HARDY MYERS
ATTORNEY GENERAL

DAVID SCHUMAN
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97310-0506
Telephone: (503) 378-4400
TDD: (503) 378-5938

May 2, 1997

David A. Bledsoe
Perkins Coie
Attorneys at Law
1211 SW 5th Avenue, Suite 1500
Portland, OR 97204

Re: Petition for Public Records Disclosure Order:
Oregon Housing and Community Service Department Records

Dear Mr. Bledsoe:

This letter is the Attorney General's Order on the petition by American Property Development, Inc. (APD)[1/] for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. APD's petition, which we received on April 18, 1997,[2/] asks the Attorney General to direct the Oregon Housing and Community Services department (OHCSD) to produce copies of the following records:

a. Records responsive to Original Request Nos. 1 and 4, including:

(i) Sound recordings of the Finance Committee meetings held on 10/15/96, 11/19/96, 11/26/96, 12/17/96, 12/24/96, 12/31/96, and each meeting of 1997.

(ii) All versions of the minutes and agendas of the 1997 Finance Committee meetings held on 1/28/97, 2/18/97, 2/25/97, 3/04/97, 3/11/97, 3/18/97, 3/25/97, 4/01/97, and 4/08/97.

[1/] The petition was filed by David A. Bledsoe as attorney for APD.

[2/] We appreciate Mr. Bledsoe's providing an extension of the time in which the law would otherwise have obligated us to respond to the petition.

b. Records responsive to Original Request Nos. 1 and 2, including:

(i) Electronic mail communications between and among the Department director, four members of his staff (Komi Kalivor, Lynn Schoessler, Robert Gillespie, and Gustavo Wilson) and the remaining members of the Finance Committee from September 1996 to date.

(ii) Phone logs or other phone records such as long distance telephone records for the Department director and four members of his staff (Komi Kalivor, Lynn Schoessler, Robert Gillespie, and Gustavo Wilson) from September 1996 to date.

c. Records responsive to original request No. 3 including all versions of the Finance Committee Policy Manual (the so-called "Burgundy Books").

d. All scoring sheets and evaluation material for all tax credit projects, both 4% and 9%, both funded and unfunded removed from project files produced by the Department for review by petitioner.

e. All public records responsive to petitioner's Original Request Nos. 1 through 11 received or created by the Department subsequent to February 28, 1997.

f. All public records which were marked for reproduction by APD but which were not copied by the Department, either by omission or error, and as petitioner identified to the agency by letter dated April 11, 1997 and attachments (Exhibit F to this Petition).

g. All other public records responsive to petitioner's Original Request Nos. 1 through 11 which the Department may be withholding, but about which APD is not specifically aware because the Department has not identified to APD such responsive records that it does not intend to disclose or the basis for the withholding.

For the reasons that follow, we respectfully deny APD's petition. Because of the extended nature of the petition and of APD's communications with OHCSD, we begin with a preliminary discussion of applicable law.

The Oregon Public Records Law confers the right to inspect public records of a public body in Oregon, subject to certain exemptions and limitations. ORS 192.420. If public records contain exempt and nonexempt material, the public body must separate the materials and make the nonexempt materials available for examination if it is "reasonably possible" to do so while

preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 note 8, 538 P2d 373 (1975); *see* ORS 192.505.

ORS 192.430 requires OHCSD and other public bodies to provide "proper and reasonable opportunities for inspection and examination" of nonexempt public records. What is "reasonable," particularly with respect to the timeliness of a response, may depend upon such factors as the volume of records requested, the staff available to respond to the records request, the nature of the records, and the difficulty in determining whether any of the records are exempt from disclosure. OREGON ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (MANUAL) 6 (1995). A public body may act reasonably, even if it does not meet deadlines established by the requestor, so long as the public body provides access to nonexempt records within a reasonable period of time under the circumstances. *Id.* at 7; *see also Morse Bros. v. ODED*, 103 Or App 619, 798 P2d 719 (1990).

"Public records" are described in ORS 192.410(4) as a "writing," but are not limited to records actually printed or written. The term "writing" is defined expansively by ORS 192.410(6) to include "every means of recording" including, but not limited to, sounds and electronic recordings. As a consequence, public bodies have an obligation to produce records in their original form when available in that form. *See* ORS 192.440(2).

