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March 10, 2000

Mr. Steve Suo
Mr. Steve Mayes
THE OREGONIAN
1320 S.W. Broadway
Portland, Oregon 97201

Re: Petition for Review of Denial of Fee Waiver
Oregon Department of Transportation Records

Dear Messrs. Suo and Mayes:

This letter is the Attorney General's order on your petition for review of the denial by the Oregon Department of Transportation (ODOT) of your request for a waiver of fees for making available public records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on February 18, 2000,[1] asks the Attorney General to order ODOT to waive all fees related to your request for ODOT records concerning bids, contract awards and audits for Y2K computer repairs. For the reasons below, we respectfully deny your petition.

1. Background

On January 19, 2000, Mr. Mayes requested various records from Grace Crunican, Director of ODOT, pertaining to ODOT contracts with contractors, consultants, vendors or suppliers for information system needs or for Y2K compliance activities for the period between January 1, 1996 and January 19, 2000. Both of you subsequently met with Mike Marsh, ODOT Executive Deputy Director, John Jacklie, ODOT Communications Manager, and David White, ODOT Information Systems Manager, to discuss your records request in order to determine if there was a less costly and faster method of providing the requested records. Mr. Marsh informs us that at that meeting, ODOT suggested that one major way of reducing the costs of providing

[1] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

the requested records was for you to narrow your request, to review the Y2K contracts first, and then to review the corresponding contract files.

On February 2, 2000, Mr. Mayes wrote to ODOT, rescinding all but two paragraphs of the January 19th request, but also requesting other records. On March 2, 2000, Mr. Suo informed our office that because ODOT had responded to the remaining items in the January 19th letter, the only records at issue are those listed in the February 2nd letter, which requested:[2]

1. The names and contract numbers of contractors hired by ODOT to work on Y2K compliance activities between Jan. 1, 1996 and the date of this letter.

2. A report of the dollar amounts paid each contractor between Jan. 1, 1996 and the date of this letter. My understanding from ODOT staff is that this information is available through standard internal computer reports and will require no new programming to produce.

3. A copy of the request for qualifications (RFQ) issued by ODOT for Y2K compliance activities. Based on conversations with ODOT staff, I assume there was only one RFQ issued for this purpose. Please inform me if this is incorrect.

4. The names of all contractors who responded to the RFQ.

5. A list of expenditure accounts associated with each contractor working on Y2K compliance projects.

6. Contract files of all Y2K contractors and any other contractors not subject to pre-award review under the provisions of your Emergency Declaration dated Sept. 5, 1997. This includes all documents in the contract file.

7. Any pre-award reviews of Y2K contracts prior to the issuance of the emergency declaration.

8. Any cost and compliance audits of Y2K contracts.

9. A report showing total paid, by expenditure account, for each E.A. object detail, for Y2K work performed by contractors.

10. A report with the same information for Y2K work performed by ODOT staff.

On February 3, 2000, Mr. Mayes requested that ODOT either waive its fees associated with complying with the records request or agree to a substantial reduction of those fees.

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[2] We list the requested items in the order that they were set out in the February 2nd letter, but have numbered them consecutively as did ODOT in its cost estimate. We understand that you requested copies of items #1 to #5, an opportunity to inspect items #6 to #8, and a cost estimate for items #9 and #10.

On March 2, 2000, Assistant Attorney General Amy Veranth asked Mr. Suo to clarify whether the records request was for information on only Y2K contracts or all information systems contracts. We understand from your response that you are seeking information on all Y2K contractors *and* any other contractors not subject to pre-award review under the provisions of ODOT's Emergency Declaration dated September 5, 1997.

Subsequently, ODOT provided you with its estimate that the actual costs for complying with your records request would be $11,119.30. After receiving ODOT's estimate, Mr. Mayes rescinded the request for a reduction of fees and asked ODOT to waive all fees associated with the records requests. By letter dated February 17, 2000, Mr. Marsh denied the request for a fee waiver.

