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*Affiliations appear only
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January 26, 2021

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VIA EMAIL ONLY

RE: Public Records Petition of Malheur Enterprise, dated January 5, 2020

District Attorney Goldthorpe:

I represent Malheur Enterprise (“Petitioner”) in connection with its October 21, 2020 request to the Malheur County Economic Development Department (“MCED” or “Respondent”) under Oregon Public Records Law, ORS 192.311, et seq. (hereinafter, the “Request”). Petitioner respectfully requests an order determining that Respondent has unlawfully withheld access to public records; requiring Respondent to immediately release unredacted copies of records provided thus far¹; imposing equitable relief to ensure full disclosure; waiving any fees associated with the Request; and imposing monetary sanctions for Respondent’s undue delay and bad faith.

I. Background

Petitioner’s petitions dated January 5 and 6, 2021, fully explain the timeline and background of relevant events, briefly summarized here.² On October 21, 2020, Petitioner submitted the Request to Respondent for records related to MCED’s application for a federal grant.³ MCED did not complete its response until eighty-five days later on January 14, 2021, when it produced sixty-five pages of documents,⁴ many of which were redacted, citing ORS 192.344(4).

II. Overview of Oregon’s Public Record Law

ORS Chapter 192 and over 40 years of case law have defined the specialized legal standards applicable to Public Records cases. Oregon’s Public Records Law provides that “[e]very person has a right to inspect any public record of a

¹ Petitioner does not challenge the redaction of privileged attorney-client communications between County Counsel and MCED unless a review by your office determines the emails do not, in fact, contain such communications.

² Petitioner’s petitions of January 5, 2021 and January 6, 2021 also requested certain remedies which Petitioner renews and amplifies in the instant petition.

³ Exhibit 1.

⁴ Exhibits 2, 3.

public body in this state, except as otherwise expressly provided by ORS 192.338, 192.345 and 192.355.⁵

Under the statutory scheme, disclosure is the rule. Exemptions from disclosure are to be narrowly construed.”⁶ The Oregon Legislative Assembly has created an express “policy in favor of disclosure.”⁷ “The legislative history of the relevant statutes shows that the legislature intended that they be applied simply, quickly and with a large measure of uniformity.”⁸

If a person is “denied the right to inspect or to receive a copy of any public record of a public body other than a state agency,” then the person may petition the district attorney of the county in which the public body is located.⁹ On review, except in the case of a public record of a health professional regulatory board, the burden is on the public body to “sustain its action.”¹⁰ If the district attorney “denies the person's petition, the person may institute proceedings for injunctive or declaratory relief in the circuit court.”¹¹

III. Overview of ORS 192.355(4), the confidential submissions exemption.

ORS 192.355(4) exempts from disclosure,

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.

In determining whether the exemption applies, courts and other reviewing bodies utilize the five-part test set out in the *Attorney General's Public Records and Meetings Manual*:

1. The exemption applies only to information which is submitted voluntarily when the informant is under no legal obligation, by statute, rule, contract, or otherwise, to provide the information.
2. The agency must be in a position to show that the information was of a nature which reasonably should be kept confidential.

⁵ ORS 192.314.

⁶ *Guard Pub. Co. v. Lane County School Dist. No. 4J*, 310 Or 32, 37 (1990); *Oregon Health and Science University v. Oregonian Publishing Company, LLC*, 362 Or 68, 79 (2017).

⁷ *In Defense of Animals v. Oregon Health Sciences University*, 199 Or App 160, 172 (2005).

⁸ *Guard Pub. Co.*, 310 Or at 37.

⁹ ORS 192.415(1).

¹⁰ ORS 192.411(1).

¹¹ *International Longshore & Warehouse Union v. Port. of Portland*, 285 Or App 222, 237 (2017) (citing former ORS 192.450(2), renumbered ORS 192.411(2) and former ORS 192.460, renumbered ORS 192.415).

3. The agency must show that it has obliged itself in *good faith* not to disclose the information.
4. Disclosure must cause harm to the public interest.
5. The person must have, in fact, submitted the information in confidence.¹²

Public bodies invoking ORS 192.355(4) must satisfy each requirement to justify non-disclosure.¹³

IV. MCED cannot meet its burden of establishing the applicability of ORS 192.355(4) to any of its proffered redactions.

MCED has cited ORS 192.355(4) to redact information from records responsive to Petitioner's Request that are in the possession or control of MCED.¹⁴ Specifically, MCED claims that the names and email addresses of *any* representatives from two commercial businesses, Americold and Treasure Valley Onion Shippers (TVOS), are exempt from disclosure. In addition, MCED asserts that "any statement in relation to Americold's confidential business matters" as well as TVOS's "confidential statements made during the private [September] meeting" are exempt from disclosure pursuant to that same section.¹⁵ MCED's claims are meritless.

