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Les Zaitz
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Re: *Petition for Public Records Disclosure Order*:
Department of Administrative Services Records

Dear Mr. Zaitz:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on February 24, 2004,[1] asks the Attorney General to direct the Oregon Department of Administrative Services (DAS) to make available certain financial information regarding the sale of surplus state property known as Dammasch State Hospital: 1) documents generated as part of the Request for Qualifications (RFQ) process undertaken by the state in 2001; 2) documents generated as part of the post-selection process to negotiate a Purchase and Sale Agreement (PSA); and 3) documents generated by DAS concerning its analysis, examination and review of financial information concerning Costa Pacific Homes (Costa Pacific), its affiliates and owners. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. If a public record contains exempt and nonexempt 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 reserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

We spoke with John Wales, Manager, Real Property Services, at DAS and Cameron Smith, formerly Real Property Coordinator, Real Property Services, at DAS, regarding your petition. They told us that, in response to your request for records on December 5, 2003, DAS disclosed records, some of which were partially redacted, regarding the process of selecting

[1] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

Costa Pacific as the developer for the Dammasch property and entering into a PSA with Villebois, LLC. (Villebois). In a letter dated December 18, 2003, and signed by John Wales, DAS denied your request for some information on the basis that it was exempt from disclosure because it was financial information about Costa Pacific or Villebois that was submitted to DAS in confidence, ORS 192.502(4), internal advisory communications, ORS 192.502(1), or attorney-client privileged communications, ORS 192.502(9).

Your petition states that it "pertains only to information directly related to the proposal and contract involving Villebois LLC, Costa Pacific Homes, and any subsidiaries or equity owners." Thus, it is narrower in scope than the requests for records that the Oregonian has submitted to DAS, and this order is likewise limited. With the exception of the pro formas specifically identified in your petition, we address the three categories of records identified in the petition in relation to the confidential submission exemption, ORS 192.502(4). Then we address the third category of records in relation to the internal advisory exemption, ORS 192.502(1). Finally, we address the requested pro formas in relation to the trade secret exemption, ORS 192.501(2).

1. Records concerning the financial status of Costa Pacific and Villebois

Among the records you seek regarding the developers' financial status you specifically cite a balance sheet, financial statements, and records drafted by DAS' outside consultant and others addressing the submitted financial information. DAS withheld these records on the basis that they were submitted in confidence in accord with ORS 192.502(4), or reflect the information contained in such records. ORS 192.502(4) 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.

We address each of the five elements that must be met for a record to qualify for the exemption.

a. Information submitted to a public body in confidence

ORS 192.502(4) applies only to records that a person submits to a public body on the condition that they be kept confidential. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2001) 64 (AG'S MANUAL).[2] Your petition requests information submitted to DAS during two time periods: information submitted by Costa Pacific as part of its proposal filed in response to the RFQ, and information submitted as part of the negotiation between DAS and Villebois for the PSA. The information for each time period is addressed separately below.

**RFQ**: As you note in your petition, DAS' RFQ document informed respondents that the agency would maintain confidentiality of proprietary trade secrets or other information to the

[2] It is not necessary for the person to have made the request in writing. This element can be established by the facts surrounding the submission of information. *See Hood Technology, Corp. v. Oregon OSHA*, 168 Or. App. 293, 7 P3d 564 (2000).

extent that such information is exempt under the Public Records Law, and outlined steps for the respondents to take to protect the information. For financial information, the RFQ directed respondents to place financial statements in a separate, sealed envelope marked "CONFIDENTIAL FINANCIALS." Your petition states that the RFQ also required respondents to submit a letter listing records they considered exempt, and that "DAS authorities" told you that DAS received no such letter from Costa Pacific. Messrs Smith and Wales told us that, as designed in the RFQ, DAS delivered the submitted proposals with the financial information unopened to its contractor, Norris Beggs & Simpson. Norris Beggs & Simpson gave the financial information, still unopened, to its accounting consultant, Deloitte and Touche, for analysis. According to Thomas Ihlan, the person at Deloitte and Touche who opened all envelopes received from the RFQ respondents, all information that came to him from proposers was contained in sealed envelopes. Although Costa Pacific may not have submitted a letter in relation to the contents of the sealed envelope that it submitted, Messrs. Smith and Wales told us that DAS considered the sending of financial materials in a sealed envelope sufficient to indicate a proposer's intent for the records to remain confidential. Thus, regardless of compliance with all of the terms of the RFQ, Costa Pacific's actions conveyed to DAS its intent that the information be kept confidential.

