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April 28, 1988

Paul Koberstein
The Oregonian
1320 SW Broadway
Portland, Oregon 97201

Frank Martino, Provost
Portland State University
P.O. Box 751
Portland, Oregon 97207

Re: Request for Public Records Disclosure Order; Portland State University Records

Dear Mr. Koberstein and Provost Martino:

This letter is the Attorney General's order on an April 19, 1988 petition filed by Mr. Koberstein pursuant to the Public Records Law. (ORS 192.410 to 192.505). Mr. Koberstein asks the Attorney General to order Portland State University to disclose a particular record that he describes as:

> "A letter dated April 11, 1988, or thereabouts, from the American Assembly of College Schools of Business, to Portland State University regarding the accreditation of the Portland State University School of Business Administration."

Portland State University (PSU) has refused to make such a letter available for Mr. Koberstein because PSU believes the record is exempt from disclosure under the Public Records Law.

As required by ORS 192.470(2), PSU has transmitted to the Attorney General a copy of an April 11, 1988 letter from the Chair of the Continuing Accreditation Committee (CAC) of the American Assembly of Collegiate Schools of Business (AACSB) to

Vergil V. Miller, the Dean of the PSU School of Business Administration. We have reviewed the record and PSU's reasons for believing the record should not be disclosed. We conclude that the record is a public record which is not exempt from disclosure under ORS 192.501 to 192.505. Accordingly, we grant Mr. Koberstein's petition.

The April 11, 1988 letter from the AACSB relates to the CAC's evaluation of programs, policies and operations of the School of Business Administration at one of the state's public universities. Although the letter was not prepared by PSU, the letter is used and retained by a public body, PSU. The letter, therefore, is a public record as that term is defined for purposes of the Public Records Law in ORS 192.410(4). Consequently, PSU must make the letter available for inspection by any member of the public who requests disclosure, unless the record is exempt from the public inspection requirements of the Public Records Law under ORS 192.501 to 192.505. See ORS 192.420 and 192.430.

PSU believes the April 11 letter is exempt from disclosure under the internal advisory communications exception, the personal privacy exception, and the confidential information exception outlined in ORS 192.502(1), (2), and (3), respectively. We disagree.

The internal advisory communication exemption is a narrow exception to the general rule requiring disclosure of records relating to the business of public bodies and officials. ORS 192.502(1) not only limits the types of governmental communication that qualify for exemption, but also places a heavy burden on a public body that proposes to claim the exemption. ORS 192.502(1) states that the following records are exempt from disclosure:

> "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 employes of public bodies clearly outweighs the public interest in disclosure;"

For at least four reasons, the April 11 letter to PSU from the AACSB fails the tests of ORS 192.502(1).

First, the April 11, 1988 letter is not a communication "within a public body or between public bodies." The AACSB is a public, non-profit organization. PSU nevertheless contends that the AACSB should be treated like a public body of the State of Oregon. PSU however presents us with no facts that suggest that the AACSB acts as an agent of PSU, let alone as an entity of state government. In fact, it appears that if the AACSB is performing governmental functions, the AACSB performs those functions for the federal government which authorizes and regulates its activities. See 34 CFR § 603.5 and 603.6. Communications between federal agencies and state agencies are not covered by ORS 192.502(1), because the Public Records Law defines a "public body" as a "public agency of this state." ORS 192.410(1).

Second, not all the information in the AACSB's letter is "other than purely factual." Although the letter refers to assessments of the CAC that could be deemed to be "of an advisory nature" for purposes of ORS 192.502(1), the letter contains many factual statements that are not exempt from disclosure. Consequently, the internal advisory communication exemption would not be a basis for withholding disclosure of the April 11, 1988 letter, in toto. ORS 192.505 requires segregation of exempt from non-exempt information in a public record, and disclosure of the non-exempt information. The Court of Appeals recently criticized a public body for taking "an all or nothing approach" to information the public body claimed was exempt under ORS 192.502(1), but PSU apparently adopts such an approach in this matter. See, Coos County v. Ore. Dept. of Fish and Wildlife 86 Or App 168, 172, 739 P2d 47 (1987).

Third, the action of the CAC that is recounted in the April 11, 1988 letter is, at least debatably, final rather than preliminary to any final determination of policy or action. Although the action of the CAC may be followed by action by the University and further action by the AACSB, the letter says that the CAC "has completed" the actions described in the letter.

Fourth, PSU has not carried its evidentiary burden. ORS 192.450(1) provides that on the Attorney General's review of a

state agency's denial of disclosure of a public record, "[t]he burden is on the agency to sustain its action." More specifically, in claiming the exemption of ORS 192.502(1), the burden is on PSU to show that with regard to the April 11, 1988 letter, the public interest in knowing what officials in the School of Business Administration are doing is clearly outweighed by the public interest in encouraging frank communication between officials and employes of public bodies. On this weighted scale, the balance tips solidly in favor of disclosure.

PSU does not explain how disclosure of the AACSB letter will deter the AACSB from communicating frankly with PSU officials. The letter itself suggests that most of the information was not based on candid discussions between PSU officials and the CAC, and PSU has not made a contrary showing. That information therefore is not exempt under ORS 192.502(1), as interpreted in Bay Area Health District v. Griffin, 73 Or App 294, 300-301, 698 P2d 977 (1985). Moreover, the few items of information that apparently are based on discussions with PSU faculty do not relate to matters that faculty likely would be loathe to discuss if the April 11 letter were made available for public inspection.

