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Lincoln City, OR 97367

November 17, 2015

Ronald A. Bersin, Executive Director  
Oregon Government Ethics Commission  
3218 Pringle Rd. SE, Suite 220  
Salem, OR 97302-1544

Via email: [ogec.mail@oregon.gov](mailto:ogec.mail@oregon.gov)

Dear Mr. Bersin,

On November 13, 2015, OGEC representative Diane Gould provided me a redacted copy of ethics complaint 15-256EDG, which was filed against Lincoln City Mayor Don Williams by his fellow City Councilor Roger Sprague, who ran against Williams for the Mayorship in 2014. While there are many items of concern in the complaint, the most troubling is that the complaint contains at least one glaring falsehood:

On page nine of the complaint, the Complainant alleges that the closed-door Council meeting held on February 9, 2015 was authorized under ORS 192.660(2)(f),<sup>1</sup> but this doesn't appear to be true. While the Complainant chose not to provide any agendas of its private, closed-door, meetings to OGEC, copies were recently obtained via a public records request, and are attached. The agenda for the private February 9, 2015 meeting does not list ORS 192.660(2)(f) as the statutory authority for the meeting, as was alleged on page nine of the complaint.<sup>2</sup> This is certainly a serious ethical breach, and may rise to level of official misconduct (ORS 162.415<sup>3</sup>).

Unfortunately, this misstatement of fact may have led OGEC to redact certain portions of the complaint, when there was no legal basis to do so.

Given that, what other misstatements, or factual inaccuracies, are in the complaint? How can we now trust the alleged transcripts contained in the complaint accurately reflect what was said in the private City Council meetings, as neither OGEC, nor the Respondent received copies of the source recordings? Can the alleged transcripts even be considered privileged?

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<sup>1</sup> <http://www.oregonlaws.org/ors/192.660>

<sup>2</sup> Attachment "2015 Executive Agendas.pdf", pg 11.

<sup>3</sup> <http://www.oregonlaws.org/ors/162.415>

The citizens of Lincoln City, and especially the overwhelming majority of voters who elected Mayor Williams, deserve to know the truth. To provide the transparency in government that Mayor Williams and our new Governor have both recently championed, and that our citizens demand, I respectfully request that the public be provided a non-redacted copy of the complaint, as required by the following facts:

- [1. OGEC is the custodian of the 24-page complaint](#)
- [2. Oregon law does not allow ethics complaints to be redacted](#)
- [3. The Complainant authorized the public release of the entire unredacted complaint](#)
- [4. OGEC repeatedly told Mayor Williams he could divulge the complaint](#)
- [5. OGEC transmitted the complaint over email without encryption, or password protection](#)
- [6. For over four years, Lincoln City has held improper private, closed-door meetings](#)
- [7. Lincoln City improperly discussed policy matters in numerous private, closed-door meetings](#)
- [8. The Complainant never cited what laws exempts certain documents from disclosure](#)
- [9. The Complainant did not submit documents via "in camera" review, so they would remain "under seal"](#)
- [10. Lincoln City did not execute a valid limited release of confidential materials](#)
- [11. Lincoln City claims they can discuss anything they want in executive session](#)
- [12. Documents regarding a breach of duty by an attorney are not privileged](#)
- [13. Only documents that were separately submitted would remain confidentially](#)

#### 1. OGEC is the custodian of the 24-page complaint

OGEC is the custodian of the 24-page complaint, as defined by ORS 192.410(1)<sup>4</sup>. The complaint was not an existing document that was simply “transferred” to OGEC. The complaint is an original document that was drafted anew, and was submitted to OGEC, and OGEC is now the custodian of this public record. As a result, OGEC is the sole arbiter in determining any exemptions that may apply to its release.

#### 2. Oregon law does not allow ethics complaints to be redacted

ORS 244.260(4)(d)<sup>5</sup> states that "All case related materials and proceedings shall be open to the public." The statute does not provide any exceptions, or exemptions. Clearly the legislature intended for all ethics complaints to be completely transparent and public, so that the Respondent receives proper due process, and is given the opportunity to clear his name if the charges are unwarranted. Just as in a criminal trial, all documents submitted to OGEC are by law public documents, unless they are submitted “under seal”. Clearly, the 24-page complaint was not submitted “under seal” in this case.

