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September 1, 2016

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2220 NW Quimby
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Christie Scott
Oregon Liquor Control Commission
9079 SE McLoughlin Blvd
Milwaukie, OR 97222

Re: Petition for Public Records Disclosure Order
Oregon Liquor Control Commission
DOJ File No.: 845200-GA0111-16

Dear Mr. Jaquiss and Ms. Scott:

This letter is the Attorney General's order responding to Mr. Jaquiss's August 25, 2016, petition for disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505. That petition asks the Attorney General to order the Oregon Liquor Control Commission (OLCC) to produce the aggregate number of drink containers turned in for redemption of deposit in each of the past five years.

As discussed below, we conclude that this aggregate number is not exempt from disclosure under ORS 459A.718(6)(d), and thus order OLCC to produce the requested data. While that exemption prohibits OLCC from disclosing beverage container return data provided by each distributor[1], it does not expressly prohibit OLCC from disclosing the aggregate of that data. Because exemptions must be expressly stated and narrowly construed, that aggregate data is not exempt from disclosure.

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[1] Throughout this order, we use "distributor" as shorthand for distributors, importers, and distributor cooperatives.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions contained in ORS 192.501 to 192.505. *See* ORS 192.420(1). In addition to the express exemptions contained in those sections, any other information that is confidential, privileged, or prohibited from being disclosed under other Oregon laws is also exempt from disclosure. ORS 192.502(9)(a). Any person denied the right to inspect or to receive a copy of a public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.450(1). The agency carries the burden to sustain any such denial. *Id.*

This petition arises out of the operation of the Oregon Bottle Bill, which requires consumers of bottled water, beer, and carbonated soft drinks to pay a five-cent deposit for each container they purchase from retailers; consumers can then obtain a refund of that deposit by returning the empty containers to redemption centers. ORS 459A.705(1). However, OLCC must raise that five-cent deposit to ten cents if the percentage of containers redeemed by consumers falls below 80%. ORS 459A.705(2)(a).

To allow OLCC to calculate that percentage, each beverage distributor must annually submit data showing how many beverage containers it sold and how many were redeemed. ORS 459A.718(5)(b)–(c). Each distributor submits this data by type of beverage container; that is each distributor submits the number of glass containers it sold and the number of glass containers that were redeemed, and then the corresponding numbers for plastic and metal containers. OLCC then must calculate, for each distributor, what percentages of glass, plastic, and metal containers were redeemed and post these percentages to its website.[2] ORS 459A.718(6)(a)–(b). OLCC must also calculate the aggregate percentages for each type of container across all distributors, and the aggregate percentage for all containers, regardless of type, and post these percentages to its website. ORS 459A.718(6)(c).

This aggregate percentage for all containers is the key percentage used to determine whether OLCC must raise the container deposit to ten cents. While OLCC is required to post that percentage to its website, it is not required to post the underlying aggregate numbers used to calculate that percentage.

OLCC denied Mr. Jaquiss's request for these underlying numbers, citing ORS 459A.718(6)(d): "Except for the percentages [required to be posted to OLCC's website], the commission may not disclose any information *provided by a distributor* [under ORS 459A.718(5)]" (emphasis added). While this exemption explicitly applies to the individual numbers submitted by each distributor, it does not explicitly apply to the aggregate numbers that OLCC subsequently calculates in order to arrive at the posted percentages. Those aggregate numbers are not "provided by" any one distributor, and cannot be derived from information provided by any one distributor. While the individual numbers are exempt presumably because

[2] These percentages are available under the heading *Beverage Container Return Data* at http://www.oregon.gov/OLCC/pages/bottle_bill.aspx.

they are sensitive business information,[3] the aggregate numbers do not constitute the sensitive business information of any single distributor, and disclosing them would not allow the general public to reverse engineer the information submitted by individual distributors.

To the extent that there may be some ambiguity about whether this exemption applies to the aggregate numbers, Oregon's appellate courts have repeatedly emphasized that exemptions from disclosure are to be narrowly construed. *E.g.*, *Colby v. Gunson*, 224 Or App 666, 675–76 (2008) (explaining that ORS 192.420(1) requires exemptions to be expressly stated). This narrow construction rule favors disclosure and "means that, if there is a plausible construction of a statute favoring disclosure of public records, that is the constructions that prevails." *Id.* at 676.

Here, this rule of narrow construction leads to the conclusion that the requested aggregate data is not exempt from disclosure. We think it is plausible to understand the provision to protect information submitted by single distributors from being disclosed to the public (and to competitors), rather than to prevent Oregonians from knowing what volume of refunds are actually paid across the entire state. Therefore, we grant Mr. Jaquiss's petition and order OLCC to produce the data within seven days. ORS 192.450(2). If OLCC does not intend to comply with this order, ORS 192.450(2) requires it to give notice of intent to institute proceedings for injunctive or declaratory relief within that seven day period.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:nog/DM7654013
c: Jesse Sweet, OLCC

[3] ORS 459A.718 was enacted as part of Senate Bill 1508 (2012). In considering this petition, our office reviewed legislative history materials, including verbal and written testimony to, and discussion by, the relevant legislative committees, relating to that enactment. It does not appear that the purpose of the disclosure prohibition was legislatively discussed.