PSU's argument for application of the internal advisory communications exemption is based on its claim that disclosure of the AACSB letter will invite adverse publicity. But the Court of Appeals recently rejected such an argument in Coos County v. Ore. Dept. of Fish and Wildlife, supra, 86 Or App at 173:

> "Any 'chilling effect' that disclosure may have on future communications within the agency, because of potential embarrassment to the agency or its employes, is not sufficient, in and of itself, to overcome the presumption favoring disclosure."

The April 11 letter is not exempt from disclosure under ORS 192.502(1).

Nor is the letter exempt under the personal privacy exemption of ORS 192.502(2). That law exempts from disclosure under the Public Records Law the following information subject to the following conditions:

> "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;"

Although this law places a burden on a person seeking disclosure of personal information, a public body has the burden in the first instance to establish that the personal information it refuses to disclose is indeed private information. Morrison v. School District No. 48, 53 Or App 148, 150, 631 P2d 784 (1981). PSU has not met its burden under ORS 192.502(2).

PSU contends that certain information in the AACSB letter may reflect adversely on the faculty of School of Business Administration and therefore is the type of information that would be in a personnel file. But even if information is in a personnel file, it is exempt only if it is personal, private information. Statements in the AACSB letter about PSU faculty are not personalized. The statements relate to the faculty collectively as faculty.

And even if the information related to the individual performance of a faculty member, "any privacy rights that public officials have as to the performance of their public duties must generally be subordinated to the right of citizens to monitor what elected and appointed officials are doing on the job." Jensen v. Schiffman, 24 Or App 11, 17, 544 P2d 1048 (1976); see also Papadopoulous v. St. Bd. of Higher Education, 8 Or App 445, 494 P2d 260 (1972), discussed below. The statements in the AACSB letter regarding PSU faculty do not qualify for exemption under ORS 192.502(2), and in any event would not justify the withholding of the whole letter. See ORS 192.505.

Finally, the AACSB letter does not satisfy the stringent tests of the confidential communications exemption, ORS 192.502(3). That statute allows public bodies to withhold disclosure of:

> "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 not suffer by the disclosure;"

We are not convinced that the claim for exemption under ORS 192.503(3) passes the threshold test that the information be submitted voluntarily (i.e. "not otherwise required by law to be submitted"). To secure federal funding, PSU's School of Business must be accredited. Federal regulations govern accrediting organizations such as the AACSB. The AACSB letter appears to be a communication prompted by applicable law. 34 CFR 603.6(b)(3)(iii). We doubt the legislature intended that such a record be deemed to have been submitted voluntarily.

Moreover, even if we presume that the AACSB submitted its letter to PSU in confidence and that PSU acted in good faith by assuring the AACSB that it would keep such a letter confidential, we have not been persuaded that the information in the letter reasonably can be deemed confidential. Nor are we persuaded that the public interest would be harmed by disclosure. We are guided to the contrary conclusions by the Court of Appeals opinion in Papadopoulous v. St. Bd. of Higher Education, 8 Or App 445, 494 P2d 260 (1972), a case decided under a prior version of the Public Records Law but nevertheless sufficiently on point.

In Papadopoulous, the plaintiff had been denied an opportunity to examine an investigative report made to Oregon State University officials about the operation of the School of Science. The report had been made by a team of educators from outside the State System of Higher Education, 8 Or App at 449. The university attempted to defend its nondisclosure decision on three grounds: 1) breach of the confidentiality agreement would harm the public interest; 2) confidentiality was required in order that the university would be able to obtain similar evaluations in the future; and 3) disclosure would violate the privacy rights of university officials. 8 Or App at 459. The court rejected all three contentions.

Regarding the promise of confidentiality, the Court of Appeals flatly stated:

> "If the promise of confidentiality were the end of our inquiry, we would be allowing a state agency official to effectively eliminate the public's rights under [the public records disclosure statute]. Breach of this promise, when required by the law of this state, is not a sufficient harm to the public interest to prevent the report's disclosure." 8 Or App at 459.

The court dismissed the university's second argument by noting that the evidence did not support the university's contention that disclosure of the report would make it more difficult to obtain similar information in the future. 8 Or App at 460. The court insisted on proof of the unavailability of future investigative review, rather than mere speculation such as PSU tenders to us in this matter.

The court disposed of the university's personal privacy argument in the same manner that we treat PSU's personal privacy claim above. The Court of Appeals found no evidence that the investigative report contained personal information, and said:

> " . . . it appears the report is only about professional matters concerning the administration of the university, and contains nothing that might be considered personal information about university officials." 8 Or App at 462.

And the court further noted:

> "We do not mean to suggest that even if the report contained highly personal information this alone would justify non-disclosure. Such a conclusion might be inappropriate if the personal information was relevant to the performance of the official duties of the persons named in the report." 8 Or App at 461 n.11.

In short, the Court of Appeals decision in Papadopoulous tells us that information concerning the administration of programs by public officials at public institutions of higher

education generally should be made available to members of the public who ask to inspect the information. PSU has not shown us a legally cognizable reason for departing from this general rule.

Conclusion

The April 11, 1988 letter from the AACSB to PSU is a public record. The information in that letter is not exempt from disclosure under the Public Records Law. PSU lawfully cannot withhold the letter from public inspection.

Therefore, the Attorney General grants the petition filed by Mr. Koberstein. The Attorney General orders Portland State University and its officers to make the AACSB's April 11, 1988 letter regarding accreditation of the PSU School of Business Administration available for inspection by Mr. Koberstein within seven days of the issuance of this order.

Respectfully submitted,

James E. Mountain Jr.

JAMES E. MOUNTAIN, JR.
Special Counsel to the
Attorney General

JEM:cm
cc: W.T. Lemman, Vice-Chancellor of Higher Education
Vergil V. Miller, Dean, School of Business Administration, Portland State University
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