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February 24, 2009

SENT VIA ELECTRONIC MAIL & REGULAR MAIL

Charlie Ringo, Attorney at Law
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Re: Petition for Public Records Disclosure Order:
DCBS/Insurance Division Records

Dear Mr. Ringo:

On February 17, 2009, we received your petition asking our office "to review the denial of a public records request made by Karen Kirsch on June 30, 2008."[1] You assert that the Insurance Division ("Division") of the Department of Consumer and Business Services ("DCBS") failed to make certain records available when, on October 1, 2008, it responded to Ms. Kirsch's request. We deny your petition as premature, because we conclude that Insurance Division understood Ms. Kirsch to be seeking discovery in connection with the administrative hearing she requested, rather than making a public records request. As we explain, that understanding was reasonable in light of the form and nature of Ms. Kirsch's request.

Oregon's Public Records Law, ORS 192.410 to 192.505, confers upon "any person" the "right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). The Public Records Law reflects a "strong and enduring policy that public records and governmental activities be open to the public," ***Jordan v. MVD***, 308 Ore. 433, 438, 781 P.2d 1203 (1989). As a consequence, exemptions from disclosure not only must be "express," ORS 192.420(1), but express exemptions "are to be narrowly construed." ***City of Portland v. Oregonian Publishing Co.***, 200 Or App 120, 124, 112 P3d 457 (2005).

[1] Your petition states, and we are aware, that you represent Ms. Kirsch in this matter.

Your petition encloses Ms. Kirsch's June 30, 2008 correspondence addressed to the Director of DCBS. As the correspondence clearly states, it is a "letter-petition for a hearing" related to an insurance rate increase approved by the Division. The petition is five pages long. In it, Ms. Kirsch explains her view that the Division should have disapproved the proposed rate increase under ORS 742.005(3), (4) and (6). Ms. Kirsch then describes the "Relief Sought" at the hearing she is requesting. It is in ***describing the relief she seeks***, on the fourth page of the petition, that Ms. Kirsch makes the request to which you refer:

> 3. That all documents filed by Regence in conjunction with its application and the record of all communications between Regence and any other person assisting Regence in this matter within the Division or the Department, and, all documents created by the Division or the Department in conjunction with this matter, including but not limited to all notes, worksheets, correspondence and memoranda be made available to me for inspection or copying effective as of the date the contested case hearing is noticed.

In a footnote, Ms. Kirsch explains that her request extended to "all materials which are currently sealed pursuant to a grant of confidentiality."

As indicated above, the Division understood Ms. Kirsch to be requesting discovery, rather than making a public records request. Thus, for example, the cover letter enclosing the Division's October 1, 2008 production of documents states that the documents are "provid[ed] in response to Karen Kirsch's ***discovery request*** in her June 30, 2008 letter" (emphasis added). The context for Ms. Kirsch's request – i.e., the fact that it occurs four pages into a five-page request for an administrative hearing on the same issue – demonstrates the reasonableness of the Division's position. Indeed, Ms. Kirsch's letter states that she should be given access "***effective as of the date the contested case hearing is noticed,***" (emphasis added) a statement that does not have any discernible connection to the Public Records Law, but makes sense in the context of discovery related to the requested hearing. The fact that Ms. Kirsch's letter explicitly seeks confidential materials similarly provides reason to think that the basis for her request was not the Public Records Law, but her anticipated role in the requested hearing. In sum, we think that the Division's belief that Ms. Kirsch was effectively seeking discovery related to the hearing was reasonable.

We acknowledge that a party's right to seek discovery in an administrative proceeding does not replace the party's rights under the Public Records Law. But the two types of requests require two different types of responses from public agencies. In responding to a discovery request, the focus is on relevance and privilege. *See*, ORCP 36B (discovery extends to "any matter, not privileged, which is relevant"). Is a particular document arguably pertinent to ***a material issue at the hearing***? If not, then production is not required; if so, then the remaining question is whether any privilege forms a basis for resisting production. A response to a public records request is not limited by the question of whether a particular document is relevant to any specific dispute; the questions are whether a given document fits within the scope of requested documents, and whether there is any express exemption applicable to that document. The first of these questions is generally broader than the question of relevance, and the second of these

questions implicates a list of statutory exemptions that incorporates, but goes well beyond, the evidentiary privileges.

In light of these differences, we do not believe that public agencies are required to treat every apparent discovery request as ***also*** being a public records request. That is why we view the Division's reasonable understanding of the nature of Ms. Kirsch's request as dispositive. If Ms. Kirsch's request had explicitly stated that it was made under the Public Records Law, or if the context was such that the Division reasonably should have understood the request to be made under the Public Records Law, the result would be different. Whatever Ms. Kirsch's subjective intent may have been in this case, we discern nothing that should have led the Division to conclude that the request was meant as a request for public records, and many reasons for the Division to have reasonably concluded that the request was for discovery.

We are aware of your view that the Division made improper determinations regarding the relevance of certain documents withheld from its October 1, 2008 production. We express no view as to the merits of that dispute, which is a discovery dispute properly resolved in the administrative proceedings. It is not a public records issue that ORS 192.450 authorizes the Attorney General to resolve.

Before closing, we note that on February 17, the same date you filed the present petition with our office, you requested that the Division provide you with the pertinent records under the Public Records Law.[2] If you are dissatisfied with the Division's response to that request, ORS 192.450 permits you to petition the Attorney General to review the Division's actions.

Your present petition, however, is respectfully denied as premature. Because the Division reasonably regarded Ms. Kirsch's request as a discovery request, rather than a public records request, Ms. Kirsch is not a "person denied the right to inspect or to receive a copy of any public record of a state agency" under the Public Records Law. Consequently, ORS 192.450 does not authorize the Attorney General to issue the order you seek.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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[2] We understand that you subsequently narrowed your request of the Insurance Division to cover only documents created between April 10 and April 30 of 2008.