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September 19, 1997

James Long, Reporter
THE OREGONIAN
1320 SW Broadway
Portland, OR 97201

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

Dear Mr. Long:

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 was received on September 10, 1997,[1/] asks the Attorney General to direct Oregon Occupational Safety and Health Division of the Department of Consumer and Business Services (OR-OSHA) to make available "reports, memos and other writings in your possession pertaining to the July 31, 1997 steelwork collapse at Portland International Airport." For the reasons that follow, we respectfully deny your petition.

We are advised by Lisa Guenther, an Administrative Secretary at OR-OSHA, that the agency received a telephone call on July 31, 1997, from Midwest Steel, Inc., informing OR-OSHA of the collapse of the parking structure addition at the Portland Airport and the resulting fatalities. The information you seek has been compiled or prepared by OR-OSHA in conjunction with its investigation of possible violations of the Oregon Safe Employment Act, ORS chapter 654, stemming from this telephone call from Midwest Steel.

ORS 192.501(17) exempts from disclosure under the Public Records Law, unless the public interest requires disclosure in the particular instance:

> Investigatory information relating to any complaint or charge filed under ORS chapter 654, until a final administrative determination is made or, if a citation is issued, until an employer receives notice of any citation[.]

[1/] The petition was sent by fax, arriving after the close of business on September 9, 1997. It was retrieved from the fax machine at 8:00 a.m. on September 10, 1997. We appreciate your agreeing to extend the time period within which we otherwise would be obligated to respond to the petition.

In interpreting ORS 192.501(17), our task is to discern the intent of the legislature. ORS 174.020; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). To do so, we examine the text of the statute as well as its context, which includes other provisions of the same statute and other related statutes. 317 Or at 610-11.

From the text of ORS 192.501(17), we infer that a "complaint or charge" is something preliminary to "a final administrative determination" or to OR-OSHA's issuance of "a citation." This interpretation is consistent with ORS chapter 654, which provides that:

> (2) * * * any employee or representative of the employee may complain to the [OR-OSHA] director or any authorized representatives of the director of any violation of law, regulation or standard pertaining to safety and health in the place or employment * * * .
>
> (3) Upon receiving any employee complaint, the director shall make such * * * investigations as the director considers reasonable and appropriate. * * *

ORS 654.062(2), (3).

ORS 192.501(17) exempts from disclosure investigatory information relating to a complaint or charge. The exemption does not cover the complaint or charge itself. *See Pace Consultants v. Roberts,* 297 Or 590, 595 (1984) (interpreting similar language in ORS 192.501(8)).

ORS 654.062(4) requires the OR-OSHA director to keep confidential the identity of any "employee" making a complaint who requests confidentiality, and provides that when such a request has been made, neither the written complaint from an employee or employee representative nor a memorandum containing the identity of the complainant shall be construed as a public record for purposes of the Public Records Law. Because the telephone call from Midwest Steel was not a complaint from an employee or employee representative, and is outside the scope of ORS 192.501(17), David Sparks, OR-OSHA Deputy Administrator, informs us that OR-OSHA will provide you with a copy of the OR-OSHA fatality intake record of that telephone call.

ORS chapter 654 expressly addresses "complaints" by employees or employee representatives. There is no indication in chapter 654, however, that the OR-OSHA director may not receive "complaints" from persons other than employees or employee representatives or that the director does not have authority to investigate complaints received from other persons. *See* ORS 654.025(5) (director "may do and perform all things whether specifically authorized by Oregon Safe Employment Act or in addition thereto that are necessary or convenient in the exercise of any power, authority or jurisdiction conferred upon [him by the Act]"). OR-OSHA has interpreted the word "complaint" in the context of the Oregon Safe Employment Act to mean:

> A written or oral report from an employee, employee representative *or other person* that an occupational safety or health violation may exist at a place of employment. * * *

OAR 437-001-0015(10) (emphasis added). We believe this to be a reasonable construction of the term "complaint" in ORS chapter 654, given the responsibility of the OR-OSHA director to "enforce and administer all laws, regulations, rules, standards and lawful orders requiring such employment and place of employment to be safe and healthful, and requiring the protection of the life, safety and health of every employee in such employment or place of employment." ORS 654.025(1). *See also* ORS 654.003 (policy of ORS chapter 654 is to "assure as far as possible safe and health working conditions for every working man and woman in Oregon"); ORS 654.025(2) (director may promulgate all necessary and reasonable rules for the purpose of carrying out Oregon Safe Employment Act, "notwithstanding any other statutory provisions which may be to the contrary").

