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December 20, 2021

VIA E-MAIL ONLY: brett@gl-lg.com

Brett Mulligan
1300 SW 5th Avenue, Suite 3600
Portland, OR 97201

Re: Petition for Public Records Disclosure Order
Department of Consumer and Business Services
DOJ File No.: 440420-GA0164-21

Dear Mr. Mulligan:

This letter is the Attorney General's order responding to your November 23, 2021,[1] petition under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition asks us to order the Department of Consumer and Business Services (DCBS) Workers' Compensation Division (WCD) to disclose records it received from Sedgwick Claims Management Services from which WCD assessed fees upon one of your clients as part of a workers' compensation claim. For the following reasons, we respectfully deny your petition.

Your petition relates to a Sedgwick ledger previously requested by your firm that we recently considered in Public Records Order, October 1, 2021, Jacoby. In that instance, the stated purpose for your firm's request was to confirm suspected errors or irregularities in Sedgwick's billing of your client, who is a noncomplying employer. In our prior order, we concluded that the requested ledger was exempt from disclosure in its entirety under

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[1] Thank you for granting us additional time to respond to your petition.

ORS 192.355(20),[2] a provision that makes workers' compensation claim records expressly exempt from disclosure. Specifically, we found that:

> The ledger you seek indisputably is a compilation of information about a particular workers' compensation claim and its processing. And publicly disclosing the ledger – *or any part of it* – would confirm the identity of the claimant and thereby risk the discriminatory effects that the exemption seeks to avoid. In our view, this confirms that the ledger should be treated as a claim record for purposes of the public records law. The ledger is therefore exempt from public disclosure unless an exception applies.

Id. at 3 (emphasis added).[3] We also concluded that DCBS did not abuse its discretion when it determined that none of the available exceptions applied in that instance. *Id*. at 4. Finally, we observed that any concerns about Sedgwick's accounting could be addressed through an audit of its claims file under ORS 656.054(3). *Id*.

In this instance, your firm initially requested a subset of information you believe to be contained in Sedgwick's ledger. Specifically, you requested information from the ledger that reflects your client's payments and fees owed to Sedgwick. You state that you need this information to ensure that your client has not been double-billed or defrauded and that Sedgwick has not committed fraud or material misrepresentation in the administration of this claim. Finally, your petition notes that you hope to obtain this information through the public records inspection process in order to avoid a time-consuming audit under ORS 656.054(3).

We contacted Cathy Ostrand-Ponsioen, WCD Legal Issues Coordinator, regarding your new petition. As a threshold matter, she explained, Sedgwick does not bill noncomplying employers directly, nor does it receive payments from them in relation to workers' compensation claims. Rather, under its contract with WCD, Sedgwick adjudicates the claims and bills WCD for any reimbursable fees and expenses. WCD, in turn, then charges the noncomplying employers for any reimbursable costs, fees, and penalties. Therefore, Ms. Ostrand-Ponsioen

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[2] ORS 192.355(20) makes the following records exempt from disclosure: "Workers' compensation claim records of the Department of Consumer and Business Services, except in accordance with rules adopted by the Director of the Department of Consumer and Business Services, in any of the following circumstances:

(a) When necessary for insurers, self-insured employers and third party claim administrators to process workers' compensation claims.

(b) When necessary for the director, other governmental agencies of this state or the United States to carry out their duties, functions or powers.

(c) When the disclosure is made in such a manner that the disclosed information cannot be used to identify any worker who is the subject of a claim.

(d) When a worker or the worker's representative requests review of the worker's claim record."

[3] We also acknowledged that the claimant's identity is known to your firm because you represent the claimant's employer. However, we noted, this fact was not relevant to our evaluation because "the identity, motive and need of the requester are generally irrelevant to determining whether an exemption applies to requested records." *Id*. at 3 (citing *Attorney General's Public Records and Meeting Manual* at 1).

explained, Sedgwick's ledger does not contain the specific information you seek. She also informed us that WCD has provided you with a document detailing the expenses, fees, and penalties assessed by WCD upon your client, as well as payments made by your client to WCD.

When we informed you of WCD's updated response, you modified your request to seek copies of the records Sedgwick submitted to WCD when it billed the agency. Because your new request was technically never submitted to, or denied by DCBS, we would ordinarily deny your petition as premature. *See* ORS 192.411(1) (Attorney General's authority is generally limited to instances where a person is denied the right to inspect or to receive a copy of a public record). However, after informing DCBS about the information you now seek, DCBS indicated that it would also deny your new request. Specifically, Ms. Ostrand-Ponsioen explained that the information submitted by Sedgwick to WCD is a subset of Sedgwick's ledger, which is part of the workers' compensation claim record and therefore exempt from disclosure under ORS 192.355(20). In light of DCBS' response to your modified request, and with DCBS' concurrence, we conclude that it is appropriate to consider your petition at this time.

Ms. Ostrand-Ponsioen described the records you now seek as a subset of Sedgwick's ledger. For the reasons discussed in our prior order, they are therefore expressly exempt from disclosure under ORS 192.355(20) unless an exception applies. Your petition appears to concede this determination. However, by narrowing the scope of your request, you contend that DCBS is now permitted to disclose the otherwise exempt information to you under an exception because you believe disclosure can be made in such a manner that the information cannot be used to identify the worker who was the subject of a claim. *See* ORS 192.355(20)(c)

ORS 192.355(20) expressly provides that the public disclosure of claims records under any of the statute's exceptions must be in accordance with rules adopted by DCBS. Those rules specify that requests for claims documents[4] – including payment ledgers and insurer generated records – must be submitted in compliance with OAR 436-001-0700 and OAR 436-060-0017. And access to claims records under an exception "will be granted at the sole discretion of the director." OAR 436-001-0700(3)(b).

According to Ms. Ostrand-Ponsioen, your records request was not submitted in compliance with DCBS' rules.[5] DCBS therefore asserts that it lacks the discretion to grant you access under an exception at this time. Ms. Ostrand-Ponsioen also reemphasized DCBS' position that your concerns about Sedgwick's accounting are better addressed through an audit under ORS 656.054(3).

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[4] The term "documents" for purposes of requests for claims information is defined in OAR 436-060-0017(1)(a) and expressly includes payment ledgers and insurer generated records, as well as correspondence between an insurer, service providers, the worker, the DCBS Director or the Workers' Compensation Board.

[5] *See, e.g.*, OAR 436-001-0700(4)(d) and OAR 436-060-0017(3)(b) (requests by someone other than the worker or the worker's beneficiary must be accompanied by an attorney retainer agreement or a valid release signed by the worker).

Because it does not appear that your current request complied with DCBS' procedures for obtaining exempt workers' compensation claim records, we find that none of the exceptions to ORS 192.355(20) are available to you at this time. And as noted in our previous order, your concerns about Sedgwick's accounting can be addressed by requesting an audit of its claims file under ORS 656.054(3) – a specific remedy available to your client that would not entail the public disclosure of any workers' compensation claim records. Under the circumstances, we conclude that DCBS did not abuse its statutorily entrusted discretion by withholding the records from you. We therefore respectfully deny your petition.

Sincerely,

Lisa M. Udland

Lisa M. Udland
Deputy Attorney General

LMU:pjn
c via e-mail only: Cathy Ostrand-Ponsioen (DCBS)