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July 9, 2020

VIA EMAIL ONLY: bosch@hmnlaw.com and John.R.Johnson@odot.state.or.us

Carole Bosch
350 Frank H. Ogawa Plaza, 4th Floor
Oakland, CA 94612

John Johnson
Oregon Department of Transportation
3930 Fairview Dr. SE
Salem, OR 97301

Re: Petition for Public Records Disclosure Order
Oregon Department of Transportation
DOJ File No.: 734315-GA0061-20

Dear Ms. Bosch and Mr. Johnson:

This letter is the Attorney General's response to Ms. Bosch's petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Her petition asks the Attorney General to order the Oregon Department of Transportation (ODOT) to disclose documents related to its investigation of a railroad accident that occurred on September 20, 2019. For the reasons that follow, we grant Ms. Bosch's 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 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*.

In response to Ms. Bosch's petition, Mr. Johnson, ODOT's Railroad Safety Manager, explained ODOT's position that ORS 823.023 restricts public disclosure in this instance. That statute provides, in relevant part:

> (1) The Department of Transportation or authorized representatives may enter upon any premises, or any equipment, rolling stock or facilities operated or occupied by any motor carrier or railroad for the purpose of making any inspection, examination or test reasonably required in the administration of ORS chapters 823, 824, 825 and 826, and to set up and use on such premises, equipment, rolling stock or facilities any apparatus or appliance and occupy reasonable space therefor.
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> (2) The department or authorized representatives shall, upon demand, have the right to inspect the books, accounts, papers, records and memoranda of any motor carrier or railroad and to examine under oath any officer, agent or employee of such motor carrier or railroad in relation to its business and affairs.
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> (5) Nothing in this section authorizes the department to use any information developed thereunder for any purpose inconsistent with any statute governing motor carriers or railroads and administered by the department or to make a disclosure thereof for other than regulatory purposes.

Mr. Johnson explained that ODOT's inquiry was conducted under ORS 824.026 as part of its responsibilities to inquire into any neglect or violation of railroad safety laws and regulations. Because the inquiry was conducted under ORS chapter 824, ODOT asserts that ORS 823.023(5) restricts it from disclosing any of the information Ms. Bosch seeks because disclosure would not serve a regulatory purpose. And records, "the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law," are expressly exempt from disclosure under the Public Records Law. ORS 192.355(9)(a).

We note that this is the first time we have considered whether ORS 823.023 falls within the scope of ORS 192.355(9)(a), the state law catchall exemption. We conclude that it does because the text of the statute substantially mirrors that of ORS 756.075,[1] a statute the legislature

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[1] For example, compare ORS 823.023(1) and (2) (above) with ORS 756.075(1) and (2), which state:

> (1) The Public Utility Commission or authorized representatives may enter upon any premises, or any equipment or facilities operated or occupied by any public utility or telecommunications utility for the purpose of making any inspection, examination or test reasonably required in the administration of ORS chapter 756, 757, 758 or 759 and to set up and use on such premises equipment of facilities any apparatus and appliances and occupy reasonable space therefor.
>
> (2) The commission or authorized representatives shall, upon demand, have the right to inspect the books, accounts, papers, records and memoranda of any public utility or telecommunications utility and to examine under oath any officer, agent or employee of such public utility or telecommunications utility in relation to its business and affairs.

has specifically identified as making exempt similar information developed by the Public Utility Commission (PUC). *See* ORS 192.500(2)(h) (1985).[2] Importantly, both statutes provide that "[n]othing in this section authorizes the [agency] to use any information developed thereunder [for other than authorized purposes] … *or to make a disclosure thereof for other than regulatory purposes*." ORS 756.075(4) and ORS 823.023(5) (emphasis added). Although this text does not expressly prohibit or restrict public disclosure, we conclude that it was intended to restrict the permissible scope of disclosures by the PUC because the legislature included ORS 756.075 among the exemptions listed in ORS 192.500(2)(h). And by including identical text in ORS 823.023(5), we conclude the legislature intended to place similar restrictions upon disclosures by ODOT.

Having determined that ORS 823.023 falls within the scope of ORS 192.355(9)(a), we now examine whether ODOT properly applied the exemption in this instance. After reviewing the responsive record, we conclude that it contains both exempt and nonexempt information. The record clearly includes information developed during inspections and examinations conducted by ODOT under ORS 823.023. Examples include summaries of witness testimony, photographs, and the inspector's first-hand observations of the incident scene. Because disclosing this information would not appear to serve a regulatory purpose in this instance, we conclude that ODOT was permitted to withhold it under ORS 823.023(5), by operation of ORS 192.355(9)(a). We therefore respectfully deny the petition with respect to this information.

However, we have also identified information in the record that does not appear to have been obtained by ODOT during an inspection or examination conducted under ORS 823.023. Examples include some of the investigating officer's opinions and commentary, conclusions, and recommendations. Although this information may have been developed as part of ODOT's broader inquiry under ORS chapter 824, we do not read ORS 823.023(5) to restrict ODOT from disclosing *all* information developed during such inquiries. Rather, read narrowly, the text of subsection (5) – "[n]othing in *this section* authorizes the department to use any information developed *thereunder* …" (emphasis added) – only applies to information developed specifically under ORS 823.023; i.e., developed during an inspection or examination conducted under that statute. And because the record includes information that was not developed by ODOT under

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[2] ORS 192.500(2)(h), a precursor of ORS 192.355(9)(a), contained a list of statutes that fell within the exemption, including ORS 756.075. Although ORS 192.500(2)(h) was repealed in 1987 and replaced with the state law catchall, ORS 756.075(4) still falls within the scope of ORS 192.355(9). *See Colby v. Gunson*, 224 Or App at 681 (statutes that prohibit or restrict disclosure under ORS 192.355(9)(a) are those that were listed in former ORS 192.500(2)(h) and those adopted in 1987 or subsequently). We also note that ORS 823.023 was enacted in 1995, subsequent to the repeal of ORS 192.500(2)(h) and is therefore not precluded from falling within the scope of ORS 192.355(9)(a).

ORS 823.023, ODOT must separate and disclose that information. ORS 192.338. We therefore grant Ms. Bosch's petition in part and order ODOT to disclose any information in the record that was not developed under ORS 823.023. ODOT has seven days within which to comply or to announce its intention to seek judicial review. ORS 192.411(2).

Sincerely,



Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM10320402
c via email only: John Johnson (ODOT)