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Mr. Peter Donohue
1735 23rd Ave.
San Francisco, CA 94122

Ms. Angela Brugato
Internal Auditor
Oregon State Treasury
350 Winter Street NE
Salem, OR 97310

Re: **Petition for Public Records Disclosure: Oregon State Treasurer Records**

Dear Mr. Donohue:

This letter is the Attorney General's order on Mr. Donohue's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on May 1, 1995,[1/] asks the Attorney General to direct the office of the Oregon State Treasurer to disclose "OPERF agreements with KKR for 1986, 1987, [and 19]93". The petition states that it "includes limited partnership agreements and documents relating to agreed upon conditions for the 1986, 1987, and 1993 investment funds, including participation shares of other fund participants."[2/] For the reasons that follow, we grant the

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1/ We appreciate Mr. Donohue's courtesy in extending the time within which the law would otherwise have required us to respond.

2/ We do not interpret Mr. Donohue's records request to extend to financial data or information supplied to the Treasury in relation to the KKR agreements, but only to the agreements themselves. The petition also requested that we address the "applicability to earlier leveraged buyout investment funds between the same parties, such as 1980, 1982,

(continued...)

petition and order disclosure, except with respect to the portions of the records that are discussed below.

Mr. Donohue requested agreements executed by the Treasurer on behalf of the Oregon Public Employes' Retirement Fund (OPERF) with the investment firm of Kohlberg Kravis Roberts & Co. (KKR) for 1986, 1987 and 1993, including any limited partnership agreements related to the 1986, 1987 and 1993 fund agreements. The agreements pertaining to the OPERF and KKR investments for the requested years consist of the following: (1) letters of agreement that were entered into between OPERF, KKR and other fund participants (the Commitment Letters), (2) limited partnership agreements for each fund (the Fund LP Agreements) and (3) limited partnership agreements entered into by OPERF, KKR and certain fund participants in order to acquire an interest in businesses selected by KKR (the Asset LP Agreements).[3/]

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. There are two exemptions under the Public Records Law that appear applicable here: ORS 192.502(3), information submitted in confidence, and ORS 192.501(2), trade secrets. We consider the applicability of these exemptions to each of the three categories of agreement.

Commitment Letters

The Commitment Letters establish the framework for later investments by OPERF, KKR and other fund participants through the formation of the limited partnerships. The Commitment Letters contain a confidentiality clause. The clause provides that certain information provided to OPERF in relation to the KKR investments must be kept confidential. The Commitment Letters themselves are not within the scope of the confidentiality clause. Because the Commitment Letters are not subject to the confidentiality clause, they are not exempt from disclosure under ORS 192.502(3) as information submitted to an agency in confidence.

[2/] (...continued)
1983, and 1984 agreements." We do not interpret this as a request for such agreements. Because Mr. Donohue previously requested and was denied only copies of the agreements with Kohlberg Kravis Roberts & Co. for 1986, 1987 and 1993, the Attorney General lacks jurisdiction to address these additional agreements in this order. See ORS 192.450.

[3/] Taken together, the Fund LP Agreements and Asset LP Agreements constitute the entirety of the limited partnership agreements.

The Commitment Letters also contain an Exhibit A. The information set forth on Exhibit A to the 1993 Commitment Letter consists of: (1) the name of each fund participant; (2) the original maximum commitment of each participant; (3) the original percentage share of each participant; (4) the participant's existing unused commitment; (5) the modified percentage share; (5) the post extension subscription amount; (6) the post extension percentage share; (7) the new maximum commitment and (8) the total fund amount.

For purposes of the Oregon Public Records Law, trade secrets include

> [a] compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

ORS 192.501(2).

Much of the information contained in the Commitment Letter is of a standard contractual nature. To the extent the Commitment Letters contain standard contractual terms, that information does not fall within this definition of a trade secret and is not exempt under ORS 192.501(2). However, the items listed on Exhibit A to the Commitment Letter do constitute a trade secret within the meaning of the Public Records Law.

