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May 11, 2000

John A. DiLorenzo, Jr.
Hagen Dye Hirschy & DiLorenzo, PC
Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2024

Re: *Petition for Public Records Disclosure Order*
SAIF Corporation Records

Dear Mr. DiLorenzo:

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,[1/] which we received on April 27, 2000,[2/] asks the Attorney General to rule on whether SAIF may refuse to disclose records that come within the exemptions generally available under ORS chapter 192 when the request for records was made under ORS 656.702.[3/] We interpret your petition as a claim that SAIF has constructively denied OSEP's request for those documents as to which SAIF intends to assert an exemption from disclosure based only on the Public Records Law's exemptions contained in ORS 192.501 and 192.502. For the reasons that follow, we find that SAIF has constructively denied OSEP's document request regarding documents that are exempt only under ORS 192.501 and 192.502. We further find that SAIF is entitled to rely on the Public Records Law exemptions contained in ORS 192.501 and 192.502, as well as the express exceptions to disclosure in ORS 656.702.

[1/] Your petition was filed on behalf of your client, Oregonians for Sound Economic Policy (OSEP).

[2/] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

[3/] We have already held that the Attorney General has authority under ORS 192.450(1) to consider a petition for disclosure of SAIF records requested under ORS 656.702. Public Records Order, April 20, 2000, DiLorenzo.

The Attorney General has jurisdiction to consider a petition under ORS 192.450(1), only when there has been a denial of a request to inspect or to receive a copy of a public record by a state agency. ORS 192.450(1); *see also Morse Bros., Inc. v. ODED*, 103 OR App 619, 798 P2d 719 (1990) ("The Public Records Law clearly contemplates that agencies have the opportunity to review the requested records and to act on the request before the Attorney General or the court can review the matter."). Your petition references a letter dated April 26, 2000, from Harlan Jones, SAIF Corporation's Vice President for Legal and Administrative Services, which states that "SAIF will not produce categories [of] documents that are exempt under the public records law." Mr. Jones advises us that although SAIF has expressed the "intention" to deny records that are exempt under ORS 192.501 and 192.502, SAIF staff are still reviewing documents and SAIF has not actually denied OSEP's request.[4/] We understand your position to be that SAIF is refusing to produce records or information exempt from disclosure under the Public Records Law exemptions in ORS 192.501 and 192.502 and that those exemptions do not apply because both ORS 192.501 and 192.502 list records that are "exempt from disclosure under ORS 192.410 to 192.505," whereas OSEP's request for the records was made under ORS 656.702. Therefore, you are seeking a review of SAIF's decision to deny records based solely on the Public Records Law exemptions. You further believe that it is appropriate at this time for the Attorney General to issue a public records order on the legal question of whether the exemptions in ORS 192.501 and 192.502 apply to a request made under ORS 656.702, even though no specific records have been denied, because SAIF is demanding payment of its costs for reviewing and segregating exempt and nonexempt records based on Public Records Law exemptions that you contend are inapplicable.

We have reviewed the correspondence between OSEP and SAIF and we find that SAIF has consistently taken the position that SAIF does intend to deny disclosure of records based on the exemptions in the Public Records Law, as well as ORS 656.702. Accordingly, we find that SAIF has constructively denied OSEP's inspection request with respect to documents for which SAIF will claim an exemption under the ORS 192.501 or 192.502, and that the legal question of whether SAIF is entitled to claim exemptions under ORS 192.501 and 192.502 is ripe for decision.[5/] We therefore turn to the question of whether the Public Records Law exemptions apply to a records request made under ORS 656.702.

We understand your position to be that ORS 656.702 provides the public an independent right to inspect SAIF records. Because ORS 656.702 mandates disclosure of SAIF records,

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[4/] We understand that on May 1, 2000, SAIF sent you documents responsive to a portion of OSEP's records request.

