HARDY MYERS
Attorney General

PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

November 20, 2007

Bob Keith, Administrator
Appraiser Certification and Licensure Board
3000 Market Street NE
Salem, OR 97301

Re: Opinion Request OP-2007-4

Dear Mr. Keith:

You ask a question arising from the occasional practice of real estate sellers to make sales concessions or allowances to facilitate residential real estate transactions. According to the United States Department of Housing and Urban Development, "[s]ales concessions may be in the form of loan discount points, loan origination fees, interest rate buy downs, closing cost assistance, payment of condominium fees, builder incentives, down payment assistance, monetary gifts or personal property given by the seller or any other party involved in the transaction."[1/]

Obviously, sales concessions may influence the price paid for real property. Accordingly, an appraiser wants to know if the seller made any sales concessions in a residential transaction that the appraiser is using as a comparable sale for an appraisal. But information about such concessions is not recorded in public records or in Multiple Listing Service after-market data. You inform us that, while in the past, appraisers obtained pertinent information by simply asking the selling or listing agent whether the seller had made sales concessions, real estate licensees are increasingly reluctant to divulge that information, believing it to be confidential under ORS chapter 696. This development prompts you to inquire about the confidentiality of such information and the related duties of real estate licensees under the pertinent statutes.[2/]

QUESTION PRESENTED

Do concessions or allowances made by a seller to a buyer in a residential real estate transaction (i.e., one to four units) qualify as "confidential information" that real estate licensees are prohibited from disclosing under ORS 696.800 through 696.870 and ORS 696.301(3)?

SHORT ANSWER

No, provided the seller in such a residential real estate transaction has instructed their real estate licensee to disclose information about the sales concession to the buyer. Once information

loses its confidential status under ORS 696.800 through 696.870, a real estate licensee may disclose that information without violating ORS 696.805, 696.810, or 696.815 and consequently being subject to discipline under ORS 696.301(3). But such a licensee is not required to disclose that information.

DISCUSSION

ORS 696.800 through 696.870 establish the obligations or "affirmative duties" of real estate brokers or principal real estate brokers. Those obligations depend on the nature of the relationship between the broker and the client, which the statutes separate into three categories: (1) seller's agent; (2) buyer's agent; and (3) an agent working under a disclosed limited agency agreement that allows the agent to represent both the buyer and seller. ORS 696.805, 696.810, 696.815. An agent owes certain duties to all principals and principals' agents involved in the real estate transaction. ORS 696.805(2). "Principal" is defined as "the person who has permitted or directed an agent to act on the principal's behalf. In a real property transaction, this generally means the buyer or the seller." ORS 696.800(9). The Real Estate Commissioner may reprimand, or suspend or revoke the real estate license of, any real estate licensee who has "[d]isregarded or violated any provision of * * * 696.800 to 696.870 * * *." ORS 696.301(3).

An agent owes other duties solely to their own principal. One such obligation is the duty "to maintain confidential information from or about the [principal] except under subpoena or court order, even after termination of the agency relationship[.]" ORS 696.805(3)(f) (seller's agent's duty to seller) and ORS 696.810(3)(f) (buyer's agent's duty to buyer); *see also* ORS 696.815(2)(a), (b), and (c)(C) (agent working under disclosed limited agency agreement's duty to both buyer and seller).

> ORS 696.800(3) defines "confidential information" for the purpose of those duties:
>
> (3) "Confidential information" means information communicated to a real estate licensee or the licensee's agent by the buyer or seller of one to four residential units regarding the real property transaction, including but not limited to price, terms, financial qualifications or motivation to buy or sell. * * *.

Thus, for information to be "confidential" under ORS 696.800 to 696.870, it must: (1) be communicated to the licensee or the licensees' agent by the buyer or seller; (2) be in the context of a real property transaction involving one to four residential units; and, (3) concern the transaction.

Applying this definition to your question, information regarding whether the seller made concessions or allowances in a real estate transaction unquestionably is information about the real estate transaction. In a brokered transaction, sellers usually will communicate sales concession information to their real estate licensee or licensee's agent. Thus, if the transaction involves one to four residential units, sales concession information usually will meet ORS 696.800(3)'s general definition of "confidential information," subject to any relevant exceptions.

Subsections (3)(a) and (3)(b) of ORS 696.800 expressly exclude two types of information from the general rule:

> * * * "Confidential information" does not mean information that:
>
> (a) The buyer instructs the licensee or the licensee's agent to disclose about the buyer to the seller or the seller instructs the licensee or the licensee's agent to disclose about the seller to the buyer; *and*
>
> (b) The licensee or the licensee's agent knows or should know failure to disclose would constitute fraudulent representation.

ORS 696.800(3) (emphasis added).

A threshold question arises from the legislature's use of "and" at the end of subsection (3)(a). That is, must information meet the criteria in both subsection (3)(a) and in subsection (3)(b) in order to be excluded from "confidential information" or is such information excluded if it meets just one of these two tests? In other words, is "and" used in ORS 696.800(3) in its "joint" or in its "several" sense?

Under the established template for statutory interpretation, ***PGE v. Bureau of Labor and Industries***, 317 Or 606, 610-612, 859 P2d 1143 (1993), we seek to discern the intent of the legislature. *Id.*, 317 Or at 610; *see also* ORS 174.020 ("In the construction of a statute, a court shall pursue the intention of the legislature if possible"). The first step in the ***PGE*** method is to examine the text of the statute in context. ***PGE***, 317 Or at 610. As an aid to statutory interpretation, Oregon courts consider rules of construction that bear directly on how to read the text, including statutory rules. *Id.* One relevant rule is that words of common usage typically should be given their plain, natural, and ordinary meaning. *Id.*, 317 Or at 611. If, after consideration of the text and context of a statute, the intent of the legislature is clear, the analysis is complete.

