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January 19, 2023

VIA E-MAIL ONLY: trampsparky@yahoo.com

John Cosmo
514 Americas Way #13850
Box Elder, SD 57719

Re: Petition for Public Records Disclosure Order
Oregon Occupational Safety and Health Division
DOJ File No.: 440500-GA0009-23

Dear Mr. Cosmo:

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 asks the Attorney General to order the Oregon Occupational Safety and Health Division of the Department of Consumer and Business Services (OR-OSHA) to disclose all records regarding a complaint filed by you in November 2022. For the reasons discussed below, 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 receive a copy of a public record of a state agency may petition the Attorney General to determine if it may be withheld. ORS 192.411(1). The state agency carries the burden to sustain its actions. ORS 192.411(1).

Your petition explains that on December 28, 2022, you requested OR-OSHA disclose all records relating to a complaint you filed against Gray West Construction Inc., alleging a lack of adequate restroom facilities at a construction site. OR-OSHA denied your request on December 30, 2022, asserting that the requested records are currently exempt from public disclosure under ORS 192.345(17). That provision provides that investigatory information relating to any complaint filed under Oregon's occupational safety and health laws is conditionally exempt from disclosure "until a final administrative determination is made or, if a citation is issued, until an employer receives notice of any citation." ORS 192.345(17). The exemption does not apply, however, if the public interest requires disclosure in the particular instance. *Id*.

In response to your petition, we contacted Nicole Zauner in OR-OSHA's Records Management Unit. She explained OR-OSHA's position that the investigation stemming from your complaint is ongoing. Because OR-OSHA has not made a final administrative determination or issued a citation to the employer in this instance, she explained OR-OSHA's position that the records are currently exempt from disclosure under ORS 192.345(17).

On the available record, we have no trouble concluding that the records you seek constitute investigatory information compiled as part of OR-OSHA ongoing investigation. They are therefore temporarily exempt from disclosure unless the public interest requires disclosure in this instance. ORS 192.345(17). Your petition asserts that the public interest requires disclosure in this instance because there are 100 workers at the site and because you believe OR-OSHA is shielding the employer. In response, Ms. Zauner denied that OR-OSHA is somehow protecting the employer. She also described why OR-OSHA believes the public interest favors the nondisclosure of investigative records while investigations are ongoing. Specifically, she noted that because information from an incomplete investigation does not reflect OR-OSHA's final determination about potential violations, early disclosure will result inaccurate or incomplete information. She also expressed OR-OSHA's concerns that early disclosure may lead employees and employers to be less cooperative. She indicated that these concerns could, in turn, undermine the integrity of OR-OSHA investigations and erode public confidence in the agency.

We recognized similar concerns when considering the application of ORS 192.345(17) in a prior order. *See* Public Records Order, Sep 19, 1997, Long. In that instance, we also took notice of legislative history indicating that the exemption was enacted to protect the rights of employees and employers, to enable unobstructed inspections, and because the previous lack of confidentiality for OR-OSHA investigative information was "'considered an impediment to a complete investigation.'" *Id*. (citing Hearing House Judiciary Committee, January 17, 1989 (HB 2192), Exhibit G; and quoting Staff Measure Summary of HB 2192, January 19, 1989). Weighed against these interests in confidentiality, we conclude that in this instance you have not demonstrated that the public interest requires disclosure prior to the completion of OR-OSHA's investigation. And we are not aware of any other public interest in this matter that would require disclosure at this time. Although ORS 192.345(17) recognizes the need for confidentiality during the investigative phase, we also note that it expressly permits the disclosure of investigative records after a final administrative determination is made or the employer receives notice of any citation. Thus, you will be able to obtain the information you seek at that time.

For the foregoing reasons, we conclude that OR-OSHA is permitted to withhold the requested records from you at this time. We therefore respectfully deny your petition.

Sincerely,

Lisa M. Udland

Lisa M. Udland
Deputy Attorney General

ACF:pjn
c via e-mail only: Nicole Zauner (OR-OSHA)