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Re: ***Petition for Public Records Disclosure Order: Treasury Investment Division and Military Department Records (Cascade Pacific Engineering, Inc. Report).***

Dear Mr. Skillman:

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 December 9, 1994,[1/] asks the Attorney General to direct the Military Department and the Investment Division of the Oregon State

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[1/] We appreciate your extending the time within which the law would ohterwise have required us to respond.

Treasury to make available a report that reviewed the performance of certain environmental assessment services on real property in which the State has an interest. The written report of the review was prepared by Cascade Pacific Engineering, Inc., and concerned environmental assessment services performed under contract with the state by another environmental consulting firm.

The sole potentially applicable exemption from disclosure that could apply to the report is ORS 192.502(3), which provides an exemption from disclosure for:

> 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.

Because, under the facts of this case, we cannot conclude that "the public interest would suffer by the disclosure" of the report, we grant the petition for disclosure.

The report was developed under a personal service contract between the state and Cascade Pacific Engineering, Inc. Certain questions and issues had arisen concerning previous environmental work among the Oregon Military Department, which had previously occupied the site, the Oregon Public Employees' Retirement Fund, which has an interest in the site, and the environmental consulting firm that had performed previous analyses of certain environmental conditions at the site. To resolves those issues, an Assistant Attorney General requested that Cascade Pacific Engineering, Inc. review the work performed by the previous environmental consulting firm.

Prior to contracting for the performance review work, the parties agreed that the resulting information would be shared only among the state, Cascade Pacific Engineering, Inc. and the previous consulting firm. Consistent with that agreement, the introductory letter that accompanied the review report concluded as follows:

> This review has been written with the understanding that its contents shall remain confidential among CPEI, representatives of the Oregon Department of Justice, and representatives of REA.

We have confirmed that the state agreed, prior to the commencement of the review, to attempt to maintain the confidentiality of the written report.

> It is of course possible for a public body to contract to keep information confidential, and the contract can be the vehicle by which it "oblige[s] itself * * * not to disclose the information.

AA Ambulance Co., Inc. v. Multnomah County, 102 Or App 398, 401, 794 P2d 813 (1990).

Based on the terms of the report, and the information made available to us, we believe that the report satisfies those conditions of ORS 192.502(3), *supra*, which require that the information be submitted in confidence, and that the understanding of confidentiality be established "at the outset," prior to the submission of the information to the public body. *See* ***Morrison v. School District No. 48***, 53 Or App 148, 156-57, 631 P2d 784 (1981) (requiring, as a condition of the applicability of ORS 192.502(3) exemption, that the public body establish that the information was clothed with confidentiality at the outset, and prior to delivery to the public body).

However, to maintain the confidentiality of a public record, the public body must also sustain its burden of demonstrating that each element of the relevant exemption applies to that record. ***AA Ambulance Co., Inc. v. Multnomah County***, *supra*, 102 Or App at 401, *citing* ***Jordan v. MVD***, 308 Or 433, 443, n 9, 781 P2d 1203 (1989). Under ORS 192.502(3), the information sought to be withheld as confidential not only must be subject to an understanding of confidentiality that was established prior to the submission of the information to the public body; the information also must be of a type that reasonably should be considered confidential, and the public interest must suffer by the disclosure of the information. *See* Public Records Order dated September 12, 1988 to Peter O. Hansen, Attorney at Law, at 3-4 (applying elements of exemption under ORS 192.502(3)).

Because we cannot conclude that the public interest would suffer from the disclosure of the report, we conclude that the petition to disclose must be granted.

Under ordinary circumstances, we would be inclined not to order the disclosure of a consultant's critique of the performance of another contractor's services when a state agency contracted for that critique with the understanding that the agency would maintain its confidentiality under ORS 192.502(3). Generally, confidentiality would be necessary to preserve the public interest in obtaining an objective,

uncompromisingly frank evaluation of the work in light of the fact that the contractor whose work was critiqued may retaliate against the reviewing contractor if it disagrees with the reviewer's conclusions.

Samuel v. Frohnmayer, 82 Or App 375, 377-78, 728 P2d 261 (1987) illustrates a reviewing professional's interest in keeping the content of such a report from the party whose work is subjected to the critique. In ***Samuel***, a chiropractor who served as a volunteer on a Workers' Compensation Department peer review committee was subjected to an action for damages brought by a chiropractor whose workers' compensation treatment billings were reduced as a result of the peer review committee's conclusion that the treating chiropractor had rendered unnecessary services to an injured worker. To encourage full and frank assessments of the quality of work under public contracts, the confidentiality of those assessments generally may be maintained under ORS 192.502(3). Otherwise, in the terms of the statute, "the public interest would suffer by the disclosure." The threat of exposure to legal defense costs and possible liability would chill the uninhibited criticism of the contractor's performance and would impair the public body's ability to obtain crucial information concerning the quality of the work for which the public pays.

In this particular instance, however, the source of any possible intimidating consequences of the release of the critique - the contractor whose performance was subject to appraisal - already has received the report. Therefore, the rationale for protecting the public interest in the full and frank appraisal of the performance of a public contract by protecting the consultant from retaliation by the subject of the consultant's critique does not apply.

Because the information in the report already has been disclosed to the party whose contract performance was subject to review by the consultant, we cannot conclude that "the public interest would suffer by the disclosure" of the report in question. We recognize that the disclosure of the report may result in some embarrassment due to the criticism the report contains. That disclosure also may foster professional discomfort resulting from the apparent criticism of the work of one professional firm by another that works in the same field. However, under a statutory standard requiring that the public interest suffer as a result of the disclosure of the report, we cannot conclude that these limited, private interests in keeping the report confidential are substantial enough to satisfy this condition of ORS 192.502(3).

For these reasons, we grant the petition and order the agencies to disclose the requested records. The Treasury Investment Division and the Military Department have seven days from the date of this order in which to comply. ORS 192.450(2).

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the Attorney General

ESH:jpl/SKILLMAN.PRO