Cameron Smith told us that, upon review of the proposals, DAS requested additional financial information from Costa Pacific. Mr. Smith told us that DAS communicated to Costa Pacific that the additional financial information would remain confidential. DAS gave the additional financial information to Norris Beggs & Simpson who forward it to Deloitte and Touche. Mr. Ihlan told us that the additional financial information submitted by Costa Pacific was accompanied with a letter stating that Costa Pacific submitted data on the condition it be kept confidential.

During the period in the evaluation process when Costa Pacific was one of two finalists, it submitted or showed additional financial information to DAS. At this point, Costa Pacific had Spirit Mountain as a potential investor. Rudy Kadlub, Chief Executive Officer of Costa Pacific, told us that prior to the submission of the additional financial information, Costa Pacific and Spirit Mountain representatives met with representatives from DAS and Norris Beggs & Simpson and DAS's attorney, at which time the parties discussed the protection of the information to be disclosed to DAS. Mr. Kadlub also told us that he and others at the meeting told DAS that confidentiality of the financial information was a major concern of the investors. Cameron Smith also told us that representatives of Costa Pacific and DAS communicated about confidentiality prior to the submission of additional financial information.

We note that the RFQ process was structured by DAS in anticipation of the respondents asserting the need for confidentiality of financial information. The information provided by DAS and its outside consultants, and Mr. Kadlub lead us to conclude that Costa Pacific submitted financial information during the RFQ process on the condition that it would be protected from disclosure.

**PSA**: Costa Pacific assembled Villebois, consisting of Costa Pacific and a group of investors, to develop the Dammasch site. Villebois entered into a PSA with DAS. Mr. Kadlub told us that there were extensive negotiations about confidentiality with representatives of DAS,

Norris Beggs & Simpson, and DAS' attorney prior to Villebois' disclosing the financial information requested in relation to negotiating the PSA, and that at all times confidentiality of the financial information was a major concern of the investors. Cameron Smith, who led the negotiations for DAS, states that during negotiations of the PSA, representatives of Costa Pacific repeatedly asked DAS for assurances of confidentiality, that DAS sought the advice of DOJ on how best to ensure confidentiality, that DAS obliged to Villebois to keep the information confidential, and that the financial information submitted by Villebois contained markings indicating that Villebois intended to keep the financial information confidential. Under the escrow instructions, Villebois submitted the financial information of the investors to the title company with instructions to allow the state and its agents to view the information but not have any copies of the information. Based on the statements of the parties involved and the evidence provided by the escrow instructions, we conclude that the requested records were submitted on the condition of confidentiality.

b. Not otherwise required by law to be submitted

The second element that must be satisfied under ORS 192.502(4) is that the person who submitted the records was not required to do so by law. AG'S MANUAL at 64. Neither Costa Pacific nor Villebois was required by law to submit financial information to DAS. While DAS required such information as a condition for consideration of a proposal and as a condition in the PSA, this obligation arose solely under the terms set by DAS to negotiate a contract, not under statute or rule. The statute directing the sale of the Dammasch property does not require contractors to submit financial information. An obligation created as a condition to a proposal being considered responsive to a RFQ or as a condition of entering into a PSA can be equated with obligations that arise out of contract. They do not rise to the level of being required by law. Public Records Order, March 3, 1997, Poo-sa-key/Willeford.

