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April 19, 1993

Joseph M. Charter, Esq.
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RE: Petition for Public Records Disclosure Order; SAIF Corporation Records

Dear Mr. Charter and Ms. Graff:

This letter is the Attorney General's order on your petition[1/] for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received April 12, 1993, asks the Attorney General to direct the State Accident Insurance Fund Corporation (SAIF) to make available certain documents pertaining to the workers' compensation claims of Timber Products Company, specifically:

1) Any and all documents pertaining to Timber Products Co. claims history for the period from January 1, 1988, to December 31, 1992.

2) Any and all documents pertaining to Timber Products Co. experience rating and experience modifications for the period from January 1, 1988, to December 31, 1992.

3) Any and all documents sufficient to show the cost of claims, by claim, and any reserves for claims for Timber Products Co. for the period from January 1, 1988, to December 31, 1992.

[1/] This petition was filed in your capacity as the attorney for John E. Williams.

> 4) All documents relating to the claim of John E. Williams, the cost of his claim including reserves and all letters, documents or correspondence between SAIF and Timber Products Co. regarding Plaintiff's claim.

For the reasons that follow, we respectfully deny your petition, in part because the information is exempt from disclosure and in part because the petition is moot.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. See ORS 192.420. If a public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. Turner v. Reed, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

ORS 192.502(8) exempts:

> Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law[.]

ORS 656.702 provides such an exemption for certain SAIF records. ORS 656.702 states:

> The records of the State Accident Insurance Fund Corporation, excepting employer account records and claimant files, shall be open to public inspection. The accident experience rating records of the corporation shall be available to a bona fide rating organization to assist in making workers' compensation rates but any costs involved in making the records available shall be borne by the rating organization. Accident experience records of carrier-insured employers shall also be available on the same terms to assist in making such rates.

Emphasis added.

In your petition, you contend that: "the later enactment of the public records law repealed the exemption found in ORS 656.702." In fact, chapter 794 of the 1973 Oregon Laws, which enacted the Oregon Public Records Law, also amended ORS 656.702 to add the explicit exemption for "employer account records." Or Laws 1973, ch 794, § 33a (HB 2157). The exemption for "claimant files" was added in 1987. Or. Laws 1987, ch 884, § 47. Moreover, the predecessor to ORS 192.502(8), former ORS 192.500(2)(h), explicitly listed ORS 656.702 as one of the statutes exempting specific

public records from disclosure.[2/] Or Laws 1973, ch 794, § 11. We conclude that when the legislature enacted the Public Records Law, it intended to incorporate the exemptions contained in ORS 656.702.

1. Exemption for Employer Account Records

Under ORS 656.702, employer account records are not open for public inspection. The phrase "employer account records" is not defined in ORS 656.702. Accordingly, we look to the legislative history of SAIF and of this statute to discern the scope of this restriction from disclosure.

In 46 Op Atty Gen ___ (No. 8212, Feb. 22, 1990), we analyzed in detail the origin, purpose, and status of SAIF. We observed that when the 1965 legislature created the State Compensation Department, a predecessor of SAIF, the legislature "communicated quite clearly its expectation that the State Compensation Department, the insurance-writing arm of government, would meet the private competition on the private sector's own terms. The new manager of the department, Charles B. Gill, set about to fulfill his commitment to the legislature that the department would be a 'very competitive' insurance company." Id. at 16. We also noted that when in 1979 the legislature created SAIF Corporation as an independent public corporation, "a representative of the Governor explained that the purpose of the bill was 'to break the SAIF out from various constraints that exist and let it be competitive.'" Id. at 18.