[5/] We stress that our decision in this public records order is on the limited issue of whether the ORS 192.501 and 192.502 exemptions apply generically to a records request made under ORS 656.702. Your petition states that OSEP has not requested any records that would fall under the employer account or claimant files exceptions from disclosure in ORS 656.702. Mr. Jones informs us that the records requested by OSEP do include records that are covered by the employer account exception in ORS 656.702. We are not resolving that dispute here. Nor are we ruling on the application of any exemptions to specific records.

subject to its own express exceptions, you contend that a request for records under ORS 656.702 is not subject to the exemptions contained in ORS 192.501 and 192.502, as these latter statutes only provide exemptions to disclosure under ORS 192.410 to 192.505.

Your argument requires us to interpret both ORS 656.702 and the Public Records Law. The primary rule of statutory construction is to ascertain legislative intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). In doing so, we first examine the text and context of the statute, which includes prior versions of that statutory language, *Krieger v. Just*, 319 Or 328, 336, 876 P2d 753 (1994), and other provisions of the same statute and related statutes. Only if the legislative intent is not clear from the statute's text and context, will we look to legislative history to attempt to discern that intent. *PGE*, 317 Or at 611-612.

ORS 656.702 provides in relevant part:

> (1) The records of the State Accident Insurance Fund Corporation, excepting employer account records and claimant files, shall be open to public inspection. * * *
>
> (2) Disclosure of workers' compensation claim records of the Department of Consumer and Business Services is governed by ORS 192.502(19).

Subsection (1) of this statute, which is the provision upon which you rely, does not reference the Public Records Law. Subsection (2) references one of the specific exemptions in the Public Records Law that applies to records of the Department of Consumer and Business Services (DCBS). It is not clear whether the legislature intended the reference to ORS 192.501(19) to identify that particular Public Records Law exemption as the only one applicable to SAIF records (i.e., to any workers' compensation claim records of DCBS within SAIF's possession) or whether the reference was a merely a reminder that any DCBS records in SAIF's possession must be considered under that specific exemption.

Turning to the Public Records Law, ORS 192.420 gives every person a right to inspect any public record of a public body "except as otherwise expressly provided by ORS 192.501 to 192.505." The only potentially relevant exemptions are in ORS 192.501 and 192.502. ORS 192.501 states: "The following public records are exempt from disclosure under ORS 192.410 to 192.505 unless the public interest requires disclosure in the particular instance * * * ." ORS 192.502 states: "The following public records are exempt from disclosure under ORS 192.410 to 192.505: * * * ." On their face, these provisions would appear to support your contention that the exemptions in ORS 192.501 and 192.502 do not apply when records are requested under some authority other than the Public Records Law itself.

The Public Records Law, including most of the exemptions now found in ORS 192.501 and 192.502, was enacted in 1973. Or Laws 1973, ch 794. The exemption provisions, which were in Section 11 of that Act, stated:

> Section 11. (1) The following public records are exempt from disclosure under *this 1973 Act* unless the public interest requires disclosure in the particular instance: * * * * *
>
> (2) The following public records are exempt from disclosure under *this 1973 Act:* * * * * * [.]
>
> (h) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under ORS * * * 656.702 * * * [.]

(Emphasis added.) Thus, the original law stated that the listed records were exempt "under this 1973 Act," not that they were exempt under ORS 192.410 to 192.505. When codified by Legislative Counsel, Sections 1 to 11 of the 1973 Act became ORS 192.410 to 192.505, and the reference in Section 11 to "this 1973 Act" was changed to "ORS 192.410 to 192.505." *See* ORS 192.501 (1973) and 192.502 (1973). That codification decision by Legislative Counsel did not change the legislative enactment. *See* ORS 173.160 (1973) ("In preparing editions of the statutes for publication and distribution, Legislative Counsel shall not alter the sense, meaning, effect or substance of any Act[.]").

