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Oregon State University
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Re: ***Petition for Public Records Disclosure Order: Oregon State University Faculty and Staff Records***

Dear Gentlemen:

This letter is the Attorney General's order on Mr. Josewski's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Mr. Josewski's petition, which we received on November 29, 1995,[1/] asks the Attorney General to direct Oregon State University (OSU) to produce copies of the following:

1. Official complaint forms, detailing complaints against faculty or staff of Oregon State University between January, 1980 and October, 1995.

2. The records of any disciplinary actions taken by Oregon State University against any faculty member or employee between January, 1980 and October, 1995.

For the reasons that follow, we respectfully grant the petition in part and deny it in part.[2/]

The Public Records Law confers a right to access to any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. The law requires that the custodian of public records furnish proper and reasonable opportunities for inspection of records in the office of the custodian. ORS 192.430. Any person denied the right to inspect or receive a copy of any public record of a state agency may petition the Attorney General to determine if the record may be withheld from public inspection. ORS 192.450(1).

1. Records of Disciplinary Action Taken Against Faculty and Staff

The Public Records Law conditionally exempts from disclosure records of disciplinary action taken against public employees. ORS 192.501(12) provides that a "personnel discipline action, or materials or documents supporting that action" are exempt from disclosure.

Case law interpreting this provision has limited the scope of the exemption to completed disciplinary action when a sanction was imposed; no exemption exists for records generated when no sanction is imposed. For example, in *City of Portland v. Rice*, 308 Or 118 (1989), the Oregon Supreme Court held the Portland Police Bureau's investigation of a complaint against two police officers was not exempt from disclosure because the investigation did not result in any disciplinary sanction. *See also State v. Heisler*, 106 Or App 7, 10, n 1 (1991) (internal police investigation of officer's conduct not exempt from disclosure because there was no record that officer was disciplined).

The exemption in ORS 192.501(12) is conditional because it exempts records "unless the public interest requires disclosure in the particular instance." Ordinarily, a disciplinary sanction and the documents supporting that action are matters of primary significance to the employer and the employee with little relevance to the public interest. In assessing the public interest in disclosure, we have previously considered the position of the employee within the state agency, the basis for the disciplinary action and the extent to which the information has already been made public. *See* Public Records Order dated November 26, 1990 (Nealy/Hogan) and Public Records Order dated January 27, 1992 (Moody). Even high level management officials are entitled to the confidentiality ordinarily granted to employees subject to discipline. Public Records Order dated April 26, 1993 (Hass). Routine employee discipline does not meet the public interest test. Public Records Order dated November 26, 1990 (Nealy/Hogan).

Here, Mr. Josewski has requested records of any disciplinary action taken by OSU against faculty and staff. He has not specified the public interest requiring disclosure, and we are not aware of one. Accordingly, if OSU took disciplinary action against a faculty or staff member, the records of that discipline, including the complaint and any other material

supporting the disciplinary action, are exempt from disclosure under ORS 192.501(12). Therefore, we deny the petition as to those documents.

2. Complaints Against Faculty and Staff

There are several provision that may exempt from disclosure complaints[3/] against faculty and staff.[4/] Below, we discuss those exemptions that are the most likely to be relevant to these records; however, depending on the nature of the complaint made, other exemptions may also apply.[5/]

a. Other State Law Exemption - ORS 192.502(8)

As a general rule, faculty personnel records of the Oregon State System of Higher Education are exempt from disclosure under the Public Records Law. *See, e.g.,* Public Records Order dated April 8, 1987 (Gross/Hynes). This is because ORS 192.502(8) exempts "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." ORS 351.065 authorizes the State Board of Higher Education (the board) to adopt rules and orders restricting access to faculty personnel records. "Personnel records" are defined as

> records containing information kept by the institution, division or department concerning a faculty member and furnished by the faculty member or by others about the faculty member at the member's or at the institution, division or department's request, including, but not limited to, information concerning discipline, membership activity, employment performance or other personal records of individual persons.

ORS 351.065(6). Pursuant to ORS 351.065, the board has adopted rules that restrict disclosure of faculty personnel records, except in accordance with those rules. *See* OAR 580-22-060 to 580-22-125. Absent the faculty member's consent, a valid subpoena, court order or other legal mandate, the board's rules permit disclosure of faculty personnel records to persons serving in an official institutional capacity who have a demonstrably legitimate need to review the records in order to fulfill their official professional responsibilities. OAR 580-22-095(1). In addition, the information listed in OAR 580-22-090 is disclosable to anyone upon request.[6/] OAR 580-22-095. The board's rules do not entitle Mr. Josewski to the records he seeks.

