HARDY MYERS
ATTORNEY GENERAL

DAVID SCHUMAN
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97310-0506
Telephone: (503) 378-4400
TDD: (503) 378-5938

December 17, 1999

Charles Sheketoff
Oregon Center for Public Policy
204 North First Street, Suite C
PO Box 7
Silverton, OR 97381-0007

RE: *Petition for Public Records Disclosure Order: Employment Department Records*

Dear Mr. Sheketoff:

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 November 12, 1999,[1] asks the Attorney General to direct the Employment Department to make available:

> The latest Shared Information System (SIS) "agency reports" on wage at placement, job retention at eight quarters, and retention earnings prepared by the SIS for the Adult and Family Services Division.

For the reasons that follow, we respectfully deny your petition.

On October 29, 1999, you asked the SIS to provide you with a number of reports that it prepared for the Adult and Family Services Division (AFS). On November 9, 1999, Mr. John Glen, SIS Program Analyst, notified you in writing that he had referred your request directly to AFS because of a "long standing procedure" to refer requests for agency-specific reports to the agency. Mr. Glen explained that AFS would be able to provide an explanation of the requested reports along with the data. On or about

[1] A facsimile copy of your petition was received in the Attorney General's office on November 11, 1999, at approximately 5:15 p.m. Because this request was received after the close of business, we consider your petition received on November 12, 1999. We appreciate your extending the time period within which the law otherwise would have required us to respond.

November 10, 1999, AFS sent you the reports you requested but did not provide an explanation. You informed Assistant Attorney General Staci Barry that you received these reports on November 16, 1999.

Your petition to this office states that the Employment Department denied your request by referring you to the Adult and Family Services Division. You claim that this denial was unwarranted because the "SIS of the [Employment Department] is the custodian of the reports." Because we find that the SIS of the Employment Department is not the custodian of reports pertaining to AFS's performance, but rather acts as a limited agent of AFS, the Attorney General does not have the authority under the Public Records Law to order the Employment Department to disclose the records at issue.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Custodians of public records are required to make those records available for inspection or copying unless the records are exempted from disclosure by statute. ORS 192.430(1). A custodian is "a public body mandated, directly or indirectly, to create, maintain, care for or control a public record." ORS 192.410(1). Public bodies that have "custody of a public record as an agent of another public body that is the custodian" are not considered custodians for purposes of the Public Records Law unless the public record is not otherwise available. *Id.* Thus, the Employment Department was required to provide you the AFS reports only if the SIS (administered by the Employment Department) is the custodian of those records.

The legislature defined the term "custodian" under the Public Records Law and excluded agents from that definition in 1993. 1993 Or Laws, ch 787, § 4 (SB 500). In a report to the Senate Committee on the Judiciary, Beth Bridges, one of the drafters of Senate Bill 500, explained the distinction between a custodian and an agent as follows: "An agent has temporary custody of a record because it is performing some duty or service for the custodian. Thus computer centers, public safety answering points, and legislative counsel are 'agents.'" Minutes, Senate Committee on the Judiciary (SB 500), March 26, 1993, Exhibit C at 33 (Supplemental Report on Issues Related to SB 500 and SB 499). Under common law principles of agency, an individual is an "agent" if the individual is authorized by a "principal" to act on behalf of the principal. 47 Op Atty Gen 1, 7 (Op-8226) (1993). In examining the meaning of agent under the Oregon Tort Claims Act, the Oregon Court of Appeals used a two-part test for determining whether an agency relationship exists:

> (1) The "agent" must be performing a function "on behalf of" a public body * * *, and (2) the public body must retain a "right of control" over the agent.

Welker v. TSPC, 152 Or App 190, 200 (1998), *citing Moxness v. City of Newport*, 89 Or App 265, 268, *rev den* 306 Or 79 (1988).

