

February 5, 1998

Deborah M. Phillips  
Attorney at Law  
Phillips Reynier & Summerfield  
718 State Avenue  
Hood River Oregon 97031

Re: *Public Records Disclosure Order*  
*Oregon Occupational Safety and Health Division Records*

Dear Ms. Phillips:

This letter is the Attorney General's order on the petition of Hood Technology Corporation (HTC) for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505.<sup>1/</sup> The petition, which we received on January 29, 1998, asks the Attorney General to direct the Oregon Occupational Safety and Health Division (OR-OSHA) of the Department of Consumer and Business Services (DCBS) to make available:

Any and all documents which reflect the identity of the complainant(s) who alleged to OR-OSHA that Hood Technology Corporation had no restroom facilities on or after November 6, 1997 as well as any documents or records which reflect subsequent complaints or prior complaints involving Hood Technology Corporation excluding records or document relating to communicated by employee(s) of Hood Technology Corporation, if any.

For the reasons that follow, we respectfully deny the petition.

It is not clear from the above description whether HTC seeks the underlying documents themselves or only the identity of any complainants. We are informed by Penny Wolf-

---

<sup>1/</sup> You have filed the petition as the attorney for Hood Technology Corporation.

Deborah M. Phillips  
September 13, 2000  
Page 2

McCormick, Supervisor, OR-OSHA Portland Field Office, that the records request OR-OSHA received was not for the underlying documents but only for the complainant's identity and that OR-OSHA is willing to make available the documents with the name of the complainant and any other identifying information deleted.<sup>2/</sup> Lisa Soderstrom, OR-OSHA Records Management, also informs us that OR-OSHA has received only the one complaint. Accordingly, this order addresses only the information in the records that would permit identification of the complainant.

The Oregon Public Records Law confers a right to inspect public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. If a public record contains exempt and non-exempt material, the public body must separate the materials and make the non-exempt materials available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt materials. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

Two statutes are relevant to the requested information: ORS 654.062(4), which specifically addresses employee complaints of health or safety violations, and ORS 192.502(4), which exempts from disclosure under the Public Records Law information submitted in confidence. As discussed below, both of these statutes are predicated on there having been a request for confidentiality. We have reviewed the complaint records at issue here and find that the person submitting the complaint requested confidentiality in writing.

#### 1. ORS 654.062 - Employee Complaints

ORS 654.062 concerns employee complaints to the Department of Consumer and Business Services, including OR-OSHA, of any violation of law, regulation or standard pertaining to safety and health in the place of employment. Complaints that HTC had no restroom facilities would come within this statute, as would complaints concerning other health or safety conditions at HTC.

ORS 654.062(4) provides:

The director shall establish procedures for keeping confidential the identity of any employee who requests such protection in writing. Where such a request has been made, neither a written complaint from an employee, or representative of the employee, nor memorandum containing the identity of a complainant shall be construed as a public writing or record under ORS 192.001 to 192.170, 192.210 to 192.505 and 192.610 to 192.990.

---

<sup>2/</sup> If HTC wishes these redacted records, HTC should contact Ms. Wolf-McCormick at OR-OSHA's Portland Field Office.

Deborah M. Phillips  
September 13, 2000  
Page 3

In accordance with ORS 654.062(4), OR-OSHA strictly protects the identity of confidential employee complainants. OR-OSHA's administrative rules provide that the identity of complainants "shall be kept in confidence" if requested, in writing, by the complainant and that any OR-OSHA employee who fails to maintain that confidence is subject to disciplinary action. OAR 437-001-0290(1). *See also* OR-OSHA FIELD INSPECTION REFERENCE MANUAL, section C.1.b.(3) and (4). Thus, when an employee complainant requests confidentiality, OR-OSHA is unambiguously required to maintain that confidence. As noted above, with respect to the complaint at issue in this petition, the person submitting the complaint requested confidentiality in writing.

Additionally, ORS 654.062(4) provides that when a written request for confidentiality is made, written complaints from employees or memoranda containing their identity are not public records under ORS 192.210 to 192.505. Such records are therefore completely outside of the disclosure requirements of the Public Records Law, ORS 192.410 to 192.505. The Attorney General has no jurisdiction to order disclosure of records that are not subject to the Public Records Law. *See* ORS 192.450(1). Accordingly, to the extent the information sought is the identity of an employee complainant, we respectfully deny the petition.

