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July 28, 2022

**VIA E-MAIL ONLY**: sllvolin@gmail.com

Stephanie Volin
29 South Valley Road
West Orange, NJ 07052

Re: Petition for Public Records Disclosure Order
*Commission on Judicial Fitness and Disability*
DOJ File No.: 175001-GA0044-22

Dear Ms. Volin:

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, submitted by you on June 1, 2022, and amended on July 5, 2022,[1] asks the Attorney General to order the Commission on Judicial Fitness and Disability (the "Commission") to disclose all complaints against judges from January 2015 until present that were not referred to a public hearing, the minutes of all Commission meetings relating to those complaints, and any letters of informal disposition attached to the minutes. The Commission denied your request for these records asserting that, pursuant to ORS 1.440, they are not public records. For the reasons discussed below, we respectfully deny your petition.

**a. The Public Records Law.**

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 any such denial. *Id*.

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[1] We thank you for granting addition time to respond to your petition.

**b. Background – Commission on Judicial Fitness and Disability.**

The Commission reviews complaints about Oregon state judges and justices of the peace and investigates when the alleged conduct might violate the state's Code of Judicial Conduct or the Oregon constitution. Upon receipt of a complaint, the Commission conducts such preliminary investigation as it considers necessary to determine whether to dismiss the complaint or conduct a public hearing. *See* ORS 1.420(1). According to the Commission, it meets six times each year to preliminarily review new complaints and ongoing investigations, as well as to determine whether to dismiss complaints or initiate formal proceedings.

The Commission's proceedings, which include its preliminary investigations and formal hearings, are governed by its Rules of Procedure ("Rule(s)"). *See* Commission on Judicial Fitness and Disability, Rules of Procedure, https://www.courts.oregon.gov/rules/Other%20Rules/CJFDRulesOfProcedure.PDF (accessed July 7, 2022). Under those Rules, an informal disposition may be an appropriate response to a complaint if an investigation "reveals a departure by the judge from the Code of Judicial Conduct which in the opinion of the Commission is not sufficiently serious to warrant a public hearing * * *." Rule 7.c. In such a case, the Commission will issue an informal disposition letter informing the judge "of the objectionable conduct and of the Commission's intent to dismiss the complaint * * *," unless the judge requests a public hearing. *Id*. Under Rule 20.d., informal disposition letters "will be attached to the minutes of the meeting at which the Commission approved the sending of such letter(s)." If the Commission files formal charges, it conducts a public hearing and then makes a publicly available recommendation to the Supreme Court on whether to dismiss the complaint or discipline the judge. *See* ORS 1.420(1), (2), (4), and ORS 1.440(1).

**c. Public Records Request and Appeal.**

Your petition explains that on May 27, 2022, you requested the Commission disclose all meeting minutes from January 2015 to present relating to complaints against judges that were not referred to a public hearing, including any attached letters of informal disposition. The Commission replied that it "does have the records you requested, however these records are not public records per ORS 1.440." Your appeal followed and challenges the Commission's claim that the requested records are not public records.

Although you have not previously requested the underlying complaints themselves, your amended petition asks us to determine whether or not those complaints are public records under ORS 1.440. Ordinarily, we would dismiss your amended appeal as premature because the Commission has not denied a request for the complaints themselves. *See* ORS 192.411 (the Attorney General's jurisdiction is generally limited to instances in which a request for records has been denied). However, the Commission informed us that if you were to request the complaints, the Commission would assert that they are not public records under ORS 1.440 and deny the request. Under the circumstances, and with the Commission's concurrence, we conclude that it is appropriate to also consider whether the Commission is permitted to withhold the complaints under ORS 1.440.

**d. ORS 1.440 – Status of Records of Commission Proceedings.**

ORS 1.440(1) provides, in relevant part, that "*[d]ocuments filed with* the Commission * * * and the *investigation conducted by* the commission prior to a hearing" to review complaints concerning the conduct of a judge "*shall not be public records unless received as competent evidence in the course*" of a public hearing under ORS 1.420. (Emphases added.) Commissioners and Commission staff are also prohibited from disclosing or using any "any investigation, testimony or documents which are not public records as defined in ORS 1.410 to 1.480 for any purpose other than in connection with their official duties * * *." ORS 1.440(3). However, the Commission may "state the disposition of [a] complaint and proceedings and the reasons for its decision," but only upon the request of the judge who was the subject of the complaint and upon a finding that "the complaint or proceedings have been publicized and fairness requires such comment." *Id*.

If the Commission files formal charges, any subsequent hearings concerning the conduct of a judge are open to the public and any testimony given, or evidence received "shall be public records." ORS 1.420(3). The decision of the Commission after a hearing "shall be a public record," together with any recommendation the Commission submits to the Supreme Court. *See* ORS 1.440(1). Finally, a consent to censure, suspension or removal signed by a judge, and any stipulation of facts entered into between the Commission and a judge, "shall not be a public record until the consent and stipulation are submitted to the Supreme Court." *Id*.

