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January 16, 1992

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Re: Petition for Public Records Disclosure Order: Oregon Government Ethics Commission Records

Gentlemen:

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 January 9, 1992, asks the Attorney General to direct the Oregon Government Ethics Commission to make available for inspection and copying a "Settlement Agreement" reached by certain parties in the case of Seiyu International Corporation, et al v. Kozai, et al, Washington County Circuit Court No. C 910119 CV. For the reasons that follow, we respectfully deny your petition.

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. The document you wish to inspect falls within several exemptions to the general rule of public accessibility to government records. In order to understand the application of these exemptions, it is necessary to know the background and circumstances surrounding the requested document.

The plaintiff, Seiyu International Corporation, purchased a commercial property in Tigard, Oregon. An Oregon State Representative from Washington County, Tom Brian, provided consultative services to the plaintiff in connection with the purchase. Subsequent to the purchase, the plaintiff filed an

action in Multnomah County (later changed to Washington County) naming Brian as one of several defendants and charging these defendants with misrepresentation, negligence, breaches of fiduciary duties, etc., and seeking the recovery of millions of dollars in damages stemming from Brian's and the others' involvement in the real estate transaction. Thereafter, in late December of 1990, the plaintiff and Brian entered into a settlement and compromise which was memorialized in a Settlement Agreement which is the subject of your request. Finally, in April of 1991, the plaintiff moved the Washington County Circuit Court for a protective order relative to the Settlement Agreement, a hearing was held and counsel for Brian submitted a form of (protective) order which the court approved and entered "Effective as of April 15, 1991."

The protective order provided that the settlement agreement "shall be kept confidential" and further provided:

> [T]hat the agreement shall be disclosed only to persons who have agreed to be bound by the terms of this protective order * * *.

There matters stood until late 1991 when the Oregon Government Ethics Commission made a finding that there was cause to make an investigation concerning Brian's conduct, as it related to the Washington County Circuit Court litigation, and upon its own instigation undertook an investigation of this conduct. See ORS 244.260.

A logical direction of that investigation was curiosity as to the contents of the Settlement Agreement and the commission, through its assigned counsel, approached the plaintiff and Brian with a view toward gaining access to the document. The plaintiff and Brian were willing to provide this access on the condition that it be kept confidential and entered into the following stipulation which had been drafted by counsel to the commission:

> Plaintiff Seiyu International Corporation moves and former defendant Tom Brian and plaintiff Seiyu International Corporation stipulate to the court entering an order exempting plaintiff Seiyu International Corporation only from those confidentiality provisions of the protective order entered by the court effective April 15, 1991, so that Seiyu International Corporation may furnish to the Oregon Government Ethics Commission a copy of that certain settlement agreement executed by plaintiff Seiyu International Corporation and former defendant Tom Brian on December 27, 1990.

A hearing was held on this stipulated motion and Judge Timothy P. Alexander signed the stipulated motion below a recitation stating "SO ORDERED this 7th day of January, 1992."

The Oregon Government Ethics Commission refused your request because it believes itself bound by the confidentiality provisions of the protective order which were incorporated into Judge Alexander's January 7, 1992, order. We conclude that the provisions of ORS 192.502(8) justify its nondisclosure of the document to you. That statute reads:

> 192.502. The following public records are exempt from disclosure under ORS 192.410 to 192.505.
>
> * * * * *
>
> (8) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

We consider the provisions of the court's protective order requiring confidentiality to constitute the "Oregon law" referred to in the statute.

We believe yet another exemption applies to the settlement agreement you have requested. ORS 192.502(3) provides as follows:

> 192.502. The following public records are exempt from disclosure under ORS 192.410 to 192.505.
>
> * * * * *
>
> (3) Information 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;

That statute sets forth five tests all of which we believe are met by the circumstances:

> 1) The settlement agreement was submitted to the commission in confidence and Brian would not have provided his stipulation if he understood that the settlement agreement would be immediately subject to public scrutiny.

2) Neither plaintiff Seiyu International nor defendant Brian were under any legal obligation to stipulate to the court entering an order allowing the commission access to the settlement agreement.

3) The context and circumstance of the settlement agreement denote a rather high degree of confidentiality.

4) The commission's drafting of the Motion and submission of it to the court constitute a good faith undertaking to comply with the confidentiality provisions of the protective order. Additionally, the commission's negotiations for Brian's stipulation took place in an atmosphere of commission recognition of confidentiality considerations.

5) Disclosure to the public of this particular document would harm the public interest because it would tend to inhibit and eliminate the commission's ability to obtain information related to its investigation of official wrongdoing in this and subsequent cases.

Because the exemptions contained in ORS 192.502(3) and (8) are applicable to the document you request and its surrounding circumstances, the decision of the Oregon Government Ethics Commission to deny you access is supported by law. For these reasons, we respectfully deny your petition to compel disclosure of this settlement agreement.

Sincerely,

Pamela L. Abernethy
Special Counsel to the
Attorney General

PLA:av:tet:JGG01F6A
c: L. Patrick Hearn, Executive Director, OGEC