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October 6, 2023

VIA E-MAIL ONLY: rot@ti.org

Randal O'Toole
26344 SW Metolius Meadows Dr.
Camp Sherman, OR 97730

Re: Petition for Public Records Disclosure Order
Oregon Housing & Community Services
DOJ File No.: 914001-GA0143-23

Dear Mr. O'Toole:

This letter is the Attorney General's response to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition asks the Attorney General to order Oregon Housing & Community Services (OHCS) to disclose unredacted copies of spreadsheets associated with various applications for low-incoming housing tax credits. For the reasons that follow, we respectfully deny your petition.

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. 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). The agency carries the burden to sustain any such denial. *Id*.

Your petition stems from a June 29, 2023 records request that initially sought all of the applications for low-income housing tax credits associated with 118 affordable housing projects. After receiving a fee estimate for the costs associated with processing your original request, on July 25, 2023, you narrowed your request to the "Excel spreadsheet portion" of the application for just one of the projects. OHCS completed its response to your narrower request on September 22, 2023 by disclosing a heavily redacted version of the 30-page spreadsheet associated with that application. In its response, OHCS informed you the redactions were made pursuant to ORS 192.355(24), a provision that expressly exempts from disclosure the following

records and information obtained by OHCS in connection with its monitoring or administration of financial assistance or of housing or other developments:

(a) Personal and corporate financial statements and information, including tax returns.

(b) Credit reports.

(c) Project appraisals, excluding certain appraisals 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.

Your petition followed and contests the extensive redactions that mask nearly all of the substantive content in the spreadsheet. You argue that the public has a clear interest in the disclosure of the redacted information:

> Oregon is spending hundreds of millions of dollars building affordable housing and Oregon taxpayers deserve to know that these funds are effectively spent and are not simply enriching a few developers.
>
> One important measure of cost-effectiveness is the construction cost per square foot. If affordable housing projects cost significantly more than private construction costs, it is a signal that something is wrong with the system. The spreadsheet contains a detailed itemization of costs that would be helpful in determining if some costs are particularly too high, yet costs were all redacted from the spreadsheet.
>
> Another important measure is the rents that will be charged for the housing units. If the rents are too high, then the target low-income families are not going to be able to afford living in these projects. Yet rents are all redacted from the projects. Neither the costs nor the projected rents are private information. Other state housing agencies post this information on their web sites. There is no reason why the state of Oregon should hide how much it is spending on individual affordable housing projects and every reason why taxpayers deserve to know that.

Following receipt of your petition, we contacted Laura Rojas, OHCS Records Officer. She explained OHCS' position that the spreadsheet portions of the applications it received are "project pro forma statements" that are expressly exempt from public disclosure under ORS 192.355(24)(g).

The phrase "project pro forma statements" is not defined in statute or rule. The dictionary defines "pro forma," in relevant part as "2: set up in advance to prescribe form or describe items <a *pro forma* financial statement>". *Webster's Third New Int'l Dictionary* 1812 (unabridged ed 2002); *see also Black's Law Dictionary* 1212 (6th ed 1990) (defining "pro forma" as "a matter of form or for the sake of form * * * [u]sed to describe accounting, financial, and other statements or conclusions based upon assumed or anticipated facts."); and The Merriam-Webster.com Dictionary, Merriam-Webster Inc., https://www.merriam-webster.com/dictionary/pro%20forma (accessed October 2, 2023) (defining "pro forma," in relevant part as "2: based on financial assumptions or projections: such as a: reflecting a transaction (such as a merger) or other development as if it had been or will be in effect for a past of future period"). Based upon these definitions, we conclude that the Legislative Assembly has authorized OHCS to withhold from the public all housing project statements relating to financial assistance, housing or other developments that are monitored or administered by OHCS and that reflect certain financial assumptions, anticipated facts, or other future projections about those developments.

With this understanding, we cannot escape the conclusion that the redacted spreadsheet is a "project pro forma statement" within the meaning of ORS 192.355(24)(g). OHCS has styled it as a pro forma statement, and it consists of the applicant's assumed, anticipated, and projected development costs, fees, loan requirements, operating expenses, subsidies, credits, and revenues. And because the pro forma statement relates to OHCS' administration of a financial assistance program – i.e., an application for low-income housing tax credits – we conclude that OHCS was permitted to withhold the spreadsheet in its entirety under ORS 192.355(24)(g).

That is the case regardless of whether we might agree with your arguments that disclosure of this kind of information would serve significant public interests. Whatever the merits of such arguments, and whatever the practices might be at other public housing agencies, the Oregon Legislative Assembly has made these types of OHCS records unconditionally exempt from disclosure. The Legislative Assembly has enacted many exemptions that require consideration of whether the public interest requires disclosure of records in particular circumstances. See, for example, the list of exemptions codified at ORS 192.345. But the exemption for these OHCS records is a part of ORS 192.355, a statute that does not include a

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public interest balancing test. As we have explained elsewhere, when the Legislative Assembly creates an unconditional exemption from disclosure, it has expressed its own view of the public interest balancing. *See Attorney General's Public Records and Meetings Manual* at 31 (2019). And because we do not have authority to second guess that assessment, we must respectfully deny your petition.

Sincerely,

Lisa M. Udland

Lisa M. Udland
Deputy Attorney General

ACF:pjn/
c via e-mail: Laura Rojas (OHCS)