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Oregon Liquor Control Commission
9079 SE McLoughlin Blvd
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Re: Joint Petition for Public Records Disclosure Order
Oregon Liquor Control Commission
DOJ File No. 845200-GA0010-19

Dear Mr. and Mrs. Casey Ward and Ms. Gomez:

This letter is the Attorney General's order responding to Mr. and Mrs. Ward's joint petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Their petition, which we received February 6, 2019,[1] asks the Attorney General to order the Oregon Liquor Control Commission (OLCC) to disclose certain records relating to Casey Ward's employment application background check. For the reasons that follow, we grant the petition in part and deny it in part.

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(1). The law is a disclosure law, and exemptions from disclosure must be express. Even express exemptions are to be narrowly construed, 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). When a public record contains both exempt and nonexempt information, the

[1] We thank the Wards for granting an extension to the deadline to issue this order.

public body must separate and disclose the nonexempt material. ORS 192.338. 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 192.411(1). The agency carries the burden to sustain any such denial. *Id.*

a. Background

The Wards' joint petition stems from separate, but identical records requests they submitted to OLCC on December 10, 2018, for:

> Records with the Oregon Liquor Control Commission's Office relating to the Liquor Inspector application background check of Casey Ward. Specifically, the reason and supporting documentation for background check failure of Casey Ward in December 2018.

OLCC initially denied the request because Mr. Ward signed a document as part of the application process that, according to OLCC, waived his right to inspect any information developed during the investigation. The Wards appealed this determination on January 11, 2019, requesting the Attorney General order OLCC to disclose any nonexempt records relating to Mr. Ward's background investigation. OLCC subsequently agreed to provide the requested records, subject to the redaction of otherwise exempt information. In light of OLCC's agreement, we denied the Wards' initial petition as moot. *See* Public Records Order, January 25, 2019, Ward.

On February 1, 2019, OLCC replied to the Wards' initial records request by disclosing two pages of information, which consisted of the first and last pages of Mr. Ward's 20-page OLCC background investigation report. OLCC noted that it withheld material that is exempt from disclosure as a trade secret (ORS 192.345(2); test and examination material (ORS 192.345(4)); internal advisory communications (ORS 192.355(1)); and as information submitted in confidence (ORS 192.355(4)). OLCC also reiterated its position that Mr. Ward waived his right to any information submitted to OLCC in confidence.

In light of OLCC's reply, the Wards filed a new joint petition alleging that OLCC improperly withheld nonexempt information. They contend that none of the exemptions cited by OLCC apply to the records they seek. Mr. Ward also argues that the purported waiver he signed is ambiguous, unconscionable and unenforceable. Mrs. Ward argues that her husband's purported waiver – insofar as it may be enforceable against him – is not binding upon her because a third party cannot waive her statutory rights.[2] Finally, information in the petition suggests to us that the Wards and OLCC understood the scope of the Wards' request differently. For example, Mr. Ward indicates he provided 159 pages of documentation to OLCC as part of

[2] We note that Mr. Ward provided OLCC written consent to disclose information to Mrs. Ward that might otherwise be exempt from disclosure to her as an unreasonable invasion of his privacy. *See* ORS 192.355(2).

the background investigation that, he implies, should have been responsive to his records request. Yet it appears OLCC considered the background investigation report itself to be the only record responsive to the Wards' request.

b. Scope of the Request

In response to the Wards' joint petition, we contacted Laura Gomez, OLCC Director of Human Resources. Regarding the scope of the initial request, OLCC determined that the 20-page background investigation report was the only record responsive to the Wards' specific request for "the reason for background check failure of Casey Ward in December 2018." She explained that this report was the only record OLCC hiring authorities considered before acting upon Mr. Ward's application. She also noted that OLCC does not have any other records that clearly address its decision to deny Mr. Ward's application. Under the circumstances, we conclude that OLCC's determination about the scope of the Wards' request was reasonable.[3]

c. Waiver

We now turn to OLCC's claim that Mr. Ward waived his right to inspect any records relating to his background investigation. OLCC's position is based upon on a document Mr. Ward signed as part of the application process entitled "Authorization to Release Information and Waiver Liability" ("Authorization"). This document expressed Mr. Ward's permission and direction to various references to provide information requested as part of the background investigation process. It also expressed his agreement to indemnify and hold harmless any person against claims arising from any information they provide to OLCC. By signing the Authorization, Mr. Ward also accepted the following provision: "I have specifically waived any rights I may have to review or inspect any and all of the information developed in this investigation, so your responses will remain completely confidential."

