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May 20, 2015

**SENT VIA EMAIL ONLY**

Barbara J. Diamond
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Re: Petition for Public Records Order
*Oregon State Bar*
DOJ File No. 993001-GA0083-15

Dear Ms. Diamond:

This letter is the Attorney General's order on your petition for public records disclosure under the Oregon Public Records Law, ORS 192.410, *et seq.* Your petition, which we received May 13, 2015, asks the Attorney General to order the Oregon State Bar (OSB) to allow you to inspect a videotape of a training session presented to OSB staff. OSB submitted a response to your petition on May 14, 2015.[1] For the reasons that follow, we respectfully deny the petition.

The Public Records Law confers a right to access any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. The law requires generally that the custodian of public records furnish proper and reasonable opportunities for inspection and/or copying of the record in the office of the custodian. ORS 192.430. Any person denied the right to inspect or receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection. ORS 192.450(1).[2] The Public Records Law is primarily a disclosure law, not

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[1] We forwarded OSB's response to you and offered you the opportunity to submit a reply. You have not submitted a reply or otherwise responded to our attempts to communicate with you, and so we must issue this order within the seven days provided by law and without the benefit of any reply. ORS 192.450(1) (the Attorney General must issue an order on a public records petition within seven days of receiving the petition).

[2] OSB is a "state agency" for purposes of the Oregon Public Records Law. *State ex rel Frohnmayer v. Oregon State Bar*, 307 Or 304, 309, 767 P2d 893 (1989).

a confidentiality law. The public body has the burden of demonstrating that withholding the public record from inspection is permitted by the Public Records Law. ORS 192.450(1).

On May 15, 2014, Figure 8 Consulting LLC (Figure 8) presented an on-site training session to OSB staff entitled "Unconscious Bias: Your Freudian Slip Is Showing." OSB asked Figure 8 for permission to videotape the training. Although Figure 8 initially denied permission to videotape, it ultimately granted permission on the condition that OSB agree not to allow anyone other than bar staff to view it. There is no contemporaneous memorialization of this agreement. However, with its response to your petition, OSB submitted a copy of a May 11, 2015, email message from Carol French of Figure 8 that stated, in part:

> "[W]e do not give permission to OSB to share the video of our presentation that was recorded when we presented to the OSB staff. This is not the first time that this request has been made of us, and it is our policy – as it is the policy of everyone we know who does that work – to not allow videotapes of our work to be given out. * * * Our agreement with OSB was that the video could only be shown to employees who had been unable to attend the presentation or those who had been newly hired."

The training presentation was videotaped. OSB has not shown the video to anyone other than its staff.

You inform us that you are a member of the bar and a member of the Labor and Employment Section Executive Committee, and that you are "highly interested in anti-bias efforts by the Bar." OSB acknowledges that you are a member of the bar and personally interested in diversity and inclusion issues. OSB further informs us that you are the operator of Diamond Law Training, "which regularly presents trainings on microagression theory and unintentional discrimination." On April 17, 2015, you asked OSB for a copy of the video, offering to pay any cost. You explained that you would "love to see this. It might have good ideas for my upcoming training in May." Christine Ford of OSB explained that OSB could not share the video with you because of the terms of their agreement with Figure 8. Ford further advised you that she had asked French and April Lewis of Figure 8 for permission to share the video with you; although French and Lewis had declined that permission, they invited you to contact them for information about resources and upcoming presentations that you might be able to attend. You then expressed to OSB that you believed that the video should be available to you as a public record because "anything used to train public servants [should] be available to the public" and that you had an additional interest in viewing the video, *i.e.*, "wanting to see what the Bar is doing in terms of diversity efforts." You offered to come to the OSB offices to view the video as an alternative to receiving a copy. Helen Hierschbiel, OSB General Counsel, responded that, in OSB's view, the video is exempt from disclosure under the Public Records Law because Figure 8 holds copyright interests in the video, OSB has only a limited license to show the video to OSB staff, and disclosing the video to you would violate federal copyright law. OSB denied your public records request on May 11, 2015. Although OSB did not allow your request, OSB advises us that it has provided you with information about the purpose, scope,

and cost of the Figure 8 training presentation, as well as information about its training goals in its Diversity Action Plan Report. In addition, OSB advises us that you have obtained a copy of a Figure 8 PowerPoint presentation from its Unconscious Bias training.

