

THEODORE R. KULONGOSKI
Governor



June 6, 2005

The Honorable Peter Courtney
President of the Senate
S-203 State Capitol
Salem, OR 97301

Re: SB 310-A

Dear President Courtney:

Senate Bill 310-A contains many provisions that have my strong support. The sections of the bill designed to increase SAIF Corporation's transparency and accountability are consistent with actions I have already recommended for SAIF and its Board of Directors. I appreciate the many hours Senate General Government Chair Frank Shields has devoted in an effort to craft a SAIF accountability bill.

Unfortunately, two specific provisions of the bill are so far contrary to acceptable public policy that I will veto the bill if it comes to me in its current form.

Application of Sovereign Immunity

The issue of sovereign immunity is an important and complex issue to the functioning of governments. The state, through the legislative branch of government, has traditionally been very selective in waiving the state's sovereign immunity (i.e., the Oregon Tort Claims Act (ORS Chapter 30.260 et al)). Likewise, the Attorney General looks at the issue of sovereign immunity on a case-by-case basis and also is cautious in waiving the state's sovereign immunity.

SAIF Corporation has always understood that all state officials are subject to a court's power to compel obedience to court orders. That proposition has never been disputed by SAIF in the case now pending in the Court of Appeals (Oregonians for Sound Economic Policy (OSEP) v. SAIF). What has been disputed is whether the Legislative Assembly has waived the state's sovereign immunity as to monetary sanctions arising from a contempt action.

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Sections 5 and 9 of SB 310-A would prohibit SAIF from asserting the state's sovereign immunity as a defense to monetary sanctions arising from a contempt action, retroactive to January 1, 2004. Whether sovereign immunity should be a defense to a monetary judgment arising from a contempt action is a policy question that applies to all state agencies, not just SAIF; such a policy question should be addressed on a statewide, rather than piecemeal basis. Furthermore, any change relating to the state's sovereign immunity should be applied prospectively, not retroactively, as in this situation to a case that is currently pending on appeal.

Protection of Customers' Confidential Records

In an opinion issued earlier this year, the Attorney General provided legal advice to SAIF that ORS 656.702 exempts "employer account records" from public disclosure. SAIF has relied on that advice to respond to various public records requests made by the attorney representing the plaintiff in the OSEP litigation.

The definition for "employer account records" contained in Section 3 of SB 310-A is consistent with the Attorney General's advice. It applies to requests made after the effective date of SB 310-A, which contains an emergency clause, and, thus, would not apply to the pending OSEP litigation. However, under Section 10 of the bill, a different definition – essentially the one adopted by the trial court judge in OSEP v. SAIF – would apply to all of OSEP's current public records requests regarding this matter and any other requests made until this bill becomes law. Section 10 contradicts the definition in Section 3 and would effectively require SAIF to disclose to OSEP all of the disputed "employer account records," notwithstanding the fact that an appeal is pending on this very issue.

Although I believe it is appropriate for the Legislative Assembly to create a definition for the currently undefined phrase "employer account records," I do not believe it is appropriate for the Legislature, through creation of a special rule applying to a single litigant, to eliminate the state's right to seek appellate review on this issue.

Sincerely,



THEODORE R. KULONGOSKI
Governor