

June 6, 2000

Peter Brown
P.O. Box 11020
Eugene, Oregon 97440

Re: *Petition for Public Records Disclosure Order
Oregon Commission on Children and Families*

Dear Mr. Brown:

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 June 6, 2000,^{1/} asks the Attorney General to direct the Oregon Commission for Children and Families (OCCF) to make available the material redacted from the following records:

1. Email dated December 16, 1999 from Jim Desmond to Becky Smith (OCCF);
2. Email dated January 14, 2000 from Jim Desmond to Michael Piraino (National CASA Association); copies to Becky Smith (OCCF) and Judge C. Carlson;
3. Email dated January 27, 2000 from Jim Desmond to Michael Piraino (National CASA Association); copies to Becky Smith (OCCF) and Judge C. Carlson;
4. 5 pages of handwritten notes (no date); and
5. 1 page of handwritten notes (both sides) dated November 17.

Your petition indicates that you received the unredacted portions of the above-listed documents on April 24, 2000. For the reasons that follow, we grant respectfully deny your petition because OCCF has now agreed to disclose some of the redacted information to you and because we find that the remaining information is exempt from disclosure.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. ORS 192.420. If a public record contains

^{1/} We appreciate your extending the time within which the law would have otherwise obligated us to respond.

exempt and nonexempt material, the public body must separate the materials and make the 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).

You requested OCCF to provide you with the working papers supporting the issuance of the OCCF “Audit” report of the Court Appointed Special Advocate (CASA) program of Lane County. In response to that request, OCCF provided numerous documents to you, including the five documents that are the subject of your petition. Each of the five documents listed in your petition contained one or more portions that had been redacted by OCCF, these portions appearing as blank spaces on the documents provided to you and identified by the word “Confidential.”

1. Emails Dated December 16, 1999, January 14, 2000, and January 27, 2000, and Certain Additional Material in the Handwritten Notes

Becky Smith, State CASA Coordinator, and Shawn Jacobsen, OCCF Fiscal Manager, inform us that OCCF will provide to you without redaction the email communications dated December 16, 1999, and January 14 and January 27, 2000. In addition, Ms. Smith states that OCCF will disclose to you certain additional information from the notes, including all of the information redacted on pages 2 and 5 of the undated notes.

Because OCCF has agreed to disclose this information to you within seven days of the date of this order, your petition is moot as to this material. Accordingly, we deny your petition as to the materials that OCCF has now agreed to disclose.

2. Remaining Redacted Material in the Handwritten Notes

As to the remaining materials sought by your petition, i.e., the redacted portions of the undated handwritten notes and the handwritten notes dated November 17, we consider whether that redacted information is exempt from disclosure under the Public Records Law. We have reviewed each of the records, including the redacted information, and also considered the additional documentation that you submitted with your petition.

The materials that you seek were created in conjunction with OCCF’s participation in a review of certain CASA activities. As a part of that review, Ms. Smith interviewed local CASA participants. The December 16 email requests confidentiality by asking that the redacted information be kept “within the confines of CASA of Lane County, with the obvious exception of [Ms. Smith] knowing.” On several occasions documented in the records at issue here, the participants in interviews expressly requested that that Ms. Smith keep confidential the information they discussed.

ORS 192.502(4) exempts from disclosure:

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 obligated itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

In previous public record orders,^{2/} we have stated that the purpose of the 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. OREGON ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (MANUAL) 58 (1999).

There are five elements in this exemption, each of which must be met for the exemption to apply. These five elements are:

- The informant must have submitted the information on the condition that the information would be kept confidential.
- The informant must not have been required by law to provide the information.
- The information itself must be of a nature that reasonably should be considered confidential.
- The public body must show that it has obligated itself in good faith not to disclose the information.
- Disclosure of the information must cause harm to the public interest.

MANUAL at 58.

As to the redacted information in all three of the remaining materials, we find that the first, second, fourth and fifth elements of ORS 192.502(4) are met. As described above, the redacted information was provided by persons who requested, at the time they provided the information, that it be kept confidential. This meets the first element of the exemption, that the information be submitted in confidence. *See Hood Technology Corporation v. Oregon Occupational Safety and Health Division*, __ Or App __, __ P2d __ (CA A104544, June 7, 2000), slip op. at 10-11.

