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January 16, 1998

Allyson Flagg-Miller
6255 Fairway Ave., S.E.
Salem, OR 97306

Re: *Public Records Disclosure Order: Department of Corrections Records*

Dear Ms. Flagg-Miller:

This letter is the Attorney General's order on your petition for disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on December 8, 1997,[1/] asks the Attorney General to direct the Oregon Department of Corrections (ODOC) to produce a copy of questionnaires ODOC sent to and responses received by ODOC from your last two employers. For the reasons stated below, we respectfully deny your petition.

You applied for a position as a purchasing agent with ODOC in the fall of 1997. ODOC routinely conducts reference checks on applicants by requesting former employers to fill out an "Employment Verification" form. The form contains the applicant's name and other identifying information, and asks the person filling out the form to answer work-related questions about the applicant.

The person conducting the reference check, Rick Hannan in ODOC Inmate Work Program/Purchasing and Contracts, faxed the employment verification forms to your former employers and then called them to discuss the questions over the telephone. Mr. Hannan

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[1/] We appreciate your extending the time within which the law would have otherwise obligated us to respond to the petition.

filled out the actual forms based on the verbal responses he received. Only one of the former employers was willing to provide information in response to the questions; the other refused.

ODOC denied your request for copies of the employment verification forms on the basis that the forms contain confidential employment reference information. However, ODOC did tell you the names of the individuals who were contacted by ODOC.

We considered the issue of ODOC employment verification forms submitted by private employers on a previous occasion. *See* Public Records Order, July 17, 1997, Wilker. In that case, we applied the exemption for information submitted in confidence by private individuals, ORS 192.502(4), and concluded that the information provided on the forms was not exempt from disclosure to the extent that it could be redacted in a manner that would not reveal, or tend to reveal, the identify of the sources providing the information.[2/]

ORS 192.502(4) exempts from disclosure:

> (4) 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 purpose of this exemption is to encourage individuals to voluntarily provide relevant information to a public body, with some reasonable assurance that the information will be kept confidential. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (MANUAL) 47 (1995).

We find that the first four elements of ORS 192.502(4) have been met in this instance. First, the individual who provided information in response to ODOC's questionnaire did so on the condition that the information would be kept confidential, i.e., the information was submitted in confidence. We have spoken with this individual and confirmed this to be the case.

Second, that information was not required by law to be submitted. The previous employers were free to refuse to provide this information, which one of them did.

[2/] The Wilker Public Records Order considered ORS 192.502(3). During the 1997 legislative session, ORS 192.502(3) was renumbered as ORS 192.502(4).

Third, the information itself, an assessment of a former employee's work performance and employee attributes, is the type of information that is generally kept confidential. Such information provided by former employers is information that the legislature has itself recognized as confidential.[3/] Thus, any candid assessment provided by former employers to the explicit questions on the ODOC questionnaire should reasonably be considered confidential, if submitted in confidence.

Fourth, although Mr. Hannan does not expressly recall promising confidentiality, there is a statement on the form that ODOC sent to the previous employers stating: "I am not obligated to provide this information but am doing so after a promise of confidentiality." We believe that, by this statement, ODOC obliged itself in good faith not to disclose the information.

The final test under ORS 192.502(3) is whether the public interest would suffer by disclosure. With respect to references from former employers, the Oregon Court of Appeals considered two competing views of the public interest in ***Gray v. Salem-Keizer School District***, 139 Or App 556, *rev denied*, 323 Or 265 (1996). There is a public interest in "ensuring unbiased, fair and informed hiring decisions by public agencies" which may be served by providing the applicant access to the records in order to verify or challenge the accuracy of the reference information. 139 Or App at 565. There is also a public interest in the ability of public employer to employ suitable persons which may suffer by disclosure because of the "potential chilling effect on the willingness of former employers or others to provide candid information" about the applicant if they knew that the information they provided would be disclosed to the applicant. *Id.* at 564.

After considering these two views, the court in ***Gray*** concluded that, under the facts of that case, the public interest in reducing the potential for hiring decisions based on secret, unrebuttable allegations or innuendo would be served by disclosing the reference forms, provided that all source-identifying information was deleted. The court stated:

> To the extent that the District's "chilling effect" concern is well-founded, that concern can only pertain to sources' names or to information tending to disclose their identities. We perceive no reason -- and the District offered none -- why the disclosure of the reference forms, with source-identifying information deleted, would deter future sources from submitting candid evaluations to the District.

Id. at 566.

[3/] *See* ORS 652.750(1)(b) which specifically excludes from the definition of personnel records that an employer must permit an employee to inspect any "confidential reports from previous employers."

We believe that the present situation is different from that which the court faced in *Gray*. As described by the court, the reference form at issue in *Gray* asked the former employers to rate the applicant's skills and characteristics (e.g., "knowledge of curriculum and subject matter," "ability to meet public") on a "1 to 10" scale, to identify the applicant's strengths and weaknesses, and to check "yes" or "no" to questions about whether the former employer would "(a) Be eager to secure this teacher's services? (b) Seek more desirable applicants before hiring this teacher? or (c) Hire this teacher only in an emergency." *Id.* Although the parties had described the references at issue as "negative," the court expressed reservations about that characterization. *Id.* at 558 n 1.