2. Analysis of Fee Waiver Decision

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. ORS 192.420. The law permits a public body to charge fees "reasonably calculated to reimburse it for its actual costs" in making the records available. ORS 192.440(3). "Actual costs" includes the time agency staff spends locating the records, searching its records for the requested material (even if it does not locate any requested records), supervising a requestor's inspection of the records to protect the records' integrity, copying, certifying, and mailing the requested records, and separating exempt from non-exempt material. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETING MANUAL (1999) (MANUAL) at 12; *see also* Public Records Order, May 17, 1999 (Smith); Public Records Order, May 10, 1996 (Kelly), Public Records Order, May 4, 1994 (Dixon); Public Records Order, May 19, 1993 (Smith); 39 Op Atty Gen 61, 68 (1978).

An agency may waive its fees for furnishing records pursuant to a public records request when it determines that it is in the public's interest to do so "because making the record available primarily benefits the general public." ORS 192.440(4). A person who believes that there has been an unreasonable denial of a fee waiver may petition the Attorney General for review of that denial. ORS 192.440(5). In reviewing an agency's denial of a fee waiver, we use a three-part analysis: a) whether a waiver is prohibited by law, b) whether the "public interest" test is met, and c) whether the agency's decision was "unreasonable." MANUAL at 13.

a. Waiver Prohibited by Oregon Law

Although ORS 192.440(4) allows a public body to waive its fees for furnishing public records when it determines that it is in the public's interest to do so, some public bodies cannot waive fees for making records available even if the provisions of ORS 192.404(4) are met. If a public body's sole funding for a particular program is from funds that are constitutionally, statutorily or otherwise legally dedicated, the public body in responding to a public records request may not charge fees that are lower than its actual costs. To do so would be an illegal diversion of those dedicated funds. 39 Op Atty Gen 61 (1978); MANUAL at 14.

(1) Constitutionally-Dedicated Funds

One reason ODOT gave for denying a fee waiver is that its funding comes from the constitutionally-dedicated Highway Fund and providing records at less than actual cost would be an illegal diversion of those funds. The "Highway Fund" refers to moneys derived from taxes and fees on motor vehicles and motor vehicle fuels. Article IX, section 3a, of the Oregon Constitution provides that revenues from motor vehicle taxes and motor vehicle fuel "shall be

used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state." These revenues may also be used for "costs of administration." Article IX, §3a(2)(a).

The language of Article IX, section 3a that allows use of Highway Funds for the "improvement, * * * * operation and use" of highways has been narrowly construed by the Oregon Supreme Court. In *Rogers v. Lane County*, 307 Or 534, 771 P2d 254 (1989), the court found that construction of an airport parking lot and covered walkway from the parking lot to the airport itself was not a highway related project and therefore not a constitutionally permissible use of Highway Funds. The court concluded that the expenditure of Highway Funds must be limited exclusively to expenditures on highways, roads, streets and roadside rest areas themselves or for other projects or purposes "that primarily and directly facilitate motorized vehicle travel." *Id.* at 545.

This narrow construction was reiterated by the Supreme Court in *Automobile Club of Oregon v. State of Oregon,* 314 Or 479, 490-491, 840 P2d 674 (1992). The court held that the underground storage tank assessments and emission fees were taxes or excises for purposes of Article IX, section 31 and because their use to aid gasoline stations in meeting environmental regulations and for public transportation projects was not constitutionally permissible, the fees themselves were invalid. The court specifically refused to adopt a broader test, stating:

> We construe Article IX, section 3a, narrowly. * * * The [proposed storage tank] fund clearly does not provide for construction, improvement, repair, maintenance, or use of highways. Neither does it fall within the meaning that this court has attached to "operation and use" of a highway, *viz.*, it does not "primarily and directly facilitate motorized vehicle traffic."

Id. at 494.

