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December 10, 2021

SENT VIA E-MAIL ONLY: hborrud@oregonian.com, jgoldberg@oregonian.com and patty.jo.angelini@state.or.us

Hillary Borrud and Jamie Goldberg
The Oregonian
1500 SW First Ave., Ste 500
Portland, OR 97201

Patty Jo Angelini
Oregon Employment Department
875 Union St. NE
Salem, OR 97311

Re: Petition for Public Records Disclosure Order
Oregon Employment Department
DOJ File No. 471090-GA0163-21

Dear Ms. Borrud, Ms. Goldberg, and Ms. Angelini:

This letter is the Attorney General's order in response to a petition filed under the Oregon Public Records Law, ORS 192.311 to 192.431, by Ms. Borrud and Ms. Goldberg on behalf of *The Oregonian*.[1] Their petition asks the Attorney General to order the Oregon Employment Department (OED) to disclose certain records that were withheld in response to a public records request. For the reasons that follow, we grant the 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). If a responsive record contains both exempt and nonexempt material, the agency shall 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*.

[1] We thank Ms. Borrud and Ms. Goldberg for agreeing to an extension of time in which to respond to their petition.

The Oregonian's petition stems from several requests for:

a. All formal and informal complaints about discrimination and other inappropriate workplace behavior or treatment made by employees in the Paid Family and Medical Leave Insurance (PFMLI) program in 2021;

b. All resignation letters from employees of the PFMLI program; and,

c. All correspondence between Director David Gerstenfeld and employees in the PFMLI program between July 1, 2021 and October 20, 2021.

Although OED disclosed records responsive to each of *The Oregonian's* requests, OED indicated that it withheld one complaint responsive to the first request, one resignation letter responsive to the second request, and 28 e-mails responsive to the third request. In each instance, OED explained its determination that the withheld records are exempt from disclosure under ORS 192.345(12) (relating to a personnel discipline action) and ORS 192.355(5) (information submitted to OED in confidence).

The Oregonian appeals each of OED's determinations. Ms. Borrud notes that the implementation of the PFMLI program, which was to become fully operational in 2022, has been delayed until 2023. She also cites public statements by OED acknowledging that several key members of the PFMLI staff recently resigned and that that OED is actively investigating allegations of discrimination and a hostile workplace with the PFMLI program. Accordingly, she argues, the public has a significant interest in knowing whether these workforce issues are likely to result in additional implementation delays that could, in turn, further delay payments to Oregon workers who are eligible for payments under the program. Ms. Borrud asserts that the public interest requires OED to disclose the records it withheld because she believes they will contribute to the public's understanding of these delays. Finally, Ms. Borrud contends that disclosure will promote the general public interest in ensuring that public employees are protected from hostile or discriminatory workplaces.

We begin by considering the written complaint withheld by OED. OED informs us that it is currently investigating the matters alleged in the complaint, as well as other complaints, and that the investigation could lead to personnel disciplinary action. Therefore, OED asserts that the complaint is exempt under ORS 192.345(12). That provision conditionally exempts from disclosure "[a] personnel discipline action, or materials or documents supporting that action," unless the public interest requires disclosure in the particular instance. *Id*. And as we have previously observed, "[w]hen a records request is received during the course of a personnel investigation, and unless the public interest requires disclosure, the records can be withheld until the investigation concludes so that the public body can determine whether this exemption applies or not." *Attorney General's Public Records and Meetings Manual* at 64 (2019) (citation omitted) ("*Manual*"). Applied to your request, that means OED was permitted to withhold the complaint at this time, unless the public interest favors disclosure in this instance.

OED asserts that the interests in withholding the complaint at this time outweigh the public interests in its disclosure. OED is concerned that disclosing this particular complaint could undermine the integrity of its broader investigation into a wide range of allegations, subject the complainant to retaliation, and deter other employees from expressing any concerns they may have about working conditions within the PFMLI program. This, in turn, could impair OED's ability to identify and correct inappropriate behaviors or employee maltreatment within the workplace.

On balance, we conclude that the interests favoring the nondisclosure of the complaint outweigh the public interests in its disclosure at this time. OED has publicly acknowledged that several key PFMLI staff members have recently resigned and that it is investigating multiple allegations of employee maltreatment within the PFMLI program. We therefore appreciate *The Oregonian's* assertion that there is substantial public interest in understanding whether these employment matters will further delay an already delayed program, with possible financial consequences to a significant number of Oregonians. However, after reviewing the complaint at issue, we cannot discern how the public's general interest in the program would be meaningfully advanced by the disclosure of this particular complaint. The complaint alleges discrimination and a hostile work environment, but the allegations are very general and do not discuss or offer any specific insight on the implementation delays in the PFMLI program.

