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January 13, 2021

VIA E-MAIL ONLY: bmillerrad@gmail.com

Brad Miller
300 Arden Road
Menlo Park, CA 94025

Re: Petition for Public Records Disclosure Order
Department of Consumer and Business Services
DOJ File No.: 123660-GA0004-21

Dear Mr. Miller:

This letter is the Attorney General's response to your petition under the Oregon Public Records Law, ORS 192.311 to 192.431. Your petition asks the Attorney General to order the Oregon Department of Consumer and Business Services (DCBS) to disclose records relating to an insurance complaint filed by you. 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. In addition to the express exemptions contained in ORS 192.345 to 192.355, any other records or information that is confidential, privileged, or prohibited from being disclosed under other Oregon laws is also exempt from public disclosure. ORS 192.355(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 192.411(1). The agency carries the burden to sustain its actions. *Id*.

Your records request to DCBS, dated October 12, 2020, generally sought all records relating to a complaint filed by you against Merrill Lynch regarding a life insurance policy. DCBS denied your request on November 4, 2020, claiming that the records you requested are exempt from disclosure under ORS 731.264. DCBS' response noted that ORS 731.264(3)

permits disclosure of certain complaint information when doing so will not identify the complainant, but that it was not possible to remove the identity of the complainant in this instance. Your petition followed.

In response to your petition, we contacted Gail Gage, a compliance specialist in DCBS' Division of Financial Regulation. She explained that DCBS conducted an investigation after receiving your complaint. She indicated that the records you have requested were obtained or generated by DCBS pursuant to that investigation. DCBS therefore asserts that these records are exempt from disclosure under ORS 731.264(2), which provides that "[d]ata gathered pursuant to an investigation by the director of a complaint is confidential [and] may not be disclosed," subject to certain exceptions.[1] Ms. Gage also explained that DCBS' previous reference to the exception to the prohibition against disclosure provided in ORS 731.264(3) was erroneous. That exception, which is no longer operative,[2] only applied to complaints of unlawful practices described in ORS 746.230 and, she explained, your complaint did not allege any of the unlawful practices described in ORS 746.230.

In previous public records orders, we have interpreted ORS 731.264(2) to apply to all information gathered pursuant to an investigation conducted in response to a complaint. *See* Public Records Order, Jun 14, 2017, Ledbetter (*citing* Public Records Orders, Aug 1, 2008, Troyer (all records in the complaint file are exempt, including correspondence between complainant and agency); Nov 6, 1992, Ostrander (all information gathered is exempt); Sept 25, 1991, Tozer (interoffice memoranda during course of an investigation are exempt)). After reviewing the records at issue in this instance, we conclude that they consist only of materials gathered as part of DCBS' investigation of your complaint. They are therefore confidential under ORS 731.264(2) and exempt from public disclosure under ORS 192.502(9)(a). Although ORS 705.137 contains exceptions to this prohibition against disclosure, none of those exceptions would permit DCBS to disclose the requested records to you in this instance.

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[1] As additional context, ORS 731.264(1) provides that, subject to exceptions, "[a] complaint made to the Director of the Department of Consumer and Business Services against any person regulated by the Insurance Code, and the record of the complaint, is confidential and may not be disclosed ***." That is, when a complaint is made against a person subject to the Insurance Code, both the complaint and the data gathered pursuant to the subsequent investigation are confidential and not subject to disclosure.

[2] At the time of your records request, ORS 731.242(3) provided that:

> The director may provide to any requester information about complaints that the director receives against an insurer for any of the unlawful practices described in ORS 746.230. Before providing information about a complaint the director receives, the director shall remove information that could identify the person that submitted the complaint.

However, as of January 1, 2021, this exception to the general prohibition against disclosure is no longer operative. *See* Or Laws 2016, ch 62, §§ 2-3(2).

Because the requested records are exempt from disclosure under ORS 731.242(2) as data gathered pursuant to an investigation into a complaint, we respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn
c via e-mail only: Gail Gage (DCBS)