



**MICHAEL D. SCHRUNK**, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643  
www.co.multnomah.or.us/da/

August 25, 2005

Les Zaitz  
The Oregonian  
1320 SW Broadway  
Portland, OR 97201

Melvin Oden-Orr  
Portland Development Commission  
222 NW Fifth Avenue  
Portland, OR 97209-3859

Re: Petition of Les Zaitz for The Oregonian received July 19, 2005 to disclose certain records of the Portland Development Commission (PDC)

Dear Mr. Zaitz and Mr. Oden-Orr:

On this public records petition, ORS 192.410 et. seq., petitioner Les Zaitz for The Oregonian requests the District Attorney to order the PDC to “provide unredacted access to reports filed with the PDC by Sue Strater or a contractor, ProDX.”

In a June 8, 2005 request to the PDC, The Oregonian asked for access “to all reports, submitted in any form by ProDX and/or Sue Strater to Don Mazziotti and Wyman Winston.” In a June 28, 2005 email, PDC Assistant General Counsel Melvin Oden-Orr claimed exemption for the documents as internal advisory communications under ORS 192.502(1). Mr. Oden-Orr noted that there were “27 responsive documents averaging 16 pages each. The documents will be provided in a redacted form once redaction is complete.”

Senior Investigative Reporter Les Zaitz took the position in his petition that the “consultant’s reports don’t qualify as ‘internal advisory communications’ and that even if they did, the public interest in this case outweighs the need for secrecy.” He said the recommendations of the consultant were not shocking revelations but were, in fact, bland in nature and not representative of the kind of candid conversation the internal advisory exemption was meant to protect.”

The July 29, 2005 response by Mr. Oden-Orr pointed out that the PDC Commission “engaged the services of ProDX and Sue Strater, the person with ProDX designated for the Commission’s EIS [Enterprise Information System] project, to provide quality assurance for the project.” Employees provided feedback to the consultant and Ms. Strater made evaluations and recommendations in the two-phase project.

Mr., Oden-Orr stated that the process of defining processes was ongoing and “preliminary and integral to the ultimate decision regarding the acquisition of technology to support those processes.” He noted that the redacted portions include only non-factual information and that “the consultant assured staff that their feedback would be afforded confidentiality and anonymity to encourage their frank and candid feedback.”

## DISCUSSION

### **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.

This office reviewed each of the 27 reports and evaluated the approximately 152 redactions made by PDC. The monthly Quality Assurance Reports vary in format and content but typically consist of categories such as an introduction, executive summary, progress, proposed risks and mitigations strategies, and key schedule and deliverable status. The redacted sections of the documents have three basic elements: advice from the consultant on identified risks, updated

recommendations, and commentary on surveys or feedback from PDC employees. We agree with the PDC position that the reports should be considered internal advisory communications. See Bay Area Health District v. Griffin, 73 Or App 294 (1985).

The public interest in the over two-year \$260,000 project has been established by The Oregonian in its petition and other correspondence. The question is whether certain categories of the redacted reports should be protected before each phase of the study is complete, and whether the confidential anecdotal feedback from PDC employees should ever be disclosed. According to the June 2005 report of Ms. Strater, her contract for Phase I was to be extended for six months in order to “maintain oversight through the planned completion of the 17 business processes.” Mr. Oden-Orr notes that in Phase II, “the effort will evaluate the need for technology improvements that support the improved processes resulting from Phase I.”

1. Phase I Advice.

We were able to identify redactions in three reports that should be disclosed: Pages 3 and 4 in the April 2003 report, page 2 in the May 2003 report, and the first paragraph redaction on page 3 of the February 2004 report. In addition, there were redactions in the Key Schedule and Deliverable Status section of three reports that were not redacted in other similar reports. These should be disclosed: page 8 of the May 2004 report, page 8 of the August 2004 report, and page 13 of the October 2004 report.

The balance of the redactions involve sensitive and pointed risk assessments and recommendations of an ongoing project. No useful purpose will be served by disclosure until Phase I is finished. This office, therefore, rejects the petition at this time with respect to the Phase I advice. However, we strongly recommend disclosure in the public interest after the anticipated December completion date.

2. Phase II Advice.

There are limited and easily identified references to technology improvement beginning with the September 2004 report through the June 2005 report. Again, the observations and recommendations of Ms. Strater are sensitive and ongoing and should not be disclosed until Phase II is completed. At that point, the public interest would strongly favor disclosure.

3. Employee Feedback.


We identified ten reports that contain employee feedback, survey findings, or summary comments from employees. We would suggest that there be limited redactions after Phase I is done and then only to the extent necessary to protect the confidentiality of identifiable employees. The reports were February 2004, March 2004, July 2004, August 2004, September 2004, October 2004, November 2004, December 2004, January 2005, and June 2005.

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ORDER

Accordingly, it is ordered that the Portland Development Commission promptly disclose the records sought in the above petition as follows: the redacted sections on pages 3 and 4 in the April 2003 report, page 2 in the May 2003 report, the first paragraph redaction on page 3 of the February 2004 report, page 8 of the May 2004 report, page 8 of the August 2004 report, and page 13 of the October 2004 report. 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. SCHRUNK  
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.