**e. Discussion.**

In response to your petition, we contacted Rachel Mortimer, the Commission's Executive Director. She explained the Commission's position that all of the records you seek are either "documents filed with" the Commission or are part of the "investigation conducted" by the Commission that resulted in complaint dismissal or informal disposition, in which case they "shall not be public records" because they were not received as competent evidence in a public hearing. ORS 1.440(1). Because they are not public records, the Commission argues, they are not subject to the Public Records Law and the Attorney General does not have jurisdiction to consider your appeal. Ms. Mortimer also emphasized the Commission's position that ORS 1.440(3) provides only limited authority for the Commission to even comment on the disposition of complaints that do not proceed to a public hearing, which reflects the legislature's intent that all records relating to pre-hearing dispositions fall within the meaning of "documents filed with," or the "investigation conducted" by the Commission.

As a preliminary matter, we note that we have reviewed an example of the Commission meeting minutes at issue. We identified three general categories of information in the minutes, including: (1) meeting logistical details, such as the meeting date, time, location, and attendees; (2) Commission administrative business, such as approving minutes and internal personnel matters; and (3) complaints against judges, including a review of pending investigations and new complaints, as well as the disposition of old complaints. None of the logistical details or administrative information contained in the first two categories relate to complaints filed against judges or to investigations conducted by the Commission. We therefore conclude that ORS 1.440 does not apply to those portions of the example we reviewed and that they are public

records under the Public Records Law. *See* ORS 192.311(5) (defining a "public record" as "any writing that contains information relating to the conduct of the public's business"). We also observe that most, if not all, of the information in those portions appears to be nonexempt, and therefore subject to disclosure consistent with the requirement to separate and disclose nonexempt material. *See* ORS 192.338. After discussing these portions with Ms. Mortimer, the Commission no longer asserts that such non-investigative information is exempt from disclosure under ORS 1.440, and the Commission will contact you soon to clarify whether you wish to obtain those portions of the minutes you requested. Because the Commission no longer asserts that the non-investigative portions of the minutes are exempt, we dismiss your petition with respect to that material as moot.

The rest of the material in dispute consists of those portions of the Commission's minutes addressing complaints against judges, the underlying complaints themselves, and any informal disposition letters attached to the minutes. With regard to those materials, we decline to address the Commission's argument that we lack jurisdiction over your appeal because, assuming that we do have jurisdiction for purposes of this order, we conclude that the remaining material you seek is exempt from disclosure.

ORS 192.355(9)(a), the "state law catchall," exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." ORS 1.440 has long been recognized as such a law. *See* ORS 192.500(2)(h) (1975) (predecessor to the "state law catchall" that listed ORS 1.440 as an exemption under the Public Records Law because it prohibits or restricts the disclosure of information). By specifying that "documents filed with," and the "investigation conducted by" the Commission, "*shall not* be public records *unless* received as competent evidence" at a public hearing, we understand the legislature intended to prohibit the disclosure of documents and information relating to the Commission's proceedings that are not received as evidence at a public hearing. ORS 1.440(1) (emphases added).

We also conclude that the disclosure of records relating to the disposition of complaints that do not proceed to a public hearing is restricted, within the meaning of ORS 192.355(9)(a), because ORS 1.440(3) prohibits Commissioners and staff from publicly disclosing records that are not received as competent evidence at a public hearing. *Cf*. Letter of Advice to L. Patrick Hearn, Executive Director, Oregon Government Standards and Practices Commission (OP-1997-4) (Aug 13, 1997) ("[I]t is clear that the commission could not meet publicly, because of specific direction that members of the commission and staff may not disclose any investigation, testimony or documents which are not introduced at a public hearing."). Moreover, the permission ORS 1.440(3) gives the Commission to "state the disposition of the complaint and proceedings and the reasons for its decision" is contingent on a request from the affected judge, and a determination by the Commission that the matter has been publicized and fairness requires comment. ORS 1.440(3). And this limited permission to comment on the disposition of complaints does not provide an exception to the general rule prohibiting the Commissioners and staff from publicly disclosing records relating to such complaints.

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**f. Conclusion.**

For the reasons discussed above, we find that the material you seek is exempt from disclosure under ORS 192.355(9)(a) because its disclosure is prohibited and restricted by ORS 1.440. We therefore respectfully deny your petition.

Sincerely,

Lisa M. Udland

LISA M. UDLAND
Deputy Attorney General

ACF:pjn
c via e-mail only: Rachel Mortimer (Commission on Judicial Fitness and Disability)