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April 12, 2021

VIA E-MAIL ONLY: acmd48@gmail.com

A. Craig McDonald
591 Chestnut Street
Ashland, OR 97520

Re: Petition for Public Records Disclosure Order
Department of Consumer and Business Services
DOJ File No.: 440030-GA0039-21

Dear Mr. McDonald:

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 communications between PEMCO Insurance ("PEMCO") and DCBS 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*.

According to your petition, DCBS denied your request for PEMCO's communications claiming that they are exempt from disclosure under ORS 731.264(2). That provision 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] *Id*. Your petition followed. You generally assert that to ensure fairness and transparency during DCBS' investigations, the statute should not be interpreted in a manner that restricts the disclosure of such information to complainants. You also assert that DCBS has selectively applied the exemption against you because it has disclosed data about its investigation (e.g., your complaint and related correspondence) to PEMCO.

In response to your petition, we contacted T.K. Keen, Administrator, DCBS Division of Financial Regulation. He explained that the communications you seek were obtained by DCBS as part of the investigation it conducted in response to your complaint. DCBS therefore asserts that these records are exempt from disclosure under ORS 731.264(2). Mr. Keen explained DCBS' position that the only exception in the statute permitting DCBS to disclose this correspondence to you is if "the director considers [disclosure] necessary in investigating * * * apparent violations of the Insurance Code or other law." ORS 731.264(2). He explained that, in this instance, DCBS determined that disclosing PEMCO's correspondence to you was not necessary to further its investigation. In contrast, he explained, DCBS believes it was permitted to share your complaint and other correspondence with PEMCO because it determined that disclosure was necessary to further its investigation. Mr. Keen also explained that DCBS has offered to assist you in obtaining some of the insurance rating information you seek from PEMCO through a separate process governed by ORS 737.505.

We begin by observing that ORS 731.264 does not contain an exception that would expressly permit or require DCBS to give special consideration to records requests from complainants. Your petition does not cite any authority for the proposition that the exemption should not apply to requests from complainants, and we are not aware of any such authority. We cannot, therefore, accept your interpretation of the statute. Moreover, when determining whether an exemption applies, "the identity of the requester and the circumstances surrounding the request are irrelevant to whether the information fits within the category of the exemption." *Attorney General's Public Records and Meetings Manual* at 31 (2019) (citing *Guard Publ'g Co. v. Lane County Sch. Dist. No. 4J*, 310 Or 32, 35 n 1 (1990) (requester's purpose in obtaining records is irrelevant to whether the records are exempt)). Consistent with this principle, we have previously interpreted ORS 731.264(2) to make DCBS investigatory information confidential and exempt from disclosure to the complainant. *See* Public Records Order, Jan 13, 2021, Miller.

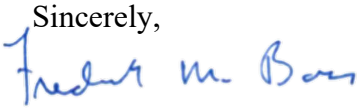
We have also interpreted ORS 731.264(2) to apply to *all* information gathered by DCBS in the course of an investigation, including correspondence. *See id*. (correspondence from insurance company exempt); and Public Records Order, Jun 14, 2017, Ledbetter (*citing* Public Records Orders, Aug 1, 2008, Troyer (all records in the complaint file are exempt, including correspondence between complainant and agency); Nov 6, 1992, Ostrander (all information

[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.

gathered is exempt); Sept 25, 1991, Tozer (interoffice memoranda during course of an investigation are exempt)). We therefore conclude that the statute applies to PEMCO's correspondence.

Because the correspondence was gathered as part of DCBS' investigation, it is confidential under ORS 731.264(2) and exempt from disclosure under ORS 192.502(9)(a), unless DCBS determines that disclosure to you is necessary to further its investigation. Under the circumstances, we have no reason to second-guess the determination, statutorily entrusted to DCBS, that disclosing the correspondence to you is not necessary in this instance. We therefore respectfully deny your petition.

Sincerely,



Frederick M. Boss
Deputy Attorney General

FMB:pjn
c via e-mail only: T.K. Keen (DCBS)