As such, the disclosure requirements of ORS 244.260(4)(d) clearly outweigh, and supersede any exemptions allowed in ORS 192.501 or ORS 192.502, as the legislative intent is clear that the public interest is best served by complete and full disclosure. Therefore, no portion of the complaint

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<sup>4</sup> <http://www.oregonlaws.org/ors/192.410>

<sup>5</sup> <http://www.oregonlaws.org/ors/244.260>

can be considered confidential, so the law requires the entire 24-page complaint be provided to the public without redactions.

### 3. The Complainant authorized the public release of the entire unredacted complaint

On page 2 of the OGE C complaint form that the Complainant signed, it states that "all information concerning this matter will become available to the public."<sup>6</sup> As such, the Complainant was fully aware, and consented to releasing the entire complaint to the public, when he signed the complaint. Neither the Complainant, nor any other Lincoln City representative, can assert that portions of the complaint are exempt from disclosure. Any claim of privilege was waived by the Complainant signing and submitting the complaint to a public body that is required by law to release "all" complaint materials to the public. Therefore, no portion of the complaint can be considered confidential, so the law requires the complaint to be released without redactions.

### 4. OGE C repeatedly told Mayor Williams he could divulge the complaint

Immediately after receiving the complaint, the Respondent, Mayor Don Williams, twice asked OGE C investigator Diane Gould if he could share the complaint with others, and both times he received Staff Advice from her that stated he was under no confidentiality provisions, he was not prohibited from divulging the contents of the complaint to third parties, and he was free to discuss the complaint with others. Mayor Williams relied on this Staff Advice, and should not be censored, fined, or thrown out of office as the result of following this advice.

It is important to note that on August 24, 2015, the Lincoln City City Council ("Council") authorized a criminal investigation of Mayor Williams<sup>7</sup>, and has authorized \$25,000 to \$50,000 for this effort.<sup>8</sup> While the investigation is ongoing, and the charges remain secret, statements have already been made by several City representatives that Mayor Williams has "broken Council rules." Council is doing everything in its power to unseat our Mayor, who won with 47% more votes than his opponent, Councilor Sprague, the Complainant.<sup>9</sup>

As 8.1.1.c of our City Charter says that a Councillor would be removed from office for "Conviction of a crime involving official misconduct or misuse of confidential information,"<sup>10</sup> OGE C may unwittingly become a party to this grievous action, by redacting the complaint. It would be a serious miscarriage of justice, if OGE C allowed this malfeasance to occur. Therefore, justice requires the complaint be released without redactions.

### 5. OGE C transmitted the complaint over email without encryption, or password protection

An OGE C representative transmitted the complaint to the Respondent by email in an unencrypted/non-password protected format. Please note that Oregon's *E-mail Policy Manual for Local Government*, states:

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<sup>6</sup> [http://www.oregon.gov/OGEC/docs/Form/Fillable\\_Complaint\\_Form\\_8-11.pdf](http://www.oregon.gov/OGEC/docs/Form/Fillable_Complaint_Form_8-11.pdf)

<sup>7</sup> <https://youtu.be/CXKmk2WJKVA>

<sup>8</sup> <https://www.youtube.com/watch?v=7unf5QlxGWE>

<sup>9</sup> <http://www.co.lincoln.or.us/clerk/election/2014-general-election>

<sup>10</sup> <http://www.codepublishing.com/OR/LincolnCity/html/lincolncitych.html#VIII>

*Remember that the e-mail system is not a secure medium and information of a confidential or sensitive nature should never be sent via e-mail.* <sup>11</sup>

and

*Confidential information should never be sent either in the body of an e-mail message or in an attachment.* <sup>12</sup>

By OGEC sending the complaint to the Respondent by insecure email, without any password protection, OGEC informed the Respondent that OGEC did not consider the complaint to contain any confidential information. Therefore, justice requires the complaint be released without redactions.

#### **6. For over four years, Lincoln City has held improper private, closed-door meetings**

Between July 11, 2011 and August 10, 2015, Council held numerous private, closed-door meetings, but failed to provide the general public with proper legal notice of any of these meetings, as is required by ORS 192.640(2)<sup>13</sup> and ORS 192.640(3)<sup>14</sup>, For details, please see civil action 15CV22131.<sup>15</sup> While Council claimed these meetings were "executive sessions," they clearly were not, due to the lack of the required notice. Therefore, the contents of these meetings are not confidential, so the law requires the complaint be released without the alleged transcripts of these secret meetings being redacted.

