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October 17, 2019

VIA E-MAIL ONLY: tbernasek@dunncarney.com

Timothy Bernasek
Suite 1500, 851 SW Sixth Avenue
Portland, OR 97204

Re: Petition for Public Records Disclosure and Fee Waiver
Oregon Employment Department
DOJ File No.: 471025-GA0129-19

Dear Mr. Bernasek:

This letter is the Attorney General's response to your October 3, 2019 petition, on behalf of your client wafla,[1] under the Oregon Public Records Law, ORS 192.311 to 192.431. Your petition, which we received October 3, 2019, asks the Attorney General to order the Oregon Employment Department (OED) to produce certain records that OED claims are exempt from disclosure.[2] Your petition also asks us to find that OED unreasonably denied your request for a fee waiver. For the reasons discussed below, we respectfully deny your 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). 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.*

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[1] According to wafla's website, wafla is a member-based association that provides human resource services to seasonal and agricultural employers. Its mission is "to facilitate a legal and stable workforce for seasonal employers in the Pacific Northwest. To that end, we are seasonal employers premier HR association providing labor and employment consulting services for these employers." Wafla Mission, *available at*: www.wafla.org/mission (accessed Oct 9, 2019).

[2] Thank you for granting an extension of time to respond.

Agencies may also establish fees reasonably calculated to recover actual costs in making public records available, but "may furnish copies without charge or a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public." ORS 192.324(4)–(5). Even if disclosure will primarily benefit the general public, agencies have discretion whether or not to grant fee waivers or reductions. *See In Defense of Animals*, 199 Or App 160, 189 (2005). An agency's decision to deny a fee waiver or reduction must be reasonable under the totality of the circumstances. *Id.* at 190. Any person denied a fee waiver or reduction by a state agency may petition the Attorney General for review. ORS 192.324(6).

Your initial request to OED, dated August 15, 2019, sought 21 categories of records relating to employment services OED provides to migrant and seasonal farmworkers (MSFWs). You also requested that OED either waive or substantially reduce its fees for processing your request. Specifically, you requested:

1. A list of all State Workforce Agency's outreach workers in the State of Oregon from 2015 through present;

2. All documents, records, and communications related to any assistance or referral done pursuant to 20 CFR 653.107(b)(4)(iv) for the past four (4) years with redactions to avoid the disclosure of information about individual employees or employers;

3. All records, documents, and communications related to training and procedure for informal resolution of complaints pursuant to 20 CFR 653.107(b)(7);

4. All documents, records, and communications, maintained pursuant to 20 CFR 653.107(b)(8), including but not limited to daily logs, logs related to contacts, and the services provided (e.g., whether a complaint was received, whether a request for career services was received, and whether a referral was made), documents, records, and communications related to each possible violation or complaint and any actions taken by outreach workers to ascertain the facts and refer the matters for the past four (4) years with redactions to avoid the disclosure of information about any individual employees or employers;

5. All monthly summary reports including those made pursuant to 20 CFR 653.107(c) of State Monitor Advocate outreach efforts for the past four (4) years;

6. All documents, records, and communications related to any and all State Workforce Agency's Outreach and Agricultural Outreach Plan including those made pursuant to 20 CFR 653.107(d) for the past four (4) years;

7. All training materials provided to the State Monitor Advocates, including training materials provided at any training session conducted by the Regional Monitor Advocate under 20 CFR 653.108(e) for the past four (4) years;

8. All performance data, reports of previous reviews, corrective action plans developed as a result of previous reviews, complaint logs, complaints elevated from the office or concerning the office, and all other documents maintained or studied pursuant to 20 CFR 653.108(g)(2) for the past four (4) years;

9. All records of field visits by or at the direction of the State Monitor Advocate including those maintained pursuant to 20 CFR 653.108(m) for the past four (4) years with redactions to avoid the disclosure of information about any individual employees or employers;

10. All Annual Summaries, all State [Employment Service] directives, manuals, and operating instructions relating to migrant and seasonal farmworkers including those made pursuant to 20 CFR 653.108(r) for the past four (4) years;

11. All documents, records, and communications, including but not limited to those made pursuant to 20 CFR 653.108(s) related to the State Monitor Advocate's compliance or noncompliance with [Employment Service] regulations in serving migrant and seasonal farmworkers for the past four (4) years;

12. All data collected pursuant to 20 CFR 653.109 for the past four (4) years.

13. All documents, records, and communications by Fernando Gutierrez concerning wafla member Cal Farms, Inc. or any employees, agents, and representatives of Cal Farms, Inc.;

14. All documents, records, and communications by Fernando Gutierrez concerning Siri and Son Farms, Inc. or any employees, agents, and representatives of Siri and Son Farms, Inc.;

15. All documents, records, and communications by Fernando Gutierrez concerning wafla member Coleman Farms, Inc. or any employees, agents, and representatives of Coleman Farms, Inc.;

16. All documents, records, and communications by Fernando Gutierrez concerning wafla member A & R Spada Farms, LLC or any employees, agents, and representatives of A & R Spada Farms, LLC.;