A plain reading of the 1973 Act is that the legislature intended all of the public records exemptions listed in Section 11(1) and (2) to apply to all of the disclosure requirements of *that Act*. Section 33a of that 1973 Act amended ORS 656.702 as follows:[6/]

> The records of the [*board and the*] State Accident Insurance Fund, excepting [*payrolls and confidential reports*] **employer account records and dividend schedules and formulas**, shall be open to public inspection. * * *

Because the disclosure mandate in ORS 656.702, as amended, was in Section 33a of the Act, the legislature must have intended the Section 11 exemptions to apply to ORS 656.702. Nothing in any amendments to the Public Records Law since 1973 indicates that the legislature did not intend the exemptions originally enacted as Section 11 of the 1973 Act and now found in ORS 192.501 and 192.502 to apply to the disclosure mandate in ORS 656.702.

Other provisions of the Public Records Law support the conclusion that the exemptions in ORS 192.501 and 192.502 apply to records requests made under ORS 656.702. ORS 192.450(1) provides: "[A]ny person denied the right to inspect or receive 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." But the Attorney General's authority under ORS 192.450 to review agency denials itself arises "under 192.410 to 192.505." Consequently, when the Attorney General exercises his authority under ORS 192.450(1) to review public records and to determine if they may be withheld from public inspection, the Attorney General must consider the exemptions in ORS 192.501 and 192.502. Thus, the context of the Public Records Law as a

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[6/] The deleted language is shown in brackets and italics; the new language is in bold.

whole, specifically ORS 192.450, supports the conclusion that the legislature intended the exemptions in ORS 192.501 and 192.502 to apply to requests for "public records" whether made under the Public Records Law itself or under broad disclosure requirements in other statutes that parallel the Public Records Law.

If this were not the case, then SAIF and any agency with a statute containing broad disclosure requirements paralleling those of the Public Records Law[7/] could not refuse to disclose, in response to a public records request, records pertaining to litigation protected by ORS 192.501(1), personal medical records of employees protected by ORS 192.502(2), or even attorney-client privileged communications protected by ORS 192.502(9). We have found nothing in the Public Records Law to suggest that this is what the legislature intended.

Accordingly, based on the text of the Public Records Law as enacted by the legislature in 1973 and the context of that law, we conclude that SAIF may rely on the exemptions in ORS 192.501 and 192.502 in responding to OSEP's request for records under ORS 656.702.

The legislative history of the Public Records Law and ORS 656.702 supports our conclusion that the legislature intended the exemptions contained in ORS 192.501 and 192.502, as well as the exceptions in ORS 656.702, to apply to SAIF records. The original public records legislation was introduced at the request of the Attorney General Lee Johnson to, in his words, "have one all-encompassing public records law." Letter dated April 6, 1973, from Lee Johnson, Attorney General, to Thomas C. Enright, Executive Secretary, Oregon State Employees Association. In the original version of the bill, ORS 656.702 was repealed in its entirety because its disclosure mandate was subsumed by the mandate in the proposed legislation. HB 2157, § 34.

SAIF was concerned, however, about employer accounts and the records it kept on file. Charles Gill, Manager of the State Accident Insurance Fund, testified as follows regarding employer accounts:

> As you probably are aware SAIF is in a kind of unique position to say the least. As a state agency it finds itself with a, as a state agency competing with private enterprise, it is a very competitive arena. With well over one hundred insurance carriers in the state. We are concerned in two particular areas. The first involves the employer accounts and records that we keep. We have on file the records of each of the employers we insure. *These files consist of payroll reports, records*

[7/] A number of public bodies have statutes that generally make their records open to public inspection. *See, e.g.,* ORS 264.470(2) (all documents, correspondence and records pertaining to business of water supply districts shall be open to inspection as public records); ORS 371.342 (records of special road districts shall be available for public inspection); ORS 440.405(2) (all documents, correspondence and records pertaining to business of health districts shall be open to inspection as public records); ORS 536.040(1) (records of Water Resources Department shall be open to inspection of the public); ORS 545.185 (all records of irrigation district board of directors shall be open to public inspection); ORS 690.195 (records of State Board of Barbers and Hairdressers shall be open to inspection by the public).

