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March 23, 2005

Janie Har
The Oregonian
1320 S.W. Broadway
Portland, OR 97201-3499

Re: Petition for Public Records Disclosure Order
Oregon Bridge Delivery Partners Records

Dear Ms. Har:

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 August 5, 2004, asks the Attorney General to direct the Oregon Department of Transportation (ODOT) to produce for inspection "four subcontracts executed on behalf of the state by Oregon Bridge Delivery Partners (OBDP). The subcontracts are #40007 with Jeanne Lawson Associates Inc., #40009 with Daniel J. Edelman Inc., #40010 with HB Media Group, and #40011 with Group AGB LLC." For the reasons that follow, we respectfully deny your petition.[1]

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. Custodians of public records are required to make those records available for inspection or copying unless the records are exempted from disclosure by statute. ORS 192.430(1). A custodian is "a public body mandated, directly or indirectly, to create, maintain, care for or control a public record." ORS 192.410(1). A public record, in turn, is any writing relating to the conduct of the public's business that is "prepared, owned, used or retained by" a public body. ORS 192.410(4). Thus, ODOT is required to provide an opportunity to inspect the specified subcontracts only if the subcontracts are public records and ODOT is a custodian of those records. Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the record to determine if it may be withheld from public inspection. ORS 192.450(1).

[1] We appreciate your having granted an extension of the time in which we would ordinarily have been required to issue this order.

OBDP is a joint venture comprising two private entities, HDR Engineering Inc. and Fluor Enterprises Inc. ODOT and OBDP have entered into a set of agreements to accomplish work required under the "OTIA III State Bridge Delivery Program."[2] The overarching agreement is "Professional Services Agreement to Agree No. 23856" (Agreement to Agree). Within the framework of this Agreement to Agree, ODOT and OBDP have entered into a series of Work Order Contracts (WOCs), each covering services pertaining to a different aspect of the Bridge Delivery Program. Heather Catron, ODOT Bridge and Alternative Delivery Program Manager, provided us with the following information regarding WOCs currently in place or planned for the Program:

Summary of Work Order Contracts (WOCs)

WOC #	Executed Date
1 Jump Start and Program Development	April 5, 2004
2 Columbia River Gorge, Design Oversight & CS	September 2, 2004
3 Design Management	February 1, 2005
4 IT	November 18, 2004
5 Construction Management	October 28, 2004
5 Amendment 1	March 1, 2005
6 Mobility	(not developed)
7 Program Management	February 1, 2005

OBDP in turn has entered into subcontracts with other private entities to perform elements of the WOCs.

Dennis Mansfield, ODOT's Document Control Coordinator for the OTIA III Program, has informed us that ODOT did not prepare the subcontracts identified in your petition, nor has it used or retained them. Mr. Mansfield also informed us that to his knowledge, nobody at ODOT has reviewed those subcontracts. Ms. Catron similarly told us that ODOT did not review the subcontracts. Consequently, the issue is whether ODOT "owns" the documents for purposes of ORS 192.410(4). A public body can "own" a record even though the public body has never had the record in its possession. Public Records Order, December 11, 1992, Smith. In Smith, the Office of Alcohol and Drug Abuse Programs within the Department of Human Services had contracted with a private entity to conduct a statewide alcohol and drug survey of eighth and ninth grade students. The contract required the contractor to prepare individual school reports which were provided to the principals of the schools surveyed, but not to the state agency. The state agency had never had the individual school reports in its possession and had not prepared, used or retained the reports. We nevertheless concluded that under the terms of the contract between the agency and the contractor "the office does own the individual school reports." Smith PRO at 3. We reasoned:

[2] "OTIA III" refers to the third in a series of Oregon Transportation Investment Acts. OTIA III was enacted in 2003. Oregon Laws 2003, chapter 618 (HB 2041).

> Although the contract may reasonably be interpreted to authorize the contractor to provide the individual school reports only to the individual schools and not to the office, the contract deals explicitly with ownership of work product. Paragraph 13 of the contract states:
>
> > All work products of the Contractor which result from this contract are the exclusive property of the Department.
>
> Since the contract requires the contractor to prepare the individual school reports, those reports are the property of the Department of Human Resources, Office of Alcohol and Drug Abuse Programs. Accordingly, we conclude that the individual school reports are public records, which must be made available for inspection unless those records fall within one of the exemptions to disclose.