Kept within Organization for Business Use

The first test that must be met to qualify under the trade secrets exemption is whether the compilation of information is known only to certain individuals within an organization and it is used in the business conducted by the organization. An argument may be made that because the names, contribution percentages and amount contributed by each fund participant is disclosed to the other participants in the Commitment Letters and the LP Agreements, that information is disclosed beyond KKR and, thus, cannot fall within the exemption for trade secrets.

However, in applying the trade secrets exemption here, we must determine the identity of the relevant organization. We conclude that under the facts at issue, the relevant organization extends to KKR and its limited partnerships. The plain language of ORS 192.502(2) limits the sharing of information to individuals "within an organization." We are to give the words used in a statute their plain and ordinary meaning. ***Portland Gen. Elec. Co. v. Bureau of Labor & Indus.***, 317 Or 606, 611, 859 P2d 1143 (1993). An organization may encompass more than one corporate entity. It can form many permutations so long as it

operates under a uniform administrative and functional structure so that it is in a state or manner of being organized. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 809 (1977).

Here, KKR has bound itself to an extended organizational structure in the form of limited partnerships to invest in selected businesses on behalf of a particular investment fund. Although the names of the fund participants, or partners, and their contribution amounts are not made expressly confidential, KKR discloses the names of the partners only to the other limited partners. In this particular instance, we conclude that the relevant organization for purposes of the trade secret exemption includes the limited partnerships to whom KKR is bound by the LP Agreements in order to invest the fund monies.

For practical purposes, KKR and the fund limited partnerships cannot transact the business of investing without the names of the fund participants and their contribution amounts. They must be disclosed by KKR to the other participants in the Commitment Letters and LP Agreements in order to enter into the fund arrangement and form the investment partnership. The contribution amounts must be established so that KKR may determine the amount available for investment by the partnership, and each partner within the partnership, when selecting future investments. The information is also used by KKR to form other investment funds and generally pursue its business as a merchant banker.

Commercial Value

We have been informed by Mr. Mike Moy, the Managing Director of Pacific Corporate Group, an investment advisory firm employed by the office of the Treasurer, that in the investment field, a list of the investors comprising a fund with a particular investment strategy could be used by other investment firms to solicit members for a fund with a similar investment strategy. Further, such a ready made list could result in substantial financial savings to a competitor because investment firms pay placement fees equal to a percentage of the aggregate fund amount to gather the potential investors for a fund. Depending on the size of the resulting investment fund, these placement fees can equal several million dollars. Thus, the names of the limited partners set forth in the Commitment Letter form a client list that is of value to the firm creating a fund and to others in the field. By soliciting the participants in the KKR fund, a competitor using such information would save time and money in the formation of its own fund.

Similarly, the amount or percentage share committed by each investor may reveal to a competitor which participants are willing to commit large amounts to a particular type of fund and, thus, are worth enticing away from KKR. In addition, the amount of capital invested to date or remaining for investment, would indicate to a competitor whether a

particular fund was about to terminate. The fund participants could be targeted by a competitor as receptive to a replacement investment vehicle.

We have been informed by Mr. Moy that although the aggregate amount of an investment fund is often revealed in investment industry publications together with the names of a few key participants, the full list, or a substantial number, of the participants is never revealed in a public forum. Accordingly, we do not extend the lack of confidential treatment with respect to the participation of a few key investors, to eliminate the entire list of customers from the sphere of a protected client list.

We do not know whether the aggregate sums of the funds at issue here have been published. However, because the size of a fund is available for publication, and we understand from KKR that it is not as protected from dissemination, we conclude that the aggregate dollar amount of the fund is not information exempt from disclosure as a trade secret.