Because the exemption in ORS 192.501(17) uses the broad phrase "complaint or charge filed under ORS chapter 654,"[2/] we conclude from its text and context that the proper interpretation of this phrase includes any type of report or notice to OR-OSHA from any person describing or alleging the possible violation of the Oregon Safe Employment Act or-OSHA's safety and health rules at a place of employment. This interpretation is consistent with the apparent purpose of the exemption to protect the integrity of OR-OSHA's occupational safety and health investigations. We conclude this to be the purpose of the exemption because it protects from public disclosure all information gathered during an investigation, but only until a final administrative determination or the employer receives notice of any citation. At that point, the investigatory information is no longer exempt from disclosure and must be disclosed upon request.

We have also reviewed the legislative history of ORS 192.501(17) for purposes of confirming our interpretation of this exemption. *See Nolan v. Mt. Bachelor, Inc.*, 317 Or 328, 335 (1993) (citing *State ex rel Juv. Dept. v. Smith*, 316 Or 646, 651 (1993) for the proposition that "when text of statute suggests a particular interpretation, court may look to legislative history for confirmation"). Scott Tighe, then Deputy Administrator of the Accident Prevention Division (APD) of the Department of Insurance and Finance, testified in support of House Bill 2192, which added ORS 192.501(17) to the Public Records Law, as follows:

> We are requesting passage of HB 2192 to ensure a fair and timely investigation of alleged violations of the Oregon Safe Employment Act (OSEAct) [now called the Oregon Safe Employment Act]. * * * A variety of reasons provide the justification for this request. These reasons are:

[2/] The term "charge" is not found in ORS chapter 654.

1. Consistency with federal standard operating procedures.

2. Protecting the rights of Oregon's employees.

3. Protecting the rights of Oregon's employers.

4. Allowing APD's occupational safety and health specialists the ability to conduct unobstructed inspections.

* * * * *

During the course of an investigation a variety of occupational safety and health hazards may be observed. Some of these hazards may be a violation of the OSEAct and the rest may be hazards but not a violation of the law. The safety and health specialist must make a neutral evaluation of the workplace and determine whether a violation of the Oregon Occupational and Safety Act has occurred.

The protection of Oregon's employees is paramount to APD enforcement of the OSEAct. Testimony (evidence) provided by the employees of a company is of significant importance to an occupational safety or health specialist's investigation. It is our contention that without the ability to ensure confidentiality employees will be reluctant to provide information for fear of possible reprisals by the employer or an aversion to publicity.

APD must ensure the rights of the employer during the course of an investigation. All violations observed during an inspection are alleged by the occupational safety or health specialist and subject to rebuttal by the employer. APD's allegations may or may not be substantiated. Hence, APD contends information relating to alleged violations of the OSEAct must not be made public until the issuance of a citation * * * .

Hearing House Judiciary Committee, January 17, 1989 (HB 2192), Exhibit G. *See also* Staff Measure Summary of HB 2192, January 19, 1989 (current lack of confidentiality for information gathered during occupational safety or health investigation "is considered an impediment to a complete investigation").

Midwest Steel's telephone call to OR-OSHA on July 31, 1997, was most likely prompted by OAR 437-001-0052, which requires employers to report fatalities. That call reported three fatalities from the collapse of steel beams at a construction site, clearly putting OR-OSHA on notice of possible violations of the Oregon Safe Employment Act at that employment site and instigating OR-OSHA's investigation. Accordingly, we believe that Midwest Steel's telephone call was a "complaint or charge filed under ORS chapter 654" for purposes of the exemption from disclosure in ORS 192.501(17). Moreover, we have been

informed by John Murphy, OR-OSHA Accident/Fatality Investigator, and Rocky Shampang, OR-OSHA Safety Compliance officer, that early in the course of the investigation, they received several employee complaints about possible safety violations at that employment site.

Therefore, all the investigatory information relating to these complaints are exempt from disclosure under ORS 192.501(17), unless the public interest requires disclosure in the particular instance. The petition alleges a public interest in disclosure because of the huge public investment in the airport expansion project and because "the records being sought by THE OREGONIAN bear not only on the accident, per se, but the Port's exercise of oversight, the conduct of its various contractors and consultants, and even the adequacy OSHA (sic)." The petition also notes that the information sought is time-sensitive because the construction of the parking facility is still underway and decisions are still being made. We do not find this public interest in disclosure to outweigh the public interest in confidentiality of the investigatory information pending the completion of OR-OSHA's investigation. The policy in ORS chapter 654 of ensuring safe working conditions and the purpose of ORS 192.501(17) of protecting the integrity of the investigation are paramount. The exemption in ORS 192.501(17) recognizes the need for confidentiality during the investigative phase, and expressly permits disclosure *after* a final administrative determination is made or, if a citation is issued, the employer receives notice of any citation. Thus, THE OREGONIAN will be able to obtain the information it seeks at that time.

Accordingly, we find that, except for the complaint by Midwest Steel, which OR-OSHA has agreed to disclose, the information you seek is investigatory information that is exempt under ORS 192.501(17). Therefore, we respectfully deny your petition.

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

JAA02644:DS/jh
c: David Sparks, OR-OSHA Deputy Administrator