

November 15, 2006

Mike Stephenson
22855 SW Noble St.
Beaverton OR 97007-8782

Re: Petition for Public Records Disclosure Order
Department of Consumer and Business Services, Division of Finance and
Corporate Securities

Dear Mr. Stephenson:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. We received your petition on November 9, 2006. The petition asks the Attorney General to order the "Department of Finance and Corporate Securities" to produce copies of the following records per Oregon's Public Records Law:

- (1) "All records relating to the Department's investigation of the complaint against Stashin Mortgage Services, Inc. as it relates to advertising rates and fees that they were not able to actually provide."
- (2) "All records relating to the Department's investigation of the complaint against Stashin Mortgage Services, Inc. as it relates to false and misleading advertising that they have 'The lowest rates and fees in the industry – proven by our (their) #1 ranking in the Wall Street Journal for the lowest interest rate in the nation.'"
- (3) "All records relating to the Department's investigation of the complaint against Stashin Mortgage Services, Inc. as it relates to false and misleading advertising that they have 'We (they) have 100's of local and national lenders and virtually every loan program under the sun available to assure customers the best deal.' In particular, but not solely, actual evidence of their approval by '100's' of lenders. Additionally, such evidence supports their statement that they can 'assure our (their) customers the best deal.'"

For the reasons that follow, we respectfully deny your petition as set forth below.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Any person who is denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.450(1). A custodian of public records must provide “proper and reasonable opportunities for inspection and examination.” *See* ORS 192.430. Correspondingly, the custodian is allowed a “reasonable” time to respond to a request for records. If a public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for examination if it is “reasonably possible” to do so while preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n.8, 538 P2d 373 (1975). Moreover, the Public Records Law expressly authorizes a public body to charge fees “reasonably calculated to reimburse the public body for the public body’s actual cost of making public records available.” ORS 192.440(3)(a). “Actual cost” may include a charge for the time spent by the public body’s staff in locating the requested records, reviewing records in order to separate out or redact exempt material, supervising a person’s inspection of original documents in order to protect the records, copying the records, and the cost spent by the public body’s attorney reviewing, redacting, and segregating the records at the public body’s request. ORS 192.440(3). A public body may require prepayment of its estimated charges before taking further action on a request.

1. Records Relating to False and Misleading Advertising Investigation

We spoke with Nancy Boysen, Deputy Administrator for the Division of Finance and Corporate Securities of the Department of Consumer and Business Services of the State of Oregon, regarding your petition. She indicated that the agency has not received a request for the second and third items in your petition and at present does not have any records responsive to those requests. She indicated that the agency has only started its investigation of the complaint referred to in the second item in your petition and, therefore, does not have any such records at present. She indicated that the agency has not received a complaint regarding the third item in your petition and so does not have any such records. We conclude that the agency has not denied your public records request with regard to the second and third items in your petition. As a result, this office lacks the authority to order disclosure. ORS 192.450(1). Any such order would be premature.

2. Records Relating to Advertised Rates and Fees Investigation

In regard to the first item in your petition, Ms. Boysen indicated that on October 3, 2006, the agency provided you via fax with copies of all documents responsive to your request in the first item of your petition, except that certain data in the Good Faith Estimate – RESPA (GFE) and in the Truth-in-Lending Disclosure Statement (TILDS) were redacted and the following records were inadvertently not provided to you: letter to you dated July 25, 2006, informing you of the results of the agency’s investigation; the fax cover sheet dated July 18, 2006, from Tim Stashin; and a “Competitive Mortgage Rates Mortgage Guide” excerpt from the Oregonian. She indicated that the agency is in the process of providing to you copies of the three records that were inadvertently not previously provided. Thus, your petition as to those records is denied as moot.

a. Trade secrets

In regard to the redacted data in the GFE and TILDS, the agency considers it trade secret and exempt from disclosure in this instance under ORS 192.501(2). The following elements must be met for a record or portion thereof to qualify as a trade secret: (i) the information must not be patented; (ii) the information must be known only to certain individuals within an organization and used in a business the organization conducts; (iii) the information must have actual or potential commercial value; and (iv) the information must give its users an opportunity to obtain a business advantage over competitors who do not know or use it. ORS 192.501(2). We have previously concluded that pricing data can qualify as exempt trade secret information when the public disclosure of such information can undermine the provider's competitive position and the public interest does not require disclosure in the particular instance. *See* Public Records Order to Steven C. Baldwin, December 7, 1989.

The information redacted from the GFE and TLDS is data related to the rates, costs, and fees for the good faith loan estimate and truth-in-lending disclosure statement being provided. The data is not patented. Tim Stashin, President of Stashin Mortgage Services, Inc., indicated to us that the Estimated Closing Costs data in the GFE contains proprietary loan pricing model data except for the underwriting and document preparation fees, which are set by the lender. Mr. Stashin indicated that this proprietary loan pricing model data in the GFE is considered confidential by the company and known only to the borrower or potential borrower and individuals within the company who have access to this information. Mr. Stashin indicated that the individuals within the company who have access to this information have entered into employment agreements with the company that prohibit disclosure of such confidential information. Mr. Stashin indicated that this proprietary pricing model data in the GFE has commercial value and would put the company at a significant disadvantage if disclosed to competitors. We conclude that this information is trade secret under ORS 192.501(2).

Mr. Stashin also indicated that the underwriting and document preparation fees in the GFE and all of the data in the TILDS is not considered proprietary by the company. We understand from Ms. Boysen that the agency is in the process of providing you with an unredacted copy of the TILDS and a copy of the GFE with the Estimated Closing Costs section redacted except for the underwriting and document preparation fees. Thus, your petition as to those portions of the record is denied as moot.

b. Public Interest

Based on the information provided, the data in the Estimated Closing Costs section in the GFE, except for the underwriting and document preparation fees, meets the criteria for trade secrets in ORS 192.501(2). Records, or portions thereof, with such trade secret data are exempt from disclosure under ORS 192.501(2) "unless the public interest requires disclosure in the particular instance." We have previously concluded that the legislature has "called for heightened scrutiny of contentions that the public interest requires the disclosure of records asserted to be trade secrets." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2005) 32. The petition does not address the public's interest in knowing about the trade secret data nor have we identified such a public interest requiring disclosure in this particular instance. Therefore, we conclude that the public interest does not require disclosure and ORS 192.501(2) exempts from disclosure the records that you seek.

Mike Stephenson
November 15, 2006
4

2. Conclusion

As it relates to records addressing the agency's investigation of Stashin Mortgage Services, Inc., for false and misleading advertising (items two and three in your petition), we deny your petition as premature. As it relates to records addressing the agency's investigation of Stashin Mortgage Service's advertised rates and fees (item one), other than information that the agency has agreed to disclose, your petition is denied under ORS 192.501(2) as trade secret.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS18759