Mr. Gill also testified before the legislature at that time, assuring it "that SAIF Corporation would continue to act 'as a weather vane or barometer of what can be done in the system and create the competitive posture that the legislature wanted in 1965.'" Id. at 19. Mr. Gill further testified that "legislative control would be replaced by the marketplace 'because the people they deal with must like the program.'" Id. at 20. Based on these and other historical indicators, we concluded that:

> The history of workers' compensation insurance in Oregon makes it abundantly clear that a central reason for SAIF Corporation's existence is to compete with private workers' compensation insurance carriers. The legislature has taken great care to ensure that the introduction of private

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[2/] In 44 Op Atty Gen 239, 253 (1984), we stated that, generally speaking, state confidentiality provisions "not listed" in ORS 192.500(2)(h) should be deemed repealed, if enacted before the Public Records Law. Because ORS 656.702 was listed in ORS 192.500(2)(h), we also listed it as a specific exemption from disclosure. Id. at 284.

> carriers into the Oregon workers' compensation insurance marketplace would not undermine the financial stability of the IAF. SAIF Corporation is given the tools to compete with private carriers in order to preserve the IAF.

Id. at 28-29.

In light of this historical context for SAIF, it is significant that in 1973 when the legislature enacted the language of ORS 656.702 providing that employer account records are not open to public inspection, Mr. Gill called to the legislature's attention that the state's workers' compensation carrier would be disadvantaged in the marketplace were its employer-related records available to the public when private carriers' records were not. The minutes of the Joint Special Committee on Professional Responsibility (HB 2157), April 16, 1973, at 4, shows the following regarding Mr. Gill's testimony on this subject:

> [Mr. Gill] felt that SAIF was in a unique situation as a state agency because they compete with private carriers. He said they were concerned in two particular areas. The first involves employer accounts and records that are kept on file. He felt that the employers would not support a bill that would let their files be public record to their competitors.

The history of SAIF, as discussed above, strongly suggests that the legislature enacted the language excluding employer account records from public inspection in order to protect SAIF's general competitive position in the context of the specific concern raised by Mr. Gill, i.e., that potential customers would be wary about insuring with SAIF, as opposed to private carriers, if SAIF's records relating to them were potentially available to the public. Such a situation would be inconsistent with the legislature's intention, revealed over many years (both before and after the 1973 enactment of the "employer account records" language) that the state carrier should be protected from competitive disadvantages. SAIF Corporation was created to insure Oregon employers "as fully as any private carrier." ORS 656.752(1). In this regard we also note that two other major Oregon workers compensation carriers, Liberty Northwest and Wausau, have advised us that they consider their employer account records to be confidential. Consequently, we conclude that the reference in ORS 656.702 to "employer account records" should be read broadly in order to protect the competitive position of SAIF, and the related confidentiality concerns of SAIF Corporation's insureds, which appear to have been the impetus for that language.

Brian Steffel, Senior Vice President of SAIF, advises us that it considers all the records requested under items 1, 2 and 3 to be "employer account records." Such records include records pertaining to underwriting, loss control, premium calculation and assessment, credit information, dividends, payroll records, and premium audits relating to an employer - in this case, Timber Products Company. The claims history, experience rating and experience modification, and the costs and reserves of claims for a particular insured are all part of the information used by SAIF to calculate the premium and to determine whether to write insurance for an employer. While we need not here decide the details of the parameters of "employer account records," it is clear to us that the specific documents requested under items 1, 2 and 3 constitute an integral part of an insured's "account records."

The language and history of ORS 656.702 lead us to conclude that SAIF's insureds would reasonably expect those records not to be made available for public inspection and that, were they made available, SAIF would be placed at a competitive disadvantage in the marketplace, contrary to the purposes of ORS 656.702. Because we conclude that ORS 656.702 restricts the disclosure of the records requested under items 1, 2, and 3, we further conclude that they are exempt from disclosure under ORS 192.502(8).[3/]

2. Application of Exemption to Mr. Williams' Claim File

Under ORS 656.702, claimant files are also not open for public inspection. This provision was added to ORS 656.702 in 1987. Or Laws 1987, ch 884, § 47 (HB 2900). Testimony and discussion on this provision indicates at least two purposes. Chairman Larry Hill introduced the amendment by stating that it "would preclude the claimants' files from being accessed by potential employers to see if a job applicant has a workers'

[3/] If items 1, 2 and 3 seek information from claimant files other than Mr. Williams' file, that information would be exempt from disclosure under ORS 656.702(1) as "claimant files." (See discussion under part 2, below.) SAIF informs us that during the five-year period covered by the petition request, 1004 claims were filed by Timber Products Company employees.

