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August 1, 2019

**VIA EMAIL ONLY**: 2CaseyWard@gmail.com and aicilef05@gmail.com

Casey and Felicia Ward
17795 Loundree Drive
Sandy, OR 97055

Re: Joint Petition for Public Records Disclosure Order
*Oregon Liquor Control Commission*
DOJ File No. 845600-GA0110-19

Dear Mr. and Mrs. Casey Ward:

This letter is the Attorney General's response to your joint petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your joint petition, which we received July 15, 2019,[1] asks the Attorney General to order the Oregon Liquor Control Commission (OLCC) to disclose certain records relating to Mr. Ward's employment application background check. For the reasons that follow, we respectfully deny your joint petition.

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 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.*

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

Your joint petition stems from separate, but identical records requests submitted to OLCC on February 27, 2019, for:

> Records with the Oregon Liquor Control Commission's Office relating to the Liquor Inspector application background check of Casey Ward. Including reference questionnaires and similar documentation.[2]

We note that your February 27, 2019 records requests followed earlier requests by each of you for a subset of the same records; specifically, records relating to the reasons Mr. Ward failed his employment background check. Those requests, and OLCC's response, were the subject of an earlier petition filed by you with our office on February 6, 2017. *See* Public Records Order, February 15, 2019, Ward ("PRO Ward" or "prior order"). In that case, OLCC determined the only record responsive to your requests was the background investigation report considered by OLCC hiring authorities. In response to your requests, OLCC disclosed a heavily redacted version of the report. You then filed a joint petition with our office appealing OLCC's redactions. We subsequently ordered OLCC to disclose several previously withheld portions of Mr. Ward's background investigation report. We also denied several aspects of your joint petition after concluding that OLCC properly withheld certain material from the report. *Id.*

Thereafter, on February 27, 2019, you requested additional supporting documentation relating to Mr. Ward's background check. The record indicates that OLCC responded to your requests by disclosing 131 pages of material to you on July 1, 2019. OLCC informed you that it redacted or withheld various responsive records under the following public records exemptions: ORS 192.355(1) (internal advisory communications); ORS 192.355(4) (information submitted in confidence); ORS 192.355(9)(a) (state law catchall for records the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law); and ORS 192.355(10) (transfer of confidential or exempt records).

Your new petition raises three issues. First, to the extent we partially denied your previous petition, you ask us to reconsider our conclusions that OLCC properly withheld certain information from Mr. Ward's background investigation report. We find that your petition does not raise any arguments that were not fully addressed in our prior order. Accordingly, we decline your request to reconsider that order.

Second, you assert that OLCC has not fully complied with those parts of our prior order directing OLCC to disclose additional portions of the background investigation report. You therefore ask us to compel OLCC to comply with that order. As noted in our prior order, we provided OLCC a copy of the report in which we identified the additional material OLCC must disclose to you. *See* PRO Ward at 8. In light of your new petition, we compared the version we provided to OLCC with the version OLCC subsequently disclosed to you. They are identical, which indicates that OLCC has fully complied with our prior order. We therefore deny this aspect of your joint petition.

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[2] In subsequent correspondence with OLCC, Mr. Ward clarified that was not seeking information previously provided by him to OLCC as part of the application process.

Finally, your joint petition explains your belief that the information withheld from OLCC's July 1, 2019 response is not exempt from disclosure in this instance. First, you indicate that the records you received included an Activity Log from which certain information was redacted. You argue that the redacted information is not exempt from disclosure because there is no evidence the information was submitted in confidence under ORS 192.355(4). You also assert that the redacted information cannot be exempt under the internal advisory communications exemption, ORS 192.355(1), because you believe all of the redacted information is factual. Second, you note that OLCC withheld a number of employment reference questionnaires without proof that the references submitted their responses in confidence under ORS 192.355(4). Finally, you contend that because OLCC did not identify which records were withheld under ORS 192.355(9)(a) (state law catchall) or ORS 192.355(10) (transferred records), it has not met its burden of sustaining its denial.

In light of your joint petition, we contacted Rich Evans, OLCC Senior Director of Licensing and Compliance. He informs us that OLCC recently disclosed an additional 73 pages of material to you, to include more information from the Activity Log and additional reference questionnaires. With respect to those records, we deny your petition as moot.

Regarding the information redacted from the Activity Log, OLCC explains its position that the materials are exempt as internal advisory communications because they include the non-factual observations and impressions of the background investigator, other law enforcement agencies, and hiring authorities. According to OLCC, many of those same observations and impressions were included in the background investigator's overall assessment, which we previously found to be exempt from disclosure as internal advisory communications. *See* PRO Ward at 7. Finally, OLCC asserts that disclosing such information will have a substantial chilling effect on the willingness of investigators to include such observations and assessments in the Activity Log in the future. This, in turn, might limit the information available to future hiring authorities when assessing the suitability of candidates for positions of public trust.

We considered the application of the internal advisory communications exemption in our prior order. Consistent with our previous analysis, we find the information OLCC redacted from the Activity Log may be withheld as internal advisory communications. We observe that some of the redacted material reveals the investigator's frank observations and assessments and includes non-factual information later incorporated in the investigator's overall assessment. In support of our prior conclusion that OLCC may withhold the investigator's overall assessment as an internal advisory communication, we previously found that:

> [T]he public interest in encouraging investigators to provide frank assessments clearly outweighs the public interest in disclosure in this case. *** [T]here 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.