#### **7. Lincoln City improperly discussed policy matters in numerous private, closed-door meetings**

While the agendas of these private, closed-door, meetings held on February 9, 2015, February 18, 2015, March 9, 2015, April 27, 2015, and June 22, 2015, were not provided to the public as required by law. they are provided in the attachment named "2015 Executive Agendas.pdf".

Here are the agenda topics listed for the five private, closed-door, meetings listed in the complaint:

1. February 9, 2015: Litigation Update - Seida and VRD LUBA Appeal (192.660(2)(h))
2. February 18, 2015: LUBA Appeal - Oregonians In Action vs. Lincoln City (192.660(2)(h))
3. March 9, 2015: Code enforcement/ORS enforcement (192.660(2)(f & h))
4. April 27, 2015: Proposed Land Exchange (192.660(2)(e & f))
5. June 22, 2015: Litigation and Enforcement Update (192.660(2)(f & h))

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<sup>11</sup> <http://sos.oregon.gov/archives/Documents/recordsmgmt/train/erm/emailman806.pdf>, pg. 11

<sup>12</sup> *Ibid.*, pg. 12

<sup>13</sup> <http://www.oregonlaws.org/ors/192.640>

<sup>14</sup> *Ibid.*

<sup>15</sup> <https://drive.google.com/open?id=0B4H4rYPVImiESWFsNGk5bkZxOUE>

As you can see, the meetings on February 9, 2015 and February 18, 2015 did not list ORS 192.660(2)(f) as the statutory authority, so discussions in these meetings regarding allegedly exempt documents are not confidential, and are not exempt from disclosure.

The April 27, 2015 meeting did not include an agenda item on “Code enforcement”, so discussions in this meeting regarding allegedly exempt documents are not confidential, and are not exempt from disclosure.

While the improperly convened March 9, 2015 and June 22, 2015 meetings do list ORS 192.660(2)(f), this designation is not listed next to the agenda item. Also the agenda item descriptions do not provide the general public with enough specificity to determine what, exactly, was being discussed. Therefore, any discussions in these two meetings regarding allegedly exempt documents are not confidential, and are not exempt from disclosure.

Please note that it wasn’t until September 17, 2015, that Council finally decided to inform the general public with an agenda description of “Accessory Use Enforcement,”<sup>16</sup> which correctly describes the discussion topic, and includes the statutory authority immediately following the agenda item.

Also, the topics under discussion for the March 9, 2015 and June 22, 2015 meetings “Code enforcement/ORS enforcement” and “Litigation and Enforcement Update” (or any of the meetings for that matter) were not regarding the discussion of allegedly exempt documents. In truth, the discussions were regarding decision made by the previous City Council that authorized the enforcement of an “accessory use” limitation against vacation rentals in a non-specific motion made late in the December 8, 2014 Council meeting.<sup>17</sup> The present Council was simply attempting to set policy regarding implementation of this past decision.

Unfortunately, the “accessory use” limitation has never been enforced in the 26 years it has been on the books, as the term has never been defined. The previous Council passed ordinances to define it to be between 30 and 180 days last December, but the voters overturned these laws on May 17, 2015.<sup>18</sup>

As a result, all discussions on enforcing the vague, and still undefined term “accessory use” were, in fact, policy discussions, as Council struggled to make final decisions on how, exactly, to enforce a limitation under the vague term.

As such, these discussions were not allowed to occur in executive sessions, due to the prohibitions against policy discussions and final decisions found in ORS 192.660(8)<sup>19</sup> and ORS 192.660(6)<sup>20</sup>.

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<sup>16</sup> <http://lincolncityor.ig2.com/Citizens/FileOpen.aspx?Type=14&ID=1481&Inline=True>

<sup>17</sup> <http://lincolncityor.ig2.com/Citizens/FileOpen.aspx?Type=12&ID=1217&Inline=True>, item J. 19.

<sup>18</sup> <http://www.co.lincoln.or.us/clerk/election/may-2015-special-election>

<sup>19</sup> <http://www.oregonlaws.org/ors/192.660>

<sup>20</sup> *Ibid.*

Therefore, the “accessory use” discussions in these meetings are not confidential, so the law requires that the transcripts of these discussions not be redacted from the complaint.