c. Such information should reasonably be considered confidential

The third element that must be satisfied under ORS 192.502(4) is that "[t]he information itself must be of a nature that reasonably should be kept confidential." AG'S MANUAL at 64. The financial information that is the subject of your petition tells its reader about the financial health of the subject entities. It is information that is not publicly available and, considering the relevance of the information to the ability of Costa Pacific and Villebois to engage in business, we conclude that the submitted financial information reasonably should be kept confidential.

d. The public body has obliged itself in good faith not to disclose the information

The fourth element essential to whether records were submitted in confidence and therefore exempt from disclosure is that the public body, in this case DAS, must have obligated itself in good faith to not disclose the information. AG'S MANUAL at 64. The RFQ issued by DAS states that the it "will maintain confidentiality of proprietary Trade Secrets or other information to the extent that such information is exempt under Public Records Law." The RFQ also states that financial data, specifically, is the information most likely to be exempt from disclosure. These statements in the RFQ, coupled with the communications already cited between DAS personnel and representatives of Costa Pacific and Villebois addressing the two

entities concerns about confidentiality, provide sufficient information for us to conclude that DAS obliged itself in good faith to keep the submitted financial information confidential.

e. The public interest would suffer by disclosure

The final required element is that disclosure of the requested information would cause harm to the public interest. AG'S MANUAL at 64. While your petition discusses DAS' citation to harms relating specifically to the Dammasch property project, relevant effects on the public interest from disclosure of the requested information also include those that disclosure would have on persons who would otherwise provide financial information to the state in relation to future business transactions.[3] AG'S MANUAL at 66. John Wales told us that failing to maintain the confidentiality of financial information submitted by private parties seeking to do business with the state puts at risk the state's ability to attract qualified contractors, including qualified developers to bid on and purchase surplus state property. Clayton Hering of Norris Beggs & Simpson, DAS' real estate consultant for the Dammasch project, told us that if the state is unable to keep financial records of developers and investors confidential, the state would not be able to continue to attract qualified developers and investors. Mr. Wales told us that DAS contracted with Norris Beggs & Simpson to draw on the latter's expertise in developing complex real estate transactions. We find the potential harm identified by DAS and Norris Beggs & Simpson to be of the nature that ORS 192.502(4) was enacted to protect against.

Your petition states that, for several reasons, "the public interest in knowing Costa Pacific's financial condition overrides any interest in confidentiality." However, the fifth criterion required to apply the exemption stated in ORS 192.502(4) is that disclosure will cause harm to the public interest. That the public interest may also be served in some measure by disclosure does not minimize the harm cited by DAS. While we agree with the petition's assessment that there are important public interests weighing in favor of disclosure of records in relation to a project such as the sale of the Dammasch property, we do not believe that disclosure of the requested financial information would advance those interests so as to diminish the harm that disclosure would cause.

Taking into account the preceding analysis, we conclude that financial records DAS has withheld from disclosure, and financial information DAS has redacted from disclosed records, are exempt from disclosure under ORS 192.502(4).

2. DAS' analysis of financial information

The third category of records cited in your petition are those "generated by DAS concerning its analysis, examination and review of financial information concerning Costa Pacific, its affiliates and owners." To the extent that these records reflect financial information submitted in confidence by Costa Pacific or Villebois, they are exempt from disclosure under ORS 192.502(4) for reasons already discussed. However, DAS has identified 5 electronic mail

[3] *Premier Technology v. Oregon State Lottery*, 136 Or. App. 124, 134-45, 901 P2d 883 (1995) (public interest would suffer from the disclosure of confidential information of lottery equipment vendors "because it could discourage video lottery terminal distributors from applying for contracts, [...] thereby reducing competition for video lottery terminals").

records responsive to your petition that do not contain such information. John Wales has told us that DAS will disclose to you in their entirety 4 of these records, 2 of which have attachments. The remaining record is, in part, exempt from disclosure as an internal advisory communication, ORS 192.502(1), in that it consists of analysis, opinions and advice offered by DAS officials or its contractors about selecting a buyer for the Dammasch property prior to the selection being made. In part, the record addresses financial information concerning Costa Pacific. Mr. Wales has agreed that DAS will disclose to you the factual information stated in the record.