We conclude that this is not an appropriate forum for resolving the waiver issue. Our job is to determine whether the public records are or are not exempt from disclosure. We are not a court, which would have the authority to adjudicate the validity and scope of this purported waiver. Nevertheless, we regard the signed Authorization as some evidence that the information provided by references is of a nature that should be kept confidential and that Mr. Ward promised those references confidentiality.

d. Information Submitted in Confidence

OLCC claims that certain information contained in the report was submitted in confidence and is therefore exempt under ORS 192.355(4). Specifically, OLCC points to 32 comments from personal and professional references that, according to OLCC, were submitted in confidence.

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[3] The Wards may, of course, submit a new request to OLCC for any additional records they may want.

ORS 192.355(4) exempts from disclosure:

> Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

The purpose of this exemption is to encourage the voluntary submission of information to public bodies with some reasonable assurance that it will be kept confidential. *See Attorney General's Public Records and Meetings Manual* at 82 (2014) ("*Manual*"). The prerequisites for exemption under ORS 192.355(4) are:

1. The source must have submitted the information on the condition that it would be kept confidential.

2. The source must not have been required by law to provide the information; i.e., the information was submitted voluntarily.

3. The information itself must be of a nature that reasonably should be kept confidential.

4. OLCC obliged itself in good faith not to disclose the information; and

5. The public interest would suffer by the disclosure.

We have no problem concluding that these comments were submitted voluntarily and that OLCC obliged itself in good faith not to disclose them.[4] However, the Wards correctly note that OLCC has not provided any evidence that the sources of these comments actually requested confidentiality.[5] And if we take at face value OLCC's claim that the comments were submitted in confidence, we nevertheless find that 30 of the 32 comments are favorable and generally not of a nature that reasonably should be kept confidential.

Regarding the final criterion under ORS 192.355(4), OLCC asserts that disclosure would chill former employers and personal references from providing candid information about applicants in the future. This, in turn, could harm the public interest because it may result in the

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[4] In this regard, we observe that Mr. Ward also signed documentation acknowledging that: "The OLCC obliges itself not to disclose background information submitted in confidence if the provider requests confidentiality, or where required or allowed by law, as there is a strong public interest in obtaining complete and accurate background information on an application."

[5] We understand that the form OLCC used to solicit information from background sources asked "[w]ould you like your responses on this questionnaire to be confidential to the extent permitted by law, and not released to the candidate, if they request disclosure?"

hiring of employees who are poorly suited for such sensitive positions. The Wards counter that the public has a greater interest in verifying the accuracy of the information OLCC considered to ensure that its hiring decision was not based on unfounded allegations or innuendo.

The Oregon Court of Appeals addressed these competing views of the public interest in *Gray v. Salem-Keizer School Dist.*, 139 Or App 556 (1996). The court concluded that even where an employment reference has submitted information in confidence, the public interest will not suffer by the disclosure of the information if source-identifying information can be redacted. *Id.* at 565. The court reasoned that:

> To the extent that the District's "chilling effect" concern is well-founded, that concern can only pertain to sources' names or to information tending to disclose their identities. We perceive no reason *** why the disclosure of the reference forms, with source-identifying information deleted, would deter future sources from submitting candid evaluations to the District.