The information was not required by law to be submitted. The CASA program is established by ORS 419A.170. The Lane County CASA requested that Ms Smith participate in an informal review of the local CASA's volunteer training and screening procedures. Neither ORS 419A.170 nor any other provision of law requires the local CASA participants to provide to the CASA Coordinator the information contained in the documents at issue in your petition. Thus, the second element of the exemption is met.

The fourth element of the exemption is also met. Ms. Smith informs us that in her conversations with the individuals who provided the information at issue, she agreed not to

^{2/} Public Records Order, July 17, 1997 (Wilker); Public Records Order, January 16, 1998 (Flagg-Miller).

disclose the confidential information. That obligation was memorialized in her notes at the time of her interviews by writing "Confidential" across the top of the notes.

To meet the fifth element, disclosure of the information must cause harm to the public interest. CASA volunteers are appointed by juvenile courts in cases involving abused and neglected children. ORS 419A.170(1). Under the direction of the court, a CASA volunteer must investigate information related to the case; advocate for the child; facilitate and negotiate with the court, the State Office for Services to Children and Families and the child's attorney; and monitor the juvenile court proceedings. ORS 419A.170(2). OCCF is authorized to expend moneys for the "creation, supervision and operation of CASA Volunteer Programs statewide." ORS 419A.170(11). OCCF employs a CASA coordinator to fulfill its responsibilities under this statute. Review of local CASA volunteer screening and training procedures are an essential component of the statewide CASA program that is within the scope of OCCF oversight responsibilities. Ms. Smith states that if she had not assured the participants of confidentiality, they would not have emailed or spoken to her with candor about the local program's volunteer screening and training procedures and she would therefore have been unable to satisfactorily carry out her responsibilities and those of OCCF.

Although you have not expressly articulated a public interest in disclosure, your communications suggests two possibilities. First, that disclosure is necessary for "public accountability and truthful answers" concerning what you view as a "flawed" Audit report issued by OCCF and, second, that disclosure may provide information as to the reasons your application to become a CASA volunteer was denied.

As to public accountability, the Oregon courts have described the public interest in disclosure as "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* *Guard Publishing v. Lane County*, 96 Or App 463, 468-69, 744 P2d 499 (1989) ("[M]embers of the public are entitled to information that will facilitate their understanding of how public business is conducted."); *Turner v. Reed*, 22 Or App at 193 (those public records "where the only interest in confidentiality is to protect public officials from criticism of the manner in which they have discharged their public duties" are per se available for public inspection). Nevertheless, the Public Records Law does not mandate disclosure of all public records and information contained in those records, but provides various exemptions from disclosure, including ORS 192.502(4). OCCF has disclosed numerous records to you, including virtually the entire content of the five records that are the subject of your petition. We have carefully reviewed those five records and the redacted information. We do not find that, by redacting these small portions of information, OCCF has screened from review information that is essential to the public's understanding about the manner in which public officials discharged their public duties. Rather, we find that any public interest in disclosing the specific information that was redacted is outweighed by the public interest in enabling OCCF and the CASA Coordinator to obtain the type of candid information that is necessary for them to supervise the CASA programs statewide.

As to providing information about the reasons your application to become a CASA volunteer was denied, this situation is similar to that addressed by the Oregon Court of Appeals

in *Gray v. Salem-Keizer School District*, 139 Or App 556, *rev denied*, 323 Or 265 (1996). In *Gray*, the court considered two competing views of the public interest with respect to the confidentiality of references from former employers. The court found 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. The court also found a public interest in the ability of the 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. In weighing these competing interests, the court concluded that, under the facts of that case, the public interest in reducing the potential for hiring decisions based on secret, un rebuttable 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.

Applying that analysis to the matter before us,³ we must weigh the public interest in OCCF’s obtaining frank communication about the CASA volunteer screening process against the public interest in ensuring that OCCF’s review process is not based upon inaccurate or false information. Both of these interests are of significant weight, and the problem of balancing them is not one of easy resolution. Thus, the issue becomes whether the interest in enabling a CASA volunteer applicant to correct or verify the information overrides the public body’s need to have the most candid information available when it reviews the CASA volunteer screening process. If OCCF was to be deprived of such candid information because it could not assure citizens that their assessments and information would be kept confidential, the public interest would suffer the loss of frank and candid information related to the CASA volunteer screening process.