As discussed more fully below, MCED cannot meet its burden with respect to the three categories of information it redacted: (1) names and contact information for Americold and TVOS employees; (2) recorded recollections of Ryan Bailey, an MCED employee who took notes during a September 24, 2020 meeting; and (3) information allegedly submitted by Americold and TVOS regarding their business matters.

- a. Names and contact information of Americold and TVOS representatives are not reasonably considered confidential, nor did MCED oblige itself not to disclose that information.

As an initial matter, MCED cites no authority for the proposition that names and email addresses submitted to a government agency by representatives of a commercial business are generally considered private or confidential. Indeed, Oregon District Attorneys have repeatedly ordered disclosure of such identifying information.¹⁶

¹² Attorney General's Public Records and Meeting Manual at 103 (June 2019); See also, *Gray v. Salem-Keizer Sch. Dist.*, 912 P.2d 938, 942 (Or. App. 1996).

¹³ *Gray* at 942.

¹⁴ Exhibit 4.

¹⁵ *Id.*

¹⁶ See, e.g., Petition of Oregonian, [MCDA PRO 10-06](#) (July 26, 2010) [Multnomah County District Attorney ordering release of unredacted police report containing names and contact information of witnesses to shooting].

Moreover, a public body seeking to withhold information must prospectively commit itself to confidentiality for this exemption to apply.¹⁷ Neither MCED, Americold, nor TVOS has put forth any evidence that MCED would hold the names and contact information of Americold and TVOS representatives confidential. MCED has pointed to no communication or information providing objective support for such a belief.

Accordingly, because the third and fourth elements of ORS 192.355(4) have not been not satisfied, the names and contact information redacted from the records at issue must be released.

- b. MCED never obliged itself not to disclose an employee's written notes regarding the September 24, 2020 meeting¹⁸, and information in those notes cannot reasonably be considered confidential.

As a threshold matter, it is questionable whether a public employee's contemporaneous written recordation of an event can even be considered a submission for the purposes of ORS 192.355(4).¹⁹

Even assuming, *arguendo*, that such a record qualifies as "information submitted to a public body," that information cannot reasonably be considered confidential in the context of the September 24, 2020 meeting. The overarching purpose of the meeting was for state and local public bodies to obtain statutorily required information from Americold and TVOS regarding their participation in a publicly-funded and publicly-managed transportation project.²⁰ Americold and TVOS could not have reasonably believed that any business matters discussed at the meeting—such as operational plans, building design, and ownership structure—would remain confidential on a public works project of this size and scope.

In addition, MCED has provided no evidence that, prior to Bailey reducing his meeting notes to writing, it specifically obliged itself to either Americold or TVOS to keep such notes confidential. In fact, there is no indication that either entity was even aware such notes were being taken. MCED has pointed to no communication wherein they specifically informed participants of their intent to keep notes, let alone a promise to withhold those notes from public inspection. Similarly, MCED provided no records indicating that after the meeting, MCED circulated the meeting notes for editing and approval by any participant, including Americold and TVOS.

Because the third and fourth elements of ORS 192.355(4) have not been satisfied, the meeting notes authored by MCED employee Ryan Bailey must be released.

¹⁷ Attorney General's Manual at 103.

¹⁸ See Exhibit 3 pages 34-35.

¹⁹ Petitioner is willing to provide additional briefing on that point if it is dispositive for your analysis.

²⁰ The project was created by the 2017 Oregon Legislature and is subject to a variety of public reporting requirements.

- c. Any information allegedly submitted by Americold and TVOS regarding their business matters cannot reasonably be considered confidential, MCED did not oblige itself to keep such information confidential, and the public interest would not suffer by its disclosure.

The same reasons indicating the meeting notes cannot reasonably be considered confidential are applicable to any information submitted to MCED by Americold and TVOS regarding their business matters. There is simply no evidence that either entity believed the information they provided to three separate public bodies about their intended involvement in a public development project would remain confidential.

Similarly, MCED has provided no evidence indicating a clear obligation not to disclose such statements. While Director Smith sent emails in which he inserted the term “CONFIDENTIAL” in the subject line and pasted the text of ORS 192.355(4) in the body of the emails,²¹ Oregon’s public records law requires much greater specificity to establish the requisite good faith obligation.²² MCED made no effort to clarify with either Americold or TVOS what information, if any, should be kept in confidence and from whom. An agency cannot simply stamp “CONFIDENTIAL” on records to keep them from the public.

Finally, MCED has made no showing that disclosure would harm the public interest. Nor could it: the public interest is entirely in favor of disclosure of these records. As set forth in Petitioner’s January 5 and 6 2021 petitions, any information regarding Americold or TVOS business matters contained in emails or the September 2020 meeting notes relates to a matter of significant and ongoing public concern.

