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December 11, 1992

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Re: Petition for Public Records Disclosure Order:
Office of Alcohol and Drug Abuse Programs

Dear Mr. Smith:

This letter is the Attorney General's order on your petition[1/] for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on December 2, 1992,[2/] asks the Attorney General to direct the Oregon Department of Human Resources, Office of Alcohol and Drug Abuse Programs to make available the individual school and class results (school results)[3/] for all schools involved in the 1992 public school drug survey, and for each year the survey has been conducted. For the reasons that follow, we respectfully deny your petition.

[1/] We understand that the petition was filed on behalf of your client, Guard Publishing Company, dba The Register-Guard.

[2/] We appreciate your courtesy in permitting us to exceed the statutory seven-day deadline for issuance of the order.

[3/] For any participating school, either the eighth or the eleventh grade class was surveyed, not both. Thus, the class results would be the school results for that school. Survey results were not separated by specific classrooms within a school.

Background

The Office of Alcohol and Drug Abuse Programs (office) is a state agency. Biennially since 1986, the office has contracted with an independent contractor to conduct a statewide alcohol and drug survey of eighth and eleventh grade students. The office selects by random sample the schools and grade within the school for the survey, obtains agreement from the school to permit its students to be surveyed, and provides the survey instrument. The contractor administers the survey and collects and analyzes the data. The contractor then prepares a preliminary and final report for the office, which contains only regional and statewide data.

The contractor is also required to prepare individual school reports. These reports are not provided to the office. The contractor provides the individual school reports only to the principal of the school surveyed, except that the principal is not given that report when, in the opinion of the contractor, the small number of student respondents creates a risk that the students' identities could be ascertained.

The office has already provided you with a copy of the final report, containing the regional and statewide survey results. However, the office denied the request for the school-by-school results of the survey because it does not have that information.

Public Records Law

1. Applicability of Public Records Law to Records in Custody of an Independent Contractor

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. A "public record" includes

> any writing containing information relating to the conduct of the public's business * * * prepared, owned, used or retained by a public body * * * .

ORS 192.410(4).

As discussed above, the individual school results are not prepared, used or retained by the office. Jeffrey Kushner, Assistant Director, Office of Alcohol and Drug Abuse Programs, confirms that the office does not have, and has never had, in its possession either the completed survey instruments or any of the individual school results.

However, we conclude that the office does own the individual school reports. Although the contract may reasonably be interpreted to authorize the contractor to provide the individual school reports only to the individual schools and not to the office, the contract deals explicitly with ownership of work product. Paragraph 13 of the contract states:

> All work products of the Contractor which result from this contract are the exclusive property of the Department.

Since the contract requires the contractor to prepare the individual school reports, those reports are the property of the Department of Human Resources, Office of Alcohol and Drug Abuse Programs. Accordingly, we conclude that the individual school reports are public records, which must be made available for inspection unless those records fall within one of the exemptions to disclosure.

2. Exemption for Confidential Disclosures by Citizens

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.

We conclude that the individual school results fall within this exemption. We discuss the statutory elements individually.

a. Information Submitted in Confidence

ORS 192.502(3) requires that the requested information must have been submitted in confidence. A letter dated March 16, 1992, sent by the office and co-signed by the State Superintendent of Public Instruction, asked the randomly selected schools to participate in the survey. This letter assured the school administrators of confidentiality, promising that "[n]o individual student or school will be identified." The letter further stated

> The generalized information, as well as the individual school results will be sent directly to the school principal. This will be accomplished through an independent contractor and the individual school results will not be seen by anyone else. (Emphasis added.)

The cover sheet to the survey instrument given to the students assured potential student respondents that:

> Your answers to these questions will be confidential. No one at school will see your answers. Your name will never be associated with the answers you give. We ask that you not write your name in the booklet so that answers cannot be associated with your name. (Emphasis in original.)

And, on page five of the survey instrument, immediately preceding the questions concerning alcohol and drug use, was the following statement:

> Remember that your answers will be strictly confidential. We never connect them with your name or your class. (Emphasis added.)

From these facts, we infer that the information provided on the returned survey instruments was submitted in confidence. This inference is bolstered by the fact that the information gathered relates to the use of alcohol and controlled substances by minors, gathered in a school setting, which could result in certain educational and other consequences to both the students and the school if disclosed.

