ELLEN F. ROSENBLUM
ATTORNEY GENERAL

LISA M. UDLAND
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

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

November 28, 2022

VIA E-MAIL ONLY: rhunt@barran.com and Kelsey.Dietrick@boli.oregon.gov

Re: Petition for Public Records Disclosure Order
Oregon Bureau of Labor and Industries
DOJ File No.: 839407-GA0109-22

Dear Mr. Hunt and Ms. Dietrick:

This letter is the Attorney General's response to Mr. Hunt's petitions for the disclosure of records under the Oregon Public Records Law, ORS 192.311 to 192.478. His petitions, received by us on November 17, 2022, allege that the Bureau of Labor and Industries (BOLI) has constructively denied various records requests by not responding to them within statutorily-required time frames.[1] For the reasons that follow, we grant Mr. Hunt's petitions in part, deny them in part, and dismiss them in part.

a. Public Records Law Processing Time Frames.

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 agencies are obligated to respond to records requests "as soon as practicable and without unreasonable delay." ORS 192.329(1). An agency that is unable to complete its response within fifteen business days of receiving a written request is required to provide the requester with a reasonable estimated completion date. ORS 192.329(5). Agencies may request additional information or clarification from a requester for the purpose of expediting the agency's response to the request, and its obligation to process the request is suspended until the requester provides clarification or affirmatively declines to provide it. ORS 192.329(4)(a). If the requester fails to provide the requested information or clarification within 60 days of the request, the agency shall close the request. ORS 192.329(4)(b).

The fifteen-business day timeline does not apply if an agency determines that compliance is impracticable because it lacks sufficient staff, compliance would demonstrably impede the agency's

[1] Although Mr. Hunt made multiple records requests, and submitted a separate petition for each request, we are consolidating the petitions for purposes of this order.

ability to perform other necessary services, or because it is unable to comply due to the volume of public records requests being simultaneously processed by the agency. ORS 192.329(6). However, an agency that cannot comply with the time frames for one of those narrow reasons is still required to acknowledge the request and complete its response "as soon as practicable and without unreasonable delay." ORS 192.329(8). A requester may petition the Attorney General if they believe an agency has failed to comply with the processing time frames or other provisions contained in ORS 192.329. ORS 192.407(1). The agency carries the burden to sustain its actions. ORS 192.411(1).

b. Background.

Mr. Hunt's petition shows that he submitted fourteen public records requests to BOLI on October 6, 2022. He alleges that he has not received any response from BOLI as of the date of his petitions, which we calculate to be more than 25 business days after he submitted his requests. For ease of reference, we have ordered and summarized each of Mr. Hunt's requests as follows:

1. Communications regarding complaints about employer meal period violations since 2017.
2. Forms used by BOLI to ask complainants if their employer has a collective bargaining agreement (CBA) with a labor organization since 2017.
3. Forms used by BOLI to ask complainants if they are a member of a union since 2017.
4. Employer complaints regarding Administrative Prosecutors' use of subpoenas since 2015.
5. All records or communications of the former BOLI Commissioner regarding meal period rules since 2008.
6. Records since 2011 reflecting that BOLI did not transfer civil penalties it collected to the Department of State Lands or the Department of Human Services.
7. Records since 2011 reflecting that BOLI did not transfer civil penalties it collected to the Department of State Lands or the Department of Human Services, including the entity fined and amount of the fine.
8. Press releases relating to alleged violations of meal periods at Legacy Hospitals since 2017.
9. BOLI Commissioner's calendar entries mentioning certain hospitals since 2019.
10. Deputy Commissioner's calendar entries mentioning certain hospitals since 2019.
11. All records reflecting discussions, guidelines, or analysis of collectively bargained meal times at hospitals with CBAs.
12. All records reflecting that BOLI has issued Notices of Intent for meal period and rest period violations to non-union hospitals other than Legacy hospitals since 2017.
13. All records relating to considerations of health consequences resulting from collectively bargained meal times at hospitals that have modified meal times pursuant to a CBA.
14. All records since 2017 relating to health and safety issues at hospitals where employees are covered by CBAs.

c. BOLI's Response.

In response to Mr. Hunt's petitions, Ms. Dietrick explained that BOLI has not completed its response to Mr. Hunt's requests, or provided him with estimated completion dates, because it has limited staff and a large number of pending requests. She indicated that BOLI recently hired a new staff member to assist with public records requests, and that BOLI will not be charging fees to process Mr. Hunt's numerous requests. She also provided BOLI's position regarding each of Mr. Hunt's fourteen requests, which are summarized below.