The right to inspect public records does not, however, include a right to unsupervised inspection of an agency's files or the examination of original records that include information potentially exempt from disclosure. A public body may adopt administrative measures to supervise document disclosure and original document review including the furnishing of copies of original documents with exempt material redacted. ORS 192.430(2), 192.505. Furthermore, a public body's decision under ORS 192.430(2) to provide copies in lieu of an inspection of original documents will be valid if "necessary for the protection of the records and to prevent interference with the regular discharge of [agency duties]." MANUAL at 10 (quoting Public Records Order, July 19, 1982, Baucom).

Moreover, a public body may establish fees "reasonably calculated to reimburse it for its actual costs in making such records available." ORS 192.440(3). The statute also expressly permits a public body to included in its fees "costs for summarizing, complying or tailoring [a] record, either in organization or media, to meet the person's request." *Id.* The term "actual cost" in the statute may included charges for the time spent by the public body staff in locating the requested records, reviewing the records in order to delete exempt materials, supervising a person's inspection of original documents in order to protect the records, copying records, certifying documents as true copies or sending records by special methods such as express mail. MANUAL at 10; *and see* Public Records Order, April 7, 1989, Martin. The term "actual cost" also may include the costs of attorney time in reviewing and segregating records at the public body's request. *See* Public Records Order, May 19, 1993, Smith. The public body's costs also

may included charges for search time even if the public body fails to locate any records responsive to the request or even if the records located are subsequently determined to be exempt from disclosure. *See* 39 Op Atty Gen 61, 68 (1978). A public body may estimate its costs for responding to a records request and require prepayment of those estimated costs before acting on the request. MANUAL at 10-11.

In light of this statutory framework, we now consider each of the records sought by the petition.

1. Sound Recordings of the Finance Committee Meetings

Mr. Gillespie, Manager, OHCSD Housing Resources Section, informs us that OHCSD has not denied APD's request for sound recordings of the Finance Committee meetings, but that OHCSD believes certain portions of those records may be exempt from disclosure as privileged attorney-client communications. *See* ORS 40.225, 192.502(8). Mr. Gillespie informs us, and has stated in his letter dated April 23, 1997, to Paul J. Ehlenbach, attorney for APD, that OHCSD believes the most cost-effective method for providing these records is by transcription given that some redaction of attorney-client communications is necessary. Nevertheless, Mr. Gillespie states that OHCSD is willing to provide either redacted recordings or redacted transcripts so long as OHCSD's estimated costs are prepaid by APD.

APD seeks sound recordings for "each meeting of 1997." With respect to such records (and each of the others sought in the petition involving 1997 records), Mr. Gillespie states that OHCSD has agreed to construe the petition as a supplemental request for records and that OHCSD is willing to provide nonexempt records through April 18, 1997, the date of the petition. Mr. Gillespie further states, however, that OHCSD will not honor an open-ended or "continuing" request for records, and if APD wishes to obtain records created subsequent to April 18, OHCSD would need to make further written request(s) to OHCSD for additional records.

A public body may require that records requests be in writing. *See* ORS 192.430(2). A public body is not obligated by the Public Records Law to make available for inspection and copying any records that do not exist at the time of the request. *See* ORS 192.430(1). Thus, a public body may require a person to make a new written request for records after the public body has responded to a request for records currently in the public body's possession. MANUAL at A-1. Therefore, OHCSD cannot be considered to have "denied" a request for records that did not exist when the records were requested.

Because OHCSD has not denied access to the sound recordings sought in the petition, the Attorney General lacks authority at this time to order disclosure. *See* ORS 192.450(1).

2. Minutes and Agendas of 1997 Finance Committee Meetings

Mr. Gillespie informs us that OHCSD did provide minutes and agendas of the Finance Committee meetings pursuant to APD's original request of January 9, 1997,[3/] in the 10,013 pages of public records previously released to petitioner's counsel on or about March 25, 1997. Mr. Gillespie states that OHCSD is willing to provide nonexempt minutes and agendas of 1997 meetings through April 18, 1997, the date of the petition. Because OHCSD has not denied access to the existing records, the Attorney General lacks authority at this time to order disclosure. *See* ORS 192.450(1).