The Oregon Supreme Court commonly uses WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY to determine the "plain, natural, and ordinary meaning" of words. WEBSTER'S explains the various uses of "and" in part as follows:

> [it] can be "used as a function word to express * * * (3) logical or semantic modification of one notion by another as when * * * two elements are joined so that the second logically qualifies the first * * * [or] (6) reference to either or both of two alternatives * * * *especially in legal language when also plainly intended to mean or* <bequeathed to a person and her bodily issue> <property for state and county purposes>.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 80 (unabridged 2002) (emphasis added). Another dictionary states this concept more directly: "Authorities agree that *and* has a several sense as well as a joint sense." B. Garner, A DICTIONARY OF MODERN ENGLISH USAGE at 624 (2d edition 1995) (emphasis in original).

In the context of ORS 696.800, we conclude for two reasons that the legislature intended "and" to mean its several sense; i.e., information that falls within either subsections (3)(a) or (3)(b), but not necessarily both, is not "confidential." First, subsections (3)(a) and (3)(b) are based on different grounds for allowing disclosure, and there is no relationship between the two that would justify joining them together. Subsection (3)(a) allows a real estate licensee to facilitate a real estate transaction on behalf of his or her principal by disclosing information that the principal directs him or her to disclose. In the absence of subsection (3)(a), licensees would be duty-bound to withhold that information and be unable to facilitate the transaction. Subsection (3)(b) addresses a completely different basis for allowing disclosure. A real estate licensee is obligated to "disclose material facts known by [the agent] and not apparent or readily ascertainable to a party" to all principals and principals' agents involved in a real estate transaction. ORS 696.805(2)(c) (seller's agent's duty); ORS 696.810(2)(c) (buyer's agent's duty); ORS 696.815(2) (an agent acting under a disclosed limited agency agreement owes the duties to the buyer and seller specified by ORS 696.805 and 696.810). Subsection (3)(b) appears to be enacted to prevent licensees from confronting conflicting obligations – the duty to keep information confidential and the duty to disclose material facts.

Second, construing (3)(a) and (3)(b) in the joint sense would put licensees in the difficult situation of first having to determine whether withholding information would "constitute fraudulent representation" before they could disclose information that their principals instructed – and clearly wanted – them to disclose to the other party. There is no reason to construe the statute in that manner.

Having concluded that subsections (3)(a) and (3)(b) are independent grounds for information to be non-confidential, we consider whether information that a seller made concessions fits within subsection (3)(a). That subsection defines "not confidential" information to include information that the seller instructs the licensee or the licensee's agent to disclose about the seller to the buyer (or vice versa). Sales concession information is exactly the type of information that principals are likely to direct their licensees to disclose to the other principals in order to facilitate a sales transaction. But whether that disclosure actually occurred is, of course, a factual determination to be made by the real estate licensee in each case before disclosing the information to third parties. As to whether the information can be disclosed to third parties, the statute provides that information that the principal instructs the licensee to disclose to the other principal (either the buyer or seller) is "not confidential"; it contains no language limiting that non-confidential status only to the party to whom the principal authorized disclosure.

If sales concession information in a particular case qualifies as "not confidential" under ORS 696.800(3), then real estate licensees are relieved from their statutory obligations as to such information, because they have a statutory duty to withhold only "confidential information" as defined by ORS 696.800(3). But simply because a real estate agent may disclose information about sales concessions does not mean that they must. However legitimate an appraiser's need for that information may be, no Oregon law requires real estate licensees to disclose such information to appraisers. Under ORS 696.800 through 696.870, agents owe duties only to the persons involved in the real estate transaction. The duty to disclose information in those statutes extends only to the parties and agents involved in the real estate transaction and only to certain

information. We can find no other source of Oregon law that would require an agent to disclose the existence and details of sales concessions to appraisers.

CONCLUSION

The existence and details of proposed sales concessions qualify as "confidential information" under ORS 696.800 for the purposes of a real estate licensee's duty under ORS 696.800 to 696.870 to maintain confidential information until a seller instructs his licensee to disclose that information to the buyer. Once a real estate licensee has been instructed to disclose the information to the other party to the transaction, the information loses its confidential status under ORS 696.800 through 696.870, and a real estate licensee does not violate ORS 696.805(3)(f), ORS 696.810(3)(f), or ORS 696.815(2) and ORS 696.301(3) if the licensee discloses the information to an appraiser. Although real estate licensees in those circumstances are not precluded by ORS 696.800 through 696.870 from disclosing sales concession information to appraisers seeking to use the information in comparable sales analysis, no law requires them to disclose it.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

DCA:WGF:AEA:JTM:mcg/GEN313682

[1/] U.S. Dept. of Housing and Urban Development, Mortgagee Letter 2005-02, Subject: Seller Concessions and Verification of Sales, January 4, 2005.

[2/] This letter addresses only the question whether a real estate licensee has an affirmative duty to keep sales concession information confidential under ORS 696.800 through 696.870 and ORS 696.301(3). It does not address or consider whether other potential sources of a confidentiality obligation, such as a non-disclosure agreement, might require a licensee to keep that information confidential.