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September 8, 2023

VIA E-MAIL ONLY: steven.wilker@tonkon.com and laura.i.rojas@hcs.oregon.gov

Steven Wilker
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Laura Rojas
Oregon Housing & Community Services
725 Summer St NE, Suite B
Salem, OR 97301

Re: Petition for Public Records Disclosure Order
Oregon Housing & Community Services
DOJ File No.: 914001-GA0132-23

Dear Mr. Wilker and Ms. Rojas:

This letter is the Attorney General's response to Mr. Wilker's petition, on behalf of a client, for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. His petition, which we received August 25, 2023,[1] asks the Attorney General to find that Oregon Housing & Community Services (OHCS) has constructively denied part of a records request submitted by his client (the "requester") in mid-June 2023 by failing to provide a complete response. His petition also asserts that OHCS failed to adequately explain which exemptions were used to justify the redactions in the records she received. He asks us to order OHCS to disclose the remaining records without further delay and to explain the basis for each document withheld or redacted by OHCS. For the reasons that follow, we grant the petition in part and deny it in part.

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(1). The law is a disclosure law, and exemptions from disclosure must be express. If an agency withholds responsive records or a portion of them, it must notify the requester and assert any exemption(s) from disclosure that it believes apply to the withheld material. ORS 192.329(2)(b). The law also obligates agencies to respond to records requests "as soon as practicable and without unreasonable delay." ORS 192.329(1). An agency that is unable to complete its response within

[1] We thank Mr. Wilker for granting an extension of time in which to respond to is petition.

fifteen business days of receiving a written request is required to provide the requester with a reasonable estimated completion date. ORS 192.329(5). Any person 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. ORS 192.411(1). A requester may also petition the Attorney General if they believe an agency has failed to comply with the processing timelines or any other provisions contained in ORS 192.329. ORS 192.407(1). The agency carries the burden to sustain its actions. *Id*.

Mr. Wilker's petition stems from his client's June 14, 2023 request for:

> All public records and information related to Rose Community Development's Affordable Housing Project * * * including, but not limited to, the application materials and the competitive process that was used to award funds to Rose Community Development rather than other applicants for the same funds.

Noelia Lahmann, OHCS Public Affairs Administrative Support Specialist, timely acknowledged the request on June 15, 2023. On June 16, 2023, the requester thanked Ms. Lahmann for the acknowledgment, and then clarified and broadened the scope of her initial request as follows:

> To be clear, we are seeking all documents evidencing the grant process (or whatever process was used to make the award to Rose Community Development), including without limitation, all agency publications concerning the award process, all applications for the funds ultimately awarded to Rose Community Development, the scoring or evaluation criteria for applications, and records concerning the scoring or evaluation of all applications. Please confirm receipt of this email, and thank you for your assistance.

On June 21, 2023, the requester again asked Ms. Lahmann to confirm that OHCS received her June 16th clarification. It does not appear that OHCS ever acknowledged receiving the clarification.

Thereafter, on June 26, 2023, Laura Rojas, OHCS Interim Public Records Officer, provided the requester a fee estimate of $100. OHCS received payment on July 12, 2023 and completed its response on July 26, 2023. However, OHCS only provided records responsive to the requester's initial, June 14th, request. Ms. Rojas also informed the requester that OHCS

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had redacted material that it determined to be exempt from disclosure under ORS 192.355(24).[2] On August 9, 2023, the requester informed Ms. Rojas that OHCS' response seemed to be incomplete as it did not include records responsive to her June 16th clarification, such as applications from other applicants or the scoring evaluation criteria for the applications. Ms. Rojas replied that she was not aware of the June 16th clarification and confirmed that the records produced were only responsive to the requester's initial request. She also explained that OHCS had already closed the request and that the requester would need to submit a new request for additional records. Mr. Wilker's appeal followed.

In response to Mr. Wilker's petition, OHCS informed us that its failure to acknowledge or respond to the requester's June 16th clarification was an administrative oversight attributed to a change within its public records staff during that timeframe. Specifically, Ms. Lahmann, to whom the clarification was directed, left OHCS in July 2023, and she did not inform Ms. Rojas of the requester's clarification or otherwise record it. In light of Mr. Wilker's petition, OHCS now estimates it can complete its response to the requester's broader request within two weeks. OHCS also informed us that in response to Mr. Wilker's petition, it identified two more records responsive to the initial request that have now been disclosed to his client.

