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Re: Petition for Public Records Disclosure Order
*SAIF Corp.*
DOJ File No.: 435001-GA0097-26

Dear Mr. Jaquiss and Ms. Gragg:

This letter is the Attorney General's response to Mr. Jaquiss's petition for the disclosure of records under the Oregon Public Records Law, ORS 192.311 to 192.478. The petition asks the Attorney General to order SAIF Corporation (SAIF) to disclose any complaints and investigative records pertaining to SAIF's former CEO. For the reasons discussed below, we respectfully grant the petition in part, and we deny the petition 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. 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 its actions. *Id*.

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The petition stems from a request sent to SAIF by Mr. Jaquiss for records pertaining to SAIF's former CEO Chip Terhune including records related to the reason and timing for Mr. Terhune's resignation. Mr. Jaquiss states that SAIF provided records showing that a complaint was made against Mr. Terhune. When Mr. Jaquiss requested the complaint, SAIF denied it citing the exemptions provided by ORS 192.355(2) (personal privacy) and ORS 192.355(4) (confidential submissions). Mr. Jaquiss also requested any investigation reports pertaining to Mr. Terhune. SAIF denied that request based on the attorney-client privilege. Mr. Jaquiss challenges the application of these exemptions.

**1. ORS 40.225 (the attorney-client privilege)**

We first address the records withheld by SAIF pursuant to the attorney-client privilege. ORS 192.355(9)(a) expressly 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." (Emphasis added.) ORS 40.225 is one such law because it provides that clients have "a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." Accordingly, ORS 192.355(9)(a) permits public bodies to withhold public records that are protected by the attorney-client privilege. *See, e.g., Port of Portland v. Ore. Center for Environ. Health*, 238 Or App 404, 409 (2011) (ORS 192.355(9)(a), then codified at ORS 192.502(9)(a), encompasses attorney-client privilege).

The Oregon Supreme Court has held that application of the attorney-client privilege is contingent upon three findings. *See State ex rel. OHSU v. Haas*, 325 Or 492, 501 (1997). First, the communication must be "confidential" within the meaning of ORS 40.225(l)(b) (a communication "not intended to be disclosed to third persons" other than to those necessary to facilitate the rendition of legal services). Second, the communication must have been made for the purpose of facilitating the rendition of professional legal services. A communication is made for the purpose of facilitating the rendition of legal services "if it makes it easier for an entity to make use of legal advice or services." *Port of Portland*, 238 Or App at 411 (citing *OHSU*, 325 Or at 502). And third, the communication must have been between the parties described in one of the paragraphs of ORS 40.225(2)(a)-(f). *Id*. If all three of these elements are met, the attorney-client privilege applies unless it has been waived. *Klamath County School Dist. v. Teamey*, 207 Or App 250, 261-62 (2006); *see* ORS 40.280 (waiver of privilege by voluntary disclosure).

We reviewed the records withheld by SAIF based on ORS 192.355(9)(a) and ORS 40.225. The records show that SAIF contracted with special assistant attorneys general (SAAGs) to investigate the complaint against Mr. Terhune. The withheld records include memoranda and reports authored by these SAAGs. The records are labeled "attorney-client privileged," and SAIF has confirmed that the communications were confidentially maintained and distributed solely to a discrete group of SAIF employees/board members.

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We find that the records withheld by SAIF constitute attorney-client privileged communications. The communications are addressed exclusively to parties described in ORS 40.225(2)(a)-(f); specifically, they are between a limited group of SAIF employees/board members and the SAAGs. The communications were made to facilitate the SAAGs' rendition of legal services to SAIF. The communications were intended to be confidential, and there is no evidence in the available record to suggest that the privilege has been waived by SAIF.

Mr. Jaquiss disputes SAIF's reliance on ORS 192.355(9)(a) to withhold the investigative report on attorney-client privilege grounds. He argues that ORS 192.355(9)(b) requires disclosure of factual information compiled during an attorney-directed investigation into possible wrongdoing by a public body. In support of that position, Mr. Jaquiss points to emails SAIF released describing "fact witness interviews" and the retention of outside counsel in response to a complaint. He also asserts that communications between the board and Mr. Terhune, including notice of an executive session to consider discipline, amount to a public characterization of the investigation's findings. For that reason, Mr. Jaquiss contends that at minimum the factual portions of the investigative report must be disclosed.