## 2. ORS 192.502(4) - Information Submitted in Confidence

ORS 192.502(4) exempts from disclosure under the Public Records Law:

Information submitted to a public body in confidence and not 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 citizens to provide relevant information voluntarily to public agencies, with some reasonable assurance that the information will be kept confidential. This exemption is designed to protect the confidentiality of information which may lead to a further investigation. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 47 (1995).

There are five tests under this exemption: (1) the information must be submitted voluntarily; (2) the information must be of a nature that reasonably should be kept confidential; (3) the public body must have obliged itself in good faith not to disclose the information; (4) disclosure must cause harm to the public interest; and, (5) the person must have submitted the information in confidence. *Gray v. Salem-Keizer School District*, 139 Or App 556, 563 (1996) (citing ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 41 (1993)). The Oregon courts require each test to be satisfied before nondisclosure is justified. *Sadler v. Oregon State Bar*, 275 Or 279, 282-284 (1976) (disclosure required because no evidence that complainants submitted information on the condition of confidentiality); *Gray v. Salem-Keizer School District*, 139 Or App at 563 (disclosure required because public interest would not suffer if all source-

Deborah M. Phillips  
September 13, 2000  
Page 4

identifying information is deleted from files); *Jensen v. Schiffman*, 24 Or App 11, 18 (1976) (disclosure required because no evidence of a promise of confidentiality).

With respect to the information at issue in this petition, we find that each test is satisfied as to the identity of the complainant(s). First, the information was submitted voluntarily. A person is not required by law to file a complaint with OR-OSHA against an employer.

Second, the information is of a nature that reasonably should be kept confidential. A person who files a complaint against an employer, whether or not the person is employed by that particular establishment, has numerous and varied reasons for filing a *confidential* complaint -- potential employment termination, on-the-job discrimination, "black-balling," or harassment.

Third, DCBS has obligated itself and OR-OSHA in good faith not to disclose the information. DCBS has promulgated administrative rules governing complaints filed with OR-OSHA. These rules are part of OR-OSHA's program to promote safety and health in the workplace. OAR 437-001-0285 provides, in pertinent part:

*Any person may complain* to the Administrator of possible violations of any statute or of any lawful regulation, rule, standard or order affecting employee safety or health at a place of employment.

(Emphasis added.) OAR 437-001-290(1) provides:

*At the complainant's request in writing, their identity shall be kept in confidence.*  
Any employe of the Department who fails to maintain that confidence is subject to disciplinary action.

(Emphasis added.)

The OR-OSHA FIELD INSPECTION REFERENCE MANUAL clarifies that nonformal complaints may be filed by complainants who are not considered employees. *See* Section C.1.b.(3) and (4). Furthermore, the manual states that "[t]he identity of formal and non-formal complainants who wish to remain confidential will be protected in accordance with OAR 437-01-285(7), 290(1)."

By these rules and the manual, DCBS has obliged itself in good faith not to disclose the identify of complainants. In the materials attached to the petition, you argued that the above administrative rules are invalid because they are inconsistent with ORS 654.062(4). Although providing broader confidentiality than that required by ORS 654.062(4), and therefore not expressly authorized by that statute, the DCBS rules do not exceed that agency's authority.

DCBS has broad statutory authority to promulgate administrative rules to create an effective program to carry out the purposes of the Oregon Safe Employment Act (OSEAct). ORS

Deborah M. Phillips  
September 13, 2000  
Page 5

654.025(2) provides, in pertinent part:

The director and the Workers' Compensation Board may make, establish, promulgate and enforce all necessary and reasonable regulations, rules, standards orders and other provisions for the purpose of carrying out their respective functions under ORS 654.001 to 654.295 and 654.750 to 654.780, *notwithstanding any other statutory provisions which may be to the contrary.*

(Emphasis added.) The legislature further provided that the director "may do and perform all things, whether specifically designated in [the OSEAct] or in addition thereto, which are necessary or convenient in the exercise of any power, authority or jurisdiction conferred upon [him] by [the OSEAct]." ORS 654.025(5).

Given the above statutes, we do not believe that the DCBS rules exceed that agency's authority. Rather, we find that this agency, by valid rule, has obligated itself not to disclose the identity of complainants.<sup>3/</sup>

Fourth, disclosure would cause harm to the public interest. The public has a strong interest in protecting citizens who voluntarily provide relevant information to OR-OSHA. If these complainants are not protected, future investigations and voluntary complaints will be stifled at the expense of the safety of Oregon's workers.

