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July 17, 1997

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Portland, OR 97204

Re: *Petition for Public Records Disclosure: Department of Corrections Records*

Dear Mr. Wilker:

This letter is the Attorney General's order on Mr. Wilker's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505, on behalf of his client, Pamela C. Cohen. The petition, which we received on June 26, 1997,[1/] asks the Attorney General to direct the Oregon Department of Corrections (ODOC) to produce a copy of records relating to a background investigation conducted in connection with Ms. Cohen's application for employment with ODOC.

Mr. Wilker made two requests to ODOC for Ms. Cohen's applicant records. Karen Roach, Assistant Director of ODOC Human Resources Division, responded to the first request by letter dated May 13, 1997, disclosing records from ODOC's central office. Jonathon Herman, Human Resource Consultant at Columbia River Correctional Institution (CRCI), responded to the second request by letter dated June 13, 1997, disclosing records from CRCI. Mr. Herman informed Mr. Wilker that ODOC had disclosed all available

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

records regarding Ms. Cohen, except for motor vehicle and computerized criminal history records and Employment Verification forms submitted regarding Ms. Cohen. Mr. Wilker's petition requests the Attorney General to order that ODOC disclose the remaining records.

As discussed below, we deny the petition, in part because the records are exempt from disclosure and in part because ODOC has agreed to disclose the remainder of the records.

## 1. Department of Motor Vehicle Records

Mr. Herman stated in his June 13 letter that ODOC was not disclosing motor vehicle records. Mr. Herman informs us that upon further review he has determined that his earlier reference to motor vehicle records was in error; ODOC did not obtain or review Department of Motor Vehicle (DMV) records regarding Ms. Cohen as part of her application for employment. Accordingly, we deny the petition as to DMV records because ODOC has no such records.

## 2. Computerized Criminal Records

The records sought by Mr. Wilker include a print-out of information maintained in the Oregon State Police Criminal Offender Information System. ORS 192.502(8) exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." Computerized criminal offender information is confidential under Oregon law and is exempt from disclosure except when the information is requested pursuant to certain statutory procedures. ORS 181.540(1)(c). *See* Public Records Order, May 17, 1995 (Hasty); Public Records Order, December 4, 1992 (Seitz).

The process for disclosure of computerized criminal history record is prescribed at ORS 181.555 and 181.560; that process does not authorize entities such as ODOC to disclose computerized criminal records that they obtain for employment-related purposes. Rather, the Oregon State Police is the entity through which disclosure occurs. If Mr. Wilker wishes to obtain computerized criminal records, he must contact the Oregon State Police Forensic Services Division, Identification Services Section, and follow the procedure established by ORS 181.560 and OAR 257-010-0035.

Because the computerized criminal records are "confidential" and their disclosure "restricted * * * under Oregon law," we conclude that these records are exempt from disclosure under ORS 192.502(8). Accordingly, we deny the petition as to these records.

### 3. Employment Verification Forms

In August 1995, Ms. Cohen applied for a correctional officer position with the ODOC. ODOC assigned an investigator to conduct a background investigation on Ms. Cohen. In the course of conducting this background investigation, the investigator requested six persons familiar with Ms. Cohen's work to fill out "Employment Verification" forms concerning their impressions of her in previous work situations. The forms contain Ms. Cohen's name and other identifying information, and ask the person filling out the form to answer work-related questions about Ms. Cohen.

The form also includes a statement that "I am not obligated to provide this information and am doing so after a promise of confidentiality." We have contacted all six persons who filled out the forms and were told by each that they did not wish their identities and their statements to be disclosed to any person other than the ODOC employees making the hiring decision.

ODOC did not disclose the employment verification forms in response to Mr. Wilker's request on the basis that the forms contain confidential employment reference information.

We have considered two exemptions when employment references are at issue, ORS 192.502(1), the exemption for internal advisory communications between public bodies, and 192.502(3), the exemption for information submitted in confidence by citizens. *See* Public Records Order, January 15, 1997 (Burr, Freshour). We analyze employment references supplied by private employers under ORS 192.502(3) and information supplied by public employers under ORS 192.502(1).