The Interagency Shared Information System was created by the Oregon Legislature in 1993. Or Laws 1993, ch. 765, § 19(a) (codified at ORS 329.965). The Employment Department is responsible for administering the SIS, but the Education and Workforce Policy Advisor oversees the monitoring of the system. ORS 329.965(2). The system was developed to share aggregate information with state agencies to allow the agencies to "develop policy, evaluate policy and plan and measure performance." ORS 329.965(1). Participating state agencies are required to provide information to the SIS in a format that encodes identifying data. SIS then matches the data received from each agency and compiles state-wide, aggregate reports on the overall performance of Oregon's workforce and educational training system. *See* Shared Information System, Report to the 70th Oregon Legislative Assembly (Report), March 1999, at 3-4; *see also* 47 Op Atty Gen at 1. These state-wide reports are published. The SIS also compiles reports reflecting the workforce outcomes of clients of a specific agency to allow the agency to measure and track its own success in providing employment and education services. Report at 1-4.

Here, the reports in question are agency-specific reports on wage at placement, job retention and retention earnings of AFS customers. By statute, the SIS is not the custodian of the information submitted to the system by AFS for purposes of the Public Records Law. ORS 329.965(3). The statute does not specify whether the SIS is the custodian of the reports it generates for AFS. Because the SIS is mandated to create these records, it is a custodian of the reports. ORS 192.410(1)(b). Nevertheless, under the Public Records Law, the SIS is not considered the custodian of AFS reports if it is the custodian merely as an agent of AFS and AFS is also the custodian of the reports. *Id.*

The SIS was designed to "act as a limited agent on behalf of participating agency partners." Letter of Agreement, Security and Data Management for the Shared Information System (Agreement), October 31, 1996, at 2.[2] The agency relationship between the SIS and AFS is demonstrated by the parameters and mandates established for the SIS. For example, the SIS is prohibited from using "SIS data in any manner not consistent with [the] agreement and applicable federal and state law." Agreement at 2. Participating agencies, including AFS, authorize the SIS to collect data, to match data and to distribute reports as authorized by the participating agencies and the system monitor (currently the Governor's Education and Workforce Policy Advisor). Agreement at 4. Upon request the SIS staff may analyze aggregate data of two or more agencies for a specified purpose. *Id.*

When the SIS creates a report for AFS, it is created based on parameters established by AFS and the participating agencies. While AFS may request a different report from the SIS, the SIS staff follows guidelines set by AFS, the participating agencies, and the Education and Workforce Policy Advisor in responding to such requests. Agreement at 4. The Agreement between the participating agencies requires the SIS to direct persons seeking agency-specific reports, like the reports in question,

[2] While the Agreement has expired, the SIS continues to adhere to the policies and procedures expressed in the Agreement.

directly to the agency. Agreement at 4. In addition, agencies have the right to review an agency-specific report, make changes to the underlying data if inaccurate, and provide explanatory footnotes where needed prior to any public distribution of an individual agency's report. Agreement at 4.

In other words, the SIS staff's actions are determined by policies and decisions made by representatives of AFS and the participating agencies, not by the SIS personnel acting independently of AFS. In addition, the Employment Department's function, as administrator of the system is a ministerial one, with the Employment Department executing the mandates decided upon by AFS and the participating agencies. Because the SIS prepares aggregate reports measuring AFS's performance for the benefit of AFS, and AFS has control over the parameters and distribution of those reports, the relationship between the SIS and AFS is one of an agent to a principal. Both ORS 329.965 and the Agreement created between agencies participating in the SIS illustrate that when the SIS prepares a report specific to AFS' performance, as are the reports in question, the SIS and the Employment Department as the administrator of the system are acting as agents of AFS. AFS's control over the parameters and distribution of the reports demonstrates that AFS is the custodian of those reports.

For these reasons we conclude that the SIS of the Employment Department is not the custodian of the reports you requested. The Employment Department is required to provide these reports only if the reports are not available from the requesting agency. Because the SIS of the Employment Department is not the custodian of the reports you requested, the Attorney General lacks the authority to order disclosure. *See* ORS 192.450(1). Therefore, we deny your request to compel disclosure.

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

AGS03692
c: John Glen, Systems Analyst, Shared Information Systems
Virlena Crosley, Director, Employment Department