In your petition, you note our 1978 opinion in which we concluded that unless the cost of requesting and handling payment would be less than the costs of furnishing the information, the constitutional restriction on the use of Highway Funds would require the Motor Vehicles Division (MVD) to charge for furnishing of information in response to a public records request. 39 Op Atty Gen 61, 64-65 (1978). You suggest, however, that reliance on this opinion is misplaced because two years after that opinion was issued, the people adopted Article IX, section 3a, of the Oregon Constitution which provides that highway funds may also be used for the "cost of administration." In fact, the constitutional provision in effect at the time of our 1978 opinion also authorized the use of Highway Funds for the "cost of administration." *Former* Article IX, § 3. Thus, implicit in our opinion was a conclusion that the cost of responding to public record requests is not a constitutionally permissible "cost of administration."

We expressly addressed that issue in a Letter of Advice dated October 19, 1993, to Gary Weeks, then Director of the Department of Administrative Services (OP-6474) in response to a question as to whether MVD could use Highway Funds to provide information to law

enforcement agencies through the LEDS computer system without charging for its costs. We stated:

> Article IX, Section 3a also permits the use of revenues "for the cost of administration and any refunds or credits authorized by law." We have interpreted administrative expenses to be allowable costs when incurred to support an allowable expense of the highway fund, such as the construction or reconstruction of a highway. *See* Letter of Advice dated March 16, 1984, to Fred D. Miller, Director of the Department of Transportation (OP-5647).
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> Providing information from the MVD computer to the criminal justice agencies does not "primarily and directly facilitate motorized vehicle traffic," nor is it an aspect of MVD's "administration" of a program or project that "primarily and directly facilitates motorized vehicle traffic." Therefore, MVD cannot provide this service using Article IX, section 3a, revenues without charging for the actual costs.

OP-6474 at 3-4. *See also* Letter of Advice dated June 16, 1989 to Robert N. Botham, Director, Department of Transportation (OP-6329) (MVD could not lawfully defray the costs of implementing a voter registration law through the sale of MVD records produced with Highway Fund money). Recently, we again concluded that Highway Funds may be used for administrative costs only when those costs are incurred to support an allowable expense of the Highway Fund. 49 Op Atty Gen __ (No. 8271, February 23, 2000) (slip op at 3).

ODOT's compliance with the Public Records Law is neither an expenditure for the highway itself, nor an administrative cost that supports a highway program or purpose that "primarily and directly facilitates motorized vehicle travel." *Cf.* 49 Op Atty Gen __ (No. 8261, September 18, 1998) (slip op at 7) (even though police agency must comply with the Public Records Law, it does not exist for the purpose of providing those records). Although the Public Records Law permits an agency to waive its costs for making records available, that statute cannot override the constitutional limitation on the use of Highway Funds. Providing records in response to a public records request is for the requestor's purpose, which may even serve a "public" purpose, depending on what the requestor intends to do with the records, but it is *not* for the purpose for which the Highway Funds were constitutionally dedicated. We therefore conclude that ODOT cannot waive its actual costs in providing the requested records to you if those costs would otherwise be paid from Highway Funds.[3]

(2) Statutorily-Dedicated Funds

Citing the 1999-2001 budget, you state that ODOT Central Services collects a large amount of revenue from fee assessments which could be used to pay for the cost of your records

[3] Even though Highway Fund revenue may be "co-mingled" with non-highway fund revenue, the use restrictions contained in Article IX, section 3a, of the Oregon Constitution still remain. Any moneys derived from taxes and fees on motor vehicles and motor vehicle fuels become constitutionally dedicated funds once they are collected and remain so regardless of whether they are co-mingled with other funds.

request. While ODOT receives the majority of its funding from the Highway Fund, it does obtain funding from other sources, including Federal Funds, Lottery Funds, Other Funds and General Fund money. Generally, these other funding sources are dedicated by statute for a particular purpose, thereby precluding their use for making public records available.

