HARDY MYERS
ATTORNEY GENERAL

PETER D. SHEPHERD
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400
TTY: (503) 378-5938

February 17, 2004

Jeffrey K. Hanson
YAZBECK, CLORAN & HANSON, LLC
Attorneys at Law
Suite 2750
1300 SW Fifth Avenue
Portland, OR 97201-5617

Re: *Petition for Public Records Disclosure Order*
DCBS, Office of Minority, Women and Emerging Small Business Records

Dear Mr. Hanson:

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 10, 2004, asks the Attorney General to direct the Department of Consumer and Business Services, Office of Minority, Women and Emerging Small Business (OMWESB), to make available the Third Party Complaint made to OMWESB concerning your client, Dirt & Aggregate Interchange, Inc., in relationship to its certification as a Disadvantaged Business Enterprise (DBE) and certification as a Minority Business Enterprise (MBE).

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. Any person who is 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 from disclosure. ORS 192.450(1). Your request was denied by Gabriel Silva, OMWESB Administrator, by a letter dated February 6, 2004. The basis of the denial was a requirement of confidentiality imposed by federal regulations, namely 49 CFR 26.109(b).

The State of Oregon, through the Oregon Department of Transportation, receives federal-aid highway funds from the U.S. Department of Transportation (USDOT). As a condition of the receipt of such funds, the State is required to establish a DBE program, and the program must comply with the applicable provisions of 49 CFR Part 26. 49 CFR 26.3; 49 CFR 26.21. These federal regulations provide a procedure for the certification of business as DBEs, and this certification function is performed in Oregon by OMWESB. A third party complaint received by OMWESB concerning the DBE certification Dirt & Aggregate Interchange, Inc. is the subject of your petition.

Federal regulations address the disclosure of DBE records. 49 CFR 26.109(b) states in relevant part that "[n]otwithstanding the provisions of paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election." If maintaining confidentiality "will hinder an investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege* * *." *Id.* While your petition does not allege maintaining confidentiality in this instance would result in any of the harms listed in the federal regulation, even if such harms were possible, the discretion to waive the privilege would remain with the complainant. It could not be exercised by USDOT or a state certifying agency such as OMWESB. If a complainant did not waive confidentiality in such a situation, USDOT or OMWESB would have to consider closing its investigation or dismissing a proceeding or hearing. *Id.*

In relation to the complaint that is the subject of your petition, Mr. Silva has told us that the complainant has requested confidentiality in accordance with 49 CFR 26.109.

Under the Public Records Law, a record is exempt from disclosure if disclosure "is prohibited by federal law or regulations." ORS 192.502(8). We have previously determined that "a federal law or regulation which expresses a clearly prohibitory policy * * * is to be deemed a prohibition even if the means of enforcing the federal policy – loss of federal funds – is only indirectly prohibitory." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2001) at 72; Public Records Order, September 20, 1999, Michael. In this instance, disclosure of a complaint for which the complainant has requested confidentiality would violate the requirements of 49 CFR 26.109, and the state would risk loss of federal funding as a result of such an action. 49 CFR 26.3. Therefore, the records that are the subject of your petition are exempt from disclosure under ORS 192.502(8).

Your petition references OAR 445-050-0080(4) as denying confidential status to third party complaints. The administrative rule as amended, effective as of February 15, 2004, no longer contains a subsection (4); subsection (3) of the current rule provides that OMWESB "may maintain the identity of complainants confidential throughout the course of the investigation, at their election." The Attorney General has authority to review records to which a petitioner has been denied access to determine if those records "may be withheld from public inspection." ORS 192.450(1). ORS 192.502(8) provides OMWESB with a basis for withholding from disclosure the records that you seek. The currently effective version of OAR 445-050-0080 does

not contradict the authority provided to OMWESB under ORS 192.502(8). Therefore, your petition for disclosure is denied.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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c: Gabriel Silva, Administrator, DCBS/OMWESB