Public Interest

ORS 192.501(2) provides an exemption from disclosure for a trade secret unless the public interest requires disclosure in a particular instance. As a general rule, the Public Records Law should be interpreted to promote disclosure, and any doubts in interpreting the Law should be resolved in favor of providing the public with information. 44 Op Atty Gen 239 (1984). Another provision of the Public Records Law, ORS 192.502(12), evidences a legislative determination that the public interest requires disclosure of information concerning investment by the State Treasurer of the funds under its management. That statute provides:

> Records submitted by private persons or businesses to the State Treasurer or the Oregon Investment Council relating to proposed acquisition, exchange or liquidation of public investments under ORS chapter 293 may be treated as exempt from disclosure when and only to the extent that disclosure of such records reasonably may be expected to substantially limit the ability of the Oregon Investment Council to effectively compete or negotiate for, solicit or conclude such transaction. ***Records which relate to concluded transactions are not subject to this exemption***[.]

(Emphasis added.)

When all of the supporting documentation for a concluded transaction is expressly made available for public disclosure, it follows that the agreements evidencing the transaction should also be subject to public disclosure. However, in this instance, the Commitment

Letters reveal more than just an investment by the Oregon State Treasurer. They reveal a protected trade secret through the names of other investors and their contributions to the investment fund. ORS 192.502(12) evidences a policy of public disclosure with respect to the investment activities of the Oregon State Treasurer's office, but not of other pension plans or corporations. Further, it is the compilation of names and information in Exhibit A that is protected as a trade secret. We find no overriding public interest that requires disclosure of this information.

However, the disclosure of information related only to the office of the Oregon State Treasurer alone could not comprise a protected client list or information. Thus, with respect to the Commitment Letters, we conclude that the interest of the public requires disclosure of the investment information related to the Oregon State Treasurer.

Fund LP Agreements

A form of the Fund LP Agreement is attached to each Commitment Letter. Because it is attached to the Commitment letter, it is not within the scope of that document's confidentiality clause. Accordingly, the exemption in ORS 192.502(3) for information submitted in confidence does not apply to the Fund LP Agreements.

We have not reviewed an executed form of the Fund LP Agreement.[4/] However, according to the proforma exhibit, the Fund LP Agreement reveals the name of each participant in the signature lines and on an attached Exhibit A. The Exhibit also reveals the commitment amount of each participant.

The contractual language of the agreement establishes the framework of a limited partnership arrangement and is not a compilation of information that could be considered a trade secret. However, for the reasons discussed above with respect to the participant names and contribution amounts set forth in the Commitment Letters, the same information would constitute a trade secret when set forth in the Fund LP Agreement, and it is exempt from disclosure under ORS 192.501(2).

Asset LP Agreements

The Asset LP Agreements are within the scope of the confidentiality clause set forth in the Commitment Letter. ORS 192.502(3) exempts from disclosure:

[4/] We understand that the executed documents may not exist in Treasury's files. However, the agency is in the process of attempting to locate those documents.

> 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.

The proforma Fund LP Agreement is almost identical in form to the Asset LP Agreements. To the extent an Asset LP Agreement contains information not disclosed in the proforma exhibit, we construe the Commitment Letters as treating that information as confidential. Thus, the information provided to OPERF in the Asset LP Agreements that is unique to the asset being acquired is provided to OPERF in confidence within the meaning of ORS 192.502(3). See Morrison v. School Dist. No. 48, 53 Or App 148, 631 P2d 784 (1981) (obligation to treat as confidential must be formed prior to submission of the material).[5/] Further, the agreements were not submitted to OPERF under any statutory requirement but as part of an investment transaction entered into by the Treasurer as the investment manager for OPERF.