According to the Budget Report and Measure Summary prepared for House Bill 5053 (1999), those funds identified in ODOT's budget as Federal Funds are various special purpose federal funds, including funds received under the Transportation Efficiency Act for the 21st Century, Federal Aviation Administration, National Highway Traffic Safety, etc. Federal law precludes their use for purposes other than those for which the funds were provided. *See, e.g.,* 26 USC § 9503(c); *see also* ORS 29.550, 835.025 (federal moneys shall be expended upon terms and conditions prescribed by United States).

The Lottery Funds in ODOT's budget are restricted in their use by state statute. Those funds may be used only to fund the Westside corridor extension of light rail and to pay debt service on the state's share of the costs of that project. ORS 391.130(2).

The Other Funds in ODOT's budget include the constitutionally dedicated Highway Funds discussed above, as well as federal fund revenues received from the Federal Highway Trust Funds. Because the federal government has mandated the use of Federal Highway Trust Funds for specific purposes, *see* 26 USC § 9503(c), ODOT cannot use them for other purposes. The Other Funds in ODOT's budget also include moneys received by ODOT from various fees, surcharges, fines or penalties. The Oregon legislature has statutorily restricted how ODOT can use these legislatively appropriated funds. *See, e.g.,* ORS 184.733 (Department of Transportation Public Transportation Development Fund); ORS 802.155 (Safety Education Fund); ORS 824.014 (Railroad Fund); ORS 835.025, 835.065 (State Aeronautic Account Fund).

ODOT's budget also includes General Fund moneys. For fiscal 1999-2001, ODOT received an appropriation of approximately $467,000 for transportation development, the "Motor Voter" program, rail, and public transit and $4 million dollars for elderly and disabled transportation.[4] Or Laws 1999, ch 907, § 1; ch 910, § 13. Virtually all of these funds are statutorily dedicated for specific purposes. ORS 184.691 (public transit); ORS 184.733 (transportation development); ORS 391.800 (elderly and disabled transportation). To the extent they are statutorily dedicated, these General Fund appropriations cannot be used to pay for the cost of your records request under the Public Records Law; that is not an allowable purpose for use of the funds.

We conclude that ODOT may not waive its actual costs in making records available if doing so would require ODOT to use Highway Funds, statutorily dedicated funds or other funds that are legally dedicated for specific purposes. For nearly all of the funds available to ODOT,

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[4] The 1999 legislature also appropriated $15 million to the Emergency Board for allocation to ODOT in the event that Oregon Laws 1999, chapter 1087 (SB 1284) does *not* become effective. If SB 1284 becomes effective, ODOT is authorized to borrow $15 million from the Oregon War Veteran's Fund, which would be repaid by General Funds in the next biennium. In any event, we need not determine whether such funds would be statutorily or otherwise legally dedicated to a particular purpose because they are not currently available to ODOT.

we have identified a constitutional or statutory dedication. ODOT cannot legally use such dedicated funds to pay for the costs of making available the records you seek. In the brief time available to us to respond to your petition, we have not been able to determine whether the remaining funds appropriated to ODOT – approximately $150,000 – are similarly dedicated and thus unavailable to pay the costs of your records request. On the possibility that some non-dedicated funds may exist, we turn to the remainder of our fee waiver analysis.

b. The "Public Interest" Test

The Public Records Law permits state agencies to waive fees if a waiver is in the public interest because making the records available primarily benefits the general public. Factors to consider in whether the public interest test is met include the requestor's identity, the purpose for which the information will be used, the nature of the information, whether the information is already in the public domain, and whether the requestor can demonstrate the ability to disseminate the information to the public. The requestor's ability to pay is also a factor but alone is not sufficient to deny a fee waiver. MANUAL at 14-15.

You stated that the reason for your request is because you are writing a newspaper story on how ODOT spent "some $26 million to $28 million in public funds on Y2K compliance activities." THE OREGONIAN is a newspaper of mass distribution with a wide readership. We have no doubt about your ability to disseminate information to the public.

We also agree that the public has a right to know how state agencies and representatives are spending public funds. Yet, the contracts themselves show what was spent on contractors and what the state expected to obtain for those funds. Thus, the public interest that you assert could be met merely by your obtaining the Y2K and other contracts without all of the other materials that you have requested.