In contrast, the ODOC questionnaire asks former employers to reveal personnel problems they may have had with the applicant. Among other things, the ODOC questionnaire asks whether the person had attendance problems, whether disciplinary action was taken against the person, whether there were any problem behaviors for which no discipline was imposed, whether the former employer would trust the person with confidential information, whether the former employer has reason to doubt the person's honesty, and whether the employer had any knowledge that the person is using illegal drugs.

Despite the qualified privilege the law provides employers who give employment references, *see* ***Wattenburg v. United Medical Laboratories***, 269 Or 377, 380 (1974), the policy usually followed by Oregon employers, in both the public and private sectors, is to give no information to a prospective employer about the job candidate except the position formerly held, the highest salary earned and the period of the individual's former employment. This "name, rank and serial number" policy is used by employers to protect themselves from litigation.[4/] In 1995, the legislature sought to encourage employers to abandon this defensive policy and to speak candidly with prospective employers about job candidates. Or Laws 1995, ch 330, § 1, codified as ORS 30.178. However, the privilege for speaking remains qualified, and, to avoid litigation, many employers continue to provide no information, as was the case with one of the former employers contacted by ODOC.

[4/] In some cases, employer liability has been based on the former employer's decision to discuss only the positive aspects of the person's employment, thereby creating a false impression ultimately resulting in injury to a third party when the candidate was hired. *See, e.g.,* ***Randi W. v. Livingston Union School District***, 49 Cal Rptr 2d 471 (5th Dist 1996), *rev granted* 51 Cal Rptr 2d 428 (Cal 1996).

Moreover, because Mr. Hannan has already informed you who he had contacted, you would have a 50/50 chance of identifying which reference provided the information to ODOC.[5/] The possibility that the source of statements made by a former employer will be identified is the most significant factor in former employers' refusal to provide information. A 50/50 chance is the type of risk that most former employers would refuse to take.

Given the type of information solicited by ODOC, the potential that you would be able to identify the source of the information, and ODOC's experience in having former employers refuse to provide candid information, we believe that ODOC's ability to obtain candid assessments of applicants from their former employers would be chilled if the statement at issue here, which was submitted in confidence, was disclosed to you, even if the name of the source and other identifying information was deleted. Weighed against the public interest in ODOC's obtaining frank evaluations of applicants from their former employers is the public interest in ensuring that ODOC's hiring decisions are not based upon inaccurate or false information from former employers. Both of these interests are of significant weight, and the problem of balancing them to determine which is greater is not one of easy resolution. In *Gray*, the court found a solution in deleting source-identifying information. We do not believe that solution is available here for the reasons stated above.

Thus, the issue becomes whether the interest in enabling the applicant to correct or verify the information overrides the public body's need to have the most candid information available to it when it makes decisions to hire an applicant. If the public body was to be deprived of such candid assessments because it could not assure citizens that their assessments would be kept confidential, the public interest would suffer the loss of a frank appraisal of a candidate's suitability for public employment.

To order disclosure in this situation would abrogate ODOC's commitment to citizens who provide employment references to maintain the confidentiality of the information they submit. The result would be that, in seeking employment references for potential employees, ODOC could never commit to the citizens providing those references that the information provided would be kept confidential. Such a result would render meaningless the exemption in ORS 192.502(4) when ODOC seeks employment references from private employers and makes a record of that reference. Such a result would have a negative affect on ODOC's ability to gather candid information about a person seeking employment and thus could

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[5/] Although only two references were at issue in *Gray*, the district had withheld only the "negative" references. 139 Or App at 566 n 9. Therefore, the court might reasonably conclude that the applicant would not be able to ascertain the identity of the sources of those references. Similarly, in the situation addressed in the Wilker Public Records Order, there were six reference forms subject to disclosure.

hinder informed hiring decisions, which are some of the most important decisions about employment that any employer makes.

In weighing the competing aspects of the public interest, we believe that in the present situation, when the identity of the source of the reference cannot be adequately protected by deleting the name or other identifying information, the overriding public interest in obtaining candid and complete references requires the promise of confidentiality to be kept. Keeping the promise in this case does nothing more than place the former employer on the same footing when giving employment reference to a public employer as when giving references to prospective employers in the private section.[6/] Keeping the promise also addresses the former employer's reasonable fear of litigation discussed above.

Accordingly, we find that the fifth element of the exemption in ORS 192.502(4), that the public interest would suffer by disclosure, has been met in this instance.[7/] Therefore, we conclude that the responses from your former employers to ODOC's questionnaire are exempt from disclosure under ORS 192.502(4), and we deny your petition as to those responses.

The questionnaire itself is not exempt from disclosure, and we understand that Mr. Hannan has already disclosed it to you.

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

JAA02901
Enclosure
c: Karen Roach, ODOC
Roxie Burns, ODOC
Rick Hannan, ODOC

[6/] References between private employers are not subject to the disclosure requirements of the Public Records Law; a record provided by a private employer may not become a public record. *See* ORS 652.750(1)(b) and Public Records Order, August 6, 1987, Larsen.

[7/] We reached the same conclusion in the Burr/Freshour Public Records Order dated January 15, 1997, which concerned records of the Board (now Department) of Public Safety Standards and Training. In that situation, disclosure of the substance of the references' statements would have revealed who made the particular statements.