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DEPARTMENT OF JUSTICE

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January 9, 2014

SENT VIA EMAIL ONLY

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

Re: Petition for Public Records Disclosure Order
Oregon Health Exchange aka Cover Oregon
DOJ File No. 989001-GA0001-15

Dear Mr. Budnick,

This letter responds to your petition of January 2, 2015. You ask our office to order Cover Oregon to disclose certain records to you under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition seeks copies of certain emails that Cover Oregon initially withheld in response to your request for public records, citing the disclosure exemption of ORS 192.502(1)[1]. You also seek unredacted versions of emails from which various personal email addresses were redacted based on the disclosure exemption of ORS 1952.502(2)[2]. For the

[1] ORS 192.502(1) exempts from required public disclosure "Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure."

[2] ORS 192.502(2) exempts from required public disclosure "Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy."

reasons that follow, we partially deny your petition as moot, and otherwise dismiss it for lack of authority to consider it.[3]

Cover Oregon has informed us that it will today provide you with the withheld emails; to that extent your petition is moot. However, Governor Kitzhaber's office asserts the right to withhold some of the information appearing in the emails, along with the email addresses previously redacted, under the disclosure exemptions of ORS 192.502(1), ORS 192.502(2) and ORS 192.502(9)(a). Cover Oregon informs us that the records – all of which are emails involving the governor or gubernatorial staff – will be redacted according to the instructions of the governor's office. Pursuant to ORS 192.480, our office lacks authority to consider your petition following the claim by the governor's office of the right to withhold certain information:

> In any case in which a person is denied the right to inspect or to receive a copy of a public record in the custody of an elected official, or *in the custody of any other person but as to which an elected official claims the right to withhold disclosure*, no petition to require disclosure may be filed with the Attorney General or district attorney, or if a petition is filed it *shall not be considered by the Attorney General or district attorney after a claim of right to withhold disclosure by an elected official*. In such case a person denied the right to inspect or to receive a copy of a public record may institute proceedings for injunctive or declaratory relief in the appropriate circuit court, as specified in ORS 192.450 or 192.460[.]

(Emphasis added.) Thus, to the extent that the documents are being provided to you in redacted form based on the governor's exemption claims, our office lacks authority to consider your petition. For those reasons, your petition is partially denied as moot, and otherwise dismissed because we lack authority to consider it.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

cc via email only:
Ariane Holm Le Chevallier, Cover Oregon
Tom Graham, Cover Oregon

[3] Your petition also notes that Cover Oregon withheld some emails based on the lawyer-client privilege of ORS 40.225, incorporated into the Oregon Public Records Law by ORS 192.502(9)(a). But you did not specifically ask that we order those emails disclosed. In any event, our review of them indicates that the emails withheld on the basis of privilege are, in fact, privileged and there for exempt from disclosure.