In assessing the public interest in granting a fee waiver, we also consider THE OREGONIAN's commercial interest and its ability to pay for the records. The media is not automatically entitled to a fee waiver when requesting information under the Public Records Law. When the legislature amended the Public Records Law in 1989 to allow agencies to waive fees, it rejected the idea of routinely granting journalists fee waivers.

> Frankly, some of the media representatives would like to have as much documentation as they'd think about asking for provided to them for nothing. It is not the intention of this bill that should be the case. It does have in there about the ability of the agency to provide for the public good. There was some discussion about the possibility of putting things like students and authors and so forth in there and we did not do that. This is strictly up to the discretion of the agency but at the same time it is also understood that the agencies will not gouge people with multiples of their actual costs. But I think it is important to just make it clear on the record that this does not give commercial organizations, of which the news media are a part of that class, the ability to go in and ask for anything they want and have it all given to them for absolutely nothing.

Public Records Order May 19, 1993 (Smith) (citing House Floor Debate on House Bill 2571, Tape 17, side 2, 368-374 (April 27, 1989)).

THE OREGONIAN routinely pays for public record information and has an active account with ODOT for bulk lists of information on vehicles, drivers, DUIs, etc. In 1999, THE OREGONIAN paid over $3600 to ODOT for such routine public record requests. We have no basis for concluding that THE OREGONIAN does not have the financial ability to pay the costs for this records request or that its reporters would be unable to write a story about the $26 to $28 million in public funds that ODOT spent on Y2K compliance activities if the fees are not waived.

Moreover, as discussed below, because of the breadth of your records request, much of ODOT's cost is due to the need to review the records in order to segregate exempt and nonexempt information. For any exempt information that is not disclosed by ODOT, there would be no public benefit from waiver of the costs because that information would not be disseminated to the public. Although ODOT would still have the expense of reviewing and segregating that exempt information, it would not add to the public's understanding of what ODOT had spent on Y2K compliance activities.

ODOT has attempted to reduce the actual cost of producing the records by suggesting options to you. ODOT personnel has asked you either to narrow the scope of your request or to first review the actual contracts (at a cost of $400) and then to decide what contract file(s) you wish to review. You have declined these options. Under these circumstances, we do not believe that it is in the public interest for ODOT to waive its fees in providing the requested records to you.

c. Reasonableness of Decision to Deny Fee Waiver

As noted above, the standard for reviewing a public agency's denial of a fee waiver is whether the denial is unreasonable. The decision to waive is permissive, not mandatory. Public Records Order, December 12, 1995 (Pecknold) ("The legislative history demonstrates an intent to place a great deal of discretion in the custodian of the records."); Public Records Order, May 19, 1993 (Smith) (analyzing legislative history). We look to the following factors in determining whether an agency's denial of a fee waiver is unreasonable: the financial hardship on the public body, the extent of time and expense and interference with the business of the public body, the volume of the records requested, the necessity to segregate exempt from non-exempt materials, and the extent to which an inspection of the records is insufficient for the public interest for the particular needs of the requestor. MANUAL at 16.

ODOT estimated its actual costs in complying with your request at over $11,000 and provided you with a breakdown of these costs, showing numbers of hours of staff time, hourly costs for that staff time, and copying charges.[5] These costs are significant and would pose a

[5] Although this office initially believed that ODOT's cost estimate was not limited to Y2K contracts, David White informs us that this estimate is for ***only*** Y2K contract information. According to Mr. White, in addition to the Y2K contracts, there are ten contracts that were not subject to the pre-award audit under the Emergency Declaration

financial hardship on the agency. (We discuss below the reasonableness of the cost estimate itself.)