Most of the information contained in the Asset LP Agreements is the standard contractual language set forth as an addenda to the Commitment Letters. Each Asset LP Agreement contains the names of the partners in the signature lines and on an Exhibit A. The exhibit also lists the investment contribution of each partner. The names of the parties in a partnership and the amount of each partner's investment in a particular transaction is the type of information that may be considered confidential, particularly as it would relate to private individual investors. Although in this instance, the parties to the Asset LP Agreements are primarily large institutional investors such as publicly traded companies, other pension plans or large corporations, the confidential nature of financial information

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[5/] ORS 192.502(3) appears intended to address information that is simply provided to an agency and is not negotiated with or agreed to by the agency; for example, information related to personal income or finances. Therefore, the argument may be made that an executed Asset LP Agreement is not information submitted to the Treasury within the meaning of ORS 192.502(3). However, in this case we have examined the applicability of ORS 192.502(3) because (i) the Asset LP Agreements each contain information that is not negotiated, such as addenda listing each partner and its contribution, (ii) the Asset LP Agreements are governed by the confidentiality clause in the Commitment Letters in the same manner as related documents that are simply forwarded to Treasury and (iii) pursuant to the Commitment Letters, the Asset LP Agreements are not actively negotiated by the Treasurer but are in the nature of a form that is signed by the office of the Treasurer to evidence the investment.

may extend into the commercial sector. See Banaitis v. Mitsubishi Bank, Ltd., 129 Or App 371 (1994) (discussing several federal and Oregon statutes protecting commercial financial information as confidential); rev allowed 320 Or 407, 887 P2d 791 (1994).

ORS 192.502(3) states as a requirement of the exemption that the public interest must suffer by disclosure. As discussed above, the financial information related to each partner may reasonably be considered to be of a confidential nature to the fund participants and to KKR. We have been informed by Mr. Moy that the disclosure of this information by the Oregon State Treasurer would be likely to have a chilling effect on its ability to invest not only with KKR, but other merchant banking firms in the future, and on the willingness of other investors to participate in a venture with OPERF. Therefore, because it is in the public interest that the Oregon State Treasurer have a large range of investment vehicles available and is not inhibited in its ability to compete and negotiate in the marketplace, the public interest could suffer by the disclosure of the names and investment amounts of the partners to each Asset LP Agreement.

However, because ORS 192.502(12) requires the disclosure of records related to the investment activities of the Oregon State Treasurer, we conclude that the interest of the public would not suffer by disclosure of the investment information related to OPERF. Thus, we conclude that ORS 192.502(3) exempts from disclosure only the names and contribution amounts of the fund participants other than OPERF. *See* 44 OP Atty Gen at 251.

An Asset LP Agreement is executed by all or a portion of the fund participants to acquire an interest in a specific asset. Although an individual Asset LP Agreement may not reveal all of KKR's customers, the aggregate of the agreements requested here could divulge a significant number or all of its clients. Further, by knowing the terms of the Asset LP Agreements, the participants in each Asset LP Agreement and the dollar amount contributed by each investor for certain assets, one could extrapolate to determine with a fair degree of accuracy the total investors and the percentage and dollar contribution of each individual participant to a fund. Therefore, for the reasons discussed above with respect to the Commitment Letters and the Fund LP Agreements, the names and contribution amounts set forth in the Asset LP Agreements also constitute a trade secret that is exempt from disclosure under ORS 192.501(2).

CONCLUSION

For the reasons set forth above, we grant Mr. Donohue's petition, except with respect to the names, contribution amounts and contribution percentages or shares of the fund participants, other than OPERF, and order the office of the Oregon State Treasurer to

disclose the requested records. Where portions of a record are exempt from disclosure, an agency may redact or separate the exempt portions before disclosure. ORS 192.500(3). The agency has seven days from the date of this order to comply. ORS 192.450(2). In your original request for information, you asked for copies of the records and agreed to pay the related costs. Angela Brugato, the Internal Auditor in the Oregon State Treasurer's office will contact you to arrange for payment and mailing of the requested documents.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to
the Attorney General

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c: Jay Fewel, Oregon State Treasury
Robert W. Muir, Attorney in Charge, Tax & Finance Section