We have stated previously that, where an individual does not specifically request confidentiality, it is difficult to justify nondisclosure. See 44 Op Atty Gen at 251. We qualified that statement, however, by noting that the evidence may demonstrate an implied request for confidentiality that would satisfy the statute's requirements. Id. In this instance, we conclude that the office's repeated and emphatic assurances of confidentiality to both students and school administrators, and the other facts noted, provide powerful evidence of such an implied request for confidentiality, and satisfy this element of ORS 192.502(3).

b. Information Submitted Voluntarily and not Otherwise Required by Law to be Submitted

Participation by the schools was voluntary. The March 16 letter to the schools asked for their participation. According to Clint Goff, Research/Evaluation Manager, Office of Alcohol and Drug Abuse Programs, 12 of the original 43 schools selected for participation refused, primarily because they were concerned about the possibility of being identified as a "drug school." The office then had to find other schools that were willing to participate in order to have a statistically valid sample.

The students' participation was also voluntary. The survey instrument states:

> This study is completely voluntary. so you may skip any question that you do not wish to answer.

See also March 16, 1992, letter to school administrators ("[T]he instructions stipulate that the survey is completely voluntary and students may choose not to answer any given question.")

Neither the school nor the students were required by law to participate in the survey. The facts satisfy this element of ORS 192.502(3).

c. Information of a Type that Reasonably Should be Considered Confidential

The survey instrument asks for highly personal information. The students are queried about their use and purchase of tobacco products and alcoholic beverages and their use of marijuana, hashish, LSD, psychedelics other than LSD, nonprescription drugs, amphetamines, quaaludes, barbiturates, tranquilizers, cocaine, heroin and narcotics other than heroin. They are also asked about demographic and family characteristics.

We conclude that this information reasonably should be considered confidential. At a minimum, there exists a risk that unauthorized disclosure of the survey results could permit the identification of students who might experience serious adverse consequences as a result of their identification of themselves or family members as controlled substance abusers. Disclosure could also adversely characterize a particular school as a "drug school" and the students in that school as drug users, regardless of their individual drug use. The facts satisfy this element of ORS 192.502(3).

d. The Public Body Obliged Itself in Good Faith Not to Disclose the Information

In its March 16, 1992 letter, the office assured the school administrators that the individual school results would not be seen by anyone other than the school principal. The survey instrument also assured potential respondents that the information obtained from the survey would be confidential and never revealed in a form that would permit identification of the student or the school class. We understand that the office made this promise of confidentiality in a good faith effort to elicit participation from the schools and candid responses from the students. The facts satisfy this element of ORS 192.502(3).

e. The Public Interest Would Suffer by Disclosure

An important public interest would be harmed by the disclosure of the requested information. At stake is the office's development of statistical information for the following purposes:

- Measures attitudes and the extent of use among eighth and eleventh graders;
- Identifies what drugs of abuse are being used;
- Gathers information necessary to make curriculum/program recommendations to [local education agencies];
- Measures the impact of prevention activities on Oregon youth; and
- Provides the data necessary to measure progress on three critical benchmarks included in the social accounting program plan contained in the Oregon Benchmarks.

March 16, 1992 letter to school administrators; see ORS 409.410(2)((b), (e), and (f).

The legislature has declared that one of the benchmarks in achieving social and economic well-being for the people of the State of Oregon is decreasing student drug and alcohol use. Or Laws 1991, ch 656, § 3(6). The office has a mandate to assist school districts to formulate programs for alcohol and drug abuse prevention and public information directed to students, parents, teachers, administrators and school board members, ORS 336.227, and to report to the legislature and the governor on the progress and effectiveness of those policies and plans. ORS 336.245. The public has a strong interest in preserving the office's ability to obtain candid information in order to accomplish its objectives.

The office needs the survey information in order to conduct a meaningful study. It is highly unlikely that school administrators would permit the administration of these surveys to their students, or that students respondents would provide such personal information, if the schools' and students' confidentiality were not respected. The office attributes the high response rate by students to its assurance of confidentiality. The office notes that even with the promise of confidentiality, many schools are reluctant to participate in the surveys and that without continued confidentiality of the individual school results, many more schools will refuse future participation, thus jeopardizing the statistical validity of the survey.

We conclude that the public interest would suffer by disclosure of the individual school results. This element of ORS 192.502(3) is satisfied.

Conclusion

We respectfully deny your petition. Although we conclude that the individual school results are public records, despite the fact that the office does not have custody of those school results, we conclude that the records are exempt from disclosure under the Public Records Law. ORS 192.502(3).

Sincerely,

Amy Veranth
Opinions Coordinator
General Counsel Division

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c: Jeffrey Kushner, Assistant Director, Office of Alcohol and Drug Abuse Programs