ORS 192.355(9)(b) operates as a partial exception to ORS 192.355(9)(a)'s confidentiality rule. Under that provision, agencies may not withhold factual information contained in an otherwise privileged record if five conditions are met; specifically:

1. The basis for the claim of exemption is the attorney-client privilege, ORS 40.225;

2. The factual information is not prohibited from disclosure under other state or federal law, regulation or court order and is not otherwise exempt from disclosure under the Public Records Law;

3. The factual information was compiled by or at the direction of an attorney as part of an investigation on behalf of the agency in response to information of possible wrongdoing by the agency;

4. The factual information was not compiled in preparation for litigation, arbitration or an administrative proceeding by or against the agency; *and*

5. The holder of the privilege under ORS 40.225 has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction. ORS 192.355(9)(b).

All five conditions must be satisfied before the Public Records Law requires the disclosure of factual information contained in an otherwise privileged record. *Id*.

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In this instance, we conclude that the exception in ORS 192.355(9)(b) does not apply because at least one of the required statutory conditions has not been met. Specifically, nothing in the record indicates that SAIF has made or authorized any public statement that characterizes or partially discloses the factual information contained in the legal advice Mr. Jaquiss seeks. *See* ORS 192.355(9)(b)(E). The records released by SAIF show only that SAIF's attorney conducted an investigation into a complaint; they do not disclose or describe the factual information gathered during that investigation. The records also show that the board scheduled an executive session to consider the discipline of Mr. Terhune, but they do not discuss or reference the investigation itself. We do not find that speculation about a connection between the investigation and the executive session is sufficient to constitute the type of "public statement" contemplated by the statute. We therefore conclude that SAIF is not required to disclose the factual information contained in the advice.

**2. ORS 192.355(4) (confidential submissions)**

We turn next to SAIF's assertion that the complaint Mr. Jaquiss has requested is exempt as a confidential submission. SAIF relies upon ORS 192.355(4), a provision that 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.

The purpose of this exemption is to encourage the voluntary submission of information to public bodies with some reasonable assurance that it will be kept confidential. *See Attorney General's Public Records and Meetings Manual* at 86 (2024) ("*Manual*"). 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.

SAIF indicates that an anonymous employee used SAIF's EthicsPoint system to lodge the complaint. SAIF states that the complainant expressly indicated a desire for the complaint to be kept confidential. SAIF contends it is reasonable for allegations of wrongdoing that are made against a supervisor to be kept confidential. SAIF observes that there was no legal requirement

for the SAIF employee to submit a complaint. SAIF states that it has publicly and repeatedly notified each of its employees that SAIF would keep confidential any complaint submitted through the EthicsPoint system for which the submitter requests confidentiality.

We reviewed training materials about EthicsPoint that SAIF provides its employees. Those materials describe EthicsPoint as offering employees "a confidential and anonymous way to report concerns or misconduct." SAIF tells employees that "your anonymity is always protected" and the "EthicsPoint System ensures that all calls and reports are handled confidentially."

The complaint at issue reveals that the complainant chose to submit their information anonymously. SAIF promised to protect the anonymity of employee complaints, and we agree with SAIF that the identity of the complainant is information that is of a nature that reasonably should be kept confidential.[1] It is less clear, however, if the allegations themselves should reasonably be kept confidential. The complaint contains certain allegations that are not specific to the complainant, and we have no indication that releasing these allegations would identify the complainant. SAIF argues that the public interest would suffer by disclosure in this instance because it would erode employee confidence in SAIF's ability to keep such information confidential which, in turn, would deter voluntary reporting in the future and thereby impair SAIF's ability to provide a safe working environment for its employees. Mr. Jaquiss contends that any privacy interests are outweighed by the public interest in transparency, particularly where the complaint appears to have prompted an outside investigation and ultimately the CEO's resignation.