Requests 1 – 3: Ms. Dietrick explained that these requests are substantially duplicative of several requests previously submitted by Mr. Hunt on December 23, 2021, which BOLI is already processing. She also indicated that BOLI would like to work with Mr. Hunt to establish search terms to help locate any responsive records.

Request 4: Ms. Dietrick informed us that the request for complaints against Administrative Prosecutors is similar to several requests made by him on December 23, 2021. Specifically, those requests sought records relating to agency guidance on the use of subpoenas, as well as any investigations or disciplinary action against Administrative Prosecutors with respect to the use of subpoenas since 2015. She indicated that BOLI is still processing those requests and will include any nonexempt complaint information as part of its response. She also indicated that BOLI anticipates producing its first installment of responsive records within 60 days, and any additional records it locates on a rolling basis thereafter.

Request 5: Ms. Dietrick informed us that it would like to work with Mr. Hunt to define specific search terms for this request because it will be extremely onerous to conduct a search for responsive records without defined search terms.

Requests 6 – 7: Ms. Dietrick explained that these requests are similar in nature to three records requests Mr. Hunt submitted in June 2022. She informed us that BOLI sought clarification from him regarding those requests but received no response. She indicated that again, BOLI would like to obtain clarification from Mr. Hunt regarding these requests.

Request 8: Ms. Dietrick explained that all press releases issued during the current Commissioner's term are publicly available on its website, and that BOLI has not issued any press releases relating to Legacy Hospitals in that time. She also indicated that BOLI is searching for any responsive press releases issued by the previous Commissioner and expects to complete its response to Mr. Hunt within 30 days.

Requests 9 – 10: According to Ms. Dietrick, most of the records responsive to these requests are a subset of records Mr. Hunt requested on December 23, 2021. She explained that BOLI is still processing his original requests, expects to produce an initial installment of responsive records within 30 days, and insofar as his new requests seek specific calendar entries made after December 23, 2021, BOLI will process those records once it completes its response to his initial requests.

Request 11: Ms. Dietrick indicated that this request appears to be duplicative of previous requests made by Mr. Hunt, and that BOLI would like to work with him to clarify his request and define search terms.

Request 12: Ms. Dietrick explained that BOLI is currently processing this request and anticipates completing its response within 60 days.

Requests 13 – 14: Ms. Dietrick informed us that BOLI is currently processing these requests and anticipates providing an initial installment of responsive records within 60 days, with disclosure on a rolling basis thereafter if additional responsive records are identified.

d. Discussion.

We begin by noting that we recently ordered BOLI to produce records to Mr. Hunt after he appealed BOLI's failure to provide substantive responses to sixteen public records requests he submitted in December 2021. *See* Public Records Order, Sep 16, 2022, Hunt and Dietrick. In that matter, we granted Mr. Hunt's petitions and ordered BOLI to disclose most of the requested records within 30 days and the remainder within 90 days. It appears that the records involved in this case relate to the same subject matter as the records at issue in our prior order and there also appears to be some overlap, which we address below. And as we observed in our prior order, it may be appropriate for BOLI to consult with Mr. Hunt to determine the scope of some of his requests because some of his requests are framed more as adversarial discovery requests than as public records requests.

Turning to Mr. Hunt's current appeals, we must again find that BOLI failed to respond to his requests in the time and manner prescribed in ORS 192.329. BOLI was required to complete its response to each request "as soon as practicable and without unreasonable delay." ORS 192.329(1). BOLI was also required to complete its response to each request within fifteen business days of receipt or to provide a reasonable estimated date of completion. ORS 192.329(5). Here, more than 25 business days have passed since Mr. Hunt submitted his requests, and there is no evidence that BOLI acknowledged his requests, provided him with estimated dates of completion, or completed its response to any requests. Although BOLI has provided the same general reasons why its response has been delayed, we again find that BOLI has not met its burden of demonstrating that compliance with the statutory time frames was impracticable for one of the exceptions enumerated in ORS 192.329(6).

We are required to treat BOLI's failure to timely respond as a denial of Mr. Hunt's requests. ORS 192.407(1)(a). To the extent we grant Mr. Hunt's petitions below, we order BOLI to disclose nonexempt responsive material to him within the time frames that we have concluded are appropriate to bring BOLI into compliance with ORS 192.329. ORS 192.407(3)(a). In determining those time frames, we have accounted for the broad scope and lengthy time frames of many of Mr. Hunt's requests, the sheer number of requests from Mr. Hunt that are still being processed (including many that have not been appealed), the high volume of requests from other requesters that BOLI is processing simultaneously, and BOLI's current resource constraints (which also accounts for the availability of staff during the upcoming holiday season). We now address Mr. Hunt's petitions in turn.

