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December 20, 1991

Robert J. Caldwell
Metro Editor
The Oregonian
1320 S.W. Broadway
Portland, OR 97201

VIA FAX

John Blatt
Assistant Director
Housing and Community Services Dept.
1600 State Street
Salem, OR 97310

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DEPARTMENT OF JUSTICE
SALEM

Dear Messrs. Caldwell and Blatt:

This letter is the Attorney General's order on Mr. Caldwell's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on December 12, 1991,[1] asks the Attorney General to direct the Oregon Housing and Community Services Department to make available for inspection and copying a fact-finding report relating to the selection and appointment of the Administrator of the Community Services Division. For the reasons stated below, we grant the petition subject to redaction of two individual candidate names.

The director and assistant director of the department are state officers. Consequently, records in their custody are subject to the Public Records Law. The Public Records Law confers a right to inspect public records 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).

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[1] We appreciate your courtesy in allowing us to exceed the seven-day deadline for issuing public records orders.

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).

We have examined carefully whether some or all of the fact-finding report is exempt from disclosure under the exemptions relating to personal privacy, internal advisory communications and personnel discipline action. We conclude in this particular instance that the names and gender references of two applicants appearing in 14 places should be withheld from disclosure under the personal privacy exemption of ORS 192.502(2). We order disclosure of the remainder of the report.

I. Personal Privacy Exemption

ORS 192.502(2) exempts private personal information from the disclosure requirements of the Public Records Law. The statute exempts:

> " . . . [i]nformation of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance."

The purpose of this exemption is to protect the privacy of individuals from unreasonable invasion. Jordan v. Motor Vehicles Division, 308 Or 433, 781 P2d 1203 (1989). The exemption is not intended for the benefit of the public body. Only personal information which would constitute an **unreasonable** invasion of privacy if publicly disclosed, is protected under this exemption. An invasion of privacy would be unreasonable if "an ordinary reasonable person would deem [it] highly offensive." Id at 442-443. This exemption from disclosure can be overcome only when the requestor, by clear and convincing evidence, shows that the public interest requires disclosure in that particular instance.

We examine whether disclosure of the report would unreasonably invade the personal privacy of Mr. Rey Ramsey, the department director, or any of the applicants for the position at issue. Despite the statement in the report that the information contained in the document is confidential to protect the privacy of Rey Ramsey, the manner in which a public official performs his or her duties is not subject to the personal privacy exemption. See Attorney General's Public Records and Meetings Manual, at 31.

However, the report contains information at pages 4-7 which, if disclosed, might reasonably be considered an unreasonable invasion of privacy as to the applicants for the position. This information falls into two categories. The first category is written test and telephone interview scores. The second is subjective comments by interviewers about the applicants' qualifications.

We find nothing "highly offensive" about disclosure of the test and telephone interview scores. The scores all are closely grouped and we are not aware of any arguments that would lead us to conclude that disclosure of the scores or the manner in which the scores are reported would be an unreasonable invasion of privacy.

As to the subjective comments by interviewers, we order redaction of the names of two applicants and order substitution of the letters "A" and "B" for those names. The comments with regard to candidate "A" relate to his or her maturity for the position. The comment with regard to candidate "B" is that he or she has "no fire in [his or her] belly." We think that disclosure of the identity of the candidates about whom these subjective remarks are made could be regarded as "highly offensive." Moreover, since the focus of the report is on Mr. Ramsey's actions, we think substitution of a name satisfies sufficiently the public interest in information about the process while maintaining the candidates' interest in privacy.

However, we do not redact names of the complaining candidates, Wilson and Caraballo, about whom subjective comments also are made. Because they requested the examination of the hiring process, they have surrendered some of their privacy interest. Moreover, because the report responds to their complaints about the hiring process of alleged discrimination against them, we believe the public interest in disclosing subjective comments about these individuals outweighs any privacy concerns similar to those of candidates "A" and "B."

II. Internal Advisory Exemption

ORS 192.502(1) exempts:

> "Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure."

Under this statute, a public record is exempt from disclosure if (1) it is a communication within a public body or between public bodies, (2) it is of an advisory nature preliminary to any final agency action, (3) it covers other than purely factual materials, and (4) in the particular instance, the public interest in encouraging frank communication in government clearly outweighs the public interest in disclosure.

We have reviewed thoroughly the report in question. The report meets the first test -- it is a communication between public bodies -- but fails tests two, three and four. First, a report investigating a past action is not, by its nature, preliminary to a final decision. Second, the bulk of the material in the report is factual. It is entitled "Report on Fact Finding." More importantly, to the extent the information is not factual, we do not believe it is the sort of information that would hamper frank communication if disclosed. In fact, much of the information contained in the report already has been released. Finally, even if we were to conclude that the report initially met the test for exemption, we would conclude that the public interest in disclosure outweighs the public interest in encouraging frank communication. There is a significant public interest in the state's hiring process given the allegations of discriminatory hiring practices.

III. Personnel Disciplinary Action

ORS 192.501(13) conditionally exempts "[a] personnel discipline action, or materials or documents supporting that action." The exemption covers only completed disciplinary actions where a sanction is imposed. City of Portland v. Rice, 308 Or 118, 755 P2d 1371 (1989). We decline to withhold disclosure under this exemption for two reasons. First, we have been told by Jeannette Pai, Director of Affirmative Action, Office of the Governor, that no sanction will be imposed on any public employee.

Accordingly the report does not fall within the exemption. Second, even if the report did fall within the exemption, it is conditional, allowing exemption "unless the public interest requires disclosure in the particular instance." In applying this exemption, the Supreme Court has stated that "The policy intended by the legislature *** protects the employees from ridicule for having been disciplined but does not shield government from public efforts to obtain knowledge about its processes." Id at 124 n. 5. The thrust of the report concerns the hiring process followed in filling the administrator's position. The report contains no sensitive information about a particular individual which might subject him or her to public ridicule.

IV. Conclusion

For all the reasons stated, we grant the petition and order the Housing and Community Services Department to disclose the fact-finding report subject to redaction of the names and pronoun references as to two candidates. We have enclosed copies of the relevant pages with the redactions made as ordered.

Yours very truly,

PAMELA L. ABERNETHY
Special Counsel
to the Attorney General

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Enclosures