Individuals associated with both private and public employers submitted the employment verification forms at issue in this petition. We discuss first the exemption for information submitted in confidence by private individuals.

#### a. ORS 192.502(3) - Information Submitted in Confidence

ORS 192.502(3) exempts from disclosure:

> (3) 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 each of the first four elements of this exemption have been met in this instance. As noted above, the information was submitted in confidence, it was not required by law to be submitted, and the public body obliged itself in good faith not to disclose the information. The information itself is a candid assessment of Ms. Cohen's work performance and employee attributes, which is the type of information that is generally kept confidential.

The final test under the ORS 192.502(3) exemption is the public interest. The Oregon Court of Appeals considered the public interest in employment references in ***Gray v. Salem-Keizer School District***, 139 Or App 556, *rev denied*, 323 Or 265 (1996). In *Gray*, the court ordered disclosure of employment reference forms because it was possible to disclose the substance of the statements without identifying their sources by redacting the source-identifying information.

In considering the public interest, the court considered two competing views. For the petitioner, the public interest was in gaining access to records in order to verify or challenge the accuracy of the reference information, which in turn ensured that public agencies made fair, informed and unbiased hiring decisions. 139 Or App at 565. For the potential employer, the public interest was in receiving candid reports from former employers by which to evaluate potential employees. A public employer's ability to employ suitable persons would suffer because of the potential for a chilling effect on the willingness of former employers or others to provide candid information if the persons knew that the information they provided would be disclosed to the candidate. 139 Or App at 564.

After considering these two views, the court concluded that 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 source-identifying information was redacted.

The reference forms concerning Ms. Cohen that were submitted by private employers present similar circumstances. Some of the information is source-identifying, but some is not, including a series of boxes that were checked. We conclude that the public interest will not be harmed by disclosing the employment reference forms submitted by private employers, provided that the reference forms are redacted in a manner that will not reveal, or tend to reveal, the identity of the sources.

Therefore, we find that the source-identifying information contained on the forms submitted by private employers is exempt from disclosure under ORS 192.502(3) and may be redacted. As to this information, we deny the petition. The remainder of the information on the forms must be disclosed, and Ms. Roach informs us that ODOC has agreed to do so.

**b. ORS 192.502(1) - Internal Advisory Communications**

ORS 182.502(1) exempts from disclosure:

> (1) 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.

The purpose of this exemption is to protect the frank and uninhibited advice and observations a public employee gives to a superior or associate. MANUAL at 37. We have concluded previously that the substantive, subjective work-related evaluations that a former public employer provides to a prospective public employer regarding an applicant for employment are exempt from disclosure under the internal advisory exemption. Public Records Order, January 15, 1997 (Burr/Freshour).

With respect to the references provided concerning Ms. Cohen, each of the completed forms was a communication within or between public bodies that was preliminary to ODOC's final determination of action with respect to its hiring of Ms. Cohen. These communications contain other than purely factual materials, i.e., the subjective assessments of Ms. Cohen's work performance and employee attributes. Thus, the frank, non-factual information provided by the public employees will be exempt from disclosure if, in this instance, the "public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure."

In weighing the public interest in encouraging frank communication, we consider relevant the fact that all of the public employees involved expressed concern with their identities being disclosed. Moreover, all of the public sources adamantly expressed their understanding that they were assured that the information they provided was confidential in nature and was a part of ODOC's internal hiring process. They indicated that their comments would not have been as forthright if they understood the information would be disclosed to Ms. Cohen.

Also relevant is the fact that Ms. Cohen applied for a security-based position, where a poor hiring decision would impact the safety of other corrections employees, inmates and the public. ODOC must feel confident that it has the most candid information available; that confidence is established by ensuring that frank communications are not disclosed to the applicant. In this instance, we conclude that the public interest in protecting ODOC's ability to communicate on a confidential basis with public employees regarding former workers outweighs the public interest in disclosure, and that the non-factual information provided by the public employees is exempt from disclosure under ORS 192.502(1).