ODOT has only a small General Fund appropriation to administer programs that are statutorily mandated and for which there are no other funds available. For example, ORS 247.017 requires ODOT to assist in the registration of voters by providing specified voter registration services at offices where driver license or renewal applications are distributed or received. We have previously advised ODOT that it cannot use Highway Funds for this purpose. *See* 39 Op Atty Gen 492 (1979). Nor can ODOT use funds that are statutorily or otherwise legally dedicated to other purposes to administer such a program. It is reasonable for ODOT to use its scarce General Fund resources to ensure that it can fulfill its statutory responsibilities for the general public good, rather than to use those funds by granting a fee waiver for a particular records request.

Moreover, we find that your request would interfere with ODOT's business. Several different staff members and over 150 hours of staff time (not including attorney time) would need to be diverted to the task of providing these records to you.

The information you request is not only voluminous but highly technical. Your request spans more than a four-year period from January 19, 1996 to February 2, 2000. Mr. Marsh informs us that there are over 60 contract files for Y2K repairs alone, any one of which contains six to ten inches of paper (or approximately 1000 pages per contract). These 60 files are located in at least three separate non-redundant locations, which include submittal and reward departments, invoicing, and record storage after contracts are closed. In addition to the 60 contract files, there are potentially thousands more pages of records for the 15 other items you requested, depending on ODOT's computer runs.

As discussed below, the contract files likely contain information that is exempt from disclosure. When requested records contain a combination of exempt and nonexempt materials, it is necessary to segregate and excise the exempt information. ORS 192.505. Sometimes, this requires line-by-line redaction within a particular record. Because of the nature of the exemptions that are likely to apply to some of the records in the contract files you have requested, e.g., trade secret exemption, it is necessary for an attorney to review those files in order to ensure that ODOT does not incur liability for disclosure of protected information.

Because of the need to review the requested records and segregate exempt and nonexempt information, inspection of the records in lieu of providing you with copies would require nearly the same amount of time and labor by ODOT and this office. Inspection could save approximately $1,100 in copying charges, unless it was necessary for ODOT to make copies of certain records in order to redact exempt information.

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dated September 5, 1997. Mr. White informs us that the estimated cost of providing the requested information on those contracts is $200, or $580 if ODOT determines that this office needs to review those files.

In light of the financial hardship to ODOT, the extent of time and expense to ODOT, the volume of the requested records and the necessity to segregate exempt and nonexempt materials, we conclude that ODOT's decision not to grant a fee waiver was not "unreasonable."

3. Reasonableness of Cost Estimate

You claim that it is not reasonable for ODOT to charge the estimated $5800 for attorney time to review the contract files and segregate exempt material. When a state agency requests this office to perform the function of segregating exempt from non-exempt material, the normal billing rates for attorney and law clerk time are "actual costs" that are recoverable by the agency. Public Records Order May 19, 1993 (Smith), Public Records Order July 8, 1991 (Marr/Rees). As noted above, you have requested an enormous amount of records from ODOT – contracts, audits, bids, and contract files that span over a four-year period. For the following reasons, we do not agree that it is unreasonable for ODOT to expend attorney fees in complying with your request.[6]

Mr. Marsh informs us that the records you seek may contain material for which Oregon statutes either mandate confidentiality or permit non-disclosure under the Public Records Law. First, Mr. Marsh informs us that the contract files contain some attorney-client communications. ORS 192.502(9) exempts:

> Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileges under Oregon law[.]

This provision incorporates into the Public Records Law various prohibitions, restrictions and privileges under Oregon law. The attorney-client privilege under Oregon Evidence Code Rule 503 (ORS 40.225) is one such privilege. Communications between a client and an attorney that are "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services" are privileged. Mr. Marsh informs us that during the Y2K contracting process, ODOT requested this office's advice concerning the contracting process and hiring of vendors to complete the Y2K upgrades. Such communications are protected by the attorney-client privilege. Unless ODOT chooses to waive this privilege,[7] those communications would need to be removed before the requested material is released to you.

Second, Mr. Marsh informs us that some of the material in the contract files may contain trade secrets and competitive proprietary information. ORS 192.501(2) conditionally exempts from disclosure:

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[6] ODOT listed this office's billing rate as $95 per hour. The correct rate is $90 per hour and the estimated actual cost of providing the requested records to you should be reduced accordingly.