Thus, if a record is: (1) kept by OSU, (2) concerning a faculty member, (3) furnished by the faculty member or others at the faculty member's or OSU's request, and (4) not listed in OAR 580-22-090(1), it's disclosure is "restricted" under ORS 351.065 and OAR 580-22-095, and it is therefore exempt from disclosure under ORS 192.502(8).

Here, petitioner has requested complaints made by students and other employees against faculty and staff members. Whether a particular complaint meets the above requirements, and thus is a faculty personnel record not subject to disclosure, must be determined on a case-by case basis.

Accordingly, to the extent the complaints sought by Mr. Josewski are faculty personnel records, we conclude that those complaints are exempt from disclosure under ORS 192.502(8), and we deny that portion of the petition. To the extent that the complaints sought by Mr. Josewski are not faculty personnel records and are not exempt under other provisions of the Public Records Law, such as those discussed below, we grant that portion of the petition.

b. Federal Law Exemption - ORS 192.502(7)

Complaints against staff and faculty may also be exempt from disclosure under ORS 192.502(7), which exempts information the disclosure of which is prohibited under federal law or regulations. *See also* ORS 192.496(4) (exempts from disclosure "[s]tudent records required by state or federal law to be exempt from disclosure").

The Family Educational Rights and Privacy Act (FERPA), 20 USC § 1232g, governs the release of student records for all educational institutions or agencies receiving federal funds. FERPA prohibits the payment of federal funds to educational institutions that have a practice or policy of disclosing student education records that violate its proscriptions. Because OSU receives federal funds, it is subject to this provision. This office has concluded that a federal law or regulation that expresses a clearly prohibitory policy, such as FERPA, is a prohibition even though the means of enforcing the federal policy is only indirectly prohibitory. OREGON ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1995) at 52. *See also* 47 Op Atty Gen ___ (No. 8226, August 4, 1993); Public Records Order dated April 13, 1987 (Bristol/Corn) (PSU student body president's payroll records were student education records exempt from disclosure).

FERPA generally prohibits the release of personally identifiable information from student education records without consent from the student. *See* 20 USC § 1232g(b).[7] *See also* Op Atty Gen No. 8226, *supra*, at 28; *Kneeland v. National Collegiate Athletics Association*, 650 F Supp 1076, 1090 (D Tx 1988), *reversed on other grounds*, 850 F2d 224, *rehearing denied*, 856 F2d 191 (5th Cir 1988), *cert denied*, 488 US 191 (1989). The issue here is whether a particular complaint against a faculty or staff member is an education record. If so, the disclosure of personally identifiable information about the student contained in that complaint is prohibited under FERPA.

FERPA defines an education record as those records, files, documents and other material that

> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 USC § 1232g(a)(4)(A); 34 CFR § 99.3.[8/]

Whether a particular complaint satisfies the definition of education record can only be determined on a case-by-case basis. For example, if a student complained that a faculty member discriminated against the student in grading, that complaint would be an education record.

If a complaint is an education record, personally identifiable information contained in that complaint would have to be removed before the record could be released. 34 CFR § 99.3 defines "[p]ersonally identifiable information," as including, but not limited to:

> (a) The student's name;
> (b) The name of the student's parent or other family member;
> (c) The address of the student or student's family;
> (d) The personal identifier, such as the student's social security number;
> (e) A list of personal characteristics that would make the student's identification easily traceable; or
> (f) Other information that would make the student's identity easily traceable.

If enough information can be removed so that the student's identification would not be apparent or easily traceable, the redacted version of the education record would be disclosable. If not, the entire record would be protected under FERPA.

Thus, if a complaint against faculty or staff is an education record, disclosure of a student's personally identifiable information in that record is prohibited under FERPA, 20 USC § 1232g(b), and that information is exempt from disclosure under ORS 192.502(7). Accordingly, with respect to any complaints sought by Mr. Josewski that are education records, we deny the petition to the extent that the records contain personally identifiable student information, and we grant the petition with respect to the remainder of those records. OSU must redact the student's "personally identifiable information" and, if enough information can be removed so that the student's identification would not be apparent or

easily traceable, then OSU must disclose the redacted version of the records. *See* ORS 192.505.