SAIF advises that it also considers portions of the documents requested as items 1, 2 and 3 to contain information that could reveal "trade secrets" and, therefore, to be exempt from disclosure under ORS 192.501(2). Because we find these documents to be "employer account records" under ORS 656.702, and exempt under ORS 192.502(8), we do not consider other possible exemptions from disclosure.

compensation claim." Minutes, Senate Committee on Labor (HB 2900), June 11, 1987, at 9. The discussion indicates a concern that potential employers would use the information to improperly reject job applicants. Senator Bill Bradbury expressed surprise that a person's medical history and other private information was a public record. Id. at 10. This history indicates that the purpose of the claimant file exemption was to protect the privacy of the claimant.

Thus, the exemption for "claimant files" in ORS 656.702 was apparently not intended to extend to requests by the claimant for the claimant's records. The purpose of the statute is to protect the claimant's privacy from unreasonable invasion. That purpose would not be violated by granting a claimant access to his or her own file.

Prior to the filing of the current petition, SAIF disclosed portions of Mr. Williams' claim file to you as Mr. Williams' attorney. Corlet Graff, Director of Claims Operations of SAIF, now informs us that SAIF is willing to disclose the remainder of the records maintained in Mr. Williams' claims file[4/] except:

a) A "Legal Case Evaluation," dated May 6, 1991;

b) Portions of a "Record of Telephone Conversation," dated June 24, 1991; and

c) A "Reserve Evaluation and Analysis of Loss" (REAL Sheet), dated May 6, 1991.

The Legal Case Evaluation was prepared by a SAIF paralegal, working under the direction of a SAIF attorney. It was sent to the SAIF claims adjuster. A public record is exempt from disclosure if it is confidential or privileged under another provision of Oregon law. ORS 192.502(8). This exemption includes documents that are privileged under the attorney/client privilege, ORS 40.225. We conclude that the Legal Case Evaluation, dated May 6, 1991, is exempt under ORS 192.502(8) and its incorporation of ORS 40.225.

[4/] SAIF advises us that while disclosure of the kind of information previously redacted from these documents could theoretically reveal "trade secrets," disclosure of these few pages to a single claimant is acceptable. Trade secret issues might well preclude disclosure of more extensive information about a single claim or information about more than one claim, but we need not reach that issue here.

The redacted information on the Record of Telephone Conversation was prepared by the SAIF claims adjuster and relates to the reserve for this particular claim. SAIF advises us that this reserve information is the same type of information that is included on the REAL Sheet. Such reserve information is part of the "employer account record." This redacted information on the Record of Telephone Conversation dated June 24, 1991, and the REAL Sheet itself are therefore exempt as an employer account record, as discussed above. ORS 192.502(8), 656.702.

In summary, we conclude that the records requested under items 1, 2, and 3, and a portion of the records requested under item 4, are exempt from disclosure under ORS 192.502(8) as employer account records, the disclosure of which is restricted by ORS 656.702; and that the Legal Case Evaluation also is exempt under ORS 192.502(8) since it is privileged under ORS 40.225. With respect to these records, we deny your petition because the records are exempt from disclosure under the Public Records Law. With respect to the remainder of the records, we deny your petition as moot because SAIF has agreed to provide those records to you.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the
Attorney General

ESH:AV:HAJ:jpl:JAA00B98

c: Corlet Graff, Director of Claims Operations, SAIF Corporation