CHARLES S. CROOKHAM
ATTORNEY GENERAL

JACK L. LANDAU
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400

April 24, 1992

Lynn Frank, President
Five Stars International
4160 SE International Way, D107
Portland, OR 97222

Re: Petition for Public Records Disclosure Order;
Employment Division

Dear Mr. Frank:

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. Your petition, which we received on March 17, 1992,[1] asks the Attorney General to order the Employment Division (division) to make available for inspection and copying that information requested in your February 24 letter to the division:

> 1. Copies of any additional written information describing the use and operation of the [computerized job match] system, including operations manuals and system documentation.
>
> 2. Access under ORS 291.038 to public job opportunity and applicant records on the computer system.

For the reasons stated below, we respectfully deny your petition, in part because your request is moot and in part because the information is exempt from disclosure under the Public Records Law.

The Public Records Law confers a right to inspect public records of a public body in Oregon, subject to certain exemptions. ORS 192.420. If a public record contains both 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, n8, 538 P2d 373 (1975).

1. Information Describing Computerized Job Match System

The division operates a computerized job opportunity system, the Oregon Job Selection System (hereinafter "OJSS" or the "system"). The division informs us that it is now willing to release the following information: press releases describing OJSS; any descriptive information and/or written testimony prepared by the division for any legislative committee concerning the system; information provided to applicants and employers explaining application/use of OJSS, including brochures, videotape and keyboard instructions available in the three local division offices currently operating a pilot program with job search terminals. Further, the division will provide you with a copy of the form that employers use to submit job orders manually.[2]

You also ask for access to job classification codes used by the division. These derive from the Dictionary of Occupational Titles (D.O.T.). The division informs us that there are no copyright restrictions on the D.O.T., and that the division will copy the D.O.T. for you if you wish. However, the division also informs us that the D.O.T. is available for purchase at the U.S. Government Printing Office at a purchase price that would be significantly less that the division's cost of providing a copy to you. The division has developed a training manual for use of the D.O.T. which the division will release to you.

The OJSS system operates through interactive pieces of copyrighted and non-copyrighted software. You have informed us that your request is limited to non-copyrighted information[3] developed to permit use and operation of the system by the division, such as operational manuals, disc access and program modules relating to OJSS.

This information is exempt from disclosure under ORS 192.501(16), which conditionally exempts:

> Computer programs developed or purchased by or for any public body for its own use. As used in this subsection, 'computer program' means a series of instructions or statements which permit the functioning of a computer system in a manner designed to provide storage, retrieval and manipulation of data from such computer system, and any associated documentation and source material that explain how to operate the computer program.

This exemption applies "unless the public interest requires disclosure in the particular instance." Id.

The computer program exemption was created by the legislature "to prevent persons from obtaining from public bodies computer programs that they otherwise would have to purchase or develop themselves." A.G. Public Records and Meetings Manual 23 (1989). The computer programs developed by or for the division for OJSS fall within this exemption, regardless of the copyright status of those programs. The exemption covers not only the computer program, but also "any associated documentation and source material that explain how to operate" the program. The operations manuals and system documentation that you request also are subject to this exemption from disclosure.

As already noted, the computer program exemption is conditional. Accordingly, we must determine whether the "public interest requires disclosure in the particular instance." In your February 24 letter to the Employment Division, you stated that your firm was "exploring the commercial applications of job opportunity and applicant information systems." Although that shows a private interest, it does not qualify as a public interest weighty enough to override the exemption, particularly where the legislature created the exemption specifically to prevent persons from obtaining computer programs developed at public expense in order to avoid their own development costs. We conclude, therefore, that the information you request concerning operations manuals and system documentation is exempt from disclosure under ORS 192.501(16).

2. Public Job Opportunity and Applicant Records

You have asked for access under ORS 291.038 to public job opportunity and applicant records on the computer system. ORS 291.038 does not confer on the public any additional right to access information that is not already discloseable under the Public Records Law.[4] Therefore, we do not analyze ORS 291.038 in our order.

Data maintained on a computer system does not come within the computer program exemption, ORS 192.501(16). Unless otherwise exempt, copies of public records maintained in machine readable or electronic form must be provided in the form requested, if available. ORS 192.440(2).

The division informs us that it will release job opportunity records to you to the extent that such records are not exempt from disclosure under the Public Records Law. Our analysis will focus, therefore, on the types of job opportunity information maintained by the division and whether they fall within any of the exemptions from disclosure.

