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October 18, 2005

Ryan Frank
The Oregonian
1320 SW Broadway
Portland, OR 97201

Matt Baines
Portland Development Commission
222 NW Fifth Avenue
Portland, OR 97209-3859

Re: Petition of Ryan Frank for The Oregonian received October 7, 2005 to disclose certain records of the Portland Development Commission (PDC)

Dear Mr. Frank and Mr. Baines:

On this public records petition, ORS 192.410 et. seq., petitioner Ryan Frank for The Oregonian requests the District Attorney to order the PDC to "provide access to loan write-off reports."

In June 2005, The Oregonian initiated an investigation of "defaulted, delinquent, or liquidated loans funded by or through PDC from Jan. 2, 2002 to present." After discussions with PDC General Counsel Matt Baines, Reporter Ryan Frank initially made a request to the PDC for the write-off reports and loan files of sixteen identified loans. He then submitted a revised request on August 17, 2005 for access for copies of only five loan write-off reports: 38183-00, 38182-00, 13661-97, 06791-93, and 13833-99.

In an August 18, 2005 letter response to petitioner by Michael Grieser, PDC staff attorney, PDC provided materials from all five reports but redacted two pages and withheld 37 other pages. PDC claimed five exemptions from disclosure: Housing Authority an Urban Agency Records, Internal advisory Communications, Personal Privacy, Confidential Submissions, and Attorney-Client Privilege.

Mr. Frank took the position in his petition that documents supplied by PDC showed that ten write-offs in 2002, 2003, and 2004 totaled \$450,000. "For the first six months of 2005, the PDC wrote off 30 loans for a total value of \$1 million." Mr. Frank asserted, "our readers have a serious and legitimate interest in PDC's performance and expenditure of taxpayer money." He rejected the applicability of the first three exemptions but agreed that any confidential submissions or legal advice should be reacted if appropriate.

PDC provided this office with four sets of loan materials that will be referred to as Advanced Microbotics (15 pages plus a redacted page), Renaissance Market (6 pages), Villa de Clara Vista (10 pages plus a redacted page), and the Queahpama Heights Apartments (2 pages). In the afternoon of October 17, this office received a faxed response to the petition. Four exemptions are claimed; the personal privacy exemption has been abandoned.

Housing Authority and Urban Renewal Agency Records

ORS 192.501(21) exempts:

The following records, communications and information submitted to a housing authority as defined in ORS 456.005, or to an urban renewal agency as defined in ORS 457.010, by applicants for and recipients of loans, grants and tax credits:

- (a) Personal and corporate financial statements and information, including tax returns;
- (b) Credit reports;
- (c) Project appraisals;
- (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 requested to be confidential;
- (k) Tenant files relating to certification; and
- (l) Housing assistance payment requests.

PDC contends that the exemption “clearly applies to all the Reports at issue because each Report contains information submitted to an urban renewal agency by recipients of loans, grants and tax credits.” PDC maintains that the “majority of the factual information contained in the Reports was submitted to PDC as records or communications from the applicants of the loans.” None however is specifically identified by PDC in its response. Consequently, it will be necessary to review each report and determine if the context of the writing announces its source.

In the Advanced Microbotics materials, the two-page report titled Request for Settlement of Legal Action contains a section titled History of Loan. The second to last paragraph is exempt financial information from the applicant. The seven-page report titled Loan Application Report contains sections on collateral, financial analysis and credit investigations that are exempt under

ORS 192.501(21)(a) and (c). In addition, there is a two-page balance sheet that is exempt as a corporate financial statement. The rest of the Advanced Microbotics materials are not exempt as Housing Authority and Urban Renewal Agency Records.

We were unable to identify the applicant or recipient of the loans as the source of information that is arguably subject to exemption from disclosure in the documents of the Renaissance Market, the Villa de Clara Vista, or the Queahpama Heights Apartments. Consequently, the exemption is inapplicable to these loan write-offs.

Internal Advisory Communications

ORS 192.502(1) exempts:

Communications within a public body or between public bodies 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.

The Attorney General's Public Records Manual, 2004, page 56, contains a discussion of the need for a strong showing of the "chilling effect" to overcome the presumption favoring disclosure. The Manual cited the decision of Coos County v. Dept. of Fish & Wildlife, 86 Or App 168, 173 (1987):

Any "chilling effect" that disclosure may have on future communications within the agency, because of potential embarrassment to the agency or its employees, is not sufficient, in and of itself, to overcome the presumption favoring disclosure. *See, e.g., Turner v. Reed*, [22 Or App 177]. To hold otherwise would effectively exempt from disclosure all interagency communications that are advisory in nature and cover other than purely factual matters.

