DAVE FROHNMAYER
ATTORNEY GENERAL
STATE OF OREGON

WILLIAM F. GARY
DEPUTY ATTORNEY GENERAL

# DEPARTMENT OF JUSTICE

Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400

September 12, 1988

Peter O. Hansen
Attorney at Law
1020 SW Taylor Street, Suite 700
Portland, OR 97205-2512

Re: Petition for Public Records Disclosure Order
Department of Insurance and Finance

Dear Mr. Hansen:

This letter responds to your August 25, 1988, petition for a public records disclosure order.[1] Specifically, you ask the Attorney General to order the Department of Insurance and Finance, and its employes, to make available for inspection, or to produce copies of, the following records:

"1. Responses to a survey questionnaire called Workers Compensation Study returned by [your] clients to the Department of Insurance and Finance; or

"2. In the alternative, make available all of the responses returned to the Department of Insurance and Finance."

For the reasons stated below, we respectfully deny your petition.

At the outset, we note that you wrote to Ted Kulongoski, Director of the Department of Insurance and Finance, in a letter dated July 18, 1988, requesting "a copy of each and every letter [the department] sent to each and every one of [your] clients and a copy of their response to [the department's] questionnaire." In response to that letter, Mr. Kulongoski sent to you a copy of the survey questionnaire along with samples of the June 22, 1988, and July 21, 1988, letters that accompanied the initial and follow-up mailings of the questionnaire. Mr. Kulongoski also offered to place you on a mailing list for the report summarizing the findings of the survey. With respect to your particular

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[1] We wish to acknowledge your courtesy in permitting us to exceed the statutory seven-day deadline for issuance of the order.

request, Mr. Kulongoski informed you that the computer tape from which the department's sample was taken for purposes of the questionnaire does not identify a claimant's attorney. Apparently, the department does not catalogue questionnaire respondents by attorney, nor is this information readily available to the department.

The Public Records Law requires "[t]he custodian of any public records, unless otherwise expressly provided by statute, [to] furnish proper and reasonable opportunities for inspection and examination of the records in the office of the custodian." ORS 192.430. The custodian may regulate inspection by "reasonable rules and regulations necessary for the protection of the records to prevent interference with the regular discharge of duties of the custodian." Id. The law does not obligate a records custodian to identify documents belonging to your clients that are not so referenced. Cf. 44 Op Atty Gen 239, 277 (1984) (Attorney General's Public Records and Meetings Manual) (Public Records Law does not require public body to create a public record); Letter of Advice dated June 1, 1987, to Jim Kenney, Supervisor, Urban Renewal Section, Department of Revenue (OP-6126) (same). Accordingly, we do not believe that the Department of Insurance and Finance must ascertain whether any of your clients responded to the survey. Your first alternative request must be denied.

With respect to your second alternative, your request is procedurally defective. Under ORS 192.450, "Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection." We understand that you did not ask the Department of Insurance and Finance to "make available all of the responses returned" to it pursuant to its questionnaire. Technically, therefore, your more general alternative request, i.e., that all responses to the questionnaire be made available to you for inspection, is not properly before this office pursuant to an ORS 192.450 petition. Only after you have been "denied the right to inspect or to receive a copy of any public record of a state agency" may you petition the Attorney General to issue a public records disclosure order. ORS 192.450(1).

Even if the technical defects in the present petition did not exist, we would conclude that the items identified in your Petition for Production are confidential records exempt from disclosure.

ORS 192.502(3) provides that public records exempt from disclosure under ORS 192.410 to 192.505 include "[i]nformation 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 suffer by the disclosure." We conclude that the documents identified in your Petition for Production fall within this exemption. We discuss the statutory elements individually.

(a) Information Submitted in Confidence

ORS 192.502(3) requires that the requested information must have been submitted in confidence. Both cover letters sent to potential respondents assured claimants that "the information you provide on this questionnaire will be held in the strictest confidence; only statistics for the entire group will ever be released. This will not affect any benefits which you may receive on your claim." Responses submitted to the department were forwarded in closed envelopes, and have been segregated and kept confidential by the department. From these facts it must be inferred that the information submitted in the returned questionnaires was provided in confidence. This inference is bolstered by the fact that much of the information may relate to an ongoing employment relationship, including opinions about immediate supervisors, which might jeopardize these relationships if disclosed. We have stated previously that, where an individual does not specifically request confidentiality, it is difficult to justify nondisclosure. See 44 Op Atty Gen at 251. We qualified that statement, however, by noting that the evidence may demonstrate an implied request for confidentiality that would satisfy the statute's requirements. Id. In this instance we conclude that the department's repeated and emphatic assurances of confidentiality, and the other facts noted, provide powerful evidence of such an implied request, and satisfy that element of ORS 192.502(3).