If a complaint against faculty or staff is not an education record, it is not exempt from disclosure under FERPA and must be disclosed. Accordingly, to the extent that the complaints sought by Mr. Josewski are not education records, and no other exemptions apply, we grant that portion of the petition.

c. Personal Privacy Exemption - ORS 192.502(2)

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

> Information 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 party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

ORS 192.502(2). 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).

To satisfy this exemption, (1) the information must be personal; and (2) the disclosure must constitute an unreasonable invasion of privacy. Even when these two elements are met, however, a record is not exempt if the public interest, by clear and convincing evidence, requires disclosure. An invasion of privacy will be unreasonable if "an ordinary reasonable person would deem [it] highly offensive." *Id.* at 442-43.

Generally, we would not consider information about the manner in which faculty or staff carry out their employment to be personal information the disclosure of which would be an unreasonable invasion of privacy. *See* OREGON ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1995) at 44-45; *see also* 41 Op Atty Gen 437 (1981). Nevertheless, a complaint may contain information about the faculty or staff member, or other individual, that would come under this exemption. Whether a particular complaint contains information falling within this exemption will have to be determined on a case-by-case basis.

Accordingly, to the extent the complaints sought by Mr. Josewski contain personal information the disclosure of which would be an unreasonable invasion of privacy, that information must be redacted before the records are disclosed.

3. Conclusion

For the reasons discussed above, we respectfully deny the petition with respect to the following:

> Records of disciplinary action taken against faculty and staff, including any complaints that support the disciplinary action;
>
> Complaints against faculty members that are faculty personnel records the disclosure of which are restricted under ORS 351.065 and OAR 580-22-060 to 580-22-125;
>
> Personally identifiable student information contained in complaints against faculty and staff that are student education records;
>
> Personal information contained in complaints made against faculty and staff the disclosure of which would be an unreasonable invasion of privacy, unless the public interest, by clear and convincing evidence, requires disclosure in the particular instance.

We grant the petition with respect to the following records,[9/] to the extent that OSU can reasonably redact, consistent with the discussion above, any personal information the disclosure of which would be an unreasonable invasion of privacy:

> Complaints against faculty and staff members that are not faculty personnel records or student education records,
>
> Complaints against faculty and staff members that are student education records to the extent that OSU can redact any personally identifiable student information

Given these conclusions, it will be necessary for OSU to review each record requested by Mr. Josewski to determine whether the record is or is not subject to disclosure under this order and what information, if any, should be redacted from records that are otherwise subject to disclosure. Many of the decisions made by OSU will be highly fact-intensive. Because this office has not reviewed each record for purposes of this order, Mr. Josewski may again petition the Attorney General under ORS 192.450 for review of decisions made by OSU on particular records.

We note that Mr. Josewski seeks 15 years of material for all offices and departments of the entire university. OSU 192.440(3) provides that a public agency has the right to establish a fee schedule that will reimburse the agency for the actual costs associated in making records available. The Oregon State System of Higher Education, of which the University is a member, has adopted such a rule, which requires the prepayment of the costs associated with complying with a public records request. *See* OAR 580-01-020. *See also* Public Records Order dated February 6, 1995 (Pittman). Thus, OSU has seven days from the date of this order in which to provide petitioner with an estimate of the costs associated with locating these documents and, upon payment of those fees, to begin to take the steps necessary to comply with this order. ORS 192.450(2).

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the
Attorney General

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[1/] We appreciate Mr. Josewski's agreement to extend the time within which the law would have otherwise obligated us to respond.

[2/] Petitioner's original request to OSU was for "a copy of all official complaints made against faculty and staff by students or other employees." The Attorney General's review is limited to the request actually denied by OSU. To the extent Mr. Josewski's petition seeks review of a different, broader request, the Attorney General has no jurisdiction to order disclosure absent denial by OSU of the broader request. *See* ORS 192.450. Accordingly, we deny that portion of the petition seeking disclosure of public records of complaints made against faculty and staff by other than students or employees as premature since Mr. Josewski has not yet been denied a right to inspect such records.

[3/] Mr. Josewski requested "official complaint forms." When informed by our office that no such forms existed, Mr. Josewski modified his request to include all complaints against faculty and staff reduced to writing.

[4/] As discussed above, if disciplinary action was taken against faculty or staff, all supporting documents, including the complaint, are exempt from disclosure under ORS 192.501(12). Therefore, this discussion is limited to those complaints against faculty and staff where no discipline was imposed.