Petitions 1 – 3: Dismissed in part and granted in part. We find that all of the records responsive to these requests, and that were created before December 23, 2021, are a subset of records previously requested by Mr. Hunt that we addressed in our recent order. We have already granted a petition with respect to those records and, on September 16, 2022, ordered BOLI to disclose them within 30 days. We also understand that Mr. Hunt has already initiated judicial proceedings for those records in the Circuit Court for Marion County. *See* ORS 192.411(2). Under the circumstances, we must respectfully dismiss Mr. Hunt's petitions with respect to those records as there is no relief we can grant at this stage. As for the remaining material, which consists of responsive records created between December 23, 2021 and October 6, 2022, we grant Mr. Hunt's petitions and order BOLI to disclose all nonexempt responsive records to him within 45 days.

Petition 4: Denied. Mr. Hunt's fourth request seeks a subset of records that appear to be responsive to two broader requests submitted by him on December 23, 2021. BOLI is still processing those requests and Mr. Hunt has not appealed BOLI's handling of those broader requests. Under the circumstances, we decline to order BOLI to complete its response to this request within a particular time period. Although BOLI failed to comply with ORS 192.329's response time frames after receiving Mr. Hunt's October 6, 2022 – a failure we are required to treat as a denial of his request – BOLI has not actually denied his request. Rather, BOLI informs us that the records sought in his new request were already being processed as part of his earlier request. Under the circumstances, we cannot conclude that BOLI's failure to respond to Mr. Hunt's more recent request resulted in any additional delay in the processing of the records he seeks. We therefore respectfully deny this petition.

Petition 5: Granted. Given the broad scope of Mr. Hunt's fifth request, that it seeks records going back to 2008, and recognizing BOLI's need to review the responsive records for exempt material, we order BOLI to disclose any nonexempt responsive records within 90 days.

Petitions 6 – 7: Granted. We understand that BOLI has previously disclosed records to Mr. Hunt relating to the collection of civil penalties, which we believe will make it easier for BOLI to locate records responsive to these more particularized requests. We therefore order BOLI to disclose any nonexempt records responsive to these requests within 45 days.[2]

Petition 8: Granted. We order BOLI to disclose any responsive press releases within 15 days.

Petitions 9 – 10: Dismissed in part and granted in part. As with requests 1 – 3, we find that all of the calendar entries responsive to these requests, and that were created before December 23, 2021, are a subset of records previously requested by Mr. Hunt that were addressed in our prior order. Again, we have already granted a petition with respect to those records, and we understand that Mr. Hunt has already initiated judicial proceedings for those records in the Circuit Court for Marion County. *See* ORS 192.411(2). Under the circumstances, we must respectfully dismiss Mr. Hunt's petitions with respect to those records as there is no relief we can grant at this stage. As for the remaining material, which consist of responsive records created between December 23, 2021 and

[2] We observe that there is substantial overlap between these requests and prior requests from Mr. Hunt for which BOLI previously requested clarification. However, Mr. Hunt's previous requests have little bearing on his recent requests because BOLI was required to close them within 60 days of Mr. Hunt's failure to provide the requested clarification. *See* ORS 192.329(4)(b).

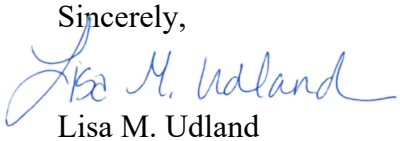
October 6, 2022, we grant Mr. Hunt's petition and order BOLI to disclose all nonexempt calendar entries to him within 30 days.

Petitions 11 – 14: Granted. We grant Mr. Hunt's remaining petitions and order BOLI to disclose all nonexempt responsive records within 60 days.

e. Conclusion.

For the foregoing reasons, we grant Mr. Hunt's petitions in part, deny them in part, and dismiss them in part. To the extent we have granted Mr. Hunt's petitions, we order BOLI to disclose all nonexempt responsive records to Mr. Hunt within the timelines prescribed above, but also note that those timelines will be tolled for any period where BOLI seeks in good faith to clarify Mr. Hunt's requests. ORS 192.329(4)(a). BOLI has seven days within which to announce its intention to seek judicial review. ORS 192.411(2).

Sincerely,



Lisa M. Udland
Deputy Attorney General

ACF/