[7] The attorney-client privilege is waived if the holder of the privilege voluntarily discloses any significant part of the matter or communication. OEC Rule 511 (ORS 40.280). It is not unreasonable for ODOT (or any client) to seek the advice of its legal counsel in determining whether disclosure of certain information would waive the attorney-client privilege and the consequences of such a waiver.

> Trade Secrets. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or 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 commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it[.]

The Uniform Trade Secrets Act (UTSA) defines "trade secret" even more broadly than the Public Records Law. *See* ORS 646.451(4). The UTSA also provides for damages if a trade secret is "misappropriated."[8] Misappropriation is defined, in pertinent part, as:

> (d) Disclosure or use of a trade secret of another without express or implied consent by a person, who at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was:
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> * * * * *
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> (B) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
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> (C) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.

ORS 646.461(2)(d).

Even though ORS 646.473(3) provides immunity to public bodies and their officers, employees and agents if trade secrets are disclosed in the course of a public records request, the immunity is limited and is available only if the agency discloses the information pursuant to a public records order issued under ORS 192.410 to 192.490 or upon advice of an attorney. In order to protect the agency from liability and to maintain the statutory grant of immunity, it is entirely reasonable for ODOT to request that an attorney review these files to determine if they contain trade secrets that should not be disclosed.[9]

Although you state that only information that has been identified by the contract bidder as a trade secret is exempt from disclosure, we do not agree. Notwithstanding ODOT's statement in its Request for Proposal that failure to identify information in the proposal as a trade secret "shall be deemed a waiver" of any future claim to a trade secret in that information, nothing in

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[8] If disclosure of trade secrets is prohibited under the UTSA, then they would also be exempt from disclosure under ORS 192.502(9).

[9] Although a public record order requiring ODOT to disclose trade secret information would provide immunity from liability under ORS 646.473(3), this office would not be acting responsibly if it issued such an order without determining that the information was not in fact a trade secret. The public records order would protect ODOT from liability, but any business or organization that had a legitimate trade secret would nevertheless be deprived of the economic value of the information

the Public Records Law or the UTSA requires a trade secret to be specifically labeled as such to be exempt from disclosure under ORS 192.501(2) or to avoid waiving a claim of misappropriation under ORS 646.451(4). Mr. Marsh informs us that the competitive proprietary information submitted by contractors was not necessarily labeled "trade secret." Some of the information submitted by Y2k contractors specifically relates to business processes and practices that make them more competitive over their rivals. Simply looking for a legend that may – or may not – exist is insufficient to protect actual trade secrets from disclosure given that term's broad definition. Moreover, determining whether particular information meets the definition of a trade secret often requires an experienced judgment of someone familiar with the particular field of business. Only a file-by-file review will enable ODOT to determine whether trade secrets are contained in the files you have requested.

You also state that it is in the public's interest to disclose this material; yet you provide no explanation why. By enacting the UTSA, by providing the trade secret exemption under the Public Records Law, and by granting immunity to public officials who disclose only when such disclosure is made pursuant to a public records order or advice of an attorney, we believe that the legislature has, in effect, called for heightened scrutiny of contentions that the public interest requires the disclosure of records asserted to be trade secrets. MANUAL at 27. We believe that without a showing of significant public interest in the disclosure of the trade secrets of the Y2K contractors, this information should be remain confidential under the UTSA and exempt from disclosure under the Public Records Law. It is therefore incumbent on either highly trained ODOT staff or attorneys from this office to perform the file-by-file review to determine if exempt trade secrets exists in the contract files.