Considering both public interests in disclosure, we believe that to order disclosure in this instance would seriously hinder OCCF’s ability to supervise and operate the statewide CASA program, thereby crippling the effectiveness of a program that impacts the lives of abused and neglected children as well as the juvenile court system. The qualifications and screening process for individuals who, as CASA volunteers, will become officers of the court authorized to obtain highly confidential information about children and families and serve as an active participant in planning for vulnerable children, necessarily involves a high degree of public trust. The result of

^{3/} For purposes of this public records order, we do not analyze whether the public interest in ensuring unbiased hiring decisions that was at issue in *Gray* may be qualitatively different than decisions about selection of CASA volunteers.

ordering disclosure in this case would be that, in seeking information related to the qualifications and screening processes for CASA volunteers, OCCF could never commit to the citizens providing the information that the information provided would be kept confidential. Such a result would render meaningless the exemption in ORS 192.502(4) when OCCF wants to interview local CASA participants about the application of their volunteer screening and selection procedures.

Thus, weighing both the public interest in public accountability and unbiased decision making that might be served by disclosure against the public interest in ensuring that OCCF maintains the ability to obtain candid and forthright communications from the local CASA programs, we conclude that disclosure of the particular information that was redacted in this instance would cause harm to the public interest. OCCF has limited its redaction to either source-identifying information or the most limited highly confidential information, thereby providing to you the major portions of the records. We believe that in this situation, the overriding public interest in OCCF's obtaining complete and candid information requires that OCCF's promise of confidentiality must be kept. Keeping the promise in this case does not prevent you from otherwise obtaining the information you requested about the process used by OCCF in developing its January report.

Accordingly, we find that the first, second, four and fifth elements of ORS 192.502(4) have been met. We turn, then, to the third element in ORS 192.502(4), whether the information itself is of a nature that reasonably should be considered confidential. We consider this element separately with respect to each document.

a. Undated Handwritten Notes

The five pages of undated, handwritten notes record conversations from a meeting in which Ms. Smith participated. At the top of the first page, the other participants in that meeting are identified. OCCF disclosed to you the majority of the notes, which relate to the CASA's general policy and practice, and has now agreed to disclose additional portions to you. Only a small portion of pages one and three remain redacted because the information contained therein was submitted to Ms. Smith in confidence. Because the identity of the participants is known, *Gray's* procedure of redacting source-identifying information about the information communicated is not available to address the confidentiality concerns.

The first page of the notes includes "Staff concerns – confidentiality." We have reviewed this material and the material redacted on page three. In these instances, the information consists of staff concerns about the disclosure of confidential information and candid assessments of applicant qualifications. This information is clearly of a nature normally considered confidential. Therefore, we find that it meets the third element of ORS 192.502(4).

b. November 17 Handwritten Notes

The material redacted from the November 17 notes relates to the identity of two individuals expressing opinions at the meeting and one subjective comment made by them. In

Gray, the court concluded that an appropriate means of protecting the candor of employment references was deletion of “source-identifying information” from the reference forms. Given that the disclosed content of the notes indicates the participants stated concerns about “words being misrepresented” and some discussion about “safety,” we find that the source-identifying information about the individuals who expressed these subjective concerns is the type of information that is reasonably entitled to confidentiality. As to the redacted comment, we find that is the type of recommendation that reasonably is considered confidential. Accordingly, we find that the third element of ORS 192.502(4) is met as to the information redacted from the November 17 notes.

In this particular instance, we also find that disclosure of the redacted information from the November 17 notes would not serve any public interest, as it would neither facilitate the public’s understanding of how public business is conducted nor further unbiased decision making.

For the reasons stated above, we conclude that the remaining redacted information in both of the handwritten notes meets all five elements of ORS 192.502(4) and is exempt from disclosure under that statute. Accordingly, we deny your petition as to this material.

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

AGS05073

c: Becky Smith, OCCF CASA Coordinator
Mickey Lansing, OCCF Deputy Director