The purpose of the OSEAct is set forth at ORS 654.003. That statute provides, in pertinent part:

The purpose of the Oregon Safe Employment Act is *to assure as far as possible* safe and healthful working conditions for every working man and woman in Oregon. \* \* \* To accomplish this purpose, the Legislative Assembly intends to provide a procedure which will:

\* \* \* \* \*

(4) *Provide an effective program*, under the Director of the Department of Consumer and Business Services, to enforce all laws, regulations, rules and standards adopted for the protection of the life, safety and health of employees.

(5) *Establish appropriate reporting* and research procedures which will help

---

<sup>3/</sup> We do not believe that agencies need to adopt rules to obligate themselves not to disclose information submitted in confidence. By its terms, ORS 192.502(4) recognizes that such a decision is within the general authority of state agencies. Concomitantly, adoption of such a rule merely meets one of the tests in ORS 192.502(4).

Deborah M. Phillips  
September 13, 2000  
Page 6

achieve the objectives of the Oregon Safe Employment Act, *identify occupational hazards and unsafe and unhealthy working conditions*, and describe the nature of the occupational safety and health problem.

(Emphasis added.)

ORS 654.003(4) expresses the legislature's intentions to provide an effective program to enforce standards for protection of employee safety and health. DCBS has decided by rule that complainant confidentiality is part of an effective occupational safety and health program. Confidential complaints are at the heart of OR-OSHA's program to assure as far as possible that unsafe and unhealthy working conditions for employees are reported to OR-OSHA.

OR-OSHA's decision to protect the identity of any person who complains in writing is supported by strong public policy concerns. Any person, be it an employee, a subcontractor, a general contractor, another employer or a casual observer must be allowed to file a confidential complaint with OR-OSHA. Complaints are a significant source of enforcement information. They provide OR-OSHA with specific information about existing unsafe and unhealthy places of employment.

OR-OSHA's experience is that it will receive more complaints if there is a process that keeps the identity of the complainant confidential. For example, assume a vendor enters into an employer's place of employment and is exposed to, or observes, an unsafe condition. Because the unsafe employer is a significant percentage of the vendor's total business, the vendor may fear that if the employer knows that he or she filed a complaint with OR-OSHA, the employer would select another vendor. Consequently, if there is not a process for the vendor to file a confidential complaint, the vendor may not file the complaint and employees will continue to be exposed to unsafe working conditions, depriving OR-OSHA of vital, perhaps life-saving, information.

Another example is a multi-employer place of employment with two subcontractors working together. Assume that Employer A is constructing the elevator shaft and Employer B is installing the electrical controls. OR-OSHA has set up a program by which either employer may file a complaint to OR-OSHA about hazards created by the other employer. Employer A may file a complaint regarding electrical hazards created by Employer B. Employer B may file a complaint regarding open flooring hazards created by Employer A. Assuming the employers have worked together for some time, and will continue to work together in the future, they may not file a complaint with OR-OSHA regarding the known hazards if the complaint is not kept confidential.

Because disclosure of the identity of complainants would likely reduce substantially the number of complaints that OR-OSHA receives, we find that disclosure would cause harm to the public interest.

Finally, the person must have submitted the information in confidence. As noted above, with respect to the information at issue in this petition, the person submitting the complaint

Deborah M. Phillips

September 13, 2000

Page 7

requested confidentiality in writing.

Having found that all five tests for the exemption in ORS 192.502(4) have been met, we conclude that to the extent the information sought is the identity of a non-employee complainant, the information is exempt from disclosure under ORS 192.502(4), and we respectfully deny the petition as to such information.

For these reasons we deny your petition to compel disclosure of information in OR-OSHA documents that would reveal the identity of the confidential complainant.

Sincerely,

STEPHANIE L. STRIFFLER  
Special Counsel to the  
Attorney General

JAA0295F

c: Penny Wolf-McCormick, Field Office Supervisor, Portland, OR-OSHA, DCBS

DEBORAH M. PHILLIPS  
ATTORNEY AT LAW  
PHILLIPS REYNIER & SUMMERFIELD  
718 STATE AVENUE  
HOOD RIVER OREGON 97031



PENNY WOLF-MCCORMICK  
FIELD OFFICE SUPERVISOR  
DCBS/OR-OSHA  
KRISTIN SQUARE 1  
9500 SW BARBUR BLVD STE 200  
PORTLAND OR 97219-5426