Third, Mr. Marsh also informs us that least one contract file contains material that supports a disciplinary action imposed on an ODOT employee. ORS 192.501(12) conditionally exempts from disclosure a "personnel discipline action, or materials or documents supporting that action[.]" Only complete disciplinary actions when a sanction is imposed, and materials or documents that support that action, are subject to exemption. *City of Portland v. Rice,* 308 Or 118, 775 P2d 1371 (1989). Records that do not relate to conduct that resulted in disciplinary sanctions do not qualify for exemption. The purpose of this exemption is to "protect[ ] the public employee from ridicule for having been disciplined but * * * not shield the government from public efforts to obtain knowledge about its processes." *Id.* at 124 n 5; MANUAL at 35.

This exemption also would not apply if "the public interest requires disclosure in the particular instance." ORS 192.501. Those circumstances when the public interest in disclosure outweighs the public interest in confidentiality include conduct that is potentially criminal or allegations of theft or misuse of public property or funds by public employees. MANUAL at 35. In determining whether the public interest requires disclosure, it is appropriate for the agency to consider the employee's position, the basis for the disciplinary action and the extent to which the information is already public. Mr. Marsh informs us that the disciplinary action concerned the quality of supervision of a Y2K project by an ODOT employee. Nevertheless, it is necessary for ODOT to review its contract files and identify what documentation it used to support the disciplinary action, to apply the public interest balancing test to determine whether that

information is exempt from disclosure and, if exempt, to segregate the exempt material from the material subject to disclosure.

The 1999 legislature added two new exemptions to the Public Record Law that might also apply to the records you requested. Or Laws 1999, ch 234. First, ORS 192.501(22) exempts, in pertinent part:

> Records or information that, if disclosed, would allow a person to:
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> * * * * *
>
> (b) Identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the service provided by the public body;
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> (c) Disrupt, interfere with or gain unauthorized access to information processing, communication or telecommunication systems, including the information contained therein, that are used or operated by a public body[.]

Similarly, ORS 192.501(23) exempts, in pertinent part:

> Records or information that would reveal the security measures taken or recommended to be taken to protect:
>
> * * * * *
>
> (c) Information processing, communication or telecommunication systems, including the information contained therein, that are used or operated by a public body * * * [.]

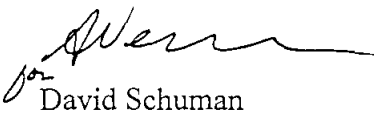
Both ORS 192.501(22) and 192.501(23) were enacted to protect the delivery of the state's public services. Because the records you seek directly relate to Y2K computer upgrades completed by ODOT, it is possible that they might contain information that comes within one or both of these exemptions. It is therefore necessary that those records be reviewed in order to determine if they contain such exempt material.

Your request for a fee waiver recognizes that prohibitions to disclosure under the Public Records Law exist. Nevertheless, you state that it appears as if ODOT is looking whether it "can *avail itself* of records *exemptions* – not whether ODOT is *bound* by *prohibitions*" by requesting this office to review the requested records and perform the segregation. This office routinely advises agencies that an exemption under the Public Records Law does not prohibit disclosure. MANUAL at 19. We also recognize, however, that there are instances in which a public body is barred from disclosing exempt information or may expose itself to claims of liability if exempt information is disclosed. *Id.* Consequently, it is necessary for an agency to first determine

whether information is exempt from disclosure and, if so, to consult legal counsel before disclosing that information.

A disclosure of records under the Public Records Law is not an "all or nothing proposition." Segregation of exempt from non-exempt material actually promotes public inspection of records by ensuring that non-exempt records are made available, rather than mixed records being completely exempted. *Gray v. Salem-Keizer School District*, 139 Or App 556, 566, 912 P2d 938 (1996) (approval of reviewing mixed records and removing source-identifying material). Finally, segregation assures that in the future, individuals will continue to do business with – and provide requested information to – public agencies because the public will be assured that agencies will perform their statutory duty and not disclose exempt material. Thus, we do not find that ODOT is unreasonable in including in its estimate of "actual costs" in providing the requested records to you the costs of having attorneys review the contract files.

Sincerely,



David Schuman
Deputy Attorney General

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c: Mike Marsh, ODOT Executive Deputy Director