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May 6, 2009

Erik Siemers
Portland Business Journal
851 S.W. Sixth Avenue, Suite 500
Portland, OR 97204

Re: Petition for Public Records Disclosure Order:
Department of Energy, Small Scale Local Energy Loan Program Records

Dear Mr. Siemers:

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. We received your email petition on April 20, 2009. Your petition asks the Attorney General to order the Department of Energy ("ODOE") to make available for inspection or to produce copies of the following portions of the loan application of Cascade Grain Products, LLC ("Cascade"):

1) Executive summary;
2) Sales projections;
3) Plan to repay the state loans;
4) Biographical information on Cascade Grain's ownership and management.

For the reasons that follow, your petition is denied.

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. Further, ORS 470.065 provides confidential treatment to certain records submitted by an applicant for a Small Scale Local Energy Loan Program ("SELP") loan, and ORS 192.502(9)(a) exempts from disclosure public records that are made confidential under Oregon law.

We deny your petition with respect to the "Executive Summary," biographical data related to Cascade's management team, and "[p]lan to repay" the loan. ODOE has agreed to provide you with a copy of Cascade's application materials that are responsive to those parts of your request. ODOE has redacted certain marketing strategy information, and certain sales projection information, from the "Executive Summary" on the basis that it is confidential pursuant to ORS 470.065(1)(b), (e), or (f). We have reviewed those redactions and believe that they are lawful. In view of ODOE's agreement to provide these records to you, you have not

been "denied the opportunity to inspect" the records (except insofar as the "Executive Summary" contains exempt information), and your petition must be denied. ORS 192.450(1).

Your petition also seeks biographical information on Cascade's ownership. However, we have learned that Cascade's loan application did not include any biographical information apart from the information already provided to you. The Attorney General cannot order an agency to disclose records that it does not have. In addition, we note that your request to ODOE only sought biographical information pertaining to Cascade's management. Thus, even if ODOE had biographical information pertaining to Cascade's ownership, we could not conclude that ODOE had denied a request for those records. Your petition must be respectfully denied insofar as it seeks biographical information pertaining to Cascade's ownership.

All that remains is your request for "[s]ales projections." Cascade's application included documents that are responsive to your request in two places. First, a "Confidential Information Memorandum" projected Cascade's future revenues. Second, Cascade submitted "*pro forma*" financial documents containing detailed projections of sales revenues in a spreadsheet format. ODOE has agreed to provide you with some the information contained in the "Confidential Information Memorandum" and it follows that we must respectfully deny your petition with respect to the information provided. However, ODOE had determined that the sales projections appearing in Cascade's "*pro forma*" financial documents, and condensations of that information appearing in the Confidential Information Memorandum, are rendered confidential by operation of ORS 470.065. We must determine whether ODOE's determination is consistent with the law. We conclude that it is.

Taken alone, we think that the text of ORS 470.065 is ambiguous with respect to whether its confidentiality projections extend to financial projections that are not derived from historical data pertaining to the loan applicant. In particular, the term "financial statements" in ORS 470.065(1)(b) could be interpreted to refer only to statements pertaining to an entity's actual assets, liabilities, cash flows, etc. as they actually existed during the time period the statement describes. And the word "data" in ORS 470.065(1)(e) could be interpreted to mean, essentially, "facts." On the other hand, however, we understand that in the context of loan applications, it is common to refer "*pro forma*" projections as "financial statements." And the word "data" is the plural of "datum," which can mean "something that is given either from being experientially encountered or from being * * * assumed for specific purpose," "material serving as a basis for discussion, inference, or determination of policy," and "detailed information of any kind," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged Edition, 2003) at 576 & 577.

Because text is to be interpreted in context, we believe that we should adopt the interpretation that is most consistent with the reality that ORS 470.065 applies exclusively in the context of loan applications. As a result, we believe that the statutory references to "[f]inancial statements" and certain kinds of accounting "data" are most likely intended to reach forward-looking projections and not only purely factual "financial statements" and "[p]roduction, sales and cost data" pertaining to the applicant. Indeed, in some cases projections may be inextricably intertwined with company-specific historical data, as where a loan applicant is a going concern that develops projections based on its actual experience. And some loan applicants may be, like

Cascade, newly-formed ventures whose sole commercial endeavor is the project for which loan funds are sought.

The legislative history indicates that ORS 475.065 was prompted by ODOE's concerns that "under current law, a [loan] application – and certain proprietary information therein – is a 'public document.'" Testimony of the Oregon Department of Energy delivered by Michael Grainey to the Senate Committee on Agriculture and Natural Resources, January 23, 1991; Testimony of the Oregon Department of Energy delivered by ODOE Deputy Director Michael Grainey to the House Committee on Energy and the Environment, February 20, 1991. The "Staff Measure Summaries" prepared for the same committees indicated that the confidentiality provisions "would ensure confidentiality of loan applicants' financial records and information necessarily involved with obtaining small scale energy project loans." We think that this history is consistent with our contextually-grounded understanding of the scope ORS 470.065. We understand that companies expend considerable resources developing future projections, and tend to view them as "proprietary" and therefore within the scope of ORS 470.065 given the legislative history. Such projections may also be "financial * * * information necessarily involved with obtaining small scale energy project loans."

It follows that your petition must be denied insofar as you seek sales projections that are intertwined with the "*pro forma*" financial statements Cascade submitted in support of its loan application, and the condensed version of that information appearing in the "Confidential Information Memorandum."[1]

For the reasons described above, your petition is respectfully denied.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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c: Jeff Keto, ODOE

[1] We note that the confidentiality provisions of ORS 470.065(1) apply only "if so requested in writing." The "Confidential Information Memorandum" submitted in conjunction with Cascade's application contains the statement that "By accepting this Memo, the recipient agrees to keep confidential the information contained herein or made available in connection with any future investigation of the Company." We are not persuaded that the statement alone makes any document exempt from disclosure under the public records law. ***See Guard Publishing Co. v. Lane County School Dist. No. 4J***, 310 Or 32, 39, 791 P2d 854 (1990) ("Nor may the public body exempt public records from disclosure simply by promising the contributor confidentiality.") We believe, however, that ODOE can reasonably treat that statement as a request that ODOE treat the information as confidential to the extent permitted by ORS 470.065.