17. All documents, records, and communications by Fernando Gutierrez concerning wafla member Townsend Farms, Inc. or any employees, agents, and representatives of Townsend Farms, Inc.;

18. All documents, records, and communications by Fernando Gutierrez concerning wafla member McCarthy Family Farm or any employees, agents, and representatives of McCarthy Family Farm.;

19. All documents, records, and communications by Fernando Gutierrez concerning wafla member Oregon Pride Nurseries, Inc. or any employees, agents, and representatives of Oregon Pride Nurseries, Inc.;

20. All documents, records, and communications by Fernando Gutierrez concerning wafla member Palmer Creek Farming Company, LLC or any employees, agents, and representatives of Palmer Creek Farming Company, LLC.; and

21. All documents, records, and communications between any employee of the Oregon Employment Department and the United States Department of Justice involving or regarding an investigation of immigration related discrimination by Coleman Farms, Inc.

In its response, dated August 29, 2019, OED denied parts 2, 4 and 9 of your request asserting that those records are exempt from disclosure under ORS 657.665. OED also denied your request for a fee waiver and informed you that the estimated fee for processing the request is $18,380.00. Your petition challenges OED's assertion that certain records are exempt from disclosure under ORS 657.665. You argue that those records are not exempt because your initial request instructed OED to redact "information about any individual employees or employers." Your petition also asserts that OED unreasonably denied your request for a fee waiver.

We contacted Jessica Prakke, OED Public Affairs Specialist, regarding your petition. She explained OED's position that the records it withheld constitute "employment service" information that is exempt from disclosure under ORS 657.665. That provision states in relevant part:

> (1) Except as provided in subsections (2) to (5) of this section, all information in the records of the Employment Department pertaining to the administration of the unemployment insurance, employment service and workforce and labor market information programs:
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> (a) Is confidential and for the exclusive use and information of the Director of the Employment Department in administering the unemployment insurance, employment service and workforce and labor market information programs in Oregon.
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> * * *
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> (c) Is exempt from disclosure under ORS 192.311 to 192.478.

Ms. Prakke explained that although the statute is written to seemingly make confidential *all* employment service information – to include administrative records such as planning documents, manuals, policies and procedures, and training materials – OED interprets the confidentiality rule to apply only to information about employment services it actually provides to employers and employees. Accordingly, she explained, OED does not believe that

ORS 657.665 prohibits it from disclosing purely administrative employment service records to you. However, it must redact all information relating to employment services it has actually provided to employers and employees. Moreover, she explained, OED interprets ORS 657.665 to prohibit the disclosure of *all* such information, and not just information that can be used to identify particular employees or employers.

In this instance, OED denied your requests for information that it acquired under 20 CFR 653.107(b)(4)(iv), 20 CFR 653.107(b)(8) and 20 CFR 653.108(m). Ms. Prakke explained OED's position that in each instance, the records you requested are exempt under ORS 657.665 in their entirety because they relate to employment services OED has actually provided to various employers and employees.[3] And although ORS 657.665 contains a number of exceptions to the confidentiality rule, OED asserts that none of those exceptions apply in this case.

We begin by examining what constitutes "employment service" information for purposes of ORS 657.665's confidentiality rule. The term is not defined in statute or rule, but it generally traces its origin to the federal and state employment services programs authorized under the Wagner-Peyser Act, 29 USC Chapter 4B, as amended by the Workforce Innovation & Opportunity Act, 32 USC Chapter 32. *See also* ORS 657.601 (OED to provide for the operation of a statewide employment service); ORS 657.705 to 657.725 (establishing Oregon State Employment Service), and ORS 657.715 (accepting the provisions of the Wagner-Peyser Act). The goal of those programs is to provide a broad range of career guidance services, to include job search and placement services, career counseling, testing, and workforce development programs for job seekers, as well as recruitment and special technical services for employers. *See, e.g.*, 29 USC 49b(c)(4); and 29 USC 49f. The United States Department of Labor, which manages the federal program, has issued regulations that specifically address the provision of employment services by state workforce agencies, such as OED, for the benefit of MSFWs. *See* 20 CFR Part 653, *Services of the Wagner-Peyser Act Employment Service System,* Subpart B, *Services for Migrant and Seasonal Farmworkers.* It follows that information acquired by OED under 20 CFR Part 653, Subpart B, will generally pertain to the administration of employment service programs for MSFWs. ORS 657.665 makes such information confidential and exempt from disclosure except in limited circumstances. *See also* ORS 192.355(9)(a) (records made confidential under Oregon law are exempt from disclosure under the Public Records Law).

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[3] Ms. Prakke also informed us that in addition to parts 2, 4 and 9 of your request, records responsive to other parts of your request may also contain employment service information that is exempt from disclosure under ORS 657.665. For example, under ORS 657.665(4)(c), most of the records responsive to parts 13 through 20 may be disclosed only "pursuant to an informed consent, received from an employer or claimant, to disclose the information." Consistent with OED's initial response to you, she indicated that OED intends to redact such information prior to disclosure unless it receives informed consent from those employers or claimants.