3. Electronic Mail Communications

Mr. Gillespie informs us that OHCSD has not denied the request for existing e-mail communications. In his letter to Mr. Ehlenbach dated April 23, 1997, Mr. Gillespie clarified OHCSD's willingness to accommodate a conversation between technical representatives of APD and OHCSD to facilitate this records disclosure. Consistent with OHCSD's response to other requests, Mr. Gillespie states that advanced payment of estimated charges are a precondition to reproduction of any e-mail communications. Because OHCSD has not denied access to the records, the Attorney General lacks authority at this time to order disclosure. *See* ORS 192.450(1).

4. Telephone Logs or Other Telephone Records

Mr. Gillespie informs us that OHCSD has not denied the request for telephone logs or other telephone records; OHCSD is willing to provide nonexempt telephone logs as clarified in communications between APD and OHCSD. Because OHCSD has not denied access to the records, the Attorney General lacks authority at this time to order disclosure. *See* ORS 192.450(1).

5. The "Burgundy Books"

Mr. Gillespie informs us that OHCSD originally denied the request for the "burgundy books" on the grounds that those books were not actual policy manuals, but constituted only internal advisory communications and were thus exempt from disclosure under ORS 192.502(1). ORS 192.502(1) exempts from disclosure:

[3/] The actual date on Mr. Ehlenbach's request letter is January 9, 1996, but that date appears to be in error as the letter was received by OHCSD on January 9, 1997.

> Communications within a public body * * * of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows 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.

Although the burgundy books appear to constitute materials of an advisory nature preliminary to final agency determination of policy, this exemption would apply only if OHCSD demonstrated 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). We need not engage in this analysis, however, because Mr. Gillespie informs us that OHCSD has agreed to produce requested copies of its draft burgundy books to APD, again upon payment of applicable charges. Because OHCSD has agreed to provide the requested records, the Attorney General has no authority at this time to order disclosure. *See* ORS 192.450.

6. Scoring Sheets and Evaluation Material

As APD notes in its petition, OHCSD has provided requested information with respect to tax credit project files with the exception of scoring sheets and evaluation materials. OHCSD has refused to disclose these limited materials on the grounds that they are exempt from disclosure under ORS 192.501(4). ORS 192.501(4) exempts from disclosure:

> Test questions, scoring keys and other data used to administer a licensing examination, employment, academic or other examination or testing procedure before the examination is given and if the examination is to be used again. Records establishing procedures for and instructing persons administering, grading or evaluating an examination or testing procedure are included in this exemption, to the extent that disclosure would create a risk that the result might be effected.

This office has previously interpreted the exemption in ORS 192.501(4) to mean that examination materials, including scoring keys and other data used to administer, grade or evaluate an examination, remain confidential after the examination if the test will be reused. MANUAL at 28.

Mr. Gillespie informs us that OHCSD gives substantially similar questions to tax credit applicants during a consolidated funding cycle and from one consolidated funding cycle to the next. More particularly, Mr. Gillespie states that the evaluation approach reflected in the

scoring sheets and evaluation materials are the same within consolidated funding cycles and essentially the same from cycle to cycle.

The application questions are designed by OHCSD to elicit information descriptive of proposed projects upon which those projects may be evaluated in a competitive funding cycle. If the evaluation methodology and materials were generally publicized, OHCSD fears that responses would be tailored in accordance with the "answers" or methodology. In other words, responses to application questions would become more uniform, less descriptive of individual characteristics of particular projects, and less useful in evaluating projects for competitive funding.

The application questions may be modified somewhat from one consolidated funding cycle to the next, but the underlying evaluation materials for evaluating responses descriptive of particular projects remain fairly constant. We find that disclosure of this withheld information would jeopardize the integrity of the competitive application examination because it would identify for an applicant precisely what the applicant needed to include to obtain a maximum score. This would significantly dilute the value of the examination for distinguishing between projects and potentially would place an increased burden upon the agency for follow-up verification of application representations. Accordingly, we conclude that these requested scoring sheets and evaluation materials are exempt from disclosure under ORS 192.501(4) because disclosure of the requested information would jeopardize the integrity of the consolidated funding cycle application examination process.

