainant beginning from the inception of his contact with the complainant.

In this instance, we conclude that the complainant submitted information, based on an understanding of confidentiality. The agency's representative obligated the agency in good faith not to disclose the complainant's identity. The information was submitted voluntarily, and the complainant was under no legal obligation to come forward.

We also conclude that disclosure would cause harm to the public interest. The purpose of this exemption is to encourage citizens to provide relevant information voluntarily to governmental agencies with some reasonable assurance that the information will be kept confidential. It is reasonable to conclude that this purpose would be defeated and this complainant and others would be deterred from coming forward if this pledge of

confidentiality was breached. We believe that this public policy is not overcome by mere speculation that identification of the complainant might help identify the author of an anonymous, but allegedly, defamatory letter circulated after the agency's investigation was completed.

Because we find that the record you seek is exempt from disclosure under ORS 192.502(3), we deny your petition.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the Attorney General

ESH:krg/JAA0148D

cc: Mr. Kirk Harvey, Investigator
Charitable Activities Section