*Id.* at 7. For the same reasons, we conclude that those portions of the Activity Log containing the investigator's non-factual observations and impressions may be withheld as internal advisory communications. We conclude for similar reasons that the non-factual observations and impressions of the hiring authorities may be withheld from the Activity Log.

OLCC also redacted material from the Activity Log that summarized information provided by other law enforcement agencies. We find that this information is substantially identical to the material in the background investigation report that we previously found to be exempt as an internal advisory communication. *See* PRO Ward at 6. For similar reasons, and for reasons discussed below, we conclude that those portions of the Activity Log may be withheld as internal advisory communications.

Next, OLCC explains that it withheld questionnaires from Mr. Ward's former employers and personal references under ORS 192.355(4) because they were submitted in confidence. We recall that in response to your previous joint petition, we considered an authorization form signed by Mr. Ward wherein he promised each reference that "your responses will remain completely confidential." OLCC explains that each of Mr. Ward's references received a copy of the authorization along with a standard reference questionnaire. The questionnaire asked each reference to indicate whether they would like their responses to be confidential and not released to Mr. Ward. OLCC asserts that it withheld only those questionnaires where the reference specifically requested confidentiality. This decision was based on OLCC's belief that disclosing such information 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 the lack of candid information could result in the hiring of employees who are poorly suited for such sensitive positions.

We considered similar arguments in our prior order. There we noted that ORS 192.355(4) does not apply to information submitted in confidence unless the agency can demonstrate that the public interest would suffer by the disclosure. We also observed 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. PRO Ward at 7. *(citing Gray v. Salem-Keizer School Dist.*, 139 Or App 556, 565 (1996) (to the extent disclosure may have a chilling effect on future references, such concerns only pertain to the disclosure of the names of references or to other information tending to disclose their identities)). Consistent with this guidance, we ordered OLCC to disclose comments from 30 employment references that were included in the background investigation report as long as

source-identifying information could be redacted from them. We did not know at that time which references had in fact requested confidentiality. *See* PRO Ward at 4.

In this instance, we must determine whether the questionnaires themselves may be withheld under ORS 192.355(4) where the references specifically requested confidentiality. We conclude that they may. First, we find that for the questionnaires withheld by OLCC, each employment reference checked a box requesting confidentiality. We also observe that each questionnaire contains between 12 and 16 substantive comments. And even if the reference's name and contact information is redacted from each questionnaire, we cannot discern a practicable or consistent way to redact source-identifying information from those comments. *See* PRO Ward at 5 (appropriate to withhold comments when there is no practicable way to redact source-identifying information); and Public Records Order, Feb 9, 2000, Schneiderman at 10 (appropriate to withhold comments that provide clues to the identity of the reference source). We have previously concluded that when an employment reference has requested confidentiality, the disclosure of information that tends to disclose the identity of the source would likely deter references from providing candid comments in the future. *See* PRO Ward at 5 (disclosure of source-identifying information is likely to chill candid assessments in the future); and PRO Schneiderman at 9 (disclosing employment reference information after promising confidentiality would discourage good faith reports about a candidate's suitability). And such a chilling effect could impair the public's substantial interest in hiring qualified candidates for sensitive positions. *See* PRO Ward at 5. Under the circumstances – which include specific requests for confidentiality, Mr. Ward's promise of confidentiality, and the impracticability of redacting source-identifying information – we conclude the questionnaires may be withheld under ORS 192.355(4).

According to OLCC, the remainder of the information it withheld relates to criminal records checks conducted by the background investigator. OLCC explains that some of the redacted information is criminal offender information made confidential by ORS 181A.195(11). We understand that certain agencies, such OLCC, are authorized to access the Oregon State Police Law Enforcement Data System (LEDS) for the purpose of conducting criminal records checks. *See* ORS 181A.195(7). Criminal offender information contained in LEDS is confidential under ORS 181A.195(11), and information made confidential under state law is expressly exempt from disclosure. ORS 192.355(9)(a). Accordingly, we conclude that OLCC was required to withhold any criminal offender information it obtained from LEDS.

OLCC indicates that the remaining criminal records check materials were obtained from other law enforcement agencies and are exempt under ORS 192.355(1) as internal advisory communications. OLCC explains that none of those agencies were required to share the information with OLCC, and that they did so with the expectation that their inputs will remain confidential. OLCC indicates further that some agencies have already expressed their reluctance to share such information with OLCC in the future if their communications are disclosed.

We note that our prior order considered the application of the internal advisory communications exemption to information provided to OLCC by other law enforcement agencies. *See* PRO Ward at 6. In that case, we concluded that OLCC may withhold such

information where: (1) it reflected frank communications between the OLCC investigator and other public bodies, (2) it was of an advisory nature preliminary to OLCC's action upon Mr. Ward's application, (3) it covered other than factual matters, and (4) in the particular instance, the public interest in encouraging frank communication clearly outweighed the public interest in disclosure. *Id.*

Applying the same analysis here, we conclude that the criminal background check materials may be withheld under the internal advisory communications exemption. After reviewing the relevant materials, we have no trouble concluding that they satisfy the first three elements of the exemption. We also observe that we previously found much of the same material to be exempt insofar as it was included in the final background report. *See* PRO Ward at 5-7. Regarding the final element of the internal advisory communication exemption, we arrive at the same conclusion we reached in our prior order. That is:

> 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.

*Id.* at 7. We therefore conclude that the criminal records check material OLCC obtained from other law enforcement agencies may be withheld under ORS 192.355(1).

For the reasons discussed above, we respectfully deny your joint petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM9751698
c via email only: Rich Evans, OLCC