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July 11, 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 June 28, 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 access to five pages of material withheld regarding the expense records of Norris Lozano.”

In a June 6, 2005 request to the PDC, The Oregonian asked for access “to all documents in the control or possession of the PDC Finance Department from Jan. 1, 2003, to present regarding any disputed or questioned reimbursements sought by or paid to Norris Lozano.” Prior to a response from the PDC General Counsel, The Oregonian submitted a petition to this office. Michael Grieser, law clerk for the PDC General Counsel, responded to The Oregonian request on June 23, 2005. He offered the documents for inspection but noted that five pages were withheld pursuant to the internal advisory exemption, ORS 192.502(1). In addition, certain information had been redacted pursuant to the personal privacy exemption, ORS 192.502(2).¹

Petitioner submitted a superseding petition on June 28, 2005. Senior Investigative Reporter Les Zaitz pointed out that Mr. Lozano, the subject of the public records inquiry, was formerly employed as Director of the Resource Development Department, which he characterized as a “top-level position” at PDC. Mr. Lozano apparently traveled extensively for the agency. Mr. Zaitz, who reviewed other documents provided by PDC, pointed out that that “Mr. Lozano either obtained travel advances from PDC or subsequent to travel submitted reimbursement claims.”

¹ Neither petitioner nor PDC has addressed the redaction question in the superceding petition or the response. It will not be further discussed in this order.

The Oregonian asserted that Mr. Lozano “repeatedly violated PDC travel rules. He traveled first class for air travel, he upgraded rental vehicles beyond what was permitted, and he repeatedly charged to PDC personal expenses such as in-room movies, valet service, and beverage services.” According to Mr. Zaitz, in early 2004 Mr. Lozano “was presented with a demand to repay the agency \$1,245.83.”

The Oregonian argued that while the documents may well fit the definition of internal advisory communications, the public interest required disclosure in light of the controversy and scrutiny of PDC financial practices and the outside audit of its contracts. The Oregonian contended, “PDC has made no showing that employees would be loath to recommend action on improper spending if they knew their advice would become public.” Mr. Zaitz added that Mr. Lozano left PDC and was appointed an executive of the Portland Family of Funds, “a private spinoff from PDC entrusted with millions in public tax credits.”

In a July 6, 2005 response to the superseding petition, Melvin Oden-Orr, PDC Associate General Counsel, claimed exemption of the withheld documents (four pages in fact) as internal advisory communications. He noted, “PDC has a strong interest in ensuring compliance with its policies, and rectifying any abuses or non-compliance thereof.” Mr. Oden-Orr argued that the need for frank communications would be chilled by disclosure of the materials. “PDC would have difficulty tracking and solving future similar cases should they arise. Employees would be less likely to volunteer this type of information if they knew it would be disclosed to the public.” Mr. Oden-Orr concluded that upholding the exemption was necessary because a “[w]illingness to volunteer this information, critical of an executive staff member, requires confidence in the confidentiality of such communications.”

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.

PDC withheld two documents as internal advisory communications. The first, an email dated October 17, 2003 from Bill Blauvelt to Sam Brugato, can be described as a routine statement of concern to management from the accounting or fiscal department. The second document is a three-page expense analysis and set of recommendations from Mr. Brugato and Ronda Vandermeer to Nancy McClain, dated February 24, 2004. The materials are bland, non-accusatory, and the expected work of fiscal analysts. These are not whistle blowing reports or extraordinary accusations or exposes of wrongdoing.

The documents are clearly internal advisory communications. Admittedly, the subject matter is sensitive and somewhat critical in nature. However, any concern about the premature disclosure of such materials has been alleviated by the departure of Mr. Lozano from PDC. Internal discipline or personal privacy has not been claimed as an exemption.


The only question is whether the public interest in encouraging frank communication outweighs the claimed public interest in disclosure. We cannot understand how the disclosure of the documents in question would chill public servants in the discharge of their fiscal oversight duties. The observations and criticisms from PDC staff are the expected responses of public servants in the normal course of their employment.

In a series of newspaper articles, The Oregonian has managed to generate some public interest in the financial and management practices of PDC. The internal review of the activities of a former executive staff member of the PDC such as Mr. Lozano falls within that investigation. Both PDC and The Oregonian have expressed a strong interest in the need to identify and stop financial abuse in public employment. Disclosure of the requested information would further that inquiry and public debate.

ORDER

Accordingly, it is ordered that the Portland Development Commission promptly disclose the records sought in the above petition. 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.