Petitioner believes there is something significant in the large amount of loan write-offs in 2005. He argues, "the public has an overriding interest in knowing and understanding why the commission declares loaned taxpayer money to be uncollectible." The four set of loans in question were from 1997, 1996/1998, 1993, and 2003. After review of the materials, we cannot say that the public interest overrides the legitimate concern that PDC expresses in the need to maintain the confidentiality of advice given to the loan committee.

The internal advisory communications should be exempt from disclosure. However, this is a difficult exemption to apply to the loan write-off materials because the documents contain both factual and advisory statements. We have taken a conservative position in evaluating the materials in order to separate analysis and recommendations from factual recitals. The following information is exempt:

1) Advanced Microbotics.

Request for Settlement of Legal Action - the last paragraph of the section titled History of Loan and the section titled Recommendation.

Request for Legal Action - the section titled Recommendation.

Loan Application Report - the sections titled Action Requested, Necessary & Appropriate, Application Terms, Environmental issues, and Credit Summary.

2) Renaissance Market.

Exempt material is discussed below in the Attorney-Client privilege section.

3) Villa de Clara Vista.

Action requested.

Restructure Highlights.

Operating analysis.

Developer Fee and Developer Contribution.

Project Financial Situation.

Expenses.

Liquidity.

Key Risks and Mitigation.

Exceptions to Guidelines.

Conditions.

Recommendation.

4) Queahpama Heights Apartments.

The two pages not disclosed by PDC are discussed below in the Attorney-Client privilege section.

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Confidential Submissions

ORS 192.502 (4) exempts:

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.

As stated in the Attorney General's Public Records and Meetings Manual, 2004, p. 68, there are "no less than five conditions that must be met" for the Confidential Submissions exemption to apply:

1. The informant must have submitted the information on the condition that the information would be kept confidential.
2. The informant must not have been required by law to provide the information.
3. The information itself must be of a nature that reasonably should be kept confidential.
4. The public body must show that it has obligated itself in *good faith* not to disclose the information.
5. Disclosure of the information must cause harm to the public interest.

PDC maintains that it is implied that the loan applicant submitted the information on the condition that it would be kept confidential. Further, PDC states that just as a "private lender," it is implied that PDC has a good faith obligation not to disclose confidential information. There is nothing in any of the loan materials that supports this position. PDC is a public agency dispensing public money. The application of the confidential submissions exemption must be clear at the time of the delivery of the materials, both from the standpoint of the public agency and the individual or business making the submission. The exemption does not apply here.

Attorney-Client Privilege

ORS 192.502(9) incorporates the lawyer-client privilege of ORS 40.225 into an unconditional exemption under the Public Records Law. In its July 6, 1982 Public Records Order (Zaitz), the Attorney General determined that a review of such a claimed exemption is very limited:

If the purpose is not waived [by the client], the exemption is absolute; neither the preliminary language of ORS 192.500(2) nor paragraph (h) itself contains any language providing for a balancing test. If the lawyer-client privilege is applicable, the Attorney General cannot consider whether or not the information should be disclosed in the public interest, but must deny your petition. Attorney General's Public Records Manual, 2004, page F-4.

The centuries old common law doctrine has maintained the rule that "communications between an attorney and his client during and by reason of their relations as such...are deemed privileged." Sitton v. Peyree, 117 Or 107, 114 (1925). This doctrine has been codified in Oregon Evidence Code (OEC) 503 (ORS 40.225). The Oregon Supreme Court has made the availability of the privilege dependent on two conditions:

- (1) the communications must be confidential within the meaning of OEC 503(1)(b)¹, and
- (2) the communication must be made for the purpose of facilitating the rendition of professional legal services to the client. State v. Jancsek, 302 Or 270, 275 (1986).

There is a four-page opinion letter in the Renaissance Market documents authored by an attorney retained by the PDC. It is clearly a legal document and is protected by the attorney-client privilege. In addition, the last paragraph in the two-page Summary of Renaissance Market Loans is a synopsis of the opinion letter and is also exempt.

There is a two-page memorandum in the Queahpama Heights Apartments documents authored by John Marshall and legal counsel Matt Baines. It is an explanation of the Stipulated General Judgment and Money Award (previously disclosed to petitioner) and, as such, is exempt as legal work product.

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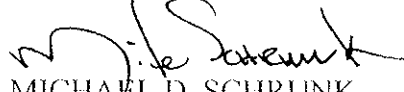
¹ OEC 503(1)(b) provides:

"Confidential communication" means a communication not intended to be disclosed to third persons other than to those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

ORDER

Accordingly, it is ordered that the Portland Development Commission promptly disclose the records sought in the above petition subject to the redactions noted in the discussion. Disclosure of the documents ordered is subject to payment of Portland Development Commission's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440 and this order.

Very truly yours,


MICHAEL D. SCHIRUNK
District Attorney

NOTICE TO PUBLIC AGENCY

Pursuant to ORS 192.450(2), 192.460 and 192.490(3) your agency may become liable to pay petitioner's attorney fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within 7 additional days thereafter.