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DEPARTMENT OF JUSTICE

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January 21, 2014

SENT VIA EMAIL ONLY

Noah Bloom
J.W. Townsend, Inc.
3980 Seminole Trail
Charlotsville, VA 22911
noah@townsendlandscape.com

Re: Petition for Public Records Disclosure Order
Oregon Department of Agriculture
DOJ File No. 603004 GA0014-14

Dear Mr. Bloom,

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 through 192.505. Your petition, which we received on January 14, 2014, asks the Attorney General to order the Oregon Department of Agriculture (ODA) to provide:

> * * * brief accounts of all instances of *Cylindrocladium buxicola* found in Oregon. Each account will contain the name of the nursery, the city or town where the pathogen was found, and the date of record. This would be done for each individual instance of a positive test. For nurseries with multiple positive tests, each account would be described separately. For any positive tests that involved detection of the pathogen in a state besides Oregon, I request both the name and address of the Oregon nursery and the name and address (city and state) of the out-of-state nursery in question. For all accounts, an informal telephone or email description is sufficient and full copies of inspection notes are not needed unless such information is easier for Mr. Hedberg or his staff to provide.

Based on your letter and a conversation with ODA, it appears that you made your request orally in a telephone call with Mr. Jan Hedberg on January 13, 2014. He emailed you that same day stating that he would need "*a written request* passed off on by our Justice Department" before he could release to you information on nurseries that had tested positive for the plant

pathogen. (Emphasis added). In that same email, Mr. Hedberg also provided a list of Oregon nurseries participating in the "NPB program."

Mr. Hedberg has informed the Department of Justice that his response was not intended as a denial of your request for documents, but was intended to direct you to resubmit your request in writing as required by ODA's rules governing public record requests. *See* OAR 603-001-0135(1) ("[r]equests for inspection or copying of public records shall be made either via FAX, via email, or in writing * * * "); ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2011) ("MANUAL") at 8 ("a public body may require the records request to be in writing"). As Mr. Hedberg indicated, once he had received your written request, he planned to "run the request by his supervisors and the Department of Justice" before responding. From your petition, it appears that you understood Mr. Hedberg's response to be a denial of your request. However, we conclude that was not the case. ODA did not deny your request for records. ODA simply asked that you submit your request in writing and informed you that it would ask DOJ for advice regarding your request.

Public bodies often must consult with legal counsel regarding public record requests. Briefly postponing the disclosure of records for that purpose does not violate the Public Records Law. MANUAL at 22. ODA did not actually or constructively deny your request. *See* Public Records Order, May 9, 1989 (when agency was consulting legal counsel about a records request, it had not refused to disclose the records and a petition to the Attorney General was premature and therefore denied); *Morse Bros., Inc.* v. *ODED*, 103 Or App 622 (1990) ("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 courts can review the matter.").

In your petition, you additionally request "the right to access records of all future accounts of *Cylindrocladium buxicola* outbreaks in the State of Oregon for a period of five years." Our office has long held that public bodies are not required to honor ongoing records requests:

> A public body is only required to make [available] nonexempt records that are in the public body's possession at the time the request is made. Persons seeking to inspect or to obtain copies of records of a public body on a continuing basis may be required to make successive requests for records.

MANUAL at A-1.

Because ODA did not deny your request for any records and because you seek records that are not yet in ODA's possession, we respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

c: Bruce Pokarney, Oregon Department of Agriculture