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November 5, 2013

John Frohnmayer
38511 Kelly Road
Jefferson, OR 97352

Re: Public Records Disclosure Order
Oregon Real Estate Agency Records
DOJ File No. 919001-GA0117-13

Dear Mr. Frohnmayer:

This letter is the Attorney General's order responding to your petition asking that we direct the Oregon Real Estate Agency (REA) to disclose public records to you under the Oregon Public Records Law, ORS 192.410 to 192.505. The records in question consist of "a copy of the responses to our complaint filed by realtors, Gary Pounder and Ron Sattler." You had requested that REA provide you with a copy of those responses to your complaint. For the reasons that follow, we respectfully deny your petition.

The Oregon Public Records Law provides that "[e]very person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 195.501 to 192.505." Exemptions from the general disclosure requirement must be express in the law. Even express exemptions are construed narrowly, meaning that "if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails." *Colby v. Gunson*, 224 Or App 666, 676 (2008). A public body that asserts a statutory exemption from disclosure has the burden of demonstrating that the law permits the material in question to be withheld from public disclosure. ORS 192.450(1); ORS 192.490(1).

The REA relies on ORS 192.502(9)(a), which exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." Specifically, REA informs us that your complaint is subject to an open investigation. ORS 696.430 provides, in relevant part, that "[e]xcept for records of open investigations, all records kept in the office of the commissioner under authority of [relevant

laws] shall be open to public inspection." In your petition, you essentially argue that, although this provision may exempt records of open investigations from disclosure, REA may not rely on it to withhold information relating to an open investigation from the complainant. That argument proceeds from an unstated premise that, in the course of investigating your complaint, REA must necessarily provide you with information provided by the subject of its investigation.

If we agreed with your premise, we would likely grant your petition. Our office has generally recognized that some kinds of records must be made available to particular requesters even if the same records could be withheld from other requesters. To take the most obvious example, we have indicated that the "personal privacy" exemption of ORS 192.502(2) cannot be asserted against the individual whose privacy would be affected by disclosure. See ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2010) at 64.

In this case, however, we do not agree with your premise. In the course of conducting its investigation, REA may or may not conclude that sharing information with you will facilitate its investigation of your complaint. To the extent that REA determines that its investigation would be best served by sharing information with you, REA certainly may do so. But REA may also conclude that sharing some information with you during the course of its investigation would be unproductive or even counter-productive. Nothing in the statutory scheme or the implementing regulations (see OAR chapter 863 division 027) necessitates providing to complainants the responses made by the subjects of their complaints during the course of the investigation. We consequently conclude that, to the extent REA decides that it would not be helpful to share such information with claimants, claimants are no different than other members of the public who may not inspect records of open investigations.

Your petition is respectfully denied. It is possible that REA may decide that sharing some or all of the information you seek will assist its investigation. To the extent REA decides otherwise, the records you seek will become available once REA has concluded its investigation.

Sincerely,



MARY H. WILLIAMS
Deputy Attorney General

MCK:tmt/4756010
cc: Selena Barnes, REA