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January 14, 2014

SENT VIA EMAIL ONLY

Nick Budnick
The Oregonian
1320 SW Broadway
Portland OR 97201
nickbudnick@gmail.com

RE: Petition for Public Record Disclosure Order
Oregon Health Insurance Exchange - Cover Oregon
DOJ File No. 989001-GA0001-14

Dear Mr. Budnick,

This letter is the Attorney General's order in response to your petition asking our office to direct Cover Oregon to disclose certain public records to you under the Oregon Public Records Law, ORS 192.410 to 192.505. Specifically, you seek the following public records:

1. [A]ll emails between Rocky King's coveroregon.com address and both the personal or state email accounts for John Kitzhaber, Mike Bonetto and Sean Kolmer; and
2. [E]mails from the accounts of Aaron Karjala and Amy Shelton since Sept 15 that include the words "blocker" [or] "blockers" * * * -- in the text, subject or in an attachment.[1]

[1] Your request initially included emails whose body, subject line or attachments included the word "jira" as well, but you subsequently modified your request to exclude that term.

You requested the records in question on December 18, 2013. On December 31, Cover Oregon sent you an email reading as follows:

> We are working diligently to fill your public records request * * *. We will fulfill your request as soon as practicable and without unreasonable delay.
>
> We have received many public records requests related to the health insurance exchange. The volume and breadth of the various requests, the need to consult with legal counsel and review for security exposures, and the contractual obligations to third parties involved requires significant time and staff capacity.
>
> The time and staff capacity involved must be balanced with the resources necessary to achieve our core mission – enrolling Oregonians in health coverage and completing work on our online exchange.
>
> We will notify you as soon as possible with a more definitive ETA for fulfilling your request.

Your petition followed.

In your petition, you assert that Cover Oregon has effectively denied your request by unreasonable delay. You argue that Cover Oregon is choosing to devote inadequate resources to processing public records requests, and suggest that Cover Oregon has recently decided to become less responsive to public records requests in order to improve negative press coverage surrounding the failed launch of the online exchange.

For now, your petition is respectfully denied.

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 192.501 to 192.505." ORS 192.420(1). Although the law does not provide specific timeframes within which public bodies are required to respond to requests, the law does require that they "furnish proper and reasonable opportunities" for members of the public to examine public records. ORS 192.430(1). Pursuant to this provision, "[T]he public is entitled to inspect nonexempt records as promptly as a public body reasonably can make them available." ATTORNEY GENERAL'S PUBLIC RECORDS & MEETINGS MANUAL (2011) at 11. We have indicated that ten working days should generally be sufficient under normal circumstances, but acknowledged that "[i]n some case[s] more time – even significantly more time – may be required." *Id.*

Based upon our conversations with Cover Oregon concerning your petition, Cover Oregon agrees that its processing of public records requests slowed in late November and early December. Cover Oregon attributes the slowdown to essentially three causes.

First is the concern that disclosures might violate the agreement between Oracle and Cover Oregon. Cover Oregon has worked with the Department of Administrative Services (DAS), the Oregon Health Authority (OHA), the Governor's office, and the Department of Justice to create a process to facilitate legal review of the records that have been requested and to ensure consistency. This is reasonable.

Second, Cover Oregon acknowledges that the priorities of its Communications, Outreach and Marketing division (Communications), and, to a lesser extent, its Information Technology division (IT), shifted somewhat around early December. Currently, Cover Oregon prioritizes three activities above public records requests:

(1) Enrolling Oregonians in health insurance plans.
(2) Creating a functional health exchange website.
(3) Publicly disseminating information Oregonians need in order to be able to successfully obtain health insurance.

Cover Oregon essentially agrees that its processing of public records requests has slowed as it has focused more heavily on the third of these priorities. We agree these priorities are central to Cover Oregon's core functions.

Finally, Cover Oregon cites the sheer volume and complexity of the public records requests it has received as contributing factors in its inability to process requests within the timeframe that our office would generally expect. Cover Oregon states that, as of January 2, 2014, Cover Oregon had received 85 public records requests since September 2013. As of the same date, Cover Oregon had 25 public records requests outstanding. A number of the requests seek emails of various natures, and the tools available to Cover Oregon's Communications staff make such requests time consuming to process.

Although Cover Oregon's explanation seems largely sensible, information presented to us in the petition process has nevertheless suggested Cover Oregon could be doing more to make public records available more promptly. For example, we learned that Cover Oregon has four staff, plus its Chief Communications Officer and an administrative assistant, assigned to work in the area of media relations,[2] but that only one manager and one staff person were tasked with compiling public records in response to requests. While some of those other staff appear to be working on communications that directly and significantly advance Cover Oregon's core mission, it appears other members of the staff have been assigned to other tasks, such as creating messages to improve Cover Oregon's image. We must be clear: responding to public records requests is a statutory obligation and has to take precedence over spending time pitching image-enhancing messages to the media.

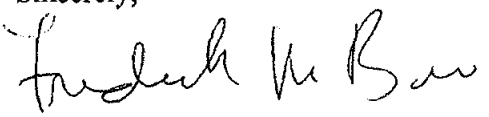
[2] Other Communications, Outreach and Marketing staff are directly involved with processing applications, others are working on helping people sign up for coverage, and still others are currently assigned to customer service work.

We have also been presented with documents indicating Cover Oregon has significant flexibility in terms of spending its budget to meet its operational needs.

Confronted with your concerns and ours, Cover Oregon has now agreed to take concrete additional steps to insure its public records are available for inspection as promptly as they reasonably can be. Specifically, Cover Oregon has committed to training two additional staff to compile public records, including emails, in response to requests, and making those staff available to compile the records. DAS personnel soon will be able to provide additional assistance with requests for emails. Furthermore, Cover Oregon has committed to January 24 as the date by which it will have eliminated its existing backlog of public records requests – with the caveat that circumstances (*i.e.* legal and security review, and potential disputes with Oracle) may complicate Cover Oregon's efforts in some instances.

Under the totality of the circumstances, we do not agree that Cover Oregon has constructively denied your request. While Cover Oregon's prioritization has not been fully consistent with its statutory functions and obligations, we are not persuaded by your suggestion that Cover Oregon has been actively working to avoid disclosure of public records. In light of Cover Oregon's commitment to devote additional resources to its public records process, and its willingness to set a target date for eliminating its sizable backlog of requests, we respectfully deny your petition. We intend to monitor the progress Cover Oregon makes in fulfilling all outstanding public records requests.

Sincerely,



FREDERICK M. BOSS
Deputy Attorney General

c: Amy Fauver, Cover Oregon