The *Attorney General's Public Records and Meetings Manual (November 2014)* makes this clear by stating:

*A news reporter has no obligation to refrain from disclosing information gathered at an executive session if the governing body fails to specify that certain information is not for publication. Media representatives may wish, in a spirit of cooperation, to inquire whether a governing body's failure to specify was an oversight. A reporter is under no obligation to keep confidential any information the reporter independently gathers as the result of leads obtained in an executive session. **A news reporter has a clear right to disclose any matter covered in an executive session that is not properly within the scope of the announced statutory authorization of the executive session.** Indeed, the presence of news media representatives at executive sessions probably encourages compliance with statutory restrictions on the holding of closed sessions.<sup>21</sup>*

Given the above, it is clear that anyone who “discloses matters covered executive sessions that is not properly within the scope of the announced statutory authorization” is following the law, and they should not be fined, censured, or thrown out of office as a result. In fact, they should be commended.

Council is clearly aware that defining, or eliminating, “accessory use,” is a policy matter that should be discussed in open meetings, as they have been doing exactly that in recent weeks. Council began dealing with “accessory use” at its first open meeting “Workshop” on August 3, 2015<sup>22</sup> and most recently on November 2, 2015<sup>23</sup>. Specifically, Council is discussing whether to define “accessory use” as a specific number of days a vacation rental can rent per year, or to remove the term from the definition of a vacation rental. In fact, during the November 2, 2015 meeting Councilor Wes Ryan bravely volunteered that the “accessory use” term is “the most odious portion of the ordinance,” and that it should be “eliminated.”<sup>24</sup>

#### 8. The Complainant never cited what laws exempted certain documents from disclosure

The Complainant did not claim that Oregon law required portions of the complaint to be exempt from disclosure, nor did he cite any specific Oregon Statute(s) that authorized any exemptions. Therefore, no portion of the complaint should be considered exempt from disclosure, so the law requires the complaint be released without redactions.

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<sup>21</sup> [http://www.doj.state.or.us/public\\_records/manual/public\\_meetings.shtml#\\_Toc276128118](http://www.doj.state.or.us/public_records/manual/public_meetings.shtml#_Toc276128118)

<sup>22</sup> [http://mediadownload.iqm2.com/LincolnCityOR/1323\\_480.mp4](http://mediadownload.iqm2.com/LincolnCityOR/1323_480.mp4)

<sup>23</sup> <http://lincolncityor.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1669&Format=Agenda>

<sup>24</sup> *Ibid.* at 12:55

9. The Complainant did not submit documents via "in camera" review, so they would remain "under seal"

The **only** indication that the Complainant requested that OGEC keep portions of the complaint from disclosure was buried in the middle of a paragraph on page eight of the complaint:

... Transcribed excerpts and portions of executive session written materials are included in this complaint and are made available as confidential transferred records. **The Executive Session recordings, or portions thereof, can be made available to OGEC for *in camera* review, however, the City Council wishes to maintain confidentiality.** *[emphasis added]*

The first sentence in the above statement is factually incorrect, as the complaint cannot by itself contain "transferred records" as the complaint was a newly minted document, the entirety of which was authorized to be made public when the Complainant signed the complaint form. The Complainant cannot authorize the release of the entire complaint to the public on page two of the complaint, and then take back that authorization on page eight.

In fact, a plain reading of the above statement clearly shows that the Complainant understood that OGEC is the sole arbiter in deciding what portions of the complaint might be determined to be exempt from disclosure. The Complainant understood that for OGEC to maintain confidentiality of specific recordings or documents, the Complainant would need to provide them **separately**, via an "*in camera* review" process, to allow the documents to remain "under seal."

It follows then, that if the Complainant had wished for portions of the complaint to remain confidential he would have separated them from the complaint itself, and provided them for *in camera* review. Since he did not do this for the 24-page complaint, the complaint does not contain any confidential information, so the law requires it be released without redactions.

10. Lincoln City did not execute a valid limited release of confidential materials

Council held a private, closed door, meeting at 4pm on June 22, 2015. The agenda for this private meeting does not list an item regarding the release of confidential materials, or the filing of ethics charges against the mayor. Yet given the magnitude of this decision, it is most certain that this topic was discussed during this private meeting. Bolstering this claim, is the fact that all the private, closed door meeting agendas claim Council has the right to discuss any unnoticed topic they want. See 11. below.

Since discussing the authorization of the release of confidential materials almost certainly occurred during the private June 22, 2015 meeting at 4pm, but this topic was not listed on that meeting's agenda<sup>25</sup>, the final decision to release the confidential materials made in the following open meeting at 6pm was improper, and in contravention of ORS 192.640(2). Therefore, Council did not legally execute a valid limited release of confidential materials to OGEC.