We find no basis to conclude in this particular instance that the public interest in disclosing the scoring sheets and evaluations materials outweighs the public interest in protecting the integrity of the competitive application examination used by OHCSD for tax credit projects. Therefore, we deny APD's petition as to these records because the information is exempt from disclosure under ORS 192.501(4).

Nonetheless, the fact that the scoring sheets and evaluation materials may be exempt from disclosure does not release OHCSD from the legal obligation to disclose those portions of the records that reasonably may be segregated from these exempt scoring sheets and evaluation materials. The scoring sheets contain evaluations of individual questions and composite scores. Although disclosure of individual question scores would not be appropriate because comparison with disclosed applications conceivably would reveal the evaluation criteria employed by OHCSD in assessing project funding applications, disclosure of the composite scores of tax credit applications would not appear to jeopardize the integrity of the competitive application examination. Accordingly, OHCSD has agreed to make available to APD the composite scores of tax credit applications.

7. Records Responsive to Original Request Nos. 1 through 11 Received or Created by the Department after February 28, 1997

Mr. Gillespie informs us that OHCSD has not denied a request for records received or created by OHCSD after February 28, 1997. As noted above, agencies may require that records requests be in writing and that persons seeking to obtain copies of records on a continuing basis make a new request for records after the public body has responded to a request for records currently in the public body's possession. Mr. Gillespie informs us that OHCSD has agreed to treat the petition as a supplemental request for documents and will disclose those records consistent with its present production of records and this order. Because OHCSD has not denied access to the existing records, the Attorney general lacks authority at this time to order disclosure. *See* ORS 192.450(1).

8. Records Marked for Reproduction by APD but Not Copied by the Department

Mr. Gillespie informs us that he has conducted a spot-check of the files in which APD has claimed omissions or errors in OHCSD's response to APD's records request and has not found any documents that were not produced consistent with that request. Assistant Attorney General D. Kevin Carlson has reviewed the Ariel Glen file for the pages listed as missing in Scott Schill's letter of April 11, 1997, and conducted a spot-check of the list of possible errors attached to Exhibit F of the petition. Mr. Carlson did not find any documents that were not disclosed to APD. Where the documents produced by OHCSD were not in page sequence or were missing certain numbered pages, OHCSD file records contained the same lack of sequence and document page numbers. Mr. Gillespie informs us that OHCSD is willing to go through the remaining items on the Exhibit F list and, if any of those pages are found in OHCSD records, to provide those to APD. Because OHCSD has not denied access to existing records, the Attorney General lacks authority to order disclosure. *See* ORS 192.450(1).

9. Other Public Records Responsive to Petitioner's Original Request Nos. 1 Through 11 Which the Department May be Withholding

Based upon the spot-check inspection by this office and upon assurances from Mr. Gillespie, there appear to be only two categories of documents for which OHCSD continues to deny disclosure. The first category includes the tax credit scoring sheets and evaluation materials addressed above, which we find to be exempt from disclosure under ORS 192.501(4). The second category includes privileged attorney-client communications between OHCSD and this office, which would be exempt from disclosure under ORS 192.502(8). As to these two categories of records, we find that the records are exempt from disclosure and

deny APD's petition. Because OHCSD has either provided or agreed to provide to APD all other records, we deny the remainder of APD's petition.[4/]

Nevertheless, we recognize that OHCSD has not yet reviewed all of the requested records to determine if any portion of those records may be exempt from disclosure because OHCSD is awaiting prepayment of its estimated costs of making the records available. Upon review of those records, it is possible that OHCSD may claim that additional exemptions are applicable. APD remains free to petition this office for an order if disclosure is not reasonably made upon identification of requested records and payment of OHCSD's costs for making the records available.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH HARCHENKO
Special Counsel to
Attorney General

DKC:AV:ros/JAA023BA

[4/] A public body may be found to have denied a records request if the public body does not respond within a reasonable time to the request. Given OHCSD's disclosure of over 10,000 pages of records, OHCSD's willingness to provide further disclosure upon payment of charges, the volume of records involved, the limited staff at OHCSD, the technical requirements of certain electronic records production and the changing nature of APD's document requests, we do not find that OHCSD has denied disclosure of nonexempt records.