ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDERICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-6002

October 14, 2021

VIA EMAIL ONLY: rcharley@troycharleytrucking.com

Richelle Charley
20986 Antioch Rd
White City, OR 97503

Re: Petition for Public Records Disclosure Order
Department of Environmental Quality
DOJ File No.: 340310-GA0144-21

Dear Ms. Charley:

This letter is the Attorney General's response to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received October 5, 2021,[1] asks the Attorney General to order the Oregon Department of Environmental Quality (DEQ) to disclose the name of the person who filed a complaint with DEQ regarding suspected pollution on your property. For the reasons that follow, 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. 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. ORS 192.411(1).

According to your petition, DEQ provided you with the "Incident/Pollution Complaint Summary Report" it prepared in response to the complaint, but the complainant's identifying information was redacted from the report. The report included the substance of the complaint and concluded that there was insufficient evidence for DEQ to pursue an investigation. When

[1] Thank you for granting an extension of time in which to respond.

you asked for the complainant's name, DEQ informed you that it was withholding the name because the complainant requested confidentiality. Your petition followed.

In response to your petition, we contacted Zach Loboy, DEQ Water Quality Manager. He explained that to facilitate the enforcement of the state's pollution laws, DEQ relies upon citizens to report suspected pollution. *See* Department of Environmental Quality, *How to Make an Environmental Complaint to DEQ*, https://www.deq.state.or.us/complaints/rep.htm (accessed Oct 11, 2021) ("Reports from Oregonians are vital for effective enforcement of Oregon's environmental laws."). Mr. Loboy explained that because such reports are filed voluntarily, DEQ encourages reporting by providing witnesses reasonable assurances that, upon request, it will keep their identities confidential to the extent permitted by law. Of the more than 3,000 citizen reports that DEQ received over the last fiscal year, more than two-thirds of the reporters requested confidentiality. According to DEQ, there are many reasons that a witness may be reluctant to file a report if their identity could not be kept confidential, such as concern about injuring an ongoing relationship or fear of retribution. For example, witnesses may be less likely to report pollution on their neighbors' property if their identities cannot be protected.

In this instance, the complaint was submitted through DEQ's online complaint webpage. The system requires complainants to indicate whether they want their contact and personal information to be treated as confidential, and in this case the complainant requested confidentiality. Consistent with that request, DEQ redacted the complainant's name and contact information from the report it disclosed to you. In doing so, DEQ relied upon ORS 192.355(4), a provision exempts from disclosure:

> Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

The purpose of this exemption is to encourage the voluntary submission of information to public bodies with some reasonable assurance that it will be kept confidential. *See Attorney General's Public Records and Meetings Manual* at 102 (2019) ("*Manual*"). For the exemption to apply, the following conditions must be satisfied:

1. The source must have submitted the information on the condition that it would be kept confidential;

2. The source must not have been required by law to provide the information;

3. The information itself must be of a nature that reasonably should be kept confidential;

4. The public body obliged itself in good faith not to disclose the information; and

5. The public interest would suffer by the disclosure.

DEQ asserts that each condition is satisfied in this instance. Specifically, the complaint was submitted voluntarily with the expectation that it would be kept confidential and DEQ obliged itself in good faith not to disclose the complainant's identity. Moreover, to encourage voluntary reporting, DEQ asserts that complainant identifying information is of a nature that reasonably should be kept confidential. Finally, DEQ argues that the public interest would suffer by disclosure in this instance because it would erode public confidence in DEQ's ability to keep such information confidential which, in turn, would deter voluntarily reporting in the future and thereby impair DEQ's ability to detect and address pollution.

Under the circumstances, we conclude that DEQ has met its burden of sustaining its decision to redact the complainant's identifying information from the report. We readily conclude that the complaint was filed voluntarily and with the expectation that the complainant's identity would be kept confidential. We also find that by requiring the complainant to select whether they wanted DEQ to keep their identity confidential, DEQ obliged itself in good faith not to disclose that information.

Regarding the third condition, we have previously concluded that the identities of people who voluntarily provide sensitive information to public bodies is information of a nature that reasonably should be kept confidential.[2] We have also observed that the condition is generally satisfied if the disclosure of the same type of information being requested is restricted by statute, or the information is exempt from disclosure under other exemptions of the Public Records Law. *See Manual* at 104. In this case, we note that there are a number of Oregon laws that make the identity of informants and complainants confidential or expressly exempt from disclosure.[3] The purpose of many of those provisions appears to be consistent with DEQ's stated purpose; i.e., to encourage candid and voluntary reporting of suspected harm or wrongdoing by reducing the risk that the reporter will face retaliation or stigmatization. Consistent with these authorities, we conclude that the complainant's identifying information in this instance is of a nature that reasonably should be kept confidential.

We also conclude that the public interest would suffer by disclosure in this instance. The public has a strong interest in preventing, identifying, and remediating pollution and its effects.

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[2] *See, e.g.,* Public Records Order, Feb 15, 2019, Ward (identities of people who provide employment references); Public Records Order, Sep 3, 2019, Boquist (employees who report a hostile work environment); Public Records Order, Nov 6, 2009, Wheatly (identity of persons who report concerns about a driver's competence); and Public Records Order, Feb 5, 1998, Phillips (employees who report workplace health violations).

[3] *See, e.g.*, ORS 40.275 (privilege against disclosing identity of informant who provided information to a law enforcement officer or legislative committee about a possible violation of law); ORS 124.075 (identity of a person who reports elder abuse confidential); ORS 131.925 (personal information about complainants in profiling complaints exempt); ORS 177.180 (identity of person who reports waste, inefficiency or abuse by a state agency to the Secretary of State confidential); ORS 250.075 (certain student complaints not subject to disclosure); ORS 329A.390 (identity of person who files complaint against a child care facility may not be disclosed); ORS 419B.035 (name of person who reports child abuse confidential); ORS 430.753 (identity of a person who reports abuse of a mentally ill or developmentally disabled adult confidential); ORS 441.640 (name of complainant reporting abuse of a resident if a long term care facility exempt); ORS 654.062 (identity of employee who reports a workplace safety and health violation confidential if requested); ORS 676.175 (complaints against licensees of health professional regulatory boards confidential); and ORS 731.264 (complaints against insurers confidential).

And because voluntary reports are a significant source of enforcement information for DEQ, the public also has a strong interest in protecting citizens who submit those reports. According to DEQ, most of the reports it received last year were filed with the expectation that the reporter's identity would remain confidential. It is reasonable to assume that some number, and perhaps a significant number, of those reports would not have been filed if there was no reasonable assurance of confidentiality. Similarly, it is reasonable to conclude that future reporting would be stifled, at the expense of the environment and public health, if we required DEQ to disclose a complainant's identity after they requested confidentiality. We are also unable to discern any public interest that would be meaningfully advanced by disclosing the complainant's identity to you in this instance.

For the reasons discussed above, we conclude that DEQ was permitted to redact the complainant's identifying information from the report under ORS 192.355(4). We therefore respectfully deny your petition.

Sincerely,



Frederick M. Boss
Deputy Attorney General

FMB:pjn
c via e-mail only: Zach Loboy (DEQ)