Applying the exemption in this fashion would result in ODOC's disclosing the employment verification forms completed by the public employees with all of the information redacted other than the name, title and telephone number of the person supplying the reference information and Ms. Cohen's name, Social Security number, etc. All of the remainder of the information on the forms is subjective, non-factual assessments, which is the type of information that this exemption is intended to protect. Thus, none of the substantive information obtained from the references would be disclosed from those forms completed by public employees.

We note, however, that the public interest in obtaining frank information from public employees and public bodies, which is protected by this exemption, is the same as the public interest in obtaining candid information from private employment references, which is protected by ORS 192.502(3). With respect to the latter exemption, the Oregon Court of Appeals recognized in *Gray* that the public interest may be served by redacting the source-identifying information.

In this instance, we believe that protecting the frank communications from the public employees concerning Ms. Cohen can be achieved one of two ways -- by redacting all substantive information except that which is purely factual or by redacting all source-identifying information. Redacting all of the substantive information and providing only the purely factual information is not clearly necessary in this instance to protect the public interest in frank communication, and it certainly does not serve Ms. Cohen's interest in assessing whether secret, unrebuttable allegations or innuendo regarding her prior work exist. Accordingly, we conclude that in this instance the policy underlying the internal advisory communications exemption with respect to employment references may be served by redacting the source's names and other identifying information, including substantive responses that reasonably reveal, or tend to reveal, the identities of the sources. Other substantive responses that do not disclose the source are subject to disclosure. We believe this result is both consistent with the analysis of the public interest in *Gray* and serves the purpose of the exemption.

Accordingly, we conclude that the information on the employment verification forms from the public employees that reveals, or tends to reveal, the identity of the person who has provided the information, including references to specific events that would reveal the person's identity, is exempt from disclosure under ORS 192.502(1) and may be redacted. As to this information, we deny the petition. The remainder of the information on the form must be disclosed, and Ms. Roach informs us that ODOC has agreed to do so.

4. **Background Investigation Results**

ODOC also did not disclose a one-page form entitled "Background Investigation Results." This form contains Ms. Cohen's name and Social Security number and the name of the investigator. The form also has space to summarize the applicant's employment history and references and information obtained from LEDS/DMV, both of which merely state, "See Attachments." We conclude that none of this information on the one-page form is exempt from disclosure and that it must be disclosed, which Ms. Roach informs us ODOC has agreed to do.

The bottom of the form contains a space for the investigator's evaluation. We conclude that this portion of the form is exempt from disclosure under ORS 192.502(1), the internal advisory communication. It is a communication within a public body of an advisory, non-factual nature and preliminary to ODOC's hiring decision. With respect to this communication, we believe that the public interest in encouraging frank communications from the investigator to the hiring authority of the investigator's completely candid and forthright evaluation and recommendation with respect to the applicant clearly outweighs the public interest in disclosure. We also believe that redaction of the investigator's name is not appropriate to protect the public interest in frank communication from the investigator.

The Employment Verification Forms provide the assessment of Ms. Cohen's work performance and employee attributes by individuals who worked with her previously. The court in *Gray* concluded that there was a public interest in enabling an unsuccessful applicant to verify or challenge the accuracy of such employment reference information in order to ensure that public agencies make fair, informed and unbiased hiring decisions. In contrast, the investigator's evaluation consists solely of the conclusion he draws from the employment references in light of the particular needs of the prospective employer and the position being filled. The investigator is not a reference, but part of the decision-making process of the hiring agency. We conclude that the public interest in frank communication from the investigator is foremost and is not constrained by any public interest in disclosure. Accordingly, we deny the petition as to the information on this form consisting of the investigator's evaluation.

There is also a note attached to the form that merely states the hiring recommendation from ODOC management to the hiring authority. We conclude that the entire content of this note is exempt from disclosure under ORS 192.502(1) for the reasons stated above, and we deny the petition as to this information.

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

JAA02538/DS/jh
c: Karen Roach, Human Resources, ODOC