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Joan Fraser
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Re: *Petition for Public Records Disclosure Order: Workers' Compensation Board Records*

Dear Mr. Scheminske and Ms. Fraser:

This letter is the Attorney General's order on Mr. Scheminske's June 18, 1998, petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. We received this petition on June 19, 1998. The petition asks the Attorney General to direct the Workers' Compensation Board (board) to produce a copy of any records that the board has not already disclosed to Mr. Scheminske related to its "investigation of complaints against former Administrative Law Judge Sidney Galton brought by Scheminske, Lyons & Bussman, L.L.P., on October 9,1997, and SAIF Corporation on October 13, 1997, and January 9, 1998."

The Public Records Law confers a right to inspect public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. The Attorney General may order a state agency to disclose records only if the agency has denied a request for public records. *See* ORS 192.450(1). On May 4, 1998, the board denied Mr. Scheminske's public records request.

We have reviewed the records related to the investigation of ALJ Galton that are the subject of Mr. Scheminske's petition, and we discuss them below by type of record.

1. Records Submitted by ALJ Galton through his Attorney Joseph Robertson

Joseph Robertson submitted a notebook to the board on behalf of ALJ Galton that contained the following documents: 1) affidavits and letters in support of ALJ Galton, and 2) miscellaneous claims documents, hearing transcript and a portion of an Order on Review. Mr. Robertson's cover letter indicated that the information was not subject to disclosure pursuant to ORS 192.502(2), the personal privacy exemption.

ORS 192.502(2) exempts from disclosure information that is "of a personal nature * * * if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance." We have construed this exception to protect information such as personal financial and medical information, and similar types of information. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS LAW MANUAL (MANUAL) at 47 (1997). The manner in which a public officer or employee performs the duties of that office or employment generally is not protected by this exemption. MANUAL at 49. All of the information provided by ALJ Galton's attorney related to his job performance as an Administrative Law Judge. That information is therefore not exempt under ORS 192.502(2).

Because this information was submitted with a cover letter that may have expressed an intent to have it withheld from disclosure, we also consider the exemption in ORS 192.502(4), which exempts from disclosure information submitted to a public body "in confidence." This exemption has five elements, each of which must be satisfied for ORS 192.502(4) to apply. MANUAL at 52. These five elements are: 1) the information must be submitted in confidence on the condition that it be kept confidential; 2) the informant must not have been required by law to provide the information; 3) the information must be of a nature that reasonably should be kept confidential; 4) the public body must have obliged itself in good faith not to disclose the information; and 5) disclosure of the information must cause harm to the public interest.

Even if we construe Mr. Robertson's cover letter as establishing the first element, i.e., that the information was submitted on the condition that it be kept confidential, the records would not be exempt from disclosure unless each of the other four elements are met. We have been informed by Joan Fraser, Administrator of the Workers' Compensation Board, and Maureen Bock, the Board Chairperson, that the board did not obligate itself to keep the information confidential. Thus, the fourth element of the exemption is not satisfied, and the records are not exempt under ORS 192.502(4).

ORS 192.501(12) exempts from "disclosure personnel discipline action, or materials or documents supporting that action." This exemption covers only completed disciplinary actions when a sanction is imposed and the materials that support that particular disciplinary action. *City of Portland v. Rice*, 308 Or 118, 775 P2d 1371 (1989). ALJ Galton resigned before completion of the board's investigation or any decision as to whether disciplinary action was appropriate. Because no discipline was imposed, these records are not exempt under ORS 192.501(12). *See* MANUAL at 33-34.

2. Records Submitted by SAIF Corporation

To support its complaints against ALJ Galton, SAIF submitted a packet of information, which included affidavits, Opinions and Orders, and Orders on Review. We contacted Harlan Jones, Vice-President of Legal and Administrative Services at SAIF, who submitted that information. Mr. Jones informed us that SAIF did not submit the information with any expectation of confidentiality. Those records, therefore, are not exempt under ORS 191.502(4), nor are they subject to any other exemption under the Public Records Law.

3. Records Submitted by the Law Firm of Scheminske, Lyons and Bussman

Various records were submitted to the board by Mr. Scheminske's law firm on behalf of ALJ Galton. If those records were sought by a member of the public, at least some of the information contained therein might be exempt from disclosure under ORS 192.502(2), personal privacy, or ORS 192.502(4), submitted in confidence. We do not find that these or any other exemptions would apply to Mr. Scheminske's request for records submitted by his law firm on behalf of ALJ Galton.

4. Notes of John McCullough, Presiding ALJ

While reviewing the complaints and related records submitted to the board concerning ALJ Galton, John McCullough, Presiding Administrative Law Judge, made notes of his assessment of the relevance of the various documents. ORS 192.502(1) exempts from disclosure "[c]ommunications within a public body * * * of an advisory nature to the extent they cover other than purely factual materials and are preliminary to any final agency determination of policy or action." This exemption does not apply unless "the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure."