As noted, you have petitioned the Attorney General to order OSB to allow you to inspect the video. You assert that "[t]his is a videotaped recording of a training conducted using public funds and there is no alleged confidentiality or privacy interest alleged." As also noted, OSB bears the burden to sustain its action. OSB asserts two reasons why its withholding of the video is permitted by the Public Records Law. First, it asserts that OSB is prohibited from disclosing the video by federal copyright law, and for that reason the video is exempt from public records disclosure under ORS 192.502(8) (the federal "catch-all" exemption). Second, it asserts that the video is exempt from disclosure as a confidential submission under ORS 192.502(4).

For the reasons that follow, we conclude that the video is exempt from disclosure as a confidential submission under ORS 192.502(4).

ORS 192.502(4) exempts from Public Records Law disclosure "[i]nformation 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." To be exempt from disclosure under this provision, the following conditions must apply:

- The informant must have submitted the information on the condition that it would be kept confidential.
- The informant must not have been required by law to provide the information.
- The information itself must be of a nature that reasonably should be kept confidential.
- The public body must show that it has obliged itself in good faith not to disclose the information.
- Disclosure of the information must cause harm to the public interest.

ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2015) (MANUAL) at 83.

We find that each condition is met here. Figure 8 was not required to present the training or to allow OSB to videotape it. At the time it agreed to allow videotaping, Figure 8 conditioned its agreement upon OSB restricting viewing of the video to OSB staff. *See* Public Records Order, September 4, 1998 (*Spatz*) (information submitted to the Oregon Department of Forestry (ODF) on condition that ODF allow a limited group to access it was submitted in confidence). In accepting that condition, OSB obliged itself in good faith not to share the video with anyone other than its staff. There was a clear understanding between OSB and Figure 8 that OSB would not share the video beyond the scope of that agreement. It is reasonable for trainers and other speakers who charge for their services to seek to limit the audience for presentations in light of

the content they have developed for that audience and the fee they have negotiated in light of the expected size of the audience. In particular, it would be reasonable for trainers and other speakers to want to be able to decide whether, and to what extent, they would share their presentations with possible competitors.

Finally, we believe that disclosure would harm the public interest. You originally stated that your purpose for seeking to view the video was to get ideas for your own training. While that purpose is understandable, it is individual to you as a provider of diversity training and is not a general public interest. You later suggested that you were also interested in OSB's diversity efforts and suggest that the public has an interest in knowing how public servants are being trained. While we agree that the public has some interest in knowing how public bodies train their employees and address diversity issues, we do not agree that disclosing the video to you would meaningfully advance that interest. For one thing, it is unclear how you would disseminate information on that subject to the public at large, or why the specific content of this particular training program would be of interest to members of the public. We also note that OSB has been forthcoming in addressing those interests with you. OSB has provided information that addresses your interest in being informed about OSB's diversity training in general and about this training in particular, including its purpose, scope, and cost. In addition, you have obtained the PowerPoint from this presentation, and Figure 8 has offered to share resources with you and let you attend future presentations. Conversely, we believe that requiring OSB to disclose the video to you would harm the public interest in specific ways. For one thing, it is clear that both OSB and Figure 8 would consider allowing you to watch the video to be a breach of their agreement. There is a public interest in holding public bodies to their agreements when those agreements are consistent with the requirements of the law. In addition, requiring OSB to breach its agreement with Figure8 could result in Figure8 or other trainers declining to permit OSB to record future trainings. That, in turn, could increase the cost of training by requiring OSB to pay trainers to return, rather than being able to show the video to other employees at no additional cost. On balance we believe that disclosure would be harmful to the public interest.

For the foregoing reasons, we conclude that the records that you seek are exempt from disclosure under ORS 192.502(4). We respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

LEK:tmt/6509802
cc via email only:
Helen Hirschbiel, OSB