In contrast, we find that the interests in withholding the complaint at this time – which include the need to ensure a thorough investigation, to reduce the danger of retaliation against complainants, to encourage reporting, to protect the subjects of the investigation from potentially unwarranted embarrassment, and to safeguard public employees from discrimination and hostile work environments – affirmatively outweigh the public's interest in the complaint's disclosure. We therefore conclude that the public interest does not require OED to disclose the complaint at this time and respectfully deny the first part of *The Oregonian's* petition.[2]

Next, we consider the resignation letter withheld by OED. OED asserts that the letter was submitted in confidence and is therefore exempt under ORS 192.355(4). That 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.

Id.

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[2] OED also asserts that the complaint was submitted in confidence and is therefore exempt from disclosure under ORS 192.355(4). Because we conclude that OED was permitted to withhold the complaint under ORS 192.345(12), we do not need to evaluate OED's claim that it is also exempt under ORS 192.355(4).

The purpose of this exemption is to encourage the voluntary submission of information to agencies with some reasonable assurance that it will be kept confidential. *See Manual* at 102. 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.

OED informs us that the employee who submitted the resignation letter requested confidentiality after OED received *The Oregonian's* record requests, and approximately one month after the letter was tendered. OED states that it promised the employee confidentiality at that time and notes that the employee was not required by law to submit the letter. OED also contends that information in the letter is of a nature that reasonably should be kept confidential because it refers to adverse working conditions that are subject to OED's ongoing investigation. And because information contained in the letter relates to the investigation, OED asserts that the public interest would suffer by its disclosure; i.e., disclosure might impair the investigation and deter employees from submitting complaints in the future.

As we have previously observed, many agencies receive information that reasonably could be considered confidential, without any specific request for confidentiality; however, it is very difficult to justify nondisclosure in such cases. *See Manual* at 103. On this record, we find no evidence that, at the time the letter was submitted, there was an explicit or implicit understanding that it was submitted in confidence or that OED obligated itself not to the disclose the letter. Because two of the necessary conditions for 192.355(4) to apply were not satisfied, we conclude that OED was not permitted to withhold the resignation letter under that provision.

OED also asserts that the resignation letter contains information related to its ongoing investigation and is therefore exempt from disclosure under ORS 192.345(12) for the same reasons discussed above. However, our review of the resignation letter reveals that most of the letter has little or no bearing on the matters that are subject to OED's ongoing investigation. And given the obligation to separate and disclose nonexempt material, we conclude that OED was not permitted to withhold the letter in its entirety. *See* ORS 192.338. We therefore grant *The Oregonian's* petition in part and order OED to disclose the resignation letter. OED may redact information from the letter that it concludes is exempt from disclosure. If *The Oregonian* disagrees with OED's redactions, it may again petition this office for review.

Finally, we examine the 28 e-mails between Director Gerstenfeld and PFMLI program staff that OED withheld. OED asserts that some of the information contained in those e-mails

pertains to the ongoing investigation and is therefore exempt under ORS 192.345(12) for similar reasons discussed above. OED also asserts that the e-mails contain some information that was submitted in confidence that is exempt from disclosure under ORS 192.355(4).

After reviewing the 28 e-mails, we make the following observations and conclusions. One e-mail is not responsive to *The Oregonian's* request as it is not between Mr. Gerstenfeld and the PFMLI staff and it does not relate to PFMLI staff resignations or OED's investigation. Another e-mail is just a forwarded copy of an e-mail sent by OED to *The Oregonian* that addresses staff resignations and OED's investigation. We discern no basis for withholding that e-mail. Only two e-mails, which are part of the same e-mail thread, are marked confidential. They are internal e-mails discussing the classification of PFMLI program positions. Because they do not mention PFMLI staff complaints, resignation or OED's investigation, OED has not sustained its burden of demonstrating why they may be withheld. Most of the remaining e-mails are comprised of PFMLI staff resignation notices and management responses to those notices, including the resignation notices of several employees that have already been disclosed to *The Oregonian*. There are no indications that any of these e-mails were submitted in confidence when they were sent, and OED has not explained why the public interest would suffer by their disclosure. Only two e-mails, including the e-mail addressed to *The Oregonian*, mention staff complaints or OED's investigation, and neither discloses information about those matters that OED has not already publicly acknowledged.

Under the circumstances, and given OED's obligation to separate and disclose nonexempt material, we conclude that OED was not permitted to withhold the e-mails in their entirety. We therefore grant the petition in part and order OED to disclose the 27 responsive e-mails to *The Oregonian*. OED may redact information that it concludes is exempt from disclosure and if *The Oregonian* disagrees with those redactions, it may again petition this office for review.

For the reasons discussed above, we deny *The Oregonian's* petition with respect to the written complaint and grant the petition with respect to the resignation letter and 27 responsive e-mails that OED withheld. OED has seven days within which to comply or announce its intention to seek judicial review. ORS 192.411(2).

Sincerely,

Lisa M. Udland

Lisa M. Udland
Deputy Attorney General

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