Smith PRO at 3. In short, the "individual school reports" were themselves the "work product" described in paragraph 13 of the contract.

In this case, Paragraph 10.b. of the Agreement to Agree similarly provides that "[a]ll Work Product created by Contractor pursuant to a Work Order Contract * * * shall be the exclusive property of Agency." But in contrast to the situation addressed in the Smith PRO, the subcontracts at issue here are not "Work Product" within the meaning given that term in the Agreement to Agree. The Agreement to Agree defines "Work Product" to mean "every invention, discovery, work of authorship, trade secret or other tangible or intangible item and all intellectual property rights therein that Contractor is *required to deliver to Agency pursuant to a Work Order Contract.*" Paragraph 10.a.iii. (Emphasis added.) The subcontracts OBDP enters into in order to *accomplish* work under a Work Order Contract are not themselves Work Product within the meaning of Paragraph 10.b. *See* Public Records Order, November 7, 1991, Mayes (accountant's working papers, notes and other documents were not "work products" within meaning of "work product ownership" provision in contract with Treasury and were therefore not public records). Each of the WOCs also contains its own extensive lists of deliverables. It does not appear that the subcontracts at issue fall within any of the categories of deliverables. Ms. Catron has also told us that the subcontracts themselves are not deliverables under the WOCs. We therefore conclude that ODOT does not "own" the subcontracts by virtue of paragraph 10.b of the Agreement to Agree.

You have identified other provisions of the Agreement to Agree that you maintain establish a custodial role for ODOT. For example, the Agreement to Agree provides that "Contractor shall not enter into any subcontracts for any of the Services required by this Agreement to Agree * * * without Agency's prior written consent." Agreement to Agree, Paragraph 6.a. You suggest that "[i]f ODOT did give its consent, it surely did so after getting the subcontracts itself," and that this "puts the documents squarely in ODOT's possession." But Mr. Mansfield has informed us that under this provision ODOT has not reviewed and approved individual subcontracts, but instead approves the *use of subcontractors*. The approved subcontractors are identified in each WOC in "Exhibit A Compensation, Part 1 Summary for Services."

ODOT does retain the *right* to examine the subcontracts at issue under the Agreement to Agree. Paragraph 14 provides, in relevant part:

> Contractor shall maintain all fiscal records relating to this Agreement to Agree in accordance with generally accepted accounting principles. In addition, Contractor shall maintain any other records pertinent to this Agreement to Agree in such a manner as to clearly document Contractor's performance. Contractor acknowledges and agrees that *Agency and the Oregon Secretary of State's Office and the federal government and their duly authorized representatives shall have access to such fiscal records and other books, documents, papers, plans and writings of Contractor that are pertinent to this Agreement to Agree* to perform examinations and audits and make excerpts transcripts. (Emphasis added.)

The subcontracts certainly are documents "that are pertinent" to the Agreement to Agree. We do not believe, however, that a right of inspection of this kind amounts to "ownership" of the covered records under ORS 192.410(4). "Own" is defined as "to have or hold as property or appurtenance : have a rightful title to, whether legal or natural : POSSESS." WEBSTER'S THIRD NEW INT'L DICTIONARY 1612 (unabridged ed 1993). The word does not encompass the mere right of access. Moreover, the Agreement to Agree's use of the term "of Contractor" to describe the pertinent records implies OBDP's continued ownership of them.[3]

Because the subcontracts at issue are not "public records" for purposes of the Public Records Law, the Attorney General lacks authority to order their disclosure. Consequently, we must respectfully deny your petition.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS15277
c: Heather Catron, ODOT Bridge and Alternative Delivery Program Manager
Dennis Mansfield, ODOT OTIA III Program Document Control Coordinator

[3] It is also worth noting that the Secretary of State is given the same right of inspection as ODOT. And a clause of this kind is routinely included in state contracts. Consequently, reading the right of inspection as tantamount to ownership would make the Secretary of State the constructive owner and custodian of privately held documents pertinent to *all* contracts to which the state is a party. Nothing in the Public Records Law suggests that the legislature intended so expansive a meaning for the word "own."