For an agency to exempt a record from disclosure as internal advisory communications, it must show that "in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure." ORS 192.502(1). The record in question reflects candid opinions expressed during the process of selecting an entity for the sale of the Dammasch project. Mr. Wales has told us that disclosure of the nonfactual elements of the record would cause people to refrain from communicating their opinions in writing in relation to future deals in order to avoid the possibility of those opinions being disclosed, because such disclosure could threaten the viability of a transaction that has not yet been finalized. Taking into account the Oregonian's statement of the public interest in disclosure, we conclude that the public interest in officials being able to candidly consider how to achieve what is in the best interest of the state in concluding business transactions would be seriously undermined if people interested in those transactions could access the communications. For this reason, we conclude that, excepting the factual information that DAS has agreed to disclose, the record in question is exempt from disclosure under ORS 192.502(1).

3. Pro Formas

The second category of requested records in your petition specifically identifies "pro formas from the developer dated December 12, 2002."[4] Unlike the other requested records, pro formas do not show the financial condition of the developer or its investors, but show the expense and revenue assumptions of the proposed project. From discussions with John Wales and Cameron Smith, it is unclear whether DAS understood your requests and its denials to encompass pro formas. However, because John Wales told us that DAS considers those records to be exempt from disclosure, we address them here.

The requested pro formas set out detailed information about the proposed Dammasch development project. Mr. Kadlub of Costa Pacific told us that the information contained in the pro formas is known by only a small number of people within Costa Pacific and Villebois. In light of this, we consider whether the pro formas qualify as trade secrets exempt from disclosure under ORS 192.501(2). The following elements must be met for a record to qualify as a trade secret:

[4] DAS has not identified a pro forma dated December 12, 2002. An undated pro forma appears to be the one referenced in your petition.

1) the information must not be patented;
2) the information must be known only to certain individuals within an organization and used in a business the organization conducts;
3) the information must be information that has actual or potential commercial value; and
4) the information must give its users an opportunity to obtain a business advantage over competitors who do not know or use it.

Of course, the information in the pro formas is not patented. As already stated, the records are known only to certain individuals within Costa Pacific and Villebois, and their use in the business of those entities is obvious. The pro formas contain information of actual or potential commercial value, and would give users an opportunity to gain a business advantage over competitors, in that a buyer with knowledge of information contained in the pro formas would know the seller's profit margins in advance and would be assisted in determining the lowest sales price acceptable to the seller. Clayton Hering of Norris Beggs & Simpson told us that making Villebois' pro formas public could be detrimental to the project, and that information such as the project pro formas could be used by potential buyers and competitive builders to the disadvantage of Villebois and the State.

Based on this information, the pro formas meet the criteria for trade secrets stated in ORS 192.501(2). However, records are exempt under ORS 192.501(2) "unless the public interest requires disclosure in the particular instance." The petition speaks of the public's interest in knowing about the financial viability of Costa Pacific and Villebois, a topic that is not addressed by the information contained in the pro formas. Disclosing the requested pro formas threatens the viability of the Dammasch property project because disclosure would take negotiating strength away from Villebois in its development of the property, threatening the success of the State's sale of the property. Since the purchase price to the State increases with the financial success of the project, the State could directly lose money from the release of the pro formas. We conclude that the public interest does not require disclosure in this instance.

3. Conclusion

As it relates to records addressing the financial condition of Costa Pacific and Villebois, your petition is denied because the records are exempt from disclosure under ORS 192.502(4). As it relates to records generated by DAS concerning its analysis, examination and review of financial information about Costa Pacific or its affiliates and owners, other than information that DAS has agreed to disclose, your petition is denied under ORS 192.502(4) and 192.502(1).

As it relates to the requested pro formas, your petition is denied because the records are trade secrets exempt under ORS 192.501(2).

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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c: Cindy Becker, Deputy Director, DAS
John Wales, Manager, Real Property Services, DAS