State and public agency job orders. Information concerning state and public agency job openings is available to the public under ORS 657.710(2). These records contain employer names and other identifying information. Records concerning state agency job openings are received from Executive Department personnel electronically twice weekly and are retrievable from computer terminals available in every local division office. Non-state public agency job openings are maintained separately from state agency openings. These records are available in local division offices in hard-copy announcements and/or on public display microfiche; the procedure for receiving and maintaining these records varies by local office. The division informs us that it will provide you with copies of records on state and public agency job openings in whatever form they are available.[5]

Private sector job orders. Information concerning private employer job openings are maintained by the division in a central inventory. Public access to these employment service records is restricted. ORS 657.665(1)(a) provides

> Information secured from employing units, employees or other individuals pursuant to this chapter:
>
> (a) Shall be confidential and for the exclusive use and information of the assistant director in the discharge of duties and shall not be open to the public [subject to certain exemptions not relevant here].

This confidentiality provision is incorporated into the unconditional exemptions under the Public Records Law. ORS 192.502(8).

Information secured from employing units, employees or other individuals pursuant to ORS chapter 657 includes employment services information under ORS 657.705 et seq, as well as unemployment compensation information. Job notices in generic form, which include job title, D.O.T. code and job order

number, are available to the public. The division informs us that this information will be made available to you.

However, pursuant to division rules, disclosure of employer identifying information is limited to applicants, governmental agencies and employers to the extent necessary for the efficient performance of Employment Service functions. OAR 471-10-052(1). These records are also available to other individuals and organizations if such disclosure will not impede the operation and is not inconsistent with the purposes of the Public Employment Service program. OAR 471-10-052(4). Such disclosure must be authorized by the Assistant Director of the division in each case based upon an evaluation of the purposes to which the data would be put. Id. This rule must be interpreted consistent with ORS 657.665(1)(a) to permit release of information only where such disclosure is in the discharge of the duties of the assistant director under ORS chapter 657. The assistant director may enter into agreements with federal or state agencies or private non-profit organizations for purposes of establishing and maintaining a free public employment service. ORS 657.720(2). The release of private sector job information to aid a commercial enterprise in providing employment services is not consistent with the duties of the assistant director to operate a public employment service program. Such release would also impede the operation of the division's employment service program by causing duplication of contacts with employers and, thereby, discouraging employers from listing their job openings with the division. Therefore, we conclude that employer-identifying information on private sector job openings is exempt from disclosure under ORS 192.502(8), which incorporates ORS 657.665(1)(a).

Access to job opportunity information is also permitted through the Job Bank System to participants who receive daily listings of job orders on microfiche. OAR 471-20-005. Interested persons must apply to participate in the Job Bank System and agree to comply with division rules. OAR 471-20-005(2). If you wish to apply to participate in the Job Bank System, you need to submit an application to John Adams, Assistant Supervisor ES Programs and Methods, Employment Division, 875 Union Street NE, Salem, OR, 97311. Because you have not yet applied for participation in this program, your petition is premature as to information that may be available by this means and is, therefore, denied.

Applicant records. Applicant records are also confidential under ORS 657.665(1)(a) as information secured from individuals

pursuant to ORS chapter 657. The discharge of the duties of the assistant director under that chapter does not include assisting a commercial enterprise to provide employment services; nor is the assistant director authorized by law to engage in a partnership with a commercial enterprise for such purposes. See ORS 657.720(2). Therefore, we conclude that these records are exempt from disclosure under ORS 192.502(8), which incorporates ORS 657.665(1)(a) except for the names of screened applicants referred to individual employers who have listed a bona fide job order with the division.

For the reasons stated above, we respectfully deny your petition. With respect to those records that the division has agreed to release to you, your petition is denied as moot. The Public Records Law permits a public body to establish and recover fees reasonably calculated to reimburse it for its actual cost in making public records available, including the time spent by agency staff in locating the requested records, reviewing the records to delete exempt material, and copying the records. See ORS 192.440(2). Because of the volume of the records you have requested, the division asks that you contact John Adams, Assistant Supervisor ES Programs and Methods, Employment Division, 875 Union Street NE, Salem, OR, 97311 (telephone: 378-7972) to obtain an estimate of, and arrange for payment of, the cost for copies of these records.

With respect to those records containing private sector job orders that might be available through the Job Bank System, your petition is denied as premature. With respect to the remainder of the records you request, your petition is denied because those records fall within one of the statutory exemptions to disclosure, ORS 192.501(16) or ORS 192.502(8).

Sincerely,

Jack L. Landau
Deputy Attorney General

JLL:CFM:ALV:cm/jaa0070e
c: Shirley Carlo, Supervisor
ES Technical Support
Employment Division
875 Union Street NE
Salem, Oregon 97311