Id. at 566. *See also* Public Records Order, February 9, 2000, Schneiderman; Public Records Order, July 17, 1997, Wilker; and Public Records Order, Jan 15, 1997, Burr (all applying the court's reasoning to information submitted in confidence by employment references). Consistent with the court's reasoning, we conclude that the public interest would not suffer by the disclosure of the 30 favorable comments if source-identifying information is redacted. Accordingly, this information must be disclosed.

We find that the two remaining comments – which were more candid and less favorable to Mr. Ward – are of a nature that they reasonably should be kept confidential. Moreover, there does not appear to be a practicable way to redact the source-identifying information from those comments. We also conclude that disclosing those comments is more likely to chill candid assessments in the future, thereby impairing the public's substantial interest in hiring qualified candidates. Under the circumstances – which include OLCC's assertion that the comments were submitted in confidence and Mr. Ward's promise of confidentiality – we conclude those two comments may be withheld under ORS 192.355(2).

e. Internal Advisory Communications

OLCC asserts that other portions of the background investigation report are exempt under ORS 192.355(1), as internal advisory communications. ORS 192.355(1) exempts from 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.

We have observed that "[t]he central thrust of this exemption is to protect the confidentiality of frank and uninhibited advice and observations a public employee gives to a superior or associate." *Manual* at 67. To determine whether the exemption is available, we assess whether disclosure will impair communications among employees or between public bodies "so as to interfere with the free flow of information and ideas that the public body needs for its efficient operation." *Id.* A public record is exempt from disclosure under ORS 192.355(1) only if it meets all of the following criteria:

1. It is a frank communication within a public body or between public bodies;

2. It is of an advisory nature preliminary to any final agency action;

3. It covers other than purely factual materials; and

4. In the particular instance, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure.

OLCC contends that the internal advisory communications exemption applies to several sections of the report, including the summary of law enforcement agency checks, the investigator's overall assessment, the profile review of Mr. Ward's Statement of Personal History, and the summary of Mr. Ward's interview. We address each of those sections in turn.

The summary of law enforcement agency checks contains information provided by six local law enforcement agencies to which Mr. Ward had also applied for employment – Gresham Police Department, Portland Police Bureau, Clackamas County Sheriff's Office, Oregon City Police Department, Multnomah County Sheriff's Office, and the Sandy Police Department. We find that the information relating to the last four of those offices is purely factual, not advisory in nature, and in two cases reflects information provided primarily by Mr. Ward himself. Accordingly, we conclude that the information pertaining to the Clackamas County Sheriff's Office, Oregon City Police Department, Multnomah County Sheriff's Office, and the Sandy Police Department offices is not exempt under ORS 192.355(1) and must be disclosed.

We conclude that most of the material pertaining to the Gresham Police Department and the Portland Police Bureau may be withheld under ORS 192.355(1). First, the material summarizes frank communications between the OLCC investigator and other public bodies. It is of an advisory nature preliminary to OLCC's action upon Mr. Ward's application. It also covers other than factual matters, although we have identified some purely factual information in this section that can be separated and that must be disclosed.[6] Regarding the final criterion of the internal advisory communication exemption, OLCC explains that its ability to gather information

[6] We also find that some of the factual information in this section may be withheld because it is not reasonably possible to separate and disclose it without effectively disclosing the substance of an otherwise exempt internal advisory communication. *See Manual* at 67 (it may be appropriate to redact a communication that is not advisory in itself if disclosing that communication would effectively disclose the substance of an exempt communication); *see also* Public Records Order, January 23, 2019, Baldwin (same).

about applicants from other law enforcement agencies is an essential part of its screening process. OLCC notes that none of these agencies are required to share such information with OLCC, and that they did so in this case with the expectation that their inputs would remain confidential. OLCC informs us that some agencies have already expressed their reluctance to share such information to OLCC in the future if their communications are disclosed. The Wards' counter that the public interest is best served by disclosure in this case because transparency will ensure OLCC's decision was based on accurate information.