> *and other information pertaining to the employer's operation, which probably in some other sections this same information would be considered private and excluded under SB 2157.* The Department of Employment collects similar information and I think theirs is excluded. I think also the, a couple of the other departments may collect the same kind of information of payroll records, that would be excluded. As you know, we collect premiums on the basis of payroll by classification. This means that we're going in and auditing an employers accounts and keeping those kind of records, which would normally be considered very private. And I'm sure we'd be concerned that a number of employers if they knew this information was public to their competitors. Or possibly to somebody else wanting to know information about their business. So our concern, from that aspect of our relationship with the employer and this kind of private information.

Testimony of Charles Gill, Joint Special Committee on Professional Responsibility (HB 2157), April 16, 1973, tape 6, side 1 at 148-158 (emphasis added).

Although Mr. Gill thought it probable that the employer account records would be covered under one or more of the exemptions in the bill, there was no certainty as to how the new Public Records Law exemption language would be interpreted by the courts. Based on these concerns, SAIF proposed that ORS 656.702 be amended rather than repealed so that the specific records that SAIF believed needed to be exempt from disclosure would be protected. Additionally, SAIF proposed an amendment to Section 11(2)(h) of the bill, which exempted from disclosure public records that were already confidential or privileged under other statutory provisions, to add ORS 656.702 to the list of those statutes that provided for specific exemptions from the Public Records Law. Or Laws 1973, ch 794, § 11(2)(h).[8/]

This history of HB 2157 indicates that the legislature wanted to enact a comprehensive law for public records that would apply to all government bodies, including SAIF. Thus, the legislature originally sought to repeal ORS 656.702, as it and other statutory provisions duplicated the provisions of the Public Records Law. Because of SAIF's concerns, the legislature did not repeal ORS 656.702, but added that statute, as amended to address SAIF's concerns, to the list of exemptions in the Public Records Law.

In summary, based on the text of the Public Records Law as enacted by the legislature and the context and history of that law, we conclude that the exemptions in ORS 192.501 and 192.502 apply to requests for records under ORS 656.702.[9/]

[8/] In 1987, the list of statutes providing additional exemptions from the Public Records Law was replaced with a reference to "Oregon law." Or Laws 1987, ch 764, § 3; *see* ORS 191.502(9).

[9/] As noted above, this public records order does not address whether any of the individual exemptions in ORS 192.501 or 192.502, or the exceptions from disclosure in ORS 656.702, apply to any of the specific records that OSEP has requested. Until SAIF has completed its review and denied inspection of specific records, this office cannot determine whether the particular records at issue may be withheld from public inspection under those exemptions or exceptions. When SAIF has completed its

Finally, we also note the Attorney General's authority to order an agency to permit inspection of public records is circumscribed by the terms of the Public Records Law and the exemptions in ORS 192.501 and 192.502. For example, if some of SAIF's records come within the trade secrets exemption in ORS 192.501(2), this office could not order disclosure of those records under ORS 192.450 because ORS 192.501(2) provides that those records are "exempt from disclosure under [192.450]." Thus, whether or not our conclusion that ORS 192.501 and 192.502 apply to requests for SAIF records under ORS 656.702 is correct, we nevertheless conclude that the Attorney General does not have authority under ORS 192.450(1) to order SAIF or any agency to disclose records irrespective of the exemptions in ORS 192.501 and 192.502.

Sincerely,

Peter D. Shepherd, for

DAVID SCHUMAN
Deputy Attorney General

AGS04754
c: Harlan Jones, SAIF

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review of the records and denied OSEP's request as to specific records, you or OSEP may again petition this office to review that denial decision.