In this case, you specifically requested information gathered by OED under 20 CFR 653.107(b)(4)(iv),[4] 20 CFR 653.107(b)(8)[5] and 20 CFR 653.108(m).[6] Each of those regulations falls within 20 CFR Part 653, Subpart B, and each clearly relates to the administration of employment services to MSFWs. In this instance, OED represents that all of the information compiled under those regulations relates to employment services actually provided to employers and employees. Given the nature and scope of the activities required by those regulations, we have no reason to question OED's representation.

We therefore conclude that the records OED withheld are confidential under ORS 657.665 and exempt from disclosure in their entirety unless an exception applies. You do not assert that any of the exceptions to ORS 657.665 apply in this case. Nor does it appear to us that any of those exceptions expressly permit OED to disclose otherwise confidential employment service information to you. We understand that you believe ORS 657.665 permits OED to disclose these records if the identifying information of employers and employees is removed. But the statute makes "*all* information" pertaining to the administration of employment service programs confidential, not just identifying information (emphasis added).

We now turn to your claim that OED unreasonably denied your request for a fee waiver. In support of your claim, you note that wafla is a non-profit organization whose membership is open to the general public. You assert that wafla's members and the general public have several interests in the information you requested. These interests include ensuring that state regulators are not unduly burdening agricultural employers, and ensuring that state regulators are administering MSFWs employment service programs equitably and in compliance with federal regulations. You also explain that wafla intends to distribute this information to its members and to the general public through its website and various wafla-sponsored training events.

In response to your petition, OED acknowledged that there may be modest public interest in the information you requested. However, OED asserted that disclosing this information to wafla will primarily benefit wafla's members and not the general public. OED also questioned wafla's ability and intent to disseminate the requested information to the general public. According to OED, wafla's website, training events, and webinars are geared toward wafla's members and agricultural employers. And wafla's website appears to contain little substantive information that is freely available to the public.

Ms. Prakke also explained that even if disclosure would primarily benefit the general public in this case, processing your broad request without recovering at least some of OED's costs would impose an undue burden upon the agency. In that regard, she noted that OED

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[4] 20 CFR 653.107(b)(4)(iv) relates to complaints received by outreach workers from MSFWs.

[5] 20 CFR 653.107(b)(8) requires outreach workers to maintain records of their contacts with MSFWs and the services they perform, to include daily logs, numbers of contacts, names of contacts, possible violations observed, complaints received, and a description of the circumstances and names of any employers who refused an outreach worker access to MSFWs.

[6] 20 CFR 653.108(m) requires State Monitor Advocates to conduct frequent field visits to the working, living, and gathering areas of MSFWs, to discuss employment services and other employment-related programs with MSFWs and employers, and to keep records of each field visit.

estimates that it will take more than 560 hours to process the request. She also explained that OED's fee estimate of $18,380.00 was calculated using the reduced fee schedule contained in the Department of Administrative Services' (DAS) *Statewide Policy on Public Records Requests Fees and Charges*, Feb 15, 2017. If OED had used DAS' standardized fee schedule, the fee estimate would have been approximately $22,760.00. Finally, Ms. Prakke explained that OED is willing to work with wafla to narrow the scope of its request in order to reduce the cost.

Under the Oregon Public Records Law, public bodies considering a request for a fee waiver must first determine whether making the records available primarily benefits the general public. *See* ORS 192.324(5). The furnishing of public records primarily benefits the public when its greatest utility is to the community or society as a whole. *See In Defense of Animals*, 199 Or App at 189. Pertinent factors include the requester's identity, the purpose for which the information will be used, the character of the information, whether the requested information is already in the public domain, and whether the requester can disseminate the information to the general public. *Attorney General's Public Records and Meetings Manual* at 24 (2019) ("*Manual*"). We have observed that regardless of the level of public interest in a particular matter, if the requester fails to demonstrate the ability to meaningfully disseminate the information to the public, disclosure will not primarily benefit the general public. *Id.*

We are satisfied that OED's decision not to grant your request for a fee waiver was reasonable. First, the available record does not sufficiently demonstrate to us that disclosure will primarily benefit the general public. Given wafla's mission and the interests you identified in support of your fee waiver request, it is clear that the records you seek will be of great utility to wafla and its members. In contrast, we are not aware of any broad or heightened interest in these records among the general public. This suggests to us that furnishing the records will primarily benefit wafla and its members.

We also find that wafla has failed to demonstrate its ability to meaningfully disseminate this information to the general public. Wafla's website and training events appear to be for the benefit of wafla's members and agricultural employers, rather than for dissemination of information to the general public. And wafla has not indicated that it has any capability or intent to disseminate this information to the general public through other means.

Finally, we observe that OED did grant wafla a substantial fee reduction of nearly $4,400.00 (though it failed to disclose this fact to you in its initial response). We find that the reduced fee estimate reasonably balances the modest public interest in disclosure in this instance with OED's interest in recovering the costs of processing such a large request.

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Under the circumstances, we conclude that OED's decision to deny your request for a fee waiver was reasonable. And for the reasons discussed above, we also conclude that the records OED withheld are confidential and thereby exempt from disclosure under ORS 657.665. We therefore respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM9877455
c via email only: Jessica Prakke, OED