Under the circumstances, we conclude that OHCS failed to respond to the requester's June 16th clarification as required by ORS 192.329. While we appreciate that administrative oversights can occur during personnel changes, we do not think the oversight in this instance excused OHCS from its obligation to respond to the June 16th clarification. In reaching this conclusion, we note that all of the e-mails described above, including the June 16th clarification, were also copied to the OHCS public records request organizational e-mail account. It follows that OHCS had at least constructive notice of the requester's clarification independent from what Ms. Lahmann received. More importantly, OHCS was again given notice of the clarification on August 9th when the requester informed Ms. Rojas that it did not appear that OHCS' response included materials responsive to her June 16th clarification. However, rather than investigating

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[2] That provision expressly exempts:

> The following records, communications and information obtained by the Housing and Community Services Department in connection with the department's monitoring or administration of financial assistance or of housing or other developments:
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> (a) Personal and corporate financial statements and information, including tax returns.
> (b) Credit reports.
> (c) Project appraisals, excluding appraisals obtained in the course of transactions involving an interest in real estate that is acquired, leased, rented, exchanged, transferred or otherwise disposed of as part of the project, but only after the transactions have closed and are concluded.
> (d) Market studies and analyses.
> (e) Articles of incorporation, partnership agreements and operating agreements.
> (f) Commitment letters.
> (g) Project pro forma statements.
> (h) Project cost certifications and cost data.
> (i) Audits.
> (j) Project tenant correspondence.
> (k) Personal information about a tenant.
> (l) Housing assistance payments.

the requester's inquiry or locating her clarification, the requester was simply told that her request was closed and that she would need to submit a new records request for any additional records.

When an agency fails to provide one of the responses required by ORS 192.329 within the prescribed time frame, we must treat that failure as a denial of the request in most circumstances. ORS 192.407(1)(a). If we grant a petition based upon such a failure, we have discretion to order the disclosure of nonexempt material within seven days, or within any other period we deem appropriate to bring the agency into compliance with ORS 192.329. ORS 192.407(3). We may also order a fee waiver or reduction if an agency has responded to a request with undue delay or has failed to respond. *Id*. In this instance, because OHCS failed to respond to the requester's June 16th clarification, we must treat this failure as a denial of her request. ORS 192.407(1). And because we see no evidence that OHCS is actively processing her clarification at this time, we grant this portion of Mr. Wilker's petition and order OHCS to disclose any nonexempt material consistent with this order.

Next, we consider Mr. Wilker's request that we order OHCS to explain the basis for each document it withheld or redacted. This office has suggested that when an agency withholds a record, "it should also consider briefly explaining the nature of the records withheld or redacted for each exemption asserted." *Attorney General's Public Records and Meetings Manual* at 30 (2019). Notwithstanding this suggestion, however, there is no provision of the Public Records Law expressly requiring agencies to provide such an explanation. Nor does the law require agencies to prepare new records in response to public records requests, or to produce lists or descriptions of any records they may withhold. *Id.* at 7 (the law does not require agencies to create new public records, disclose the reasoning behind their actions, answer questions about their records, or analyze their records). The law requires only that when an agency asserts that records or portions of them are exempt, it must notify the requester of the specific statutory exemption(s) upon which the agency based its determination. *See* ORS 192.329(2)(b); *see also* Public Records Order, Jun 5, 2023, Johnson. The record in this case demonstrates that OHCS complied with that requirement when it informed the requester that it had redacted material under ORS 192.355(24). We therefore deny this aspect of Mr. Wilker's petition. That said, we note that in response to Mr. Wilker's petition, OHCS informed us that in responding to the requester's initial request, OHCS only redacted material and did not withhold any records in their entirety under ORS 192.355(24).

To conclude, we grant Mr. Wilker's petition in part and order OHCS to complete its response to the requester's June 16th clarification by September 22, 2023. In light of OHCS' continued failure to acknowledge or respond to the requester's June 16th clarification, we also order OHCS to waive any fees associated with processing the remainder of that request. ORS 192.407(3)(c). If OHCS elects not to comply with this order, it has seven days to announce its intention to seek judicial review. ORS 192.411(2). We respectfully deny the remainder of

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Mr. Wilker's petition insofar as he asks us to order OHCS to explain the basis for each record it withheld or redacted. We note, however, that Mr. Wilker may again petition this office for review if he wishes to challenge the application of ORS 192.355(24), or any other exemptions, to any material withheld by OHCS. *See* ORS 192.411.

Sincerely,

Lisa M. Udland

Lisa M. Udland
Deputy Attorney General

ACF:pjn/