Because the third, fourth, and fifth elements of ORS 192.355(4) cannot be satisfied, the information allegedly submitted by Americold and TVOS regarding their business matters must be released.

V. MCED engaged in sanctionable and unreasonable delay in responding to Petitioner’s Request.

Under Oregon’s public records law, a public body is required to complete its response to a request “as soon as practicable and without unreasonable delay.”²³ If a public body fails to complete its response in a timely manner, the District Attorney is empowered to order a fine, fee waiver, or fee reduction as penalty.²⁴

Here, MCED failed to respond as soon as practicable and engaged in unreasonable delay throughout its handling of Petitioner’s Request. As an initial point, once a public body

²¹ Exhibit 2, pgs 3-29.

²² See e.g. Attorney General Manual at 103 [advising public bodies to “specifically discuss with the person submitting the information whether it is being submitted in confidence and, if so, document that in the file”]. See also *Hood Technology Corporation v OHSU*, 168 Or App at 295 (2000) [discussing agency practice of asking each complainant whether confidentiality was being requested].

²³ ORS 192.329(1).

²⁴ ORS 192.407.

has received a public records request, ORS 192.329(5) establishes a deadline of fifteen business days as a baseline for responding to the request, either by providing a cost estimate or substantive response. MCED, in contrast, provided its first substantive response on January 5, 2021, more than sixty days beyond the statutory requirement. MCED has not offered any satisfactory explanation for this extraordinary delay.

Moreover, MCED appears to have initially failed to conduct any search whatsoever for easily accessible email records clearly responsive to Petitioner's Request. MCED Director Greg Smith compounded that error by incorrectly asserting on January 5, 2021, that only two pages of responsive documents existed when, in fact, dozens of responsive emails were later found.²⁵ Once MCED did produce responsive records on January 14, 2021, the agency improperly redacted nonexempt material in contravention of clearly established law.

A penalty is reasonable and appropriate because an agency delay of eighty-five days to fulfill a routine records request is unreasonable on its face. It is particularly important it be imposed in this case because MCED's non-compliance has resulted in significant harm to the public that cannot be cured even through the immediate release of unredacted records.

Petitioner's reporting on matters related to the records at issue has illuminated actions undertaken by local, state, and national governing bodies working on an expensive publicly-funded project.²⁶ Timely access to the requested records would have enabled Petitioner to inform the public about the conduct of officials at each level of government well in advance of important milestones, such as the January 21, 2021 decision by the Oregon Transportation Commission to release millions of dollars in public subsidy to further advance the project.

Furthermore, MCED's responses of January 5 and January 14, 2021 demonstrate bad faith in two ways. First, MCED justified its withholding of certain responsive records on January 5, 2021 by citing a clearly inapplicable exemption which it almost immediately disclaimed.²⁷ Second, on January 14, 2021, MCED contemporaneously released the records requested by Petitioner to a competing news outlet even though that there was no indication the outlet had requested those records.²⁸

²⁵ Exhibit 5.

²⁶ See e.g. Pat Caldwell, *Review raises questions on proposed rail center*, Malheur Enterprise (February 1, 2018 at 3:47pm), <https://perma.cc/7LX4-R75T>; Pat Caldwell, *Feds scuttle funding for Malheur County's public-owned industrial park*, Malheur Enterprise (October 15, 2020 at 7:00am), <https://perma.cc/ZMK8-RAMV>; Pat Caldwell, *WATCHDOG: Malheur County's bid to grab \$15 million in federal money stymied by errors in application*, Malheur Enterprise (January 13, 2021 at 11:55am), <https://www.malheurenterprise.com/posts/8048/watchdog-malheur-countys-bid-to-grab-15-million-in-federal-money-stymied-by-errors-in-application>.

²⁷ Exhibit 5.

²⁸ Exhibit 6.

In a democracy, the role of the press is two-fold: to inform the public and to act as a watchdog on government activities. Respondent's unlawful actions undermined both of those goals, and a sanction is warranted.

VI. Conclusion

For the reasons stated herein, Petitioner respectfully requests you issue an order:

- determining that Respondent has unlawfully withheld access to public records
- requiring Respondent to immediately release to Petitioner unredacted copies of all records it provided on January 14, 2021, with the exception of any attorney-client privileged records;
- waiving any fees imposed by the agency related to the Request;
- waiving any fees Respondent make seek to impose to comply with your order;
- requiring Respondent to submit a sworn affidavit to your office indicating that no further responsive records exist or, in the alternative, if additional records do exist, require Respondent to immediately release them without redaction; and
- imposing the maximum statutory fine as a sanction for Respondent's undue delay and bad faith.

Respectfully submitted,

/s/ Ellen Osoinach

Ellen Osoinach

Counsel for Petitioner

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