In this instance, we agree with Mr. Jaquiss that the public interest favors disclosure of the complaint. The complaint concerns the highest-ranking official of a public body. The records SAIF released show that the complaint led to an investigation of Mr. Terhune, that the board scheduled an executive session to consider disciplining him, and that he resigned before that session occurred. Because SAIF has chosen to shield the investigation under the attorney-client privilege, the public has no insight into the circumstances that led to the CEO's sudden departure. Under these circumstances, we do not find that the public interest will suffer by disclosure. The potential chilling effect identified by SAIF is not substantial because the complainant is not named, and we believe that the complainant's identity can be further protected through limited redactions of allegations specific to the complainant. *See Gray v. Salem-Keizer School Dist.*, 139 Or App 556, 566 (1996) (observing that concern for chilling effect is mitigated when information can be released without identifying the source).

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[1] We have previously concluded that the identities of people who voluntarily provide sensitive information to public bodies is information of a nature that reasonably should be kept confidential. *See, e.g.,* Public Records Order, Feb 15, 2019, Ward (identities of people who provide employment references); Public Records Order, Sep 3, 2019, Boquist (employees who report a hostile work environment); Public Records Order, Nov 6, 2009, Wheatly (identity of persons who report concerns about a driver's competence); and Public Records Order, Feb 5, 1998, Phillips (employees who report workplace health violations).

**3. ORS 192.355(2) (personal privacy)**

SAIF also contends that the complaint is exempt from public disclosure under ORS 192.355(2) because disclosure would constitute an unreasonable invasion of privacy. That provision exempts:

> Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

ORS 192.355(2). For the exemption to apply in this instance, SAIF first must show that disclosing the complaint will unreasonably invade an individual's privacy. *See Manual* at 77 (citing *Jordan v. MVD*, 308 Or 433, 440, 443 & n 9 (1989)). Disclosure constitutes an unreasonable invasion of privacy if "an ordinary reasonable person would deem [disclosure] highly offensive." *Jordan*, 308 Or at 442-43.

SAIF argues that disclosing the complaint would constitute an unreasonable invasion of Mr. Terhune's privacy because it contains unproven allegations. According to SAIF, an ordinary reasonable person would find public release of such uncorroborated allegations to be highly offensive. SAIF further contends that it should not be required to waive attorney-client privilege simply to prevent what it views as an unfair public mischaracterization of Mr. Terhune. SAIF also asserts that the exemption applies because the complaint identifies individuals other than Mr. Terhune who have not been accused of wrongdoing, and that an ordinary reasonable person in their position would find disclosure of their names in connection with the complaint to be an unreasonable invasion of privacy.

In this instance, the allegations in the complaint concern the workplace conduct of a public official, which is presumptively a matter of public interest. *See* Manual at 81–82 ("Information concerning the manner in which any public officer or employee carries out the duties of the office or employment generally will not come within this exemption."). We acknowledge SAIF's concern that the allegations have not been proven. However, the fact that a complaint contains unproven allegations does not, by itself, make disclosure "highly offensive" to an ordinary reasonable person under *Jordan*. Complaints, by their nature, often contain preliminary or unverified assertions, and the public is capable of understanding that such allegations represent one party's account rather than established fact. The mere possibility that the public may draw its own conclusions does not transform disclosure into an unreasonable invasion of privacy within the meaning of ORS 192.355(2).

We agree with SAIF, however, that disclosure of the names of individuals other than Mr. Terhune, who have not been accused of wrongdoing, would be highly offensive to an ordinary reasonable person. Those names may therefore be withheld.

For the foregoing reasons, we conclude that SAIF was permitted to withhold the investigative report, memoranda, and other communications with its attorneys pertaining to Mr. Terhune. We therefore respectfully deny your petition as to those records. With respect to the complaint, however, we grant the petition, and we order SAIF to produce the complaint with redactions made to protect the identity of the reporter and two additional named individuals.[2] If SAIF elects not to comply with this order, it has seven days to announce its intention to seek judicial review. See ORS 192.407(3) and 192.411(2).

Sincerely,

BENJAMIN GUTMAN
Deputy Attorney General

DP9/pjn

[2] We will email counsel for SAIF a redacted version of the complaint that complies with this order.