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April 14, 1995

THIS IS THE ORIGINAL
OF OUR LETTER SENT
BY FAX ON 4-14-95

Steve Mayes, Reporter
THE OREGONIAN
1320 S.W. Broadway
Portland, Oregon 97201

Re: ***Petition for Public Records Disclosure Order: Children's Services Division Records***

Dear Mr. Mayes:

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 April 7, 1995, asks the Attorney General to direct the Children's Services Division (CSD) to produce the following information:

1. A list of all Washington County or Central Office CSD employees involved in the Gordon and Diane Whitehead case;

2. Any recommendations for disciplinary actions involving any CSD employee involved in the Whitehead case;

3. Any disciplinary actions involving any CSD employee involved in the Whitehead case.

For the following reasons, we deny your petition.

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. If a public record contains exempt and nonexempt material, the public body must separate the materials and make nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. ***Turner v. Reed***, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

1. List of Employees

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[.]

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). An invasion of privacy will be unreasonable where "an ordinary reasonable person would deem [it] highly offensive." *Id.* at 442-43.

The first determination to be made is whether the information is of a "personal nature." The test for determining this, established in ***Jordan***, requires determining whether the information sought is specific to one individual. A name itself may not be personal information, the disclosure of which would constitute an unreasonable invasion of privacy. *Cf.* Letter of Advice dated October 13, 1988, to W.T. Lemman, Chancellor (OP-6428) (identities of candidates for president); Public Record Order dated Aug. 12, 1988 (Dean) (names of nonfinalist applicant to Oregon State System of Higher Education for position of chancellor). Generally, the identity of public employees is not personal information the disclosure of which would constitute an unreasonable invasion of privacy. ***See Jensen v. Schiffman***, 24 Or App 11, 17, 544 P2d 1048 (1976); 41 Op Atty Gen 437 (1981). A public body may consider requests for nondisclosure by employees when the body has knowledge of facts from which it reasonably may anticipate that disclosure of the information could lead to harassment or physical harm. *See* Public Record Order dated May 31, 1990 (Heilman and Boles) (harassment of Adult and Family Services Division case workers). However, any decision to withhold public records under ORS 192.502(2) requires a public body to consider the merits of each request for nondisclosure on an individual case-by-case basis. ***Guard Publishing Co. v. Lane County School District***, 310 Or 32, 39-40, 791 P2d 854 (1990).

CSD has compiled a list of employees at the branch, the region and the central offices who have been or currently are materially involved in the Whitehead case. In a memo to Kay Toran dated February 27, 1995, six CSD staff persons whose names are on that list requested that "none of the information regarding their personal identities" be released to the media. The request for non-disclosure does not describe any circumstances from which we can anticipate that disclosure of the names would be likely to lead to harassment or physical harm. Moreover, the CSD list includes 25 names and the identities of these six employees

are not singled out or identified in any way except that they fall within the list of persons who have been involved in the Whitehead case. Under these circumstances, we conclude that disclosure of the names of the CSD employees materially involved in the Whitehead case does not constitute an unreasonable invasion of privacy.

Paul Drews, CSD Deputy Administrator, informs us that CSD will provide you with this list. Accordingly, with respect to your request for a list of CSD employees involved in the Whitehead case, we deny your petition as moot.

2. Recommendations for Disciplinary Actions

For purposes of your request for documents reflecting recommendations for disciplinary action, we consider separately recommendations that resulted in completed disciplinary actions for which a sanction was imposed and recommendations that did not result in discipline. The records of recommendations for disciplinary actions for employees who received a sanction are exempt from disclosure under ORS 109.501(13), discussed below.

However, your request refers to recommendations for discipline involving "any CSD employee involved in the Whitehead case," not only those employees who actually received a sanction. Therefore, we consider whether there are any records of recommendations for disciplinary actions applicable to employees who did not receive a sanction. Ann Niederehe, CSD Assistant Administrator for Employee Services, informs us that there are no such records and that all employees who were the subject of written recommendations for discipline actually were disciplined. We cannot order disclosure of records that do not exist.

3. Disciplinary Actions

ORS 192.501(13) conditionally exempts records of a "personnel discipline action, or materials or documents supporting the action[.]" This exemption covers completed disciplinary actions in which a sanction was imposed. ***See City of Portland v. Rice***, 308 Or 118, 775 P2d 1371 (1989). The records of "any disciplinary actions involving any CSD employee involved in the Whitehead case" and for "any recommendations for disciplinary actions involving any CSD employee" who was disciplined fall directly within the scope of ORS 109.501(13) because they are records of completed personnel discipline actions or materials or records supporting the action in which a sanction was imposed.

The exemption in ORS 192.501(13) 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 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 discipline 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 confidentiality ordinarily granted to employees subject to discipline. Public Records Order dated April 29, 1993 (Hass). Routine employee discipline does not meet the public interest test. Public Records Order dated November 26, 1990 (Nealy/Hogan).

Under the circumstances presented here, we conclude that the public interest does not require disclosure. The public interests you assert include the "nationwide publicity of the case" and the public interest in knowing "what actions CSD has taken or will take to discipline those responsible for mismanaging the Whitehead case." CSD has already disclosed that the branch manager has been demoted and that four other CSD employees have been reprimanded. *See* THE OREGONIAN, April 11, 1995. We conclude that this disclosure satisfies the public interests you assert in that it fairly describes what actions CSD has taken to discipline employees involved in the Whitehead case.

The personnel discipline actions you request are routine employee discipline matters not involving dismissal associated with criminal conduct. In ***City of Portland v. Rice,***, the court noted: "The policy intended by the legislature, which we enforce, protects the public employee from ridicule for having been disciplined but does not shield the government from public efforts to obtain knowledge about its processes." 308 Or at 124 n 5 (citation omitted). That balance has been struck in this case, and the public interest does not require the disclosure of the records in this particular instance. *See* Public Records Order dated April 5, 1995 (Lindberg). Accordingly, we find these records to be exempt from disclosure under ORS 192.502(2) and deny your petition as to them.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the Attorney General

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