(b) Was the Information Submitted Voluntarily and not Otherwise Required by Law to be Submitted?

The facts are quite clear that the questionnaires that were completed and returned by the random sample of claimants were returned on a voluntary basis. Claimants have no statutory obligation to complete questionnaires of this type.

(c) Was the Information of a Type Which Reasonably Should be Considered Confidential?

As we have previously observed, the questionnaire asks for personal attitudes and information, including opinions by claimants regarding their immediate supervisors and the attitude of their employers in response to their workers' compensation

injuries and claim. We conclude that this information reasonably should be considered confidential. At a minimum, there exists a risk that unauthorized disclosure of the candid responses might, for instance, subject certain employes to recriminations from supervisors and others they may have criticized, thus jeopardizing employment relationships. If disclosed, this information also might be used in ongoing or future litigation, contrary to the assurances of the director in his cover letters of June 22, 1988, and July 21, 1988.

(d) The Public Body Obliged Itself in Good Faith Not to Disclose the Information.

It is self-evident from the language of the cover letters that accompanied the questionnaire that the Department of Insurance and Finance assured potential respondents that the information would be treated in confidence and never revealed except in the form of composite statistics. The department also assured claimants that providing a response would not affect any benefits they "may receive on [their] claim." We understand that the department made this promise of confidentiality in a good faith effort to elicit candid responses to the questionnaire. The facts satisfy this element of ORS 192.502(3).

(e) The Public Interest Would Suffer by Disclosure.

An important public interest would be harmed by disclosure of the requested documents. At stake is the department's development of statistical information to be used in the formulation of public policy and enhancement of agency programs. The public has a strong interest in preserving the agency's ability to obtain candid information in order to increase understanding of the workers' compensation system and to study the operation of the system to determine the need for, and provide factual support for, law reform proposals. This interest has been emphasized by the legislature's declaration of state policy to assure appropriate treatment of injured workers. See ORS 656.012.[2]

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[2] The legislature has declared that the objectives of the workers compensation law include the provision "regardless of fault, [of] sure, prompt and complete medical treatment for injured workers and fair, adequate and reasonable income benefits to injured workers and their dependents; [the provision of] a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceeding, to the greatest extent practicable * * * [the restoration of] the injured worker physically and economically to a self sufficient status in an expeditious manner and to the greatest extent practicable; and * * * [the encouragement of] maximum employer implementation of accident study, analysis and prevention programs to reduce the economic loss and human suffering caused by industrial accidents." ORS 656.012.

The agency needs the type of personal information at issue here in order to conduct a meaningful study, and it is unlikely that claimants will be willing to provide such personal information if their privacy is not respected. The department attributes the very high response rate -- nearly 50 percent -- to its assurances of confidentiality. We have no basis on which to second guess this opinion by the department's statistical experts.

On the other hand, the public interest in knowing how the department is operating or what the department is doing to evaluate the workers' compensation system is not enhanced substantially by public disclosure of the identity of the responding claimants or disclosure of responses that may reveal their identity.

We recognize that an agency has a duty to segregate and disclose nonexempt information, ORS 192.505, and that sometimes it is possible to delete an individual's name from a document and thereby preserve that person's privacy. See 44 Op Atty Gen at 252-52. Here, however, we conclude that such a procedure would not preserve confidentiality. The department believes, and we agree, that the responses to the questionnaire provide sufficient detail about the claimant's attitudes and the circumstances of a claimant's claim that, even if the claimant's name were deleted, a person familiar with the underlying facts would be able to determine the claimant's identity.[3]

Conclusion

For these reasons we respectfully deny your petition. You are, however, free to ask your clients if they are willing to have their questionnaires made available for disclosure. If so, they may identify themselves and waive any confidentiality as to their questionnaire responses on an individual basis.

Very truly yours,

James E. Mountain Jr.

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

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cc: Theodore R. Kulongoski, Director
Department of Insurance and Finance
21 Labor and Industries Building
Salem, OR 97310

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[3] Because of our resolution of your petition, we do not specifically address the personal privacy exemption, ORS 192.502(2). We believe, however, that that exemption probably would apply to most or all of the record information at issue here.