ALJ McCullough's notes are communications to the agency decision makers about the merits of the complaints received by the board concerning ALJ Galton. These communications were preliminary to any final agency determination of action on the complaints.

Some portions of ALJ McCullough's notes cover "purely factual materials" in that they are merely objective descriptions of the content of the materials collected during the agency's investigation of ALJ Galton. Any such portions of the notes would not come within the exemption in ORS 192.502(1).

Other portions of the notes, however, are subjective in nature. They contain ALJ McCullough's candid interpretation and evaluation of the materials, as well as suggestions of further avenues of investigation or inquiry. The notes also reveal ALJ McCullough's forthright assessment of rulings and decisions made by ALJ Galton in underlying cases. Finally, the notes also contain tentative recommendations for board action. We find that these portions of the notes contain "frank communication" and that their disclosure would have a "chilling effect."

In order to properly and adequately investigate complaints against employees for purposes of determining whether disciplinary action is appropriate, the persons assigned to conduct the investigation and make recommendations to the agency must be able to communicate candidly their analysis of the evidence. Our review of ALJ McCullough's notes persuades us these notes are the types of candid communications protected by ORS 192.502(1). Disclosure of these portions of the notes would seriously undermine the board's ability to obtain a frank appraisal from its presiding ALJ concerning the actions of his subordinates that are the subject of complaints. We recognize the public's interest in knowing how an agency assesses complaints made against its employees, particularly those employees who are in positions to adjudicate claims or other matters involving members of the public. In this instance, however, we conclude that the public's interest in disclosure is clearly outweighed by the public's interest in encouraging frank communication about the substance of the complaints and the underlying actions of the employee so that appropriate decisions about disciplinary action can be made.[1/]

Accordingly, we conclude that to the extent the ALJ McCullough's notes contain other than purely factual materials, they are exempt from disclosure under ORS 192.502(1).

5. Notes of Joan Fraser, Administrator

During the course of the board's investigation, Ms. Fraser interviewed ALJ Galton, in the presence of his attorney. We are informed by Ms. Fraser that before that interview,

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[1/] The fact that ALJ Galton resigned prior to the board's completing its investigation or making any decision about disciplinary action does not affect our conclusion. The notes in issue are candid and blunt. We believe that there would be a significant chilling effect on the willingness of supervisors or investigators to make such frank communications if their disclosure were dependent upon whether or not the investigation was completed.

ALJ Galton's attorney mentioned confidentiality, but was advised by either Ms. Fraser or Ms. Maureen Bock that any information provided during the interview could not be protected. The board's investigation committee also interviewed various SAIF attorneys. Ms. Fraser informed each of those individuals that the board could not guarantee confidentiality of their information.

Ms. Fraser took notes during these interviews; her notes were limited to statements made by the informants. Because the board did not oblige itself to maintain confidentiality of information provided during the interviews, Ms. Fraser's notes are not exempt from disclosure under ORS 192.502(4) as information submitted in confidence. Ms. Fraser's notes are not exempt from disclosure under ORS 192.502(1) as internal advisory communications because they were limited to factual materials. MANUAL at 40. Because ALJ Galton resigned before completion of the board's investigation, Ms. Fraser's notes are not exempt under ORS 192.501(12), the disciplinary action exemption.

6. Miscellaneous Correspondence

The board's investigation file also contains miscellaneous correspondence regarding recusal on pending cases involving the complainants. These documents are not covered by any of the exceptions from disclosure under the Public Records Law.

7. Workers' Compensation Records

ORS 192.502(19) exempts from disclosure workers' compensation claims records of the Department of Consumer and Business Services (DCBS) except in accordance with rules adopted by the DCBS Director in the following circumstances:

> (a) When necessary for insurers, self-insured employers and third party claim administrators to process workers' compensation claims.
>
> (b) When necessary for the director, other governmental agencies of this state or the United States to carry out their duties, functions or powers.
>
> (c) When the disclosure is made in such a manner that the disclosed information cannot be used to identify any workers who is the subject of a claim.
>
> (d) When a workers or the worker's representative requests review of the worker's claim record.

The board is a division of DCBS. Therefore, any workers' compensation claims records that are within the scope of Mr. Scheminske's petition are exempt from disclosure except in accordance with one of the above four exceptions. The only applicable exception for the records that are at issue here is (c), when the disclosure is made in such a manner that the identity of the worker is protected. In accordance with ORS 192.502(19)(c), the board may redact any workers' names and other identifying information from claims records that are contained in the records that we have otherwise concluded are not exempt from disclosure.

Conclusion

As to those records and information discussed above in sections 4 and 7 that we find to be exempt from disclosure under ORS 191.502(1) and 192.502(19), we deny Mr. Scheminske's petition.

As to the remainder of the records, we grant Mr. Scheminske's petition and order the board to disclose the nonexempt records. That agency has seven days from the date of this order in which to comply. ORS 192.450(2).

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

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