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Dianne Perry, Chairman
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Salem, OR 97310

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Assistant Presiding Referee
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2525 S.W. Third Avenue
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Re: Petition for Public Records Disclosure Order; Workers' Compensation Board, Hearings Division Records

Dear Mr. MacKenzie, Ms. Perry and Mr. Lipton:

This letter is the Attorney General's order on Mr. MacKenzie's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on March 6, 1990, asks the Attorney General "to order the Workers' Compensation Board and its employes to make available for inspection" and production of a copy, if requested, "file No. 89-09244, relating to a claim submitted by Lisa R. Walleri, and all documents, correspondence and records of telephone communications in the board's possession relating to the Walleri claim." For the reasons given below, we grant the petition in part and deny it in part.

The Public Records Law confers the right to inspect public records of a public body in Oregon, subject to certain exceptions. ORS 192.420. If a public record contains both exempt and non-exempt material, the public body must separate the materials and

make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. ORS 192.505; Turner v. Reed, 22 Or App 177, 186 n 8, 538 P2d 373 (1975). Here, much of the requested material is exempt under ORS 192.502(7), which incorporates federal prohibitions against disclosure, and 192.502(2), the personal privacy exemption.

1. Examination Records of the Office of Thrift Supervision (OTS) of the United States Department of the Treasury

OTS is the successor to the former Federal Home Loan Bank Board. The documents at issue include records prepared by OTS personnel relating to the examination of a savings association. OTS has asserted that, at a minimum, the examination documents are confidential and may not be disclosed to the public. OTS also has noted that the examination documents at issue were unlawfully disclosed from OTS records. OTS bases its assertions on 12 CFR § 505.5(a)(2) and (c).

Subsection (a)(2) exempts from disclosure information

> "[c]ontained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of, the Board or a Federal Home Loan Bank, relating to the affairs of any member, institution or affiliate thereof."

Subsection (c) provides that "no officer, employee or agent of the Board or of any Federal Home Loan Bank shall disclose or permit the disclosure of any unpublished information of the Board." We understand that OTS has neither published nor approved release of the examination records described above.

Through its attorney, OTS has explained to a Workers' Compensation Board referee the importance of the exemption for examination records:

> "The privilege covering examination related information is essential to the operation of the regulatory system. OTS has a vital interest in protecting the confidentiality of its records. The agency has a regulatory responsibility to preserve the integrity of its examination process and the financial well-being of the associations that it examines. Release of information contained in examination reports could affect the public's confidence in the thrift industry and OTS's interest

> in preserving the industry's cooperation in providing OTS with necessary operational information. Release of the OTS information could also inhibit examiners from stating their candid opinions. Finally, the release of sensitive financial data and candid comments on all aspects of an association's operations could be misconstrued by the public. In the worst case, release of otherwise confidential information would have an unnecessary and unjustifiable affect on the public's confidence in an association."

Federal courts long have recognized the confidential nature of records described in 12 CFR § 505.5. See, e.g., Federal Home Loan, Etc. v. Superior Court, Etc., 494 F Supp 924, 927 (D Az 1980); First Fed. S.&L. Ass'n, Etc v. Fed. Home Loan Bd., 426 F Supp 454, 458 (W.D. Ar 1977), aff'd, 570 F2d 693 (8th Cir 1978). For instance in Federal Home Loan, Etc. v. Superior Court, Etc., supra, a state judge had ordered a banking institution to disclose the results of an examination report to a plaintiff home building company. Citing 12 CFR § 505.5, the federal district court enjoined the savings and loan from disclosing its examination report. The court also enjoined the builder from enforcing discovery sanctions against the savings and loan for failure to make disclosure, and enjoined the Arizona state judge from any further action designed to force disclosure of such documents. 494 F Supp at 927.

We conclude that federal law prohibits disclosure of the examination records without permission from OTS. This prohibition is incorporated into the Public Records Law by ORS 192.502(7), which exempts from disclosure "[a]ny public records or information the disclosure of which is prohibited by federal law or regulations."