Under the circumstances, we conclude that the public interest in encouraging frank communications between law enforcement agencies clearly outweighs the public interest in disclosure in this instance. Several factors lead us to this determination. First, the public has a strong interest in hiring the most suitable candidates for law enforcement positions. Frank communications between agencies about such candidates promotes this purpose, and disclosure in this case is likely to impair the free flow of such information. Second, after reviewing the entire background investigation, to include the summary of Mr. Ward's interview, we have no reason to conclude that OLCC's final determination was based upon inaccurate information provided by these agencies. Moreover, we find it was reasonable for these agencies to expect that their communications would remain confidential given Mr. Ward's promise of confidentiality. Finally, the public interest in disclosure in this instance is significantly diminished by the fact that if a member of the general public requested this information, it would likely be withheld because disclosure would constitute an unreasonable invasion of Mr. Ward's privacy. *See* ORS 192.355(2).

We reach the same conclusion with respect to the investigator's overall assessment. We have no problem concluding that this material satisfies the first three criteria for an internal advisory communication. It represents a frank assessment of the investigator's overall findings. It covers other than purely factual material, and it is of an advisory nature preliminary to OLCC's action on Mr. Ward's application. Regarding the fourth criterion, OLCC asserts that disclosing this material will have a substantial chilling effect on the willingness of investigators to share frank and candid assessments in the future. This, in turn, would impair OLCC's ability to assess the suitability of candidates for positions of public trust.

Under the circumstances, we conclude the public interest in encouraging investigators to provide frank assessments clearly outweighs the public interest in disclosure in this case. As noted previously, there is substantial public interest in ensuring that only suitable candidates are hired for law enforcement positions. Disclosure in this instance threatens to chill candid assessment of such candidates which could, in turn, result in less-informed hiring decisions. In contrast, our review of the investigator's overall assessment reveals that the public interest in disclosure is relatively low in this instance. For example, we find no reason to conclude the investigator's assessment contains factually inaccurate information. We also note that the Wards' initial records request appears to have been motivated by their personal interests, and not any general public interest. And as noted above, the public interest in disclosure in this instance is significantly diminished by the fact that this material would likely be exempt from disclosure to the general public based upon privacy considerations. We therefore conclude that the investigator's entire assessment may be withheld as an internal advisory communication.

Finally, we examine OLCC's claim that the profile review and the summary of Mr. Ward's interview are exempt as internal advisory communications. After reviewing these sections, we conclude that they contain both exempt and nonexempt material. The exempt portions reflect the investigator's frank assessment and may be withheld from disclosure under ORS 192.355(1) for the same reasons discussed above. The remainder of these sections contains purely factual information or information provided by Mr. Ward that must be separated and disclosed. *See* ORS 192.338.

f. Remainder of Material Withheld by OLCC

OLCC withheld additional material from the report but did not identify a statutory basis for nondisclosure.[7] For example, despite disclosing part of Mr. Ward's criminal and traffic history on page one, OLCC withheld the continuation of that history on page two. Similarly, OLCC did not explain its rationale for withholding sections of the report summarizing Mr. Ward's educational history, military service, law enforcement experience, employment history, or volunteer experience. Because OLCC has not sustained its burden for withholding this material, it must be disclosed.

g. Conclusion

For the reasons discussed above, we deny the petition with respect to material that was either submitted to OLCC in confidence or that constitutes internal advisory communications. We also grant the petition in part and order OLCC to disclose the nonexempt material identified above. We have provided OLCC with a copy of the report that identifies the material it must disclose to comply with this order. OLCC has seven days within which comply or to announce its intention to seek judicial review. ORS 192.411(2).

Sincerely,

Frederick M. Boss
Deputy Attorney General

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[7] In its response to the Wards, OLCC indicated that it withheld material that was exempt as a trade secret (ORS 192.345(2)) and as test and examination material (ORS 192.345(4)). OLCC has not identified which material it considers exempt under these provisions. Nor is it apparent to us how those exemptions apply to the records in this case. We therefore conclude that OLCC has not met its burden of establishing that either exemption applies in this instance.