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<sup>25</sup> Attachment "2015 Executive Sessions.pdf", pg. 6.

As Council did then release the documents to multiple individuals and governmental agencies, including OGEC, any claim of privilege has been waived, so the complaint cannot contain any confidential materials, and should be released without redactions.

#### 11. Lincoln City claims they can discuss anything they want in executive session

It's important to note that on March 25, 2013, just a month after the city attorney was hired, he added the following text to the agendas of all future private, closed-door Council meetings:

*This notice includes a list of the principal subjects anticipated to be considered at the meeting however, this requirement shall not limit the ability of a governing body to consider additional subjects. (ORS 192.640) <sup>26</sup>*

While ORS 192.640(1) does allow for unnoticed agenda items to be discussed in open meetings, this is not allowed in executive sessions, as ORS 192.640(2) clearly requires that the general public be provided the statutory authority for each specific agenda item. Otherwise, how would the public ever know what secret discussions are being held, as minutes of executive sessions are never provided to the public, as they are with open meetings.

In fact, there is evidence that discussing unnoticed agenda items in private meetings occurred as recently as April 13, 2015, where the meeting's agenda shows a handwritten topic that was added at the meeting. See the attached agendas. This leads one to ask: what other discussions has our Council failed to inform the public about?

#### 12. Documents regarding a breach of duty by an attorney are not privileged

On June 22, 2015, at their regular 6pm open meeting, Council passed a motion to release confidential documents.<sup>27</sup> The city attorney claimed this release was required as he was the "target of some allegations and in order to fully discuss with the appropriate authorities ...." the release was required. Note that Council took over 16 weeks to approve the meetings of this meeting.

Given that, the release that Council authorized on June 22, 2015 was not a limited release as ORS 40.225(4)(c) states there is no privilege:

*As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;*<sup>28</sup>

Therefore, the complaint does not contain confidential materials, and should be released without redactions.

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<sup>26</sup> Attachment "2013 Executive Sessions.pdf", pg. 11.

<sup>27</sup> <https://youtu.be/q1XsK3VuHQw>

<sup>28</sup> <http://www.oregonlaws.org/ors/40.225>

### 13. Only documents that were separately submitted would remain confidentially

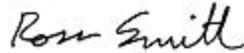
At the August 10, 2015 open Council meeting, Councilor Susan Wahlke's motion stated the OGEC complaint would include a "transfer of supporting confidential records."<sup>29</sup> This statement indicates that Council had a clear understanding that the complaint itself did not contain confidential records, but that the confidential records were being provided separately, perhaps in the 300 pages of accompanying materials that were provided with the 24-page complaint. Therefore, the complaint itself does not contain confidential materials, and it should be released without redactions.

Given the overwhelming evidence listed above, and the fact that the complaint contains at least one significant falsehood, the complaint should be released to the public without redactions. To do otherwise would do a grave disservice to the citizens of Lincoln City, who elected their Mayor on a platform of honesty, transparency, and accountability in government.

If you have any questions, concerns, or need any clarification, please don't hesitate to call me at 541.996.6232, or email me at [rasa7777@gmail.com](mailto:rasa7777@gmail.com).

Thank you for your time and your service to our State.

Yours sincerely,



Ross Smith

#### Attachments:

1. "2013 Executive Agendas.pdf"
2. "2014 Executive Agendas.pdf"
3. "2015 Executive Agendas.pdf"

#### ccs:

1. "Andrew Dean - The Oregonian" <[adean@oregonian.com](mailto:adean@oregonian.com)> ,
2. "Darin E. Tweedt - Chief Counsel - Department of Justice" <[Darin.E.Tweedt@doj.state.or.us](mailto:Darin.E.Tweedt@doj.state.or.us)> ,
3. "Diane Gould - Investigator - OGEC" <[diane.gould@oregon.gov](mailto:diane.gould@oregon.gov)> ,
4. "Don Williams - Mayor - Lincoln City" <[subrest2@gmail.com](mailto:subrest2@gmail.com)> ,
5. "Ellen Rosenblum - Attorney General" <[ellen.f.rosenblum@state.or.us](mailto:ellen.f.rosenblum@state.or.us)> ,
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10. "Rick Beasley - Newport News Times" <[rickbeasley@newportnewstimes.com](mailto:rickbeasley@newportnewstimes.com)> ,

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<sup>29</sup> <https://youtu.be/oTNgY8azp1A>