We reach this conclusion even though the records already have been disclosed unlawfully. ORS 192.502(7) focuses on the nature of the information. As already noted, the information should not have left OTS's files in the first instance. We find nothing in the law requiring us to conclude that Oregon public bodies must exacerbate the breach of confidentiality.

We also have considered that these documents are part of the record in a state administrative proceeding. This fact does not change our conclusion. OTS apparently does not oppose this limited use of the subject documents but only their public dissemination. Although the referee conducting the hearing has allowed members of the public to attend, we have no indication that the records have been disclosed publicly. Accordingly, the

Workers' Compensation Board has not been divested of its authority to withhold the documents in question. Cf. Public Records Order, February 24, 1989 (Weill) (no public interest in confidentiality where substance of record already has been disclosed to requestor).

2. Personnel Records

The requested documents include personnel records relating to Ms. Walleri. From the information of which we are aware, it is unclear whether, at the relevant times, Ms. Walleri was an employee of OTS or of the financial institution under examination. Regardless whether Ms. Walleri was a federal or private employee, however, the records are nonexempt and must be disclosed.

The relevant federal exemption appears in 12 CFR § 505.5(a)(6), which exempts from disclosure information "[c]ontained in personnel, medical and similar files * * * the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." We begin by assuming that Ms. Walleri was an OTS employee. Construing a similar exemption under the Public Records Law, see ORS 192.502(2) (personal privacy), we have said that information concerning the manner in which any public officer or employee carries out the duties of the office or employment is not exempt from disclosure. Attorney General's Public Records and Meetings Manual 31 (1989) (Manual). Disclosure of such information cannot constitute an unreasonable invasion of privacy, because the public is entitled to know what public employees are doing on the job. Therefore, if Ms. Walleri was an OTS employee, the personnel records are not exempt.

We would reach the same conclusion, although for somewhat different reasons, if Ms. Walleri were considered to have been a private employee. Information about her job performance is personal information. In these circumstances, however, disclosure would not be a "clearly unwarranted invasion of personal privacy." The information at issue is job-related, not information about Ms. Walleri's personal life. Moreover, Ms. Walleri has made those documents part of the record in an administrative proceeding, thus lessening any claim to privacy, and creating a public interest in the contents of those documents. We conclude that the personnel records fall outside the exemption.

These personnel records, however, are replete with references to confidential examination information. Accordingly, in disclosing the nonexempt portions of the personnel records the Hearings Division must segregate and withhold the exempt information. ORS 192.505.

3. Medical Records

Also included in the relevant documents are medical records relating to Ms. Walleri and her workers' compensation claim. To the extent that those records recapitulate or contain confidential information subject to 12 CFR § 505.5 as described above, they too are exempt from disclosure and may not be released.

Also, the medical information contained in those records is exempt under the personal privacy exemption, ORS 192.502(2). See Manual at 30-31. Therefore, on both grounds, the personal medical records are exempt from disclosure.

4. Other Records

Some of the requested documents fall outside of any exemption. These documents generally involve pleadings filed in the workers' compensation proceeding. These records must be disclosed in a manner that effectively maintains the confidentiality of the other described documents.

5. Summary

The Hearings Division of the Workers' Compensation Board must disclose only those documents that fall outside the exemptions described above. OTS examination records must not be disclosed. Furthermore, all of the documents recapitulating or containing information from those exempt documents must be edited to protect that confidentiality. Medical information concerning Ms. Walleri also is exempt from disclosure. The routine pleading and claim forms contained in the file, which are not exempt, must be disclosed.

Under ORS 192.450(2), the Hearings Division has seven days from the date of this order in which to comply. An assistant attorney general will work with the division in identifying and segregating the exempt information. The division may charge Mr. MacKenzie its actual cost in satisfying Mr. MacKenzie's request, including its photocopy costs and the time spend by agency personnel reviewing the records to delete exempt information. ORS 192.440(3); Manual at 6.

Sincerely